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September 6th?" And the answers thereto which create a new issue not made by the contract or the pleadings.

3. Because the Court permitted plaintiff to be asked and to answer the following question: "What did you say to him?" Said question and answer not being relevant and not within the terms of the contract or within the issue made by the pleadings.

10

4. Because the Court permitted plaintiff to be asked and to answer the following question: "What was said, if anything, with relation to these peaches that you were complaining about?" Said question and answer thereto not being relevant and not within the terms of the contract or within the issue made by the pleadings.

20

5. Because the Court permitted plaintiff to be asked and answer the following question: "Well, Mr. Miller, when you went over to the warehouse after you had received your notice of September 12th, what did you find was the condition of the warehouse?" there being no allegation that there was any negligence by reason of the condition of the warehouse.

30

6. Because the Court permitted plaintiff to be asked and answer the following question: "Were they in the same condition as they were in the other years when you had taken them out?" and "What was the date?" The questions being irrelevant and not within the terms of the contract nor the issue made by the pleadings.

7. Because the Court permitted witness Bulmer to answer the following question: "Now, what have

you to say with respect to seeing any evidence of refrigeration in there?" Said question and the answer thereto being irrelevant, outside of the terms of the contract, and created a new issue.

8. Because the Court permitted witness Bulmer to answer the following question: "What would you say was the proper temperature to maintain at a storage plant to preserve fruit for three or four weeks?" Said question and the answer thereto being irrelevant, outside of the terms of the contract, and created a new issue. 10

9. Because the Court permitted witness Bulmer to answer the following question: "What the purpose would be in storing fruit—why isn't it policy to sell the fruit as soon as you pick it in the market?" Said question being irrelevant.

10. Because the Court refused to strike the answer to the following question to witness Moore: "That would be sufficient refrigeration to at least preserve the fruit?" It appearing on cross-examination that witness was merely supposing and had no experience. 20

11. Because the Court permitted plaintiff to answer the following question: "When did you realize, Mr. Miller, that you would not be able to recover out of this matter without filing a claim for damages?" The question was irrelevant, attempting to create a right contrary to the terms of the contract and an issue not made by the pleadings. 30

12. Because the Court refused to non-suit notwithstanding the plaintiff's case did not establish a right to recover.

13. Because the Court permitted witness Parkhurst to be asked on cross-examination in reply to answer the following question: "You then did not know of any incident where you have done that and placed these peaches in storage, do you?" The question attempted to make an expert of the witness when he was not offered as such, and it was not cross-examination.
- 10 14. Because the Court permitted witness Riley to answer the following question: "Do you recall whether or not during the year 1927 you stored in your plant at Pitman any Hale or Elberta peaches?" The testimony tendered was not rebuttal nor was it relevant.
- 20 15. Because the Court permitted witness Schober to answer the following question: "Would you or would you not say that the peaches that you had placed in your storage between August 25th and Labor Day, when you had taken them out, were they preserved?" The question calling for a conclusion and not being rebuttal in character.
16. Because the Court refused to direct a verdict for the defendant notwithstanding the cases disclose that the plaintiff was not entitled to recover and that the defendant was entitled to a direction.
- 30 17. Because the Court refused to charge defendant's third request in the following language: "3. The duty which the defendant owed the plaintiff, if any, was to exercise such care for the preservation of the peaches as a reasonably prudent person would exercise in the circumstances." The tendered request was proper and one that defendant was en-

titled to have charged in the light of the contract, issues and testimony produced.

18. Because the Court refused to charge defendant's fifth request in the following language: "5. The only negligence the jury is permitted to find is that which is charged in the complaint that defendant received peaches well knowing that the temperature was not sufficient to properly preserve them." The tendered request was proper and one that defendant was entitled to have charged in the light of the contract, issues and testimony produced. 10

19. Because the Court refused to charge defendant's sixth request in the following language: "6. The jury cannot find negligence outside of the written contract." The tendered request was proper and one that defendant was entitled to have charged in the light of the contract, issues and testimony produced. 20

20. Because the Court refused to charge defendant's seventh request in the following language: "The jury cannot find negligence based upon the claim of negligence in not maintaining a proper temperature." The tendered request was proper and one that defendant was entitled to have charged in the light of the contract, issues and testimony produced. 30

21. Because the Court refused to charge defendant's eighth request in the following language: "There is no evidence to justify a finding of negligence based upon failure to maintain a proper temperature." The tendered request was proper and one that defendant was entitled to have charged

in the light of the contract, issues and testimony produced.

22. Because the Court refused to charge defendant's ninth request in the following language: "There is no evidence to justify a finding of negligence based upon a claim that defendant's plant was in any way defective or negligently operated." The tendered request was proper and one that defendant was entitled to have charged in the light of the contract, issues and testimony produced.

23. Because the Court refused to charge defendant's tenth request in the following language: "If the plaintiff did not claim damages in writing within 72 hours after discovery of damage there must be a verdict for the defendant." The tendered request was proper and one that defendant was entitled to have charged in the light of the contract, issues and testimony produced.

24. Because the Court refused to charge defendant's twelfth request in the following language: "Plaintiff cannot recover damages from defendant in excess of what they were within the period of 72 hours after receiving notice from defendant." The tendered request was proper and one that defendant was entitled to have charged in the light of the contract, issues and testimony produced.

25. Because the Court refused to charge defendant's thirteenth request in the following language: "If after the defendant had knowledge that the temperature was rising, it did all that a reasonably prudent person could do to maintain a proper temperature, the plaintiff cannot recover." The ten-

dered request was proper and one that defendant was entitled to have charged in the light of the contract, issues and testimony produced.

26. Because the Court refused to charge defendant's fifteenth request in the following language: "If plaintiff knew or ought to have known that any peaches he stored in defendant's house were likely to be damaged by reason of defendant's inability to maintain a proper temperature, the plaintiff cannot recover." The tendered request was proper and one that defendant was entitled to have charged in the light of the contract, issues and testimony produced. 10

27. Because the Court charged the jury: "The specific negligence alleged is that the defendant negligently failed to maintain a temperature necessary for the preservation of the peaches, that he continued to receive the plaintiff's peaches and store them in this warehouse, knowing that the temperature of the warehouse was not in a condition properly to preserve them." The question of negligence in failing to maintain a temperature was submitted to the jury when there was no evidence to justify a finding of negligence in that aspect of the case. 20

28. The Court erred in charging the jury that the defendant owed to the plaintiff a duty of ordinary care for the protection of the fruit and which it was bound "to observe regardless of any condition of the contract that might conflict therewith, that the law imposed that obligation, and could not be impaired by any stipulation of the contract in pursuance of which the peaches were stored." Such 30

a charge permitted the jury to ignore the provisions of the contract which were enforceable against the plaintiff.

29. Because the Court erroneously charged the jury as follows: "If you find that the peaches were sound when delivered for storage you would be justified in finding that that deteriorated condition, or damaged condition when removed, was due to  
10 the temperature to which they were subjected while in the defendant's storage plant." This charge permitted the jury to infer negligence or presume it, notwithstanding the plaintiff was required to prove it.

AVIS & AVIS,  
*Attorneys of Defendant.*

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**BILL OF COMPLAINT.**

The plaintiff, Edward E. Miller, of the Township of Elk, County of Gloucester and State of New Jersey, says that:

1. On August 26th, 1927, the defendant company kept certain cold storage warehouses in the Borough of Glassboro, County of Gloucester and State of New Jersey, and plaintiff then and subsequently  
30 delivered to the said defendant company at said warehouses certain merchandise, to wit, sixteen thousand two hundred twenty-five five-eighths baskets of peaches of the value of \$24,337.50, being the property of the plaintiff, to be stored in said warehouses and retained until called for by the plaintiff, all in accordance with a written contract, a copy of which is hereto attached.

2. The defendant company, as warehousemen, received the said goods for the purpose contemplated in said contract.

3. The defendant, in violation of its duty, by its servants, agents and employes, did not take due care of the said merchandise, and through its neglect the same became wholly lost to the said plaintiffs.

10

4. The said defendant, by its servants, agents and employes, was further negligent in that it did negligently fail to maintain a proper temperature necessary for the preservation of the said merchandise.

5. Said defendant, by its servants, agents and employes, was further negligent in that it continued to receive merchandise and placed the same in its said warehouses, well knowing that the temperature of the said cold storage warehouse was not then sufficient to properly preserve the said merchandise.

20

Plaintiff demands as damages the sum of \$20,281.25.

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(COPY)

UNLESS this CONTRACT is DULY SIGNED and RETURNED in 5 days, SPACE WILL NOT BE RESERVED

30

STORAGE CONTRACT

JOHN REPP ICE & COLD STORAGE  
COMPANY, INC.

AGREEMENT, made this 26th day of August, 1927, between E. E. MILLER of Aura, N. J., party

of the first part and the JOHN REPP ICE & COLD STORAGE CO., INC., of Glassboro, N. J., party of the second part,

WITNESSETH, that the party of the first part hereby rents storage space for the following goods in the COLD STORAGE WAREHOUSE, of the party of the second part at Glassboro, N. J. namely Number of Packages 10,000 kinds of Packages 5/8 baskets. The space to be designated and assigned  
10 by the party of the second part at the rate of 10¢ per basket for a period of time beginning on the 27th day of August and ending 1st day of October 1927, which said space so rented the party of the second part hereby agrees to reserve for the exclusive use of the party of the first part.

In consideration of said rental and reservation by the respective parties it is understood and agreed that this contract shall bind both parties hereto  
20 whether said space shall be occupied or not, and in case said space is occupied, then the party of the first part agrees to pay therefore on or before removal of peaches and in case said space is not so occupied then the party of the first part agrees to pay for the space reserved for him hereunder on the first day of January following the date hereof.

In case party of the first part desires to dispose of the space hereby reserved for his use it is understood and agreed that the party of the second part shall have the first right to take over said space  
30 from said first party at the agreed price hereinabove set forth, but if after two days' notice in writing to it, the said party of the first part fails to avail itself of such right by a written acceptance, then the party of the first part shall have the right to sell and assign the space hereby reserved for him.

This contract is for number of packages only and

Storage Company has no knowledge as to contents and condition and is not responsible for damage to perishable stock.

Party of the second part shall not be responsible for failure to maintain any given temperature unless same is caused by its negligence.

Party of the second part shall not be liable for, and the party of the first part hereby releases party of the second part from any and all damages that may arise on account of the inability of the second party to obtain electric power necessary for the operation of its cold storage plant or breaking of any machinery or due to any cause beyond the control of the party of the second part or the act of "God of the Public Enemy."

Party of the second part shall not be liable for loss by failure to insure property covered hereby or for loss or damage caused by leakage, ratage, vermin, breakage, accidental or providential causes, riot or insurrection.

If the goods stored herein are of a perishable nature, or by keeping will deteriorate greatly in value, or by their odor, leakage, inflammability or explosive nature, will be liable to injure other property, the party of the second part may give seventy-two hours notice in writing to the party of the first part, which notice may be served by mail, addressed to party of the first part at the address appearing below, with postage prepaid, which notice shall require the party of the first part to satisfy the lien upon said goods and to remove them from the warehouse within the period aforesaid, and in the event of the failure of the party of the first part to satisfy the lien and to remove the goods within the time so specified the party of the second part may sell the goods at public or private sale without advertising.

If the party of the second part, after a reasonable effort, is unable to sell such goods, he may dispose of them in any lawful manner, and shall incur no liability by reason thereof. In case of sale the party of the second part shall satisfy his lien including the reasonable charges of notice, advertising and sale, and the balance, if any, of such proceeds shall be paid to the party of the first part.

10 The party of the second part shall not be liable or responsible for any shortage in goods stored, unless the packages are clearly marked or stenciled with name of party of the first part.

In case property stored hereunder shall be released in installments remainder left in storage shall be responsible for all unpaid charges.

Claims for damages must be made in writing within seventy-two hours after discovery of damage, otherwise they are waived.

20 Depositor's goods in warehouse of the same general class are deemed "fungible" within the statutory definition.

Party of the second part is not responsible for shrinkage in weight or measurement.

This agreement shall bind the heirs, executors, administrators, successors and assigns of the respective parties hereto.

IN WITNESS WHEREOF the parties have hereunto set their hands and seals this 26th day of August, 1927.

30

Post Office Address  
JOHN REPP ICE & COLD  
STORAGE CO., Inc.  
Per R. E. Zimmerman

RETAIN THIS COPY

## ANSWER.

Defendant, a corporation of the State of New Jersey, conducting business at Glassboro, Gloucester County, New Jersey, says that:

1. It admits that on August 26, 1927, it kept certain cold storage warehouses in the Borough of Glassboro, County of Gloucester and State of New Jersey, and that plaintiff then and subsequently delivered to it, the defendant, at said warehouses, 16,225 five-eighths baskets of peaches, to be stored in said warehouses, in accordance with the terms of the contract, a copy of which is annexed to the complaint in this cause; but it denies that the value of said peaches was \$24,337.50, or a sum anywhere near that amount, as alleged in complaint.

20

2. It admits paragraph two.

3. It denies paragraph three, and alleges that it took every care and precaution, in the operation of its plant to full capacity, and denies that through any lack of care or neglect on its part the peaches were injured or lost to said plaintiff. It further denies that said peaches were wholly lost to plaintiff, but alleges that as soon as it appeared that said peaches were not keeping properly, this defendant gave notice to plaintiff, in accordance with the provisions of the contract, to remove said peaches from said warehouse, but plaintiff failed and refused to remove same in accordance with terms of contract and notice.

30

4. It denies paragraph four.

5. It denies paragraph five.

It denies that it is indebted to plaintiff in any manner, or in any amount.

## DEFENSE.

10 1. The defendant was not guilty of any negligence.

2. The plaintiff was guilty of contributory negligence, by reason of the fact that he stored in the warehouses of defendant, overripe peaches, and peaches that were overheated and watery, which was well known to plaintiff at the time of storage.

3. The peaches stored by plaintiff were of little or no value at time of storage.

20 4. After said peaches, which were of a perishable nature, were in storage for a few days, and it became apparent that they were about to deteriorate in value, defendant gave notice of this fact to plaintiff, and required removal thereof within seventy-two hours, in accordance with terms of contract. Plaintiff failed and refused to remove same, and by reason of such failure and refusal, plaintiff is not entitled to any damages.

30 5. Plaintiff did not make any claim of damages, in writing within seventy-two hours after discovery of alleged damages, and consequently any claim for damages was waived.

6. The contract aforesaid provided that defendant should not be responsible for damage to perishable

goods; said peaches were perishable goods and defendant cannot be held liable in damages.

7. Any alleged damages sustained by plaintiff was due to a cause beyond the control of the defendant, and by reason of the terms of the contract aforesaid, defendant cannot be held in damages.

10

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REPLY.

The plaintiff denies each and every allegation set forth in the answer filed in this cause.

20

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AMENDED ANSWER AND COUNTER-CLAIM.

The answer and defense filed in the above-stated cause is hereby amended by adding thereto a counter-claim, in manner following:

By way of counter-claim against the plaintiff, defendant says that: 30

The plaintiff is indebted to defendant upon an account for storage of peaches, and removal of same from cold storage, and expense of marketing good peaches, deducting receipts from sale of marketable peaches, of which the following is a copy, to wit:

16 *Reply to Amended Answer and Counter-Claim*

November 22, 1927.

EDWARD E. MILLER

TO JOHN REPP ICE & COLD STORAGE COMPANY, DR.

Storage	16,254	baskets	peaches,	.10,	\$1625.40	
Sorting	4,609	"	"	.05,	230.45	
Carting	876	"	"	.08,	70.80	
Carting	180	"	"	.05,	9.00	
10	Expense for taking peaches out of storage and emptying baskets,				100.00	
					<hr/>	
					Total charge,	2034.93
					Cr. receipts from sale of peaches,	1281.91
					<hr/>	
					Balance due defendant,	\$753.02
					The defendant counter-claims \$753.02, damages.	

20

REPLY TO AMENDED ANSWER AND COUNTER-CLAIM.

The plaintiff denies each and every fact and allegation set forth in the counter-claim filed in the above-noted cause.

30

TESTIMONY.

NEW JERSEY SUPREME COURT.  
GLOUCESTER COUNTY.

---

EDWARD E. MILLER, <i>Plaintiff,</i>	}	10
v.		
JOHN REPP ICE & COLD STORAGE COMPANY. <i>Defendant.</i>	}	Action at Law.

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February 5, 1929. 20

APPEARANCES:

For the plaintiff, GEORGE B. MARSHALL, ESQ.,  
DAVID O. WATKINS, ESQ.

For the defendant, AVIS & AVIS, ESQS., CLARENCE  
L. COLE, ESQ.

30

Before JESS, J., and a jury.

(Mr. Marshall opens the case for the plaintiff to  
the jury.)

(Mr. Avis opens the case for the defendant to the jury.)

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THE CASE FOR THE PLAINTIFF.

EDWARD E. MILLER, SWORN.

10 By Mr. Marshall:

Q. Mr. Miller, you are a farmer?

A. I am.

Q. How many years have you been engaged in farming?

A. All my life, ever since I have been old enough to farm.

Q. Where is your farm located?

A. At Aura, New Jersey.

20 Q. How large a farm do you own?

A. I have one with 128 acres, and the other one 55 acres.

Q. Are you a fruit farmer?

A. Yes, sir.

Q. How many years have you been engaged in fruit farming?

A. About five years.

Q. How many?

A. About five.

30 Q. What kind of fruit do you raise?

A. I raise peaches and apples.

Q. Did you raise a peach crop during the summer of 1927?

A. I did.

Q. You know the John Repp Ice and Cold Storage Company, do you?

A. I do.

Q. During that season of 1927, you did enter into a contract with the John Repp Ice & Cold Storage Company, didn't you, for the storage of peaches?

A. Yes, sir.

Q. Whom did you see about storing your peaches in the John Repp Ice & Cold Storage Company?

A. I saw Mr. Charles Repp.

Q. Did you see him or did he see you?

A. I saw him.

Q. And you arranged for your space in the storage, did you?

A. I did.

Mr. Marshall: These things are admitted in the answer, Mr. Avis, but don't you think we had better prove them in the regular way?

Mr. Avis: Yes.

Q. The witness is shown a storage contract and is asked if that is the storage contract between himself and the John Repp Ice & Cold Storage Company? 20

A. Yes, sir, I would say it is; that is the contract.

Mr. Marshall: I offer in evidence a copy of the storage contract and ask that it be marked.

The Court: It may be marked.

30

(Said paper is marked Exhibit P1.)

Mr. Marshall: I am wondering whether or not it would not be well for both sides to read this contract at the present time, for the Court as well as the jury.

The Court: I think so; it would be helpful to the jury.

Mr. Marshall: Ladies and gentlemen of the jury, the contract which has just been offered in evidence, I think you ought to know it, and I will read it to you: "Unless this contract is duly signed and returned in five days, space will not be reserved. Storage contract." (Reading contract.)

10

Q. What kind of peaches, Mr. Miller, had you grown on your farm that you were undertaking to store by virtue of that contract?

A. Hales and Elbertas.

Q. Are they classified as an early or late peach?

A. A late peach.

Q. After you had entered into your contract, when did you start hauling the peaches to the John Repp Ice & Cold Storage Company?

20

A. On August 27th.

Q. Can you tell us when you finished hauling to the John Repp Ice & Cold Storage Company?

A. I finished on September 6th.

Q. September 6th, 1927? Now, during that period of time, how many peaches had you placed in the John Repp Ice & Cold Storage Company?

A. Sixteen thousand two hundred and twenty-five.

Q. What kind of baskets were they?

30

A. Five-eighths baskets.

Q. Had you had any talk with Mr. Repp or any officer of the company as to putting in more peaches than you had reserved space for?

A. I did.

Q. Who did you have your talk with?

A. Mr. Charles Repp.

Q. What was said about it?

A. He said, "We will be able to take care of what you have; we will be able to take care of your crop."

Q. And did you rely upon that?

A. I did, absolutely.

Q. And you put in 6,225 over and above your reserved space?

A. Yes, sir.

Q. After you had placed your 16,225 baskets of peaches in the storage, were you notified by Mr. Repp at that time that you had too many in there? 10

A. I was not.

Q. When did you next hear of anything with relation to your peaches that you had stored in the John Repp Ice & Cold Storage Company?

A. I was over there possibly on a Thursday or Friday previously to the week we started to take out, and Mr. Repp and I were talking about the condition of the storage. I said I had just tried to get in there to look at my peaches; I said, "I can't get in there; I went in there —" 20

Mr. Cole: I object to this, may it please your Honor; he seems to be laying some new cause for alleged negligence, and this might be an opportune time to have our position stated with respect to this contract, with relation to testimony of this character. The contract provides, if your Honor has followed it, that "This contract is for the number of packages only, and the storage company has no knowledge of contents and condition and is not responsible for damage to perishable stock." Now, this, of course, was perishable stock; there is no question about that; peaches are perishable stock; so that if the contract ended there, there would be no liability on our part under that clear, express language. Now, it follows, "Party of the second part shall not be responsible for failure to maintain any given 30

temperature unless same is caused by its negligence." Now, those two paragraphs may be regarded as inconsistent, irreconcilable. If they are, we have the question as to what is the effect, and our contention would be that if they are irreconcilable, then we have to take what is first said in this contract, which is, that we are not responsible for damages to perishable stock. The only allegation of negligence in this complaint that I think can be  
10 considered at all is that which says that we—I will read the exact language of the complaint: "5. Said defendant by its servants, agents and employees, was further negligent in that it continued to receive merchandise and place the same in its said warehouse well knowing that the temperature of the said cold storage warehouse was not then sufficient to properly preserve the said merchandise." Now, I am unable to see how this testimony is relevant, and we object to it on the ground that the  
20 only possible claim that can be made here to the jury of negligence, irrespective of the point I make that we are not responsible for damages at all, is that we received stock knowing that we were not able to maintain the temperature; anything more is outside of the issue.

Mr. Marshall: I hardly know which one of these points to meet first, if it please the Court, but I contend, taking up the first point, as to the number of packages, if that has any bearing upon the motion as it is presently addressed, the answer of the  
30 defendant admits the placing in his storage of 16,225 baskets, and they undertook in that answer to say that they took good care of the whole 16,225. He raises no question as to that, so I cannot feel there is much merit in that. As to the next proposition, I call your Honor's attention to the provision of the

warehouse act, wherein it provides a number of things that a warehouseman is allowed to stipulate in his contract, but there are certain things that he cannot stipulate, and one is that he shall not make any provision that shall be contrary to the provisions of the act, and second, that he shall in no wise avoid the obligation to exercise that degree of care in guarding and safe-keeping the goods entrusted to him that would be exercised by a reasonable man taking care of his own property. That is what we are contending, that they did not take care of the goods as a reasonable man would take care of his own property. I also contend that regardless of whatever they may put in their contract, a cold storage man impliedly warrants he will maintain a temperature in the building which is proper for the preservation of the property, so I feel it is perfectly competent for us to now relate what step Mr. Miller was taking with respect to the manner in which his peaches were being kept. 10 20

Mr. Cole (after further argument): His action is grounded wholly on the contract; if he intends to make a case notwithstanding the contract, he should have informed us of that. He bases his cause of action on this contract, and he cannot now come in and say there may be some statute that made it nugatory. He should have sued and ignored the contract; he cannot take the benefits of it and not take the burdens. 30

Mr. Marshall (after further argument): If the Court please, I have not claimed that the contract is nugatory at all.

The Court: You are relying upon the contract, as I understand?

Mr. Marshall: I certainly am relying upon the contract, and I do not see how I could avail myself very much by relying on anything else, because I would be met by the contract.

(Last question and answer repeated.)

The Court (after further argument): I over-  
rule the objection and allow an exception.

(Exception noted for the defendant.)

Q. Do you understand the last question?

A. I think so.

Q. What conversation did you have with Mr. Repp?

A. He and I were talking out between his office and the cold storage. I said to him, "I came over to look at my peaches," I said, "I went into the storage there and I was unable to stay in there and had to come out; you couldn't get your breath." He said, "I wouldn't allow my men to go in there without a gas mask on."

Q. Do you know what date that was?

A. I am pretty sure it was Thursday or Friday of the previous week.

The Court: Well, can't you say whether it was Thursday or Friday with reference to the time the peaches were finally stored? You say you finished storing them on the 6th of September.

The Witness: Yes, sir.

The Court: Now, in reference to that date, how long after that was this date of the alleged conversation?

The Witness: Well, I started packing my peaches on the 13th.

Q. Was this conversation that you had with Mr. Repp after that?

A. That was before that.

Q. Was it before you received the notice from the John Repp Ice & Cold Storage Company?

A. That was before I received the notice, yes, sir.

10

Q. You finished hauling your peaches into the Cold Storage Company on the 6th day of September, didn't you?

A. On the 6th day of September.

Q. What day of the week was that, do you remember?

A. I do not.

Q. And do you remember how many days it was after that that you received notice to take out these peaches?

20

A. I received my notice on a Monday morning.

Q. I show you a letter —

The Court: Well, Mr. Marshall, we will interrupt this testimony right now and take a recess until 1:30.

At this point a recess was taken until 1:30 o'clock, P. M.

30

Trial of the cause resumed at 1:30 o'clock, P. M., pursuant to adjournment, in the presence of counsel for the respective parties.

EDWARD E. MILLER, resumed.

By Mr. Marshall:

10 Q. I show you a letter dated September 9, 1927, signed by R. E. Zimmerman, secretary of the John Repp Ice & Cold Storage Company, and ask you whether you received that letter?

A. I did, yes, sir.

Q. When did you receive that letter, Mr. Miller, if you remember?

A. I received mine on Monday morning.

Q. What date was that?

A. That was September 12th.

20

Mr. Marshall: With permission of the Court, I will read this letter to the jury: "September 9, 1927. Mr. Edward E. Miller, Aura, New Jersey. Dear Sir: We have had some trouble in attempting to keep the temperatures down in the storage warehouses, and find that the fruit is not keeping as it should. This appears to be caused by some peculiarity in the fruit itself, as the plant has been operated in its usual manner to capacity. The conditions are such that we deem it necessary to notify you that the peaches of yours now in storage in our Glassboro warehouse should be removed within seventy-two hours in accordance with the terms of your signed contract. We have such a large quantity of peaches on storage that it will be somewhat difficult to remove all within the above

30

period, but if early application for removal is made we will do the best we can in getting them out. Your storage bill is herewith enclosed. Very truly yours, John Repp Ice & Cold Storage Company, Inc. R. E. Zimmerman, Secretary.”

Mr. Marshall: I offer that in evidence and ask that that be marked.

The Court: It may be.

10

(Said paper is marked Exhibit P2.)

Q. Prior to the time of the receipt of this notice, Mr. Miller, had you any knowledge that your peaches were not keeping?

A. I did not.

Q. What did you do on Monday, September 12, after you had received the notice from the company that your peaches were not keeping, that the temperature could not be kept down?

20

A. I started out to get some extra help to get my packages over there, so as to start the next morning to pack.

Q. And when you went over on Monday, you hauled over your equipment, did you?

A. I did.

Q. What did your equipment consist of?

A. Bushels and sorting table.

Q. Now, let's stop there for a just a moment. During the time that your peaches were being picked and hauled to the storage, what part did you take in that?

30

A. I took the part of taking care of the orchard, to pick it.

Q. Where were you while the picking was being carried on?

A. I was with the pickers most of the time.

Q. And where was that?

A. Right in the orchard.

Q. Out in the orchard?

A. Right in the orchard with the pickers.

Q. Did you have complete supervision of the picking, or did you delegate that to anybody else?

A. No, I had one Italian man there that was to look after them, and I looked after them with him,  
10 he and I together.

Q. Did you do any of the hauling of your peaches over to the storage warehouse?

A. I did not, excepting the first Saturday I carted over eighteen to twenty baskets to reserve my space; that was the only time I was to the store house.

Q. That was a few days after your contract was signed?

A. No, that was the same day I signed the con-  
20 tract.

Q. The same day you signed the contract you personally hauled over a few peaches yourself?

A. I took over eighteen or twenty baskets on Saturday; when I got home I signed the contract and mailed it back to the Repp Company.

Q. You hauled over yourself personally no other peaches?

A. No other peaches, absolutely.

Q. And the peaches were hauled over for you by  
30 whom?

A. By Emil Eifert.

Q. And did you supervise the loading of the wag-  
ons?

A. He supervised the loading.

Q. What did you have to do with that?

A. I didn't have anything to do with it.

Q. Did you superintend the fruit as it was picked and as it was placed in baskets and loaded?

A. I certainly did.

Q. What condition were your peaches that you shipped or that you sent over by truck?

A. By truck, yes, sir.

Q. By truck to the John Repp Ice & Cold Storage Company between August 27th and September 6th?

Mr. Cole: Now, just a moment. That is objected 10  
to, may it please your Honor, on our theory that it  
does not matter, under the terms of the contract,  
which is the basis of this suit, what the condition  
of the peaches was. That raises the question more  
directly perhaps than it was raised before, and we  
object to it.

The Court: The objection is overruled.

(Exception noted for defendant.)

20

(Question repeated.)

A. Didn't I answer that question?

Q. No, you haven't told us yet what condition  
they were?

A. They were in good condition, sound and hard.

Q. Were all your peaches ready to pick at one  
time, or did you have to wait for any of them?

A. I had to wait for some of them.

Q. What variety was it you had to wait for?

30

A. I had to wait for some of the Elbertas.

Q. And what did you wait for?

A. Waited for them to get ripe enough to pick.

Q. And as soon as they were picked, they were  
hailed to the storage, were they?

A. They were.

Q. Did you have any peaches, Mr. Miller, out of the whole 16,225, that you did not haul over there immediately after they were picked?

A. I did.

Q. How many baskets were they?

A. Around five or six hundred.

Q. Will you tell us about those peaches, please?

A. That was on a Saturday prior to Labor Day.

Q. Saturday prior to Labor Day?

10 A. Yes, sir, we picked on up until about 3 o'clock in the afternoon; I seen that we were going to have too many picked to get them over there, due to the fact they could not get unloaded when they got there; it took quite a length of time to unload, so I laid the pickers off about 3 o'clock in the afternoon. Then I had about five or six hundred baskets that we did not get out that afternoon. The next day was a Sunday; I am very sorry to say, but we had to go out there and load those peaches on two trucks  
20 and pull them up under the trees. We delivered them over there Monday morning.

Q. You delivered those over there Monday morning?

A. Yes.

Q. Now, were they the only peaches that were not delivered over there on the same day that they were picked?

A. Yes, they were.

30 Q. Now, what effect, if any, did that have on those peaches that you had picked, those five hundred baskets that you had picked and had held on the wagon until early Monday morning?

A. Well, I noticed they had taken on more color, some more color than the others.

Q. Had they softened any?

A. They had not softened.

Q. You say you have been in the peach business for —

A. Five years.

Q. For five years; would you say that those peaches were in proper shape at that time to place in cold storage?

A. For a certain period of time.

Q. For a certain period of time?

A. Yes.

Q. Would they have kept there as long as October 1st—as late as October 1st the date of your contract?

A. I think so.

Q. Now, after you had hauled these peaches all over there and received this notice from the company to take them out, what steps did you take, if any, after you received this notice, to ascertain where you stood with relation to your baskets that you had in there?

A. After I received that notice, why, I moved my equipment over there on Monday, the same day I received the notice, and the next day we started packing the peaches. 20

Q. Then what did you do?

A. Well, we packed on Tuesday, and I shipped that lot by truck. Then we packed on Wednesday. Wednesday morning when we started packing, they were in such condition that really they were not fit to handle, and so we talked the matter over and decided to go in and relate the coincidence to Mr. Repp, which we did. 30

Q. Who was with you?

A. Mr. J. H. Poreh, and R. E. Mawson.

Q. And you went in and saw Mr. Repp, did you?

A. Yes.

Q. Where did you see him?

A. In his office.

Q. What did you say to him?

Mr. Cole: I object to that as not being within the terms of the contract, not within the terms of the pleadings and being irrelevant, what this conversation may have been.

10 The Court: The objection is overruled.

(Exception noted for the defendant.)

A. We told Mr. Repp that the peaches were in such a condition that we were unable to pack them at a profit, that they were absolutely lost to us, and Mr. Repp said he was expecting that before this; that was the remark he made; he said, "I have been expecting this." That is the words he used.

20 Q. What did you do after that?

A. After that we held a meeting over to Brother Porch's that Wednesday night.

Q. Did Mr. Repp attend that meeting?

30 A. No, he must have been invited there; I didn't invite him there, but he came to me in the afternoon and said, "Miller, there is no use in my going over there and attending that meeting," he said, "you fellows go ahead and have your meeting and appoint a committee at that meeting to meet me and my lawyers, and you and your lawyers at Mr. Watkins' office the next morning at 9 o'clock," which would have been Thursday.

Q. That was Thursday?

A. Thursday morning at 9 o'clock.

Q. Did you meet at Woodbury Thursday morning at that time?

A. We did.

Q. Where did you meet?

A. In Mr. Watkins' office.

Q. Who was with you?

A. Mr. Porch and Mr. Mawson.

Q. Who else was there?

A. You were there, and Mr. Watkins and Mr. Avis and Mr. Repp.

Q. Well, what was said, if anything, with relation to these peaches that you were complaining about?

10

Mr. Cole: I renew the objection for the same reason.

The Court: The objection is overruled.

(Exception noted for the defendant.)

A. Mr. Avis said—he called Mr. Watkins “Governor”—he said, “We came down, Mr. Governor, to talk this peach situation over. We want to talk it over in a friendly way, and we want to know what we are to do about these peaches.” Mr. Watkins said, “I have told these fellows if they are taking those peaches out of that storage at a loss to let them be there, to let you do what you please with them.” Mr. Repp said, “The peaches are no good; they have got to be dumped and I want to know who is going to dump them.”

20

Q. Did he say why he wanted them taken out of there?

30

A. He said he wanted to get the place cleaned up to store apples.

Q. And that was the result of that meeting, was it?

A. That was the result of that meeting.

Q. That was on Thursday, wasn't it?

A. That was on Thursday.

Q. Well, Mr. Miller, that evening you met where?

A. At J. H. Porch's, Richwood.

Q. And at that time did you sign statements or notices to the Repp Company of your claim, or the loss that you had sustained?

A. That night I received the claims to be served.

Mr. Marshall: Have you the original of that?

10

Mr. Avis: I think I have.

Q. The witness is shown a paper dated September 15th, marked "Claim for damages" and is asked what it is.

A. Why, this here is the amount of baskets that I had stored there in storage.

Q. Is that your signature?

A. Yes, it is, yes, sir.

20 Q. And what did you do with this paper after you signed it on Thursday night?

A. I delivered it the next morning to Mr. Repp at 9 o'clock, about 9 o'clock in the morning.

Mr. Avis: What date is that?

Mr. Marshall: It was dated September 15th and was delivered the following morning—is that right, Mr. Miller?

30

The Witness: Yes.

Q. The following morning, September 16th, at nine o'clock, at the office of the John Repp Ice & Cold Storage Company, and handed to Mr. Repp?

A. Handed to Mr. Repp himself.

Mr. Marshall: I offer this in evidence and ask that it be marked Exhibit P3.

(Said paper is so marked.)

Mr. Marshall: With permission of the Court, I would like to read this likewise to the jury; it is only a short memorandum. It is dated "September 15, 1927. Claim for damages against John Repp Ice & Cold Storage Company, Inc." (Reading notice.) 10 It is signed "Edward E. Miller."

Q. Well, Mr. Miller, when you went over to the warehouse after you had received your notice on September 12th, what did you find was the condition of the warehouse?

A. The condition was in very bad condition, I would say.

Mr. Cole: Just a moment; we object to any testimony touching the condition of the warehouse on the broad ground that there is no allegation in this complaint that the action is grounded upon any defect or trouble in the warehouse or the machinery or the plant. I take it this proof is intended to establish such a case. 20

The Court: I think the testimony is relevant under the claim in the complaint that the defendant failed to exercise due care and through its neglect the property was wholly lost. I overrule the objection. 30

(Exception noted for the defendant.)

Q. Just proceed, Mr. Miller, and tell us what you

observed about the plant when you went over there after you had received the notice.

A. When I went over to start to pack the peaches?

Q. Yes.

A. Why, I went in the plant there, and there was a lot of large cakes of ice piled up all around in the hallways there around the thermometers, and a lot of lime thrown around in there. The pipes were dripping, no frost of the pipes.

10 Q. The pipes were dripping, eh?

A. The pipes were dripping very badly.

Q. Did you see any of the pipes in the cold storage warehouse where the peaches were stored that had any coating of ice on them?

A. I did not.

Q. What else did you notice?

A. Well, I noticed my fruit.

Q. Did you notice the condition of the air?

A. Oh, yes, there was a bad condition of the air  
20 in there.

Q. What was it?

A. Well, I couldn't tell you, but it seemed like an acid from the peaches or something or other or something that the peaches might throw off under such conditions.

Q. Did you see anybody going in or coming out of the storage warehouse?

A. Yes.

Q. Did they use anything to protect themselves?

30 A. Yes, had gas masks on.

Q. They had gas masks?

A. Gas masks.

Q. Who were they, the employees?

A. The employees around there.

Q. And what was the effect—how did you find your peaches?

A. I found the peaches in pretty bad condition.

Q. When you say "bad condition," just describe to us the bad condition—what was it?

A. Why, they seemed to be soft and wilted, like, had no life in them, just like a peach would look if it was kept somewhere where there was no temperature.

Q. And were the peaches themselves cold or were they warm?

A. No, they were not cold, not at all. 10

Q. Have you had peaches in cold storage in other years?

A. I certainly did.

Q. Were they in the same condition as they were in other years when you had taken them out?

A. They certainly were not.

Q. What was the difference?

Mr. Cole: I object to that.

20

The Court: The objection is overruled.

(Exception noted for the defendant.)

A. Peaches taken out in other years were cold.

Q. Yet in spite of that, you undertook on Monday or Tuesday to see what could be done?

A. I certainly did.

Q. To see whether you would realize a loss or not? 30

A. Yes.

Q. Now, you shipped some of these peaches, didn't you?

A. I did.

Q. How many did you ship?

A. I have a couple of bills here in my pockets.

Q. Well, just refer to them, if you will, please, if you need them for the purpose of refreshing your memory.

A. One of these lots was received on 9/14—they were shipped to New York, Danzinger Brothers & Rubin; there was 450 bushels that day.

Q. 450 bushel?

A. Yes, sir.

Q. How many did you ship on the second day?

10 A. 250.

Q. 450 on the first and 250 on the second?

A. 250 on the second.

Q. And you shipped those in bushels, did you?

A. Yes, sir.

Q. You shipped 450 bushels, did you?

A. Yes.

Q. On what day?

A. Shipped them on the 13th; they received them on the 14th.

20 Q. What price did they bring in New York?

A. Twenty-two bushel brought eighty cents, three hundred and forty bushel seventy-five cents, thirty bushel brought one dollar, and fifty-eight bushel brought fifty cents.

Q. That is, per bushel?

A. That is per bushel.

Q. What did your peaches that you had sold on the following day—what did they bring?

30 A. On the following day, forty-eight bushels brought seventy-five cents, two hundred and two bushels brought fifty cents. They were shipped to Newark, the last lot.

Q. The last lot to Newark, and the first lot were shipped to New York?

A. Yes.

Q. Did you ship any other peaches other than those?

A. Mr. Repp carted a load for me to Philadelphia.

Q. Do you know what they brought?

A. Yes, sir, I will give it to you in a minute. They were carted to Ralph D. Hughes, 204 baskets of Elberta peaches. Four baskets at eighty-five cents —

Q. How many?

A. Four; eight at seventy-five cents, ten at sixty cents, twelve at fifty cents, /forty-three at forty 10 cents, fifty at thirty cents.

Q. What was the date of that?

A. That date? That was 9/14.

Q. Are they baskets or bushels?

A. This lot that went to Philadelphia was five-eighths baskets.

Q. They were five-eighths baskets?

A. Yes, sir.

Mr. Marshall: I offer these bills in evidence as 20 one Exhibit and ask that they be marked.

(Said bills are marked Exhibit P4.)

Q. Do you know what the general condition of these peaches was that were shipped to New York and Newark and Philadelphia?

A. What the condition of the peaches was? Yes, sir, I do.

Q. What was it?

A. They were soft. 30

Q. They were soft?

A. They were soft.

Q. Do you know what the market price for Hale and Elberta peaches was from September 14th for possibly a week or ten days thereafter in the New York markets?

A. A week or ten days after? Yes, they advanced considerably in ten days after from the time I shipped these.

Q. Well, do you know what the prevailing market price was for peaches at the time that you shipped these peaches?

A. I would say \$1.25 a basket.

Q. A dollar and a quarter a bushel basket?

A. A five-eighths basket.

10 Q. A five-eighths basket?

A. I would, yes.

Q. So that the total amount that you received from the peaches that you had put in the storage was \$61.16 for the peaches shipped to Mr. Hughes?

A. Yes, sir.

Q. \$592.21 for the peaches shipped to Baltimore, was it?

A. No, you have got the wrong bill there; that is a lot that I picked after I got through with the cold storage, of a different variety of peaches.

20 Q. New York—those shipped to New York \$185.94?

A. Yes, sir.

Q. And the peaches shipped to Newark \$60.80?

A. Yes, sir.

Q. That is the only money that you received from any of the peaches that you put in storage?

A. Except that Mr. James, the superintendent of the cold storage, gave me \$10.00. I was down there one day, and he said, "I sold some of your peaches; here is ten dollars for them." I got that ten dollars.

30 Q. And ten dollars from Mr. James?

A. Yes.

Q. The bill that you referred to here as being dated September 26th —

A. Yes, sir.

Q. That was in that batch; does that in any wise relate to the peaches that were in the cold storage plant?

A. It has nothing to do with them whatever.

Q. They were never in the plant?

A. They were never there.

Q. Now, are you prepared to tell us, Mr. Miller, what your cartage and your packing and your commission are on the shipments to New York? 10

A. Well, my carting would be twenty-five cents a bushel.

Q. Twenty-five cents per bushel?

A. Yes.

Q. And what is the packing?

A. The packing, ten cents a bushel.

Q. Yes, and the commission?

A. Commission off of that.

Q. That is what?

A. Off the one dollar and twenty-five cents. 20

Q. Is it ten per cent or eight per cent?

A. Ten per cent, yes.

Q. Ten per cent?

A. Yes.

Q. Now, the price that you speak of as one dollar and twenty-five cents for a five-eighths basket, as being the prevailing price at that time, that includes, I expect, the basket or the wood?

A. The wood goes with the peaches, yes, sir.

Q. So if you had received one dollar and twenty-five cents a basket, you would have to pay out your cartage, packing and your commission, wouldn't you? 30

A. Yes, sir.

Mr. Marshall: I would like to know if we can

stipulate that sixteen thousand two hundred and twenty-five five-eighths baskets is equivalent to ten thousand one hundred and forty and seven-tenths bushels? It is simply a question of arithmetic.

10 Mr. Avis: No, in the first place the suit is for sixteen thousand two hundred and twenty-five baskets. I think you allege there were sixteen thousand two hundred and fifty-four.

Mr. Marshall: Yes, but that was the total amount that was put in, wasn't it—16,225, it was.

Mr. Avis: Well, that was the total. Of course, Mr. Miller took some out himself.

20 Mr. Marshall: Oh, yes, but I am saying that 16,225 five-eighths baskets, if they had been put into storage in bushels, would have been equivalent to 10,140.7 bushels. There are the figures on that.

Mr. Avis: I don't know about that. We will agree on whatever it is.

Q. You spoke about the price being \$1.25 for a five-eighths basket. Are you prepared to tell us or able to tell us what it was in the New York markets for peaches by the bushel, or don't you know?

30 A. I don't really know what they would have been in the New York market, because I didn't ship no good stuff over there.

Q. Mr. Miller, on Tuesday and Wednesday, particularly on Wednesday, when you were sorting over these peaches, did you find that the softness of the peaches seemed to be the same throughout the basket?

A. Yes, sir.

Q. Or was it more on the top or on the bottom?

A. There wasn't a bit of difference.

Q. There didn't seem to be a bit of difference?

A. No, sir, they were soft all the way through.

Q. What was the condition? Can't you describe the peach as best you can to the Court and jury?

A. Well, the peach didn't seem to have no life in it whatever; it seemed to be of a dead nature, and they were soft.

10

Q. Well, was it speckled?

A. No, they weren't speckled.

Q. Were they watery?

A. No, they were not watery, no more than —

Q. Just simply soft?

A. Just simply soft, yes.

Q. And what effect would the hauling of the soft peaches have on the peaches themselves, if you hauled them, for instance, to the Philadelphia markets?

20

A. Have a very bad effect on them; they would be that much softer by the time they got there.

Q. And I presume the same thing would be true, only worse, if hauled to the New York markets?

A. It would be worse. When they loaded these peaches on the truck, the juice was running out of the bottom of the boxes.

Q. Did you have any talk with Mr. Repp as to the occasion for the temperature at the plant being what it was in order not to preserve the fruit?

30

A. No, I did not.

Q. Do you know Mr. Adams?

A. I do.

Q. Who is Mr. Adams?

A. I think he is superintendent of the cold storage; he seemed to have the say around there.

- Q. Was he over at the cold storage plant itself?  
A. He was.  
Q. Did you ever talk with him?  
A. I did.  
Q. When did you have a talk with him?  
A. On a Wednesday, I think at the noon hour.  
Q. What Wednesday is that?  
A. On Wednesday the second day I packed out.  
Q. The second day you packed?  
10 A. The second day; I started on Tuesday the 13th and this was on the 14th.  
Q. On September 14th?  
A. September 14th, I was talking to him.  
Q. And where was the conversation?  
A. Right outside the storage, right next to the entrance to the storage, on one of the sleds they pack peaches on to take them into the storage, he and I and Harry Mayhew sat there together.  
Q. What did he say?  
20 Mr. Cole: I object to that if it is intended to bind this defendant; it has not been shown he had authority to speak for the defendant.

The Court: The objection is sustained.

- Q. But you had no conversation at any time with Mr. Repp, did you?  
A. No.  
30 Q. As to what he had or had not done with the plant?  
A. I did not.

Cross-examination.

By Mr. Cole:

Q. When did you begin to pick peaches?

A. On the 27th day of August, 1927.

Q. And when did you cease to pick?

A. September 6th, 1927.

Q. Were all the peaches that you picked stored  
in the defendant's warehouse? 10

A. They were.

Q. And you say, do you, that when the peaches  
were picked, they were in prime condition?

A. I certainly do.

Q. And likewise in that condition when they were  
stored?

A. Likewise in that condition when they were  
stored.

Q. They were not watery when they were picked? 20

A. No, they were not.

Q. They were not ripe when they were picked?

A. They were not soft.

Q. And they were not watery or soft when they  
were stored?

A. They certainly were not.

Q. Were they in the same condition in 1927 as  
your peaches had been in prior years when you  
stored them in this warehouse?

A. They were in just as good condition as they  
were in 1925, when they kept to a peach in the stor- 30  
age warehouse.

Q. How long had you been storing your peaches  
in this warehouse?

A. I think, if my memory serves me right, 1925  
was the first year I ever stored in there.

Q. And in 1926?

- A. 1926.  
Q. And 1927?  
A. And 1927.  
Q. What was the condition of the weather in 1927 during your picking and storing?  
A. We had some wet weather.  
Q. And some warm weather?  
A. No more warm weather than we had in 1925.  
Q. I am not asking you about 1925.  
10 A. Yes, we had some warm weather, yes, sir.  
Q. And does wet weather and warm weather have any effect on peaches?  
A. In what way do you mean?  
Q. In any way?  
A. I don't know that it does, no.  
Q. What?  
A. I don't know that it does.  
Q. You don't know that it does?  
A. No.  
20 Q. It doesn't tend to soften them faster if the weather is warm and damp?  
A. If it is extremely warm and the peaches are about the time for them to ripen, it may ripen them a little faster, yes, sir.  
Q. Was the weather during this period extremely warm?  
A. Oh, I don't think so, no, not extremely.  
Q. When you say the weather was wet, do you mean by that it was raining?  
30 A. I mean we had rainy days, yes.  
Q. How many rainy days during the period between the time you began to pick and the time you stopped picking?  
A. I couldn't tell you.  
Q. Now, have you a record of the peaches you stored day by day?

A. I certainly have.

Q. Will you read it, please.

A. I haven't them with me; I have them at home; I have all the storage tickets just as I received them from the storage excepting these eighteen baskets on a Saturday; that ticket I haven't got; I don't know whether I received it or not.

Q. I will read from a report of the defendant company and ask you whether it is correct according to your recollection.

10

Mr. Marshall: If the Court please, I did not produce that, and I do not think it would be hardly fair for the witness to be asked if he can recollect that. We have them for you tomorrow.

Mr. Cole: I think the witness can say.

The Court: Yes, he can say whether he recollects them or not.

20

Mr. Cole: The answer admits the receipt of them but not in the time and number stated on the sheet. The totals agree but we want to get the dates and amounts.

Q. According to our sheet, Mr. Miller, we have the following dates and following amounts, and I ask you whether you think this is accurate: On August 27th, twelve, the 29th seventeen hundred and seventy-nine, the 30th, nineteen hundred and one, the 31st, sixteen hundred and thirty-four, September 1st, one hundred and seventy-four, September 2nd, twenty-four hundred and ninety-six, September 3rd, twenty-three hundred and thirty-one, September 5th, thirty-five hundred and forty-eight, and September 6th, twenty hundred sixty-seven.

30

A. That might be right.

Q. It sounds correct, does it?

A. It doesn't sound bad.

Mr. Marshall: What does that make the total?

Mr. Cole: The total here is sixteen thousand two hundred and fifty-four.

10

Q. Have you the envelope in which this notice was enclosed, coming from the defendant company, to remove these peaches in seventy-two hours?

A. I don't think I have.

Q. What did you do with it?

A. I think I left that notice with Mr. Watkins.

Q. The envelope, too?

A. I couldn't say about the envelope.

Q. I am asking you, what did you do with the envelope?

20

A. I don't know.

Q. The letter is dated on the 9th, and you say you got it when?

A. I got it Monday morning.

Q. Through the mail?

A. Through the mail.

Q. From where was it sent?

A. Sent from Glassboro, I suppose.

Q. Do you recall the post mark on the envelope, the date?

30

A. I do not.

Q. What was the first thing you did with relation to these peaches after you received that notice?

A. The first thing I did was to procure some extra help, I hadn't help enough within myself to pack the peaches—to get some extra help and move my packages over to the storage and sorting table over

there so as to start the next morning to pack my peaches.

Q. Did you go into the storage house at that time?

A. On Monday?

Q. The day that you went up there?

A. I think I did.

Q. Did you see your peaches?

A. I think I did get to them, yes.

Q. And were the baskets covered or uncovered? 10

A. Uncovered.

Q. They had been uncovered all the time, hadn't they?

A. As far as I know.

Q. So they could be seen by anybody from the time you picked them until you saw them in the storage warehouse on that date?

A. I believe they could.

Q. What day of the week do you say that was?

A. When I started packing? 20

Q. No, on the day you went to the storage warehouse after receiving the letter?

A. Oh, that was on the 13th.

Q. The 13th?

A. Yes.

Q. You got the letter on the 12th?

A. I got the letter on Monday morning, yes, sir, the 12th.

Q. Was that the 12th?

A. I think it was, yes. 30

Q. Have you got a calendar with you of 1927?

A. It was the 13th when I started to pack the peaches.

Q. The 13th when you started packing?

A. Yes.

Q. But you did not start packing until the day after you went to the plant?

A. I moved my equipment over there, started the next day after I moved my equipment.

Q. Then if you started to pack on the 13th, you must have gone there on Monday the 12th, the same day you got the letter?

A. Yes, yes, that is right.

Q. You then saw your peaches were in poor condition, did you?

A. I did.

10 Q. Now, why did you send the notice to the Repp Company?

A. Why did I send the notice?

Q. Yes.

A. What do you mean by the notice?

Q. I suppose the seventy-two hour notice, or, rather—I withdraw that —

A. Why did I send it?

Q. Yes, demanding damages?

A. Because I felt that there was damage coming  
20 to me.

Q. What?

A. I felt that there were damages coming to me.

Q. No, but how did you come to send this particular notice—how did you come to do it—why did you do it?

A. How did I come to file that claim?

Q. Yes.

A. Why, according to the advice of my attorney.

Q. Because you had to do it under your contract?

A. Had to do it within seventy-two hours, yes.  
30

Q. Under your contract, is that right?

A. Had to do it in seventy-two hours.

Q. I say, under your contract?

A. I suppose you might say the contract.

Q. Was there any other contract that you had except this written contract?

A. Not that I know of.

Q. In point of fact, your lawyer told you to send this notice which is Exhibit P3 because the contract required you to do it, is that correct?

A. The contract, I believe, required me to do it, yes, yes, sir.

Q. All right. Now, you say that when you went in there on Monday the 12th that people were wearing gas masks?

A. Yes, they had gas masks on.

10

Q. Who?

A. Some of the employees there; I can't tell you what their name was.

Q. How do you know that the New York market was \$1.25 for a five-eighths basket?

A. I didn't say it was.

Q. Didn't you?

A. No.

Q. What did you say about that?

A. I said the Philadelphia market was \$1.25.

20

Q. You did not testify to the New York market?

A. I did not.

Q. How did you know that the Philadelphia market was \$1.25?

A. I knew what some of the rest was getting for their peaches.

Q. Then it was hearsay?

A. Hearsay, yes; partly hearsay.

Q. It was only what somebody told you?

A. I generally try to keep in touch —

Q. Is that the only way you know, because somebody told you?

30

A. No, that ain't the only way I knew.

Q. What other way did you know?

A. What other way did I know it was \$1.25?

Q. Yes, that it was \$1.25 for a five-eighths basket during this period in the Philadelphia markets?

A. I generally keep in touch with the market.

Q. I don't say you do not, but I want to know how you knew?

A. I 'phoned to my commission man from time to time to know the prices.

Q. Did you in this particular instance call him up?

A. Yes, I called him up.

10 Q. Did you make a memorandum anywhere in writing as to what the prices were at that time?

A. No, I called him up very frequently in regard to the prices.

Q. I ask you, did you put it down anywhere?

A. No.

Q. You say that there were no pipes in the building on this Monday, the 12th, that showed any evidence of freezing?

A. I say I didn't see a bit of frost on any of the pipes that I saw.

20 Q. But you saw considerable ice there?

A. In the aisles.

Q. In the aisles?

A. Yes.

Q. What would you say as to the quantity of ice you saw?

A. Oh, dear, I couldn't tell you the quantity; there might have been fifteen or twenty ton there, might have been thirty.

30 Q. Well, which part of the building did you find the ice?

A. The first floor.

Q. Everywhere?

A. The first floor.

Q. Were all your peaches on the first floor?

A. No, sir.

Q. Where were they?

A. Some were on the first floor and some were on the second floor and some were in the ice house.

Q. Was there any ice in the ice house?

A. I didn't see any.

Q. Was there any ice on the second floor?

A. I didn't see any ice on the second floor; I don't remember of any ice being on the second floor.

Q. But you saw about thirty tons, you said, on the first floor?

A. I said it could be possibly thirty tons. 10

Q. Will you please relate again the talk you had when you say that Mr. Repp told you that he had been expecting this.

A. Yes, sir.

Q. Just what was that?

A. Well, we were talking it over between ourselves there.

Q. Well, tell us what was said.

A. What was said?

Q. Yes. 20

A. Why, we said that these here peaches we couldn't pack then, peaches in the condition that the peaches were in; we thought the best thing we could do was to go over and tell Mr. Repp about it and see what he wanted to do, so that is what we did.

Q. Won't you tell me, please, what you said to Mr. Repp and what he said to you.

A. We told Mr. Repp that these peaches were in such condition that we were unable to pack them at a profit, and Mr. Repp said, "I have been expecting this." 30

Q. Yes. Now, when was that?

A. That was on a Wednesday morning.

Q. You mean Wednesday following the Monday that you received the letter?

A. Yes, sir.

Q. Had Mr. Repp been to see you and told you the condition of the peaches before you received the letter?

A. He did not tell me the condition of the peaches.

Q. What did he say to you?

A. He told me that he had done all he could to keep the temperature down in the building and could not keep it down, and he thought he had better take in no more peaches.

10 Q. When was that?

A. That was on Labor Day, about nine o'clock in the morning.

Q. Nine o'clock in the morning on Labor Day?

A. Yes.

Q. Did he come to see you?

A. He did.

Q. Did he tell you you had better remove the peaches?

A. He didn't tell me anything about removing  
20 them.

Q. He thought he had better not take any more on?

A. He thought he had better not take any more in.

Q. You didn't take in any more after that, did you?

A. I did, yes.

Q. After that?

A. Yes, after that.

30 Q. How many peaches did you take in to store after he told you he didn't want to take any more on?

A. I couldn't exactly tell you the exact amount I took, but I said to Mr. Repp, I said, "I have only got another day's picking or so," and he said, "You bring those over, we will put them in the ice house." That is how they came to get in the ice house.

Q. Tell us, please, about how many peaches you stored after you were told they could not maintain the temperature?

A. I may have stored fifteen hundred or two thousand baskets; it may not have been that many.

Q. Now, you stored thirty-five hundred and forty-eight on the fifth and two thousand and sixty-seven on the sixth; now, that was after Mr. Repp had told you that the temperature could not be maintained, wasn't it?

10

A. I suppose it was.

Q. Well, when he told you that he could not maintain the temperature, did you think that, notwithstanding that fact, your peaches would be good?

A. Thought that they would be good?

Q. Yes.

A. I thought they would be so that we could use them, yes.

Q. You thought that, notwithstanding he told you he didn't want you to bring any more in and that the temperature could not be maintained, that it was still all right for you to bring peaches there?

20

A. Yes, but he was going to put them in another building.

Q. Yes, but the peaches that were not in the ice house, they were the ones that he was talking to you about, weren't they?

A. They were.

Q. And he told you he was not able to maintain the temperature?

30

A. That is what he said.

Q. Well, did you suspect then that perhaps your peaches were in peril?

A. I did not.

Q. How did you suppose they were going to be

maintained without damage if he could not maintain the temperature in his plant?

A. I didn't suppose that the temperature was anything near what it was.

Q. Did you ask him?

A. No, I did not.

Q. You were not concerned enough about all these peaches you had there to inquire of him whether there was a temperature sufficiently low to keep  
10 them frozen?

A. No, sir, I never asked the question.

Q. Now, didn't you know that when he called your attention to the fact that he could not maintain the temperature, that it was risky for you to leave them there?

A. I don't know that I did.

Q. He told you that he was going to put the remaining peaches in the ice house, didn't he?

A. Yes, sir.

20 Q. And still you did not think that that meant that your other peaches that were not in the ice house were being imperilled?

A. I did not; I thought I was going to be able to save them.

Q. That is all I want to know; you didn't think so?

A. No.

30 Q. You say, if you put peaches in a refrigerating plant that are in good condition, and they are kept under proper temperature, that they will keep how long?

A. Five weeks.

Q. Five weeks?

A. Yes.

Q. Have you had that experience?

A. I have; I have had that experience.

- Q. With this plant?
- A. I think so, in 1925; I believe I had them there that long.
- Q. 1926?
- A. I won't say about 1925.
- Q. Were you in the plant in 1925?
- A. Yes, sir.
- Q. Were you in the plant in 1926?
- A. I certainly was.
- Q. The same plant? 10
- A. The same plant.
- Q. The same machinery?
- A. I don't know nothing about the same machinery.
- Q. Was there any difference, as far as you know, in that plant in 1927 than it was in 1926 and 1925?
- A. I certainly do.
- Q. What is the difference?
- A. Why, we had temperature in there in 1925.
- Q. I am not talking about temperature; I am talking about the plant. 20
- A. The construction of the plant?
- Q. The machinery and all that.
- A. I couldn't say a word about it.
- Q. You don't know a thing about it?
- A. I don't know a thing in the world.
- Q. Did Mr. Repp tell you that the reason he could not maintain the temperature was because the peaches were brought in there watery, they were brought in in such quantities that he could not maintain it? 30
- A. He never uttered no such words.
- Q. He never breathed the reason for it?
- A. He never uttered it.
- Q. Did he ever mention the fact of their being brought in there too hot?

A. No, not to the best of my knowledge.

Q. In other words, he didn't give you any reason whatever for the failure to maintain the temperature?

A. He didn't the day he came to see me.

Q. But didn't you inquire?

A. I didn't inquire, no.

Q. Didn't you have interest enough in the peaches to know why it was that the temperature could not  
10 be maintained?

A. I did not feel that that was my business.

Q. I am not asking you about how you felt.

A. No, I did not.

Q. Was this plant open for the reception of peaches on Sunday?

A. Was it open? I think there were peaches being unloaded there as late as five o'clock Sunday morning.

Q. Why didn't you store your peaches on Sunday  
20 day that you gathered on the Friday before?

A. I didn't know anything about whether the storage would be open on Sunday night or not.

Q. Did you try to find out?

A. I didn't attempt to find out.

Q. What was the condition of the weather during the period from the time you picked the five or six hundred baskets until you delivered them to storage on Monday morning?

A. Clear weather.

30 Q. What?

A. Clear weather.

Q. Was it warm?

A. Medium.

Q. Do you know anything about the temperature?

A. I couldn't say.

Q. Have you made any investigation at all to as-

certain the weather conditions as far as the temperature was concerned while you were picking the peaches and while you were storing them?

A. No, I never did.

Q. I may have asked you, but I want to ask you again if I haven't done so: Didn't Mr. Repp tell you he wouldn't take any more peaches from you because he could not maintain the temperature?

A. No, he did not.

Q. Now, let's get the dates correct. Mr. Miller, 10 you testified to going to this plant on a day when you discovered gas?

A. Yes, sir.

Q. Now, what day was that?

A. I think that was on about Thursday previous to Labor Day.

Q. And before you got the notice?

A. Before I got the notice.

Q. How did you come to go there?

A. I always did go there to look after my peaches. 20

Q. Then you were there looking after your peaches?

A. I went there to look at them, see how they were, yes.

Q. Was that after all the peaches had been stored?

A. That was before all were stored.

Q. Was it while some of them had been stored?

A. Yes.

Q. And you were going there to see what the con- 30 dition was?

A. No, I was going there just to take a look at the peaches, which I always did.

Q. Did you see them?

A. I attempted to see them, but I did not see them.

Q. Why not?

A. Because there was such an odor in there that you couldn't stay in there.

Q. Did you think there was something wrong with the plant?

A. I certainly thought there was something wrong with something.

Q. What did you think was wrong with it?

A. What did I think was wrong with it? I  
10 couldn't think what was wrong with it.

Q. How long were you there?

A. In the storage?

Q. Yes.

A. Just as soon as I could get in and out.

Q. And when you found a condition that you thought was wrong, did you go see Mr. Repp about it?

A. Yes, sir, he and I was talking about it.

Q. Right away?

20 A. Yes.

Q. And what was the talk you had?

A. I told him I attempted to go in there and see my peaches, but there was such an odor in there that I could not stand it in there, and I came out, and he said he wouldn't let his men go in there without gas masks on.

Q. Did he tell you what was causing that?

A. He didn't; he thought there was something coming from the peaches.

30 Q. Something coming from the peaches?

A. Yes.

Q. From your peaches?

A. Not my particular peaches.

Q. All the peaches?

A. Yes.

Q. And notwithstanding that, you did not think there was anything wrong with your peaches?

A. I didn't think there was anything wrong with my peaches? I couldn't tell whether there was anything wrong with them or not, I couldn't get to them.

By Mr. Marshall:

Q. Just a moment, Mr. Miller. May I ask you—you said thirty-five hundred and forty baskets on September 4th, was it? 10

A. No, that was what it was on the 5th.

Q. Thirty-five hundred and forty-eight on the 5th and twenty hundred and sixty-seven on the 6th.

A. September 5th, that was Monday, Labor Day, wasn't it?

Q. Mr. Miller, I only wanted to ask you again with respect to the conversation you had with Mr. Repp on that Labor Day?

A. Yes, sir.

Q. Just relate that, will you, so I may get that straight myself? 20

A. Mr. Repp drove down there to the orchard where I was picking right along the road; he stopped out in the road, and he said, "Miller," he said, "I have not been able to get that temperature down in the storage, and," he said, "I think you had better not bring in any more peaches." "Well," I said, "I have got a day or two picking"—whatever it was I might have said to him—a day or two picking, and he said, "Bring them in, I will put them in the icehouse," so I brought them over there. 30

Q. Thirty-five hundred and forty-eight you brought over on Labor Day and twenty sixty-seven—they were put in the ice house, were they, as far as you know?

A. I don't know whether they were or not, I

couldn't say about that; I didn't go to the storage.

Q. But he told you to send those over?

A. He told me to send those over, he would put them in the icehouse.

Q. And you sent those over relying upon that, did you?

A. I did, wholly.

Q. Did you learn later, after you had received the notice and had undertaken to remove your peaches, 10 whether there were any of your peaches in the icehouse?

A. Yes, there were some of mine in the icehouse.

Q. Do you know about how many you had in the icehouse?

A. I could not say for the life of me how many I had in the icehouse.

Q. You couldn't say how many were in there, but on Labor Day Mr. Repp did not tell you that the peaches that were in the main storage were not 20 keeping?

A. He certainly did not.

Q. Or he did not tell you then about taking them out?

A. No, sir, not a word said about it.

Q. You will bring up with you tomorrow the slips so we will have those?

A. Yes.

By Mr. Cole:

30

Q. What time of the day was it he was over there?

A. What day are you alluding to?

Q. What time of the day when he told you not to bring any more peaches over?

A. I wasn't over there; he was over to my place.

Q. I see, he was over to your place?

A. Yes.

Q. What time of the day was it?

A. About nine o'clock in the morning, I judge.

Q. About seven o'clock?

A. About nine.

Q. It wasn't seven, it was not as early as seven?

A. No, I don't think so.

Mr. Avis: If the Court please, for the information of counsel on the other side, we want to call Mr. Bliss in relation to some temperatures. 10

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GEORGE S. BLISS, SWORN.

Mr. Avis: I don't suppose there is any question about qualifying Mr. Bliss, is there?

Mr. Marshall: No, sir.

By Mr. Avis: 20

Q. Mr. Bliss, will you tell us the condition of the temperature from your records from August 27, 1927, to September 16, 1927, giving us the four readings at midnight, six o'clock in the morning, noon and six o'clock in the evening.

A. Is that August 27th?

Q. Commencing August 27th, yes, sir.

A. August 27th, midnight fifty-five; 6 A. M. fifty-five; noon, fifty-nine; and 6 P. M. fifty-nine. Midnight fifty-nine — 30

Q. This is of the 28th?

A. Between the 27th and 28th, yes. 6 A. M., sixty-one; noon, sixty-four; 6 P. M., sixty-five.

Mr. Marshall: May I ask you to give us the midnight on that one—I didn't catch that one.

The Witness: Fifty-nine. Midnight, sixty-four. 6 A. M. of the 29th, sixty-one; noon, seventy-one; 6 P. M., sixty-nine; and midnight, sixty-two. 6 A. M., of the 30th, fifty-nine; noon, seventy-six; 6 P. M., seventy-nine; and midnight, sixty-eight. 6 A. M., of the 31st, sixty-four; noon, seventy-four; 6 P. M., seventy-four; midnight, seventy. 6 A. M., of September 1st, sixty-seven; noon, sixty-seven; 6 P. M., seventy; midnight, sixty-six. 6 A. M. of the second  
 10 sixty-five; noon, seventy-seven; 6 P. M., seventy-eight; midnight, seventy. 6 A. M., of the 3rd, sixty-six; noon, eighty-three; 6 P. M., eighty-one; midnight, sixty-nine. 6 A. M., of the 4th, seventy; noon, eighty-one; 6 P. M., seventy-nine; midnight, sixty-nine. 6 A. M., of the 5th, sixty-three; noon, seventy-seven; 6 P. M., seventy-six; midnight, sixty-seven. 6  
 20 A. M., of the 6th, sixty-one; noon, seventy-nine; 6 P. M., seventy-nine; midnight, sixty-seven. 6 A. M., of the 7th, sixty-two; noon, seventy-nine; 6 P. M., eighty; midnight, seventy-two.

Q. Now, Mr. Bliss, that is as far as we desire to go, unless Mr. Marshall wants you to go further. Now, Mr. Bliss, as I understand it, you haven't your 1926 records with you?

A. No, I did not bring them, because I was asked to bring only the 1927.

Q. Could you mail us a memorandum from August 30th to September 11th, of 1926, after you go back to your office tonight?

30 A. Yes, I am going right back directly. You want August?

Q. From August 30th to September 11th of 1926, the temperatures four times a day, the same. Will that be satisfactory to you?

Mr. Marshall: Yes; I think if Mr. Bliss sends

that down over his signature, I think it would be acceptable to us.

Mr. Avis: We will have it read as though he testified to it.

The Court: Senator, for the purposes of the record, ought it not to appear who Mr. Bliss is?

By Mr. Avis:

10

Q. Mr. Bliss, will you just tell the Court and jury who you are and why you keep these records?

A. I am in charge of the Philadelphia office and the Pennsylvania section of the United States Weather Bureau.

Q. And in the course of the work of that bureau, these records have been kept?

A. These records have been kept.

Q. And they are from actual readings, of course, 20 in Philadelphia?

A. They are, these are Philadelphia temperatures.

Q. From the top of the Post Office Building, is it?

A. From the top of the Post Office Building, yes.

Cross-examination.

By Mr. Marshall:

Q. Would you be able to tell us, Mr. Bliss, whether any variation should be expected in the readings 30 that you have given us for Glassboro, New Jersey, as compared with Philadelphia?

A. These would merely show a sort of general condition through this region. You can go down on the streets of Philadelphia and get a variation of four or five degrees, especially on a sun-shiny day,

just walking around through the squares with a thermometer, but the conditions we have here for practical purposes would show general conditions. Of course, when you come to technical work, you have got to have the temperatures taken precisely on the spot.

10 Q. But, for instance, any reading that you would take, for example, the one on September 1st, being sixty-seven degrees at noon in Philadelphia; now, that might be at Glassboro, a distance of twenty miles away—there might be a variation there of four or five degrees one way or the other, might there?

A. Yes, it might vary one way at one reading and the other way at the next reading.

Q. Does the fact that the Delaware River is close to Philadelphia or close to your station have any bearing on the temperature readings?

20 A. No, I think that would make no practical difference in the temperature.

Q. Are you prepared from the records you have to give us the record of the water fall during these periods?

A. The rainfall, yes.

Q. As between August 27th and September 6th?

A. The rain fall on August 27th was an inch and seventy-four one-hundredths.

Q. On August 27th?

A. Yes.

30 Q. How much was that?

A. An inch and seventy-four one-hundredths; on August 28, fifteen one-hundredths of an inch; August 29th, nine one-thousandths of an inch; August 30th, none; 31st, a trace, that is, a sprinkle, but not enough to measure; September 1st, twenty-six one-hundredths of an inch; September 2nd none; Septem-

ber 3rd none; September 4th none; September 5th none; September 6th none; September 7th none.

Q. When you speak of those dates as being none on August 30th and September 2nd, 3rd, 4th, 5th, 6th and 7th, that means that there was no rainfall?

A. No rainfall in Philadelphia.

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HARRY T. BULMER, SWORN.

10

By Mr. Marshall:

Q. Mr. Bulmer, where do you live?

A. In New York.

Q. New York?

A. That is my home.

Q. What is your business?

A. Fruit business, peach grower.

Q. Fruit buying or selling or what?

A. Buying and selling and growing peaches.

20

Q. Did you know Mr. Edward Miller during the year 1927?

A. Yes, sir.

Q. How many years have you been engaged in peach growing?

A. About eighteen years.

Q. And where?

A. North Carolina.

Q. Are you still engaged in the growing of peaches?

30

A. Yes, sir.

Q. Have been doing that consistently for the past eighteen years?

A. Yes, sir.

Q. Well, how many years have you been buying peaches?

A. The same length of time.

Q. For what reason were you in Glassboro in 1927?

A. Buying peaches.

Q. Did you have any occasion to inspect the crop of Edward E. Miller at Aura?

A. Yes.

Q. Can you tell us when you saw the crop of Mr. Miller?

10 A. Well, I saw his crop about two weeks before he started picking; then I saw it off and on while he was picking.

Q. While he was picking?

A. Yes, sir.

Q. And did you see any of his crop after it was taken over to the storage?

A. Yes, sir.

Q. Did you see his peaches after they had begun to take them out?

20 A. Yes, sir.

Q. With relation to the peaches as you saw them on the tree, what would you say was their condition before they were picked?

A. Well, they were very good quality.

Q. What variety of peaches were they?

A. Elbertas and Hales; of course, that is the only two varieties that I was interested in.

Q. Elbertas and Hales?

A. Elbertas and Hales.

30 Q. They are a late peach, are they?

A. Yes.

Q. Are they or are they not generally considered a good keeper?

A. A good keeper.

Q. Better than the earlier peach?

A. Yes, sir.

Q. And you say you saw those peaches as they were being picked?

A. Yes, sir.

Q. By that you mean you were in the orchard while they were being picked?

A. I would go out from time to time, yes.

Q. What would be your reason, Mr. Bulmer, for wanting to see the peaches so often?

A. Well, you see, when they are stored, we usually buy them out of storage. We watch them closely as they are going in to know about what we are going to get when they come out, and we watch the better marks of fruit, that is, carefully picked fruit that will stand up in storage. Those are the only ones we are interested in. 10

Q. Now, while the peaches were being picked, what was the condition of the peaches?

A. I would say they were all right.

Q. You saw the peaches, some of them, as they were loaded and hauled over? 20

A. Yes.

Q. What have you to say in respect to the manner in which the peaches were hauled?

A. Just as good as it could be.

Q. And you saw them over at the storage—did you see any of them delivered there?

A. I was there at times when his truck would come in, that is, the truck that was hauling his fruit would come in, yes.

Q. And they would deliver them where? 30

A. At the cold storage.

Q. Who would place them after they were delivered there?

A. Of course, that was up to the help at the storage.

Q. At the storage?

A. Yes.

Q. Of course, Miller's men delivered them at the outside door?

A. They would do the unloading, help the hands at the storage to take care of them when they brought them there.

Q. Now, you saw these peaches of Mr. Miller's down to the time—from the time they were growing, picked, hauled and delivered to the storage?

10 A. I saw them about two weeks before he started gathering them. That was the earliest I saw them, from then on until —

Q. From that time on down to the time they were delivered at the storage plant, you would say that they were in perfect condition?

A. Yes.

Q. Did you have occasion to see these same peaches —

A. I wouldn't say perfect condition; I would say they were in good, sound, merchantable condition.

20 Q. Good, sound merchantable condition?

A. Yes.

Q. Would you say that they were peaches that were a proper peach for being placed in cold storage?

A. Yes.

Q. In your opinion, how long with proper refrigeration would they have been likely to have kept?

A. Well, the Elberta peach will keep at least a month in storage.

30 Q. How about a Hale peach?

A. The same length of time; they are just as hardy as your Elbertas.

Q. Then the peaches, considering the condition they were in when you saw them, would in your opinion, with proper refrigeration, have kept at least a month?

A. Yes.

Q. And they were the peaches that you were preparing to buy?

A. Yes, sir.

Q. Now, did you see these peaches of Mr. Miller after he had begun to haul them from the cold storage?

A. I was there the day he started taking them out.

Q. What was the condition of those peaches then? 10

A. Very soft.

Q. Very soft?

A. Yes.

Q. As a man having handled peaches, could you tell us what was the trouble with them?

A. Well, you can see easy enough the cause of the trouble.

Q. What was it?

A. We call it poor refrigeration.

Q. Poor refrigeration?

20

A. Yes, sir.

Q. Could you tell whether there had been any refrigeration at all or not?

A. From the appearance of the peach you could not tell it; the peach was dry and soft. If there had been — That is, anything that has had refrigeration in it recently and it just passes out of it, there is a certain amount of moisture on your fruit, whether it is a peach or apple or pear, that is, when you are changing it from your colder temperature to your outside temperature, and, of course, the only part I noticed about Miller's fruit was the condition of them and it was a dry, soft peach. 30

Q. Soft—was it speckled?

A. No, sir, I wouldn't say it was, any more so than the amount of decay that you would look for in storage peaches.

Q. Storage peaches?

A. Yes.

Q. Did you have any occasion to see inside of the plant at that time?

A. I was in the plant a couple of times, yes, sir.

Q. Would you say that these peaches when you saw them after they were taken out were marketable?

A. I wouldn't say so, no.

10 Q. Were they such peaches that you as a buyer were interested at all in buying at that time?

A. I wouldn't buy them.

Q. You would refuse them?

A. Yes.

Q. You say you were in the plant after Mr. Miller had started taking the peaches out?

A. Yes.

Q. Now, what have you to say with respect to seeing any evidence of refrigeration in there?

20

Mr. Cole: This, of course, is objected to, may it please your Honor, for the reason we objected before, that it is not within the contract or issue.

The Court: The objection is overruled.

(Exception noted for the defendant.)

30 A. I noticed, of course, the lack of frost which you look for when you go into a storage plant—that was the main thing. When we saw the condition of the fruit, of course, the next thing that we were looking for was the cause of it, and, of course, the main thing that you would notice would be the lack of the one thing that would give you the refrigeration.

Q. What was that?

- A. That was frosted pipes.
- Q. What condition were the pipes in—what were the pipes doing, if anything?
- A. Well, there was considerable drip.
- Q. Dripping?
- A. Yes.
- Q. What does that indicate?
- A. Well, that would indicate high temperature.
- Q. Would it indicate a lack of temperature sufficiently low to preserve the fruit? 10
- A. Well, it would be too high to give it any refrigeration that would be worth anything to it.
- Q. Did you notice anything with respect to any gas or odor in the plant?
- A. There was some in there, yes. Of course, that is a condition that is noticeable in any storage, but then the amount you noticed there, of course, was brought on by the temperature more than anything else.
- Q. Will you speak just a little louder, if you can? 20  
The odor that was there, you say was caused by the temperature in the storage?
- A. Yes, sir.
- Q. Now, the temperature in the storage, what effect did that have on the peach?
- A. Well, of course, that would be the one thing that would cause your deterioration.
- Q. Cause your deterioration?
- A. Low temperature, not sufficient.
- Q. Would it or would it not throw off gas? 30
- A. That is the only thing that throws it off.
- Q. Now, if there had been a proper and sufficient amount of refrigeration, sufficient to have preserved the fruit, would it have thrown off as much gas?
- A. Well, your gas would not have been noticeable.

I couldn't say whether it would throw off as much gas or not. The chances are that your refrigeration would take care of this gas that causes the decay in your fruit, the excessive gas.

Q. Do you know what that gas is called?

A. C 2-1, I believe.

Q. C 2-1?

A. I couldn't say whether that is correct or not.

Q. You don't know whether it is C 2-1 or C 2-0?

10 A. C 2-0, I guess that is it. We know what the gas is, and we know the damage it does.

Q. Have you had experience in preserving peaches, storing fruit?

A. I have stored peaches for the last twelve years.

Q. What would you say was the proper temperature to maintain at a storage plant to preserve fruit for three or four weeks?

Mr. Cole: I object to that as not within the con-  
20 tract or the issue.

The Court: The objection is overruled.

(Exception noted for the defendant.)

A. In storages that we do most of our storing in, they like to keep their temperature as close to thirty-three and thirty-four as possible.

30 Q. Do you know what effect, if any, a low temperature has on a warm peach when placed in storage?

A. How low would you —

Q. Around freezing or around thirty-two or thirty-three?

A. Well, of course, your low temperature will put your fruit in proper shape; it will throw off your heat, it will pre-cool your fruit, so it puts it in proper shape for storing.

Q. Is that the proper method in the cold storage of peaches?

A. Yes.

Q. First to chill your fruit immediately?

A. Yes, sir, that is the important thing that really is needed; the first cooling that your peach goes through is really the best part of your refrigeration, or that is the whole thing really.

Q. In other words, the immediate chill is of much value, probably more value than the other part of the 10 refrigeration?

A. I would say more.

Q. Are you familiar, Mr. Bulmer, with what the prevailing New York prices, Newark prices and Philadelphia prices were for Hale and Alberta peaches between September 12th and the last of the month, September 30th?

A. Yes, I think I am.

Q. Will you tell us what they were?

A. On the best grades, that is, now? 20

Q. Yes, sir.

A. There are exceptional lots that possibly sold higher, but on the best qualities, around two dollars was the market on good fruit between those dates at the time you mentioned.

Q. You say two dollars for what kind of carrier?

A. Of course, that would be a bushel.

Q. A bushel carrier?

A. Yes. Your Government reports, I believe, would show you that. There is a report issued by the Government that I believe will show you that that is about what they were quoted at that time. 30

Q. Do you know whether —

A. The market at that time ranged anywhere from possibly fifty cents to two dollars and fifty cents.

Q. That is what I was going to ask you, fifty cents

to two dollars and fifty cents was the prevailing market price?

A. Yes.

Q. For peaches?

A. Yes, sir.

Q. So that the prevailing market price for good, first grade peaches would average about two dollars a bushel?

A. They were selling at that time, yes, at that.

10 We were selling some fruit out of Jersey at the time right around two dollars, some marks going a little higher.

Q. Now, what difference, if any, if you know, was there at that time, between those dates, between the New York and the Newark markets?

A. Well, Newark is practically governed by New York; there really is very little difference between the two markets at any time. There are times when you will get Newark possibly a shade higher than

20 New York, and vice versa; it all depends on the amount of stuff that may go into Newark, but Newark is really governed by New York.

Q. You look upon the market prices in the Newark markets as the New York markets?

A. Yes.

Q. Now, with respect to the Philadelphia markets, can you tell us anything about that?

A. I am not as well posted on Philadelphia.

Q. What?

30 A. I am not as well informed on Philadelphia markets; I do very little business in there, but I think the Government reports would cover you on that.

Q. Yes. Are you prepared to tell us the average cost that the shipper bears on shipping produce, we will say, to New York—peaches, for instance, to New York?

A. Of course, the usual ten percent commission, and then, of course, the packing charges, and whatever their material might cost them.

Q. Do you know what the packing would average?

A. I think they claim around ten cents, that is about it; of course, that is speaking of Jersey.

Q. Ten cents a bushel?

A. Yes.

Q. And are you prepared to tell us what the carting would be? 10

A. Yes, that is twenty-five cents a bushel.

Q. So that if the party received two dollars a bushel for peaches, he would be obliged to take from that ten per cent in commission?

A. Yes.

Q. To the broker, packing, ten cents per bushel, and twenty-five cents cartage?

A. Yes.

(At this point a five minute recess was taken.) 20

Q. Mr. Bulmer, with respect to the temperature at the time peaches are picked, can you tell us what bearing, if any, that has upon the preservation of the fruit?

A. Do you mean the temperature during the day when you are picking your fruit?

Q. Yes.

A. Why, it has none, if it is properly taken out of it at the time your fruit is put away. 30

Q. Have you caused any fruit to be picked and stored when the temperature was as high as eighty?

A. Oh, yes.

Q. Stored, was it?

A. Oh, yes, sir.

Q. How long did it keep?

A. I had some of it in thirty days, that is a month's period.

Q. How high have you been able to pick peaches—what temperature, rather, what is the highest temperature during which time you have picked peaches, stored them and kept them?

A. Well, this past season we had one week where I think it averaged a hundred or better in the sun every day during the week. We stored all of that  
10 fruit.

Q. Where were they picked?

A. They were picked and packed in North Carolina and stored in Jersey City; they were loaded in refrigerator cars and stored in the Merchant's in Jersey City, and part of them in the Merchant's in Newark.

Q. What condition were they in when they were unpacked?

A. I don't think they showed over five percent  
20 deterioration then, which would be practically sound for storage fruit.

Cross-examination.

By Mr. Cole:

Q. Mr. Bulmer, did you ever manage a refrigerator plant?

A. No, sir.

30 Q. Did you ever have any practical experience in a refrigerating plant?

A. No, sir.

Q. Is there any difference in the matter of refrigeration in a peach from Georgia, or North Carolina than one from New Jersey?

A. I wouldn't say there was, no.

Q. You don't think there is any?

A. No, sir.

Q. Did you buy peaches from this plaintiff in 1926?

A. In 1926 I handled some of Mr. Miller's fruit, yes.

Q. What do you mean by handling it?

A. Well, we buy it, we say we handle it.

Q. You buy it?

A. We buy it sometimes and sell it for him. 10

Q. Did you buy it?

A. I bought some from him.

Q. For whom did you buy it?

A. It went to New York.

Q. It went to New York?

A. Danziger Brothers & Rubin.

Q. Is that the firm for whom you were working?

A. Yes, I work independent, but do business for firms in different markets.

Q. Then, the peaches you bought from Mr. Miller 20  
in 1926 you bought for yourself, did you?

A. Sometimes I buy them for myself, sometimes I bought them on brokerage.

Q. Did you buy any peaches from Mr. Miller for yourself in 1926?

A. For myself in 1926? I don't think I did.

Q. You bought for some one else?

A. Yes, sir.

Q. Now, when did you buy them with relation to the picking? 30

A. Some of them I bought, I believe, before they went in storage, some of them after they were in storage.

Q. What is the general practice in buying them, when they are on the trees or just at the time of the picking or when they are in storage?

A. Well, they are bought all three ways; there is no particular way, no particular rule as to that part of it.

Q. But in 1926 you bought before they were stored?

A. I believe some of them; I won't say for sure.

Q. Did you go there in 1927 for the purpose of buying?

10 A. 1927, yes.

Q. Did you buy?

A. No, sir.

Q. You saw these peaches on the trees?

A. Yes, sir.

Q. They were in perfect condition?

A. Yes, sir.

Q. Why didn't you buy them ?

A. Well, there is several reasons why we don't buy fruit.

20 Q. Give your reasons—that is what I want to know—why didn't you buy?

A. I didn't believe I could buy them at a price that I wanted to gamble on and store them myself, and for that reason I figured it would be safer to wait until they were coming out of storage and buy them.

Q. Any other reason?

A. That is the only reason that I can think of now that would stop me from buying them at the time. The quality was good enough.

30 Q. How was the market during the period from August 27th to September 7th, not as to price, but as to sale of peaches?

A. Fairly good at times.

Q. Do you know why Mr. Miller was storing all these peaches from August 27th to September 6th, if the market was good for the sale of them?

A. Well, in that particular section, I would say that every year that goes by, there is more peaches stored there than any other point in Jersey for the simple reason that they are a little later than the balance of the State, and they usually move their fruit before York State starts on its Elbertas, and they have been lucky enough in several seasons to realize possibly a dollar more after they come out of storage.

Q. Now, just keep your mind on 1927; I ask you, 10 was there a good market for the sale of these peaches in that area from August 27th to September 6th?

A. A fairly good market, yes, sir.

Q. Do you know why they put so many peaches in this storage place, if that is so—why didn't they ship them right away?

A. They usually feel that storage—I couldn't answer your question.

Q. You said in answer to counsel's question that 20 these peaches were not perfect peaches; why did you say that?

A. In our business we don't class anything as being perfect; I really classed it as good, sound, merchantable stock.

Q. In other words, there is no perfect peach, is that the idea?

A. I wouldn't say there was, because I believe any one can find a defect in one, possibly.

Q. Now, you undertook to and did testify as to the 30 market price of peaches during this period in 1927. What I want to know is this: Are you testifying, or did you testify from a present recollection of what peaches sold for during that period?

A. Well, at the time —

Q. Now, please. (To the reporter.) Repeat the question.

A. Let me hear it again.

(Question repeated.)

A. Yes, the recollection that I had on fruit that was moving at that time, yes, sir.

Q. What was the market price of peaches for the same period of time in 1925?

10 A. 1925? I really couldn't say to be correct.

Q. 1924?

A. I couldn't say.

Q. 1926?

A. I couldn't say.

Q. 1928?

A. 1928 was this past year; I could tell you that.

Q. How is it you can remember 1927, but cannot remember any preceding years?

20 A. For the simple reason that I went to Glassboro to buy fruit at that time, and when this fruit should have been moving, I recollect what was being paid f. o. b. for cars that were moving out of Pitman, and for that reason I don't have much trouble in remembering.

Q. Did you buy any peaches at all in 1927 from Glassboro?

A. No, sir.

Q. You went down there for the specific purpose of buying?

A. Yes.

30 Q. How many did you intend to buy?

A. Usually buy thirty, forty or fifty cars.

Q. And you bought none?

A. Not a one.

Q. Now, were you inside of this plant while the peaches were being stored?

A. No, sir.

Q. Where were you—what part of the plant were you?

A. I don't believe I ever went in the plant until they were ready to take the fruit out.

Q. What were you doing there prior to the time they were taken away?

A. We usually go in there when a deal starts and stay until it is over.

Q. You were there during the time these peaches were being stored, weren't you? 10

A. Yes.

Q. And what was your object in going there?

A. We usually look over the different crops and watch them as they are putting them in, see what condition they are putting them in.

Q. But you did not go inside the plant?

A. No, sir.

Q. You don't know anything about the condition of the refrigeration whatever during that period?

A. I couldn't tell you. 20

By Mr. Marshall:

Q. Mr. Bulmer, I want to ask you if you can tell us what the purpose is in storing fruit?

A. What is that?

Q. What the purpose would be in storing fruit—why isn't it policy to sell the fruit, as soon as you pick it, in the market? 30

Mr. Cole: I object to this; I don't think it is relevant.

Mr. Marshall: I only asked that for the reason Judge Cole had asked that, and I think the witness answered it.

The Court: I overrule the objection.

(Exception noted for the defendant.)

Q. What is the purpose of placing fruit in the cold storage at all?

A. They usually store their fruit there to catch a little gap that comes in between Jersey and New York State, and as a general thing, the advance in  
10 the market follows the movement of fresh fruit out of Jersey.

Q. In other words, would they be apt to receive as much or more for the fruit when it came out of storage as they would at the time it was put in?

A. They have been lucky enough to realize considerably more, I think, in most seasons.

Q. Is that the reason for placing it in the storage?

A. That has been the reason, I think, with every one that stored there that I know of.

20 Q. Are you able to tell us, Mr. Bulmer, what in your judgment was the temperature of the cold storage plant when you were there on that Monday, September 12th?

A. No.

Mr. Cole: I object to that as being irrelevant and immaterial to the issue.

30 The Court: He says no.

The Witness: I really couldn't say.

By Mr. Cole:

Q. When does the New York market begin?

A. Well, what do you mean by —

Q. You say they hold over between certain markets, holding the peaches in cold storage?

A. Well, usually New York State, as a general thing, will start possibly a week after Labor Day or ten days after, it all depends on how early the crop comes—I have seen it start the first of October—and there is usually enough gap in between the two crops —

Q. How was it in 1927?

A. In 1927 they had their usual gap, I believe. 10

Q. When did the market open for the salability of peaches in quantities in 1927?

A. In 1927, I think it was—well, it was a little before Labor Day in 1927, if I remember right—that was 1926.

By Mr. Marshall:

Q. Mr. Bulmer, I have another question, please. 20  
Are you familiar with the fact that there are Government reports put out on the price of merchandise?

A. Yes.

Q. Do you know what they purport to be?

A. Well, they issue those reports to give shippers and producers an idea of the ruling prices on the different commodities. If there is an extreme outside price, I don't think they ever quote it, that is, they will take—if a commodity is selling within a range of \$1.25 to \$1.50, and if there are some special marks outside selling for \$2.50 or \$2.75, it is a rare thing that they will quote them, unless they make special mention of the fact that there are one or two marks, but their reports really give what the average offerings are selling for. 30

Q. Does it also pertain to fruit out of storage?

A. Well, it will mention that, usually it will quote it as being storage stuff.

Q. The prices you have given us are based upon what, upon the Government reports or upon actual conditions that existed at that time?

A. No, these were actual sales that I think were covered, possibly, by the Government report. Now, at the time the fruit would have been moving out of storage here, I believe everything that was being  
10 quoted at that time possibly would have been early New York State fruit, either Rochesters or some of the other earlier varieties. I don't believe there was enough of the Jersey fruit going on the market to quote it; in fact, about the only point it would have been moving from would have been here, so I won't say whether it was quoted or not.

Q. Now, with respect to the plant again, a moment, do you remember whether or not when you went to the plant, did you notice ice in the aisles?

20 A. I didn't notice that.

Q. You didn't notice that?

A. No.

By Mr. Cole:

Q. The Government also inspects peaches, doesn't it?

A. Well, there is a Government inspection if you require it.

30 Q. You have to ask for it?

A. Yes, sir, you pay for it.

EDWARD E. MILLER, recalled.

By Mr. Marshall:

Q. Mr. Miller, with respect to the ice which you saw in the aisles at the cold storage plant, will you tell us whether it had melted or not?

A. Yes, it had melted some. 10

Q. What was the general condition of the floor?

A. The general condition of the floor was wet.

Q. What kind of floor was it?

A. Cement.

Q. Can you say it was very wet?

A. Very wet.

Q. Can you tell us how deep the water was?

A. I judge there was places there that was that deep. (Indicating.)

Q. Where it had melted and run off? 20

A. Melted and run off and drippings from the pipes.

(No cross-examination.)

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JOHN W. MOORE, SWORN.

By Mr. Marshall: 30

Q. Mr. Moore, your business is what?

A. I was in the produce commission business in Philadelphia.

Q. Are you in that business now?

A. No, not now.

Q. Retired?

A. Well, not exactly; I have quit that end of the business.

Q. Were you in the produce business in the month of September, 1927?

A. I was.

Q. And where was your place of business?

A. 110 Little Dock Street.

10 Q. And as such commission merchant, did you handle peaches?

A. I did, sir.

Q. Are you prepared to tell us what the market price was in Philadelphia for Hale and Elberta peaches during the month of September, 1927?

A. Yes.

Q. What was the price on that date, the price range?

20 A. Well, on good sound, storage peaches, from seventy-five to ninety cents, something a little extra, ninety cents to one dollar.

Q. Did you actually make sales of peaches during the month of September, 1927, of peaches at those prices you have mentioned?

A. Yes.

Q. Now, with respect to merchandise shipped into Philadelphia from Glassboro, do you know what the commission was—is that the usual ten percent?

A. Ten percent.

30 Q. And the packing, do you know what that is estimated at?

A. No, I have nothing to do with that end of it.

Q. Or the carting?

A. Or the carting, no.

Q. And you know nothing except the commission, and that is ten percent?

A. Ten percent.

Q. The price you have given us is that which pertained to Hales and Elbertas?

A. Yes, later on the price of Hales was much higher than that.

Q. When you say "later on" ——

A. Near the end of the month.

Q. Toward the close of September?

A. Yes.

Q. How high did it get then?

A. As high as a dollar and a half to a dollar 10  
seventy-five.

Q. For what?

A. A five-eighths basket.

Q. For five-eighths baskets?

A. Yes.

Q. Are all these prices you have given us on five-eighths baskets?

A. Yes.

Q. From a dollar and a half to how much?

A. A dollar seventy-five on Hales. 20

Q. And those prices were all on five-eighths baskets?

A. Yes.

Q. And are those, the dollar and a half and dollar seventy-five for Hales late in September, they are for storage fruit?

A. Out of Pitman cold storage, yes, sir.

Q. Did you handle any peaches that month out of the Pitman cold storage?

A. Yes, sir. 30

Q. What varieties?

A. Hales and some Elbertas.

Q. What did Hales sell for?

A. That is the price I just gave you.

Q. A dollar and a half to a dollar seventy-five a five-eighths basket?

A. Yes.

Q. And the Elbertas sold for what?

A. From seventy-five cents to one dollar and some few exceptionally good as high as a dollar twenty-five.

Q. Those peaches that you have now testified to were peaches shipped out of the cold storage plant at Pitman?

A. Yes.

10 Q. Did you sell any fruit at your place in Philadelphia that year, any peaches shipped out of the Repp plant at Glassboro?

A. I did.

Q. Can you tell us what prices they brought?

A. From twenty-five to fifty cents.

Q. What was the condition of the peaches?

Mr. Cole: I object to that.

20 A. Very soft.

Mr. Cole: The condition of some other peaches?

Q. That is, out of the Glassboro storage—what was the condition of them?

A. Very soft, over-ripe.

Q. Did that have any bearing upon the price?

A. Absolutely.

Q. And they sold from twenty-five to fifty cents?

30 A. They sold from twenty-five to fifty cents.

Q. Were you able to handle those peaches after you had handled the first lot?

A. No, we always had to get a new customer for those peaches; every new lot that came in, we had to hunt a new customer.

Q. You couldn't sell the same fellow twice peaches from the same plant?

A. No, absolutely not.

Q. Why not?

A. Because they weren't first class. They were very deceptive; and peaches would look good on the outside and if you break them open, on the inside they would be all brown and discolored.

Q. Could you tell what had caused that to the peach?

A. Not sufficient cold air, cold storage, I suppose; that was my idea.

10

Q. Did you know from your experience in handling fruit when you saw a peach as to what was the trouble?

A. Yes.

Q. And what did you say it was?

A. Not sufficient refrigeration.

Q. That would be, sufficient refrigeration to at least preserve the fruit?

A. Yes.

20

Cross-examination.

By Mr. Cole:

Q. Mr. Moore, at first you said that you supposed that it was lack of refrigeration—what do you mean by that?

A. Well, I have never had any actual experience in cold storage.

30

Mr. Cole: If that is so, if it please your Honor, I think his answer should be stricken; he said he supposes, and now he says he has had no experience.

The Witness: Only from observation, that is all.

Mr. Cole: Pardon me; I am directing my remarks to the Court.

Mr. Marshall: I think, Judge, he had not quite finished. (To the witness.) Had you finished your answer?

The Witness: No, not altogether.

10 Mr. Marshall: Just repeat his answer as far as he had gone. I thought he had intended to say something else. What did he say?

(Answer repeated.)

Q. Is that your complete answer to the question?

A. Well, I believe so, yes.

Mr. Marshall: Unless he had had any experience  
20 in handling fruit out of cold storage; that might qualify his answer.

Mr. Cole: How can a man testify as to such fruit when he has no knowledge? Besides that, he says, "I suppose."

The Court: I suppose it goes to the weight of the testimony, but I cannot strike it out.

30 (Exception noted for the defendant.)

By Mr. Cole:

Q. Mr. Moore, have you refreshed your recollection as to the market price of the peaches in 1927 by examining any records recently?

- A. Yes, sir.
- Q. When did you refresh your recollection?
- A. Within the last week.
- Q. And what did you examine in order to ascertain what the price was?
- A. Just the price on different farmers' peaches.
- Q. Where did you get it from?
- A. From my original invoice book.
- Q. Where is that book?
- A. In the courtroom. 10
- Q. Did you look at it today?
- A. No, sir.
- Q. When was the last time you looked at it?
- A. Yesterday, I believe.
- Q. For the purpose of testifying in this case?
- A. Yes, to look over the prices, yes, sir.
- Q. You would not have any independent recollection at this moment without refreshing your memory?
- A. Oh, yes, I remember how hard peaches were 20  
to sell that year out of cold storage.
- Q. They were hard to sell?
- A. Hard to sell.
- Q. You mean out of that cold storage?
- A. People were suspicious of all cold storage  
peaches.
- Q. In 1927?
- A. Yes, sir.
- Q. Well, what about the prices in 1926?
- A. I can't remember off-handed. 30

By Mr. Marshall:

- Q. When did you make the entries in your book?
- A. The day the peaches were received.

CHARLES RILEY, SWORN.

By Mr. Marshall:

Q. Mr. Riley, you were in what business?

A. Ice and cold storage.

Q. At what place?

A. Pitman, New Jersey.

10 Q. And you are in that business at the present time, are you?

A. Yes.

Q. And were you engaged in such business in 1927?

A. Yes, sir.

Q. Did you undertake during the year, 1927 to store any peaches from the vicinity of Pitman and Glassboro?

A. Yes, sir.

20 Q. Do you remember whether you stored during that period of time any Hale or Elberta peaches?

A. Yes, sir.

Mr. Cole: This is objected to at the threshold; I do not see how we can be held by what some other plant may have done. It seems to me it is collateral, irrelevant and immaterial.

30 The Court: Well, I think perhaps it is, Mr. Marshall, although I do not know what you are leading up to. Simply to show that peaches were stored in this other plant and that they were properly preserved, I do not believe would be —

Mr. Marshall: That is what I propose to show.

Mr. Cole: It is on that ground that I am object-

ing to it, how this jury is going to take what some other plant did without knowing the conditions. The question is whether we were negligent.

Mr. Marshall: I am frank to say we were debating whether to call Mr. Riley now or whether to use him on rebuttal, but I felt that possibly—the contention of the defendant was that peaches generally did not keep that year in cold storage —

10

The Court: That would present a different situation.

Mr. Marshall: Now, I am prepared by this witness to show that peaches did keep in cold storage and keep properly, but if that will fit in rebuttal, I will call him from the stand.

(Witness withdrawn.)

20

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DAVID HITCHENER, SWORN.

By Mr. Marshall:

Q. Mr. Hitchener, what business are you in?

A. Well, I am in the chicken business, I guess.

Q. The chicken business?

A. Yes, sir.

30

Q. Are you a farmer?

A. Yes.

Q. Where do you live?

A. I live at Aura.

Q. Do you know Mr. Miller, Edward E. Miller?

A. Yes, sir.

Q. During the year, 1927, did you work for him?

A. Yes, sir.

Q. In what capacity were you working for him?

A. I was helping him pick peaches.

Q. Did you help him all during that season of 1927 in the picking of the peaches?

A. Yes.

Q. From the time you started until the time you finished?

10 A. Yes, sir.

Q. Have you ever had any experience in raising peaches yourself, growing peaches?

A. No, sir.

Q. Have you had experience in handling peaches?

A. Yes.

Q. In 1927, who else was working in the peach orchards with you in the picking of them?

A. Well, I just can't recall; there was Harry Mayhew.

20 Q. Just describe how the peaches were picked, will you?

A. Well, the trees I seen were picking all right.

Q. How did you pick them?

A. I tried to pick them all right.

Q. How did you pick them—did you shake the tree and pick them off the ground?

A. No, sir.

Q. You picked them by hand?

A. Picked them by hand, yes.

30 Q. After you picked them by hand, what did you do with them?

A. Put them in a basket.

Q. In what manner did you handle the baskets after they were filled?

A. Handled them ordinarily, like we would handle anything that was perishable.

Q. And that was your job, to pick the fruit, wasn't it?

A. Yes.

Q. Did you see Mr. Miller, Edward E. Miller, there in the orchard while you were there picking?

A. Yes.

Q. What was he doing?

A. Well, he was walking around, looking over the picking, the people picking.

Q. Did you see any difference in the condition of 10 the peaches at all from the time you started to pick your peaches down to the time that you finished picking your peaches?

A. Very little.

Q. What was the general condition of the peaches that you picked and saw picked in Mr. Miller's office in the year, 1927?

A. I claim they were good.

Cross-examination.

20

By Mr. Cole:

Q. Mr. Hitchener, were you there throughout all the picking?

A. Yes, sir.

Q. Did you hurry up or take your time?

A. Well, I generally tried to do a good day's work.

Q. I don't mean exactly with reference to your work; I have no doubt you did that, but I mean, 30 were you in a hurry to get these peaches off the trees?

A. Naturally, yes, sir.

Q. You did all the picking between August 27 and September 5th or 6th, didn't you?

A. Yes, sir.

Q. Did you pick most of the peaches in the early part of the picking or in the latter part of the picking?

A. Well, I picked about the same all through, that is, different varieties while they were lasting; while certain varieties lasted, I helped pick.

Q. How many baskets were picked during that period?

A. Oh, I couldn't say.

10 Q. Have you no idea?

A. Oh, no.

Q. How many pickers were there?

A. Oh, there were ten or fifteen, maybe more sometimes.

Q. Had you picked in 1926?

A. Yes, sir.

Q. When did you begin picking that year?

A. I can't recall now.

20 Q. And how long a period were you picking in 1926?

A. During the season.

Q. How many pickers did you have that season?

A. I couldn't tell you.

Q. Weren't you hurrying up to get these peaches off the trees and get them into storage because of their bad condition?

A. No, sir.

30 Q. Did any of them have any indication of rot when they were being picked, or before they were put in storage?

A. Oh, naturally, once in a while you see one, not as a rule.

Q. Not as a rule?

A. Once in a while, yes.

Q. What do you mean by "once in a while"?

A. Well, like you would see them, some maybe needed to be picked a little sooner.

By Mr. Marshall:

Q. What did you do with those peaches when you found they were rotted and spoiled?

A. Didn't put them in.

Q. That is, you mean they didn't go —

Mr. Cole: I object to leading the witness like that.

Q. Didn't put them in what? 10

A. In the basket.

Q. In what basket?

A. The peach basket.

By Mr. Cole:

Q. What kind of rot was it?

A. Well, I couldn't say; it was not a general rot.

Q. How many years had you been picking 20  
peaches?

A. Oh, I don't know, three or four years, I suppose.

Q. What?

A. Three or four, I suppose.

Q. Just what did you mean by these peaches having a rot?

A. Oh, naturally once in a while you will see a peach, maybe a few peaches in a day's picking, that wasn't so good. 30

C. EARL HITCHENER, SWORN.

By Mr. Marshall:

Q. Mr. Hitchener, you are engaged in business where?

A. Farming.

Q. Where?

10 A. At Aura.

Q. Do you know Mr. Edward E. Miller?

A. I do.

Q. Did you have any engagement during the year, 1927 to do any work for him in connection with the picking of these peaches?

A. I did.

Q. What did you do for Mr. Miller?

A. Well, I had a team over there and I mostly hauled them out of the orchard or was on the wagon  
20 while they were hauled.

Q. You would haul them from the orchard where?

A. To the truck.

Q. What would happen to the peaches there?

A. They were loaded on the trucks and sent to the storage.

Q. Did you have an opportunity of observing the peaches that you were hauling?

A. I did.

Q. What variety of peaches were they?

30 A. J. H. Hale and Elberta.

Q. With respect to the general condition of those peaches, what have you to say?

A. As far as I could see, they were all right.

Q. Did you see any difference in the condition of the peaches from the time that you hauled them out of the orchard and the time they were loaded on the trucks?

A. No.

Cross-examination.

By Mr. Cole:

Q. Did you help to carry the peaches from the trucks into the storage house?

A. Oh, no.

Q. You just picked?

10

A. Oh, no, I helped haul out of the orchard.

Q. How?

A. I helped haul out of the orchard.

Q. But you did not go to the storage house with them?

A. Only once or twice my truck went over, and I went then.

Q. When you did, did you go inside the plant?

A. I did not.

Q. Did you discover that any of these peaches had a rot?

20

A. Not necessarily, no, not hauling them out, I didn't notice any.

Q. What do you mean by "not necessarily"?

A. Well, I didn't happen to notice any.

Q. None at all?

A. No, none at all.

Q. All the peaches you picked were put in the baskets?

A. I didn't pick any.

30

Q. What?

A. I wasn't picking any.

Q. Were you watching while they were picking and putting them in the baskets?

A. No, sir.

Q. What were you doing there?

A. Well, I was loading the wagon and taking them out to the truck.

Q. Weren't you noticing what kind of peaches they were putting in the baskets?

A. Well, I don't know that I was; I don't know that that was my job.

By Mr. Marshall:

10 Q. You say, Mr. Hitchener, that you hauled some over to the cold storage plant at Glassboro?

A. Yes.

Q. Won't you just describe to the Court and jury what you did to the peaches when you got over to the cold storage plant at Glassboro?

A. Well, we just drove up to the door and set them on a truck, and some one else put them away.

Q. That is, on a truck that was on wheels, that moved them from your truck into the storage?

20 A. On platforms, yes.

Q. Who else helped unload your truck on to these carriers—I don't mean by name, but whose employes were they?

A. I don't know, he was was employed by Mr. Repp.

Q. The employes of the storage company?

A. Yes.

Q. And that is the last you had to do with the peaches after you delivered them on these carriers?

30 A. Yes.

Q. Did you help place them in the cold storage plant?

A. No, I did not.

Q. And had no opportunity of going in?

A. No.

By Mr. Cole:

Q. Did you haul every day from the 27th of August to September 6th?

A. I wouldn't say I did.

Q. Do you recall what days you did work?

A. No.

Q. Do you recall how many days you hauled?

A. No.

10

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HARRY E. MAYHEW, SWORN.

By Mr. Marshall:

Q. Mr. Mayhew, you are engaged in what business?

A. Farmer.

20

Q. And where?

A. Aura.

Q. How large a farm do you have?

A. I have got about thirty-five acres.

Q. Do you know Mr. Miller, Edward E. Miller?

A. Yes, sir.

Q. During the summer season of 1927, did you have any occasion to work for him?

A. Yes, I worked quite a little that year.

Q. In what capacity were you working?

30

A. Well, in the peach business in general, mostly carting out of the orchard. I picked some when I had time.

Q. You picked some and saw that they were gotten out of the orchard?

A. That is the idea.

Q. What do you mean by "saw they were gotten out"—did you put the load on?

A. Yes, loaded the wagon, and straightened things out in general.

Q. Was Earl Hitchener one of those that was hauling out?

A. Yes, he hauled some of the time.

Q. Did you have any occasion to observe what kind of peaches they were?

10 A. Oh, I naturally looked at the most of them, yes.

Q. What kind were they?

A. Good.

Q. Do you know the variety?

A. Elbertas and Hales.

Q. Are you able to tell us from the observations you made of those peaches as to what condition they were in?

A. I would say they were good.

20 Q. Good peaches?

A. Good peaches. I took the pains to bring some friends down from Collingswood to show them the orchard; they thought they were good.

Q. Don't tell us what they thought. Were you in the orchard working for Mr. Miller during all the time that he was picking peaches?

A. I think I was, all the Elbertas and Hales.

Q. All the Elbertas and Hales?

A. Yes.

30 Q. And did the condition of the peaches that you have named varied any from the time you started until you finished picking?

A. I wouldn't think so.

Q. You say that during all that period of time they were good peaches?

A. Good peaches, yes, sir.

Q. Did you have any occasion to haul any of them over to the storage plant at Glassboro?

A. No, I didn't do any of that.

Q. Can you tell us, Mr. Mayhew, as to how these peaches were picked?

A. Why, they were picked like I have always seen peaches picked.

Q. How were they picked there at Mr. Miller's place that year?

A. Stand a basket on one that is turned up-side down and put peaches in them, so it won't throw them so far and bruise them.

Q. Were they picked from the trees?

A. Yes, all that I seen.

Q. You didn't see any limbs shaken and picked up from the ground?

A. No, I didn't see anybody do that; they didn't let me see them, if they did.

Q. All the peaches you saw were picked by hand and placed in the baskets?

A. Yes.

(No cross-examination.)

(At this point a recess was taken until Wednesday morning, February 6, 1929, at 10 o'clock, A. M.)

Woodbury, N. J., February 6, 1929.

(Trial of the cause resumed at 10 o'clock, A. M., pursuant to adjournment, in the presence of counsel for the respective parties.)

10

HERMAN WAGNER, SWORN.

By Mr. Marshall:

Q. Mr. Wagner, where do you live?

A. Aura.

Q. And during the summer of 1927, did you do any work for Mr. Miller, Edward E. Miller?

20 A. Yes, sir, some.

Q. Did you work for him during the peach season?

A. I worked there three days, I guess, altogether.

Q. What character of work did you do?

A. I hauled out peaches.

Q. What do you mean by "hauled out"?

A. Peaches out of the field with a wagon.

Q. You hauled them out from the orchards?

A. Yes.

30 Q. And where did you haul them to?

A. To the trucks.

Q. With respect to any peaches that were left in the orchards or lying in the yard over Sunday, do you have any recollection of any occurrence of that kind?

A. Why, there was some left there over Saturday, and we loaded them on Sunday on two trucks.

Q. On how many trucks?

A. Two.

Q. On two trucks?

A. Yes.

Q. During the time that you were there, do you know of any other occurrence when any peaches were hauled over and not put in storage the same day they were picked?

A. I do not, no.

Q. And you say there were two truck loads that 10 you now refer to?

A. Yes, two.

Q. And how many baskets would you say that amounted to?

A. I imagine around six hundred, something like that.

Q. Did you see those peaches—you hauled those peaches in from the orchards to the yard, did you?

A. No, out to the road.

Q. And what condition were they in at that time? 20

A. They were all right, looked all right to me.

Q. And did you see those peaches on Monday morning?

A. No.

Q. You did not see them on Monday?

A. No.

Q. Did you see them on Sunday?

A. Well, they had them setting under the trees, and after Sunday—they hauled them away some time Sunday night, I don't know, to storage. 30

Q. They were under the trees only on Sunday?

A. Sunday, yes.

Q. When was the last you saw them?

A. Why, Sunday afternoon after we loaded them.

Q. Sunday afternoon after you loaded them?

A. Yes.

Q. What condition were those peaches on Sunday afternoon when you saw them?

A. They were in good condition.

Q. By "good condition" can you tell us whether

A. Why, they were hard. they were hard or soft?

Cross-examination.

10

By Mr. Cole:

Q. Had you ever done this kind of work before?

A. What is that?

Q. Had you ever done that kind of work before 1927?

A. Oh, yes, I hauled out the year before, too; the year before that I hauled some out.

20 Q. Now, where did you see these peaches that were picked and not carried at once to the storage?

A. Where were they?

Q. Yes.

A. Well, they were out in the orchard over Saturday night. We hauled them up Sunday and loaded them on the trucks.

Q. Where were they hauled on Sunday?

A. Up to the trucks, and then the trucks were run under the trees in the shade.

30 Q. The trucks in which these peaches were hauled were left under the trees, you say, or out on the highway?

A. Well, he ran them up in his yard, under the trees, you know.

Q. Whose yard?

A. Eifert, Emil Eifert.

Q. You mean Mr. Miller's yard?

A. No, he hauled them in his own yard. You see,

he hauls, and he hauled them up under the trees in his yard.

Q. What was the condition of the weather that day?

A. Well, it was warm; it wasn't any too warm, you know, a warm day.

Q. Pretty warm, wasn't it?

A. Pretty warm, yes.

Q. Did you examine these peaches with the idea of finding out whether they were all right or not, or just take them as they came? 10

A. Well, I helped load them, helped load them on the wagon, helped load them on the trucks. They looked hard to me.

---

EMIL EIFERT, SWORN.

By Mr. Marshall:

20

Q. Mr. Eifert, where do you live?

A. Down at Aura.

Q. What was your business in 1927?

A. Farming and hauling together.

Q. Do you know Mr. Edward E. Miller?

A. Yes.

Q. Did you know him in 1927?

A. Yes, sir.

Q. Did you do any hauling for him in 1927? 30

A. Yes, sir.

Q. Do you recall the fact that he ——

A. I did all the hauling for Mr. Miller.

Q. Oh, you had all the hauling?

A. Yes.

Q. Did you have the hauling of his peaches in 1927?

A. Yes, sir.

Q. Where were they hauled from?

A. Out from the orchard.

Q. To where?

A. To the storage.

Q. To where?

A. The late variety were hauled to the storage, and the other variety somewhere else; they didn't go to storage.

10 Q. Well, speaking of the late variety, which was hauled from August 27th to September 6th, 1927, for Mr. Miller, where were they hauled to?

A. At the storage plant at Glassboro.

Q. At Glassboro?

A. Yes.

Q. And did you do all the hauling?

A. Yes.

Q. Did you have any opportunity to examine the fruit that you were hauling to know what condition

20 it was in?

A. Yes, I seen them all, and they all looked good.

Q. When you say "good" can you tell us whether they were hard or soft?

A. They were hard.

Q. And when you hauled these peaches, tell us when you hauled them with relation to the time that they were picked?

A. We hauled them just as fast as they picked them all day long.

30 Q. Was that true in every instance, or were there any of them left over?

A. Only one time, when we couldn't get loaded at the storage, we could not get them in, that is the reason they were left over.

Q. They were held over what day?

A. That was on Saturday.

Q. Then what happened to those peaches if you know?

A. The ones that were left over?

Q. Yes.

A. They were left under the trees out of the sun there.

Q. Out of the sun?

A. Yes, they were standing under the trees.

Q. Then what happened to them?

A. And they gathered them on Sunday on the 10 wagon, brought them out to the road on my truck.

Q. And you hauled them to the storage when?

A. That Sunday night sometime; I went over early.

Q. What condition were those peaches in at the time you hauled them and delivered them at the storage?

A. Well, those peaches wasn't bad; well, they wasn't bad at all, but they wasn't quite so good maybe as the rest was, but they looked all right; 20 they were not soft.

Q. Can you tell us whether they were hard or soft?

A. Well, they wasn't soft, no.

Q. They were not soft?

A. No.

Q. Now, when you delivered those peaches, together with all the others that you delivered at the storage, won't you just tell us what you did when you arrived at the storage plant with your peaches?

A. Well, sometimes we had to wait quite a long 30 time around there until we were taken care of.

Q. Then what did you do when you backed up to the storage—just tell us what you did—how did you unload?

A. I generally had a helper man, and we unloaded them on these little sleds, then Repp's men took care of them; they come and put a jack under it.

Q. What was the last that you had to do with those peaches that you carted to the storage?

A. Unloaded them on the sled, that is all.

Q. You unloaded them on the sleds?

A. Yes.

Q. And when they were unloaded on the sleds, did you have anything more to do with them?

A. No.

10 Q. Did you have anything whatsoever to do with placing them in the storage?

A. No, sir.

Q. Did you have anything whatsoever to do with taking them into the storage?

A. No.

Q. You were completely done when they were loaded on the sleds?

A. Yes.

20 Q. Do you have any recollection of any of the 16,225 that you hauled to storage, of any of them being other than good peaches?

A. Well, Mr. Miller's peaches was very good. Of course, I heard a peach man that was there, that wanted to buy them, he said —

Q. Don't tell us what the peach man might have said.

A. They were good as far as I could see.

Q. Good peaches?

A. In good condition.

30 Q. How many years have you been farming, Mr. Eifert?

A. Farming all my life.

Q. Did you ever raise any peaches?

A. Not myself, but I have been around the farms a good bit with peaches.

Q. Have you been around peach farms a good bit?

A. Yes.

Q. Who else did you ever farm for that had peaches?

A. Well, I used to haul other people's peaches, too.

Q. Who was that?

A. Mr. Runge—they had quite a lot of peaches.

Q. They have a large orchard at Aura, too?

A. Yes.

Q. Were you over at the storage at any time in 10 the evening, hauling for Mr. Miller?

A. That same year?

Q. Yes.

A. I came over one day—he was going to put a load up, and he told me to go over there, and when I came over with the truck, he just said, "Nothing doing."

Q. Who told you "Nothing doing?"

A. Mr. Miller.

Q. Well, I don't know whether we are interested 20 in that I asked you whether you went over to the storage at any time after you had finished your delivery there on September 6th?

A. No, only when Mr. Miller was ready to take some out; that was the only time again.

Q. Were you over there at any time when he was taking them out?

A. Well, I came there with the truck to load up, and they wasn't fit to load up, so I went back.

Q. What day was it, if you can remember, that 30 you were there after and while he was taking them out?

A. It must have been four or five days or somewhere around there; I don't exactly recall that.

Q. Do you remember when he started to take his peaches out?

A. He didn't take none out that year, as far as I knew; I didn't cart none.

Q. Well, did you haul any away from the storage place?

A. No.

Q. You did not?

A. No.

10 Cross-examination.

By Mr. Cole:

Q. What was the object in having these trucks under the trees?

A. To keep them out of the sun as much as we could.

Q. Why did you want to keep them out of the sun?

20 A. It is much better for them to keep the sun from them.

Q. What does the sun do to them?

A. It heats them up.

Q. How was the weather?

A. It was a regular nice summer day; it wasn't no hot spell at that time.

Q. How was it when the trucks were under the trees?

A. You mean —

30 Q. The weather—how was the weather when the trucks were under the trees?

A. Well, just as I said, a regular summer day, not too hot.

Q. It wasn't cold, was it?

A. No, just a summer day, not too warm, no hot spell.

Q. How hot do you think it was that day?

A. Oh, about seventy.

Q. Now, what day was it that you were over to the storage plant and Mr. Miller told you there was nothing doing?

A. That must have been not quite a week or four or five days, something like that, afterward.

Q. And you stopped hauling?

A. Yes.

Q. You stopped hauling on the 6th?

A. I don't exactly remember the date.

10

Q. Was it on Monday the 12th, the following Monday?

A. Well, I remember finishing one on Monday; I don't know about Mr. Miller.

Q. I am talking about Mr. Miller.

A. I don't recall the day when I finished Mr. Miller's peaches up.

Q. Well, but you said you were over to the plant and Mr. Miller told you, "Nothing doing."

A. Yes.

20

Q. You say that was four or five days after you had stopped hauling?

A. Yes, his peaches, yes.

Q. Then I ask you if that was on Monday the 12th?

A. I don't know; I don't remember the day.

Q. Well, how did you come to go over there?

A. Because he gave me orders to come over and load up; he was going to take some out; he heard they wasn't keeping.

30

Q. When was it they told you to come over?

A. In the morning, and do some hauling.

Q. Yes, what day was it?

A. I don't exactly know, but it seems to me it was on Thursday, maybe; I don't exactly know that.

Q. Well, was it the same day—I withdraw that.

Did you go to the plant the same day he told you they were not keeping?

A. He didn't exactly tell me, he said he was going to take some peaches out; he said, "Come over with your truck, and we will take some out."

Q. All right. Now, did you go that same day?

A. Yes.

Q. And then he told you, "Nothing doing"?

A. After I got there, yes.

10 Q. Did he tell you why there was nothing doing?

A. Well, he said they wasn't good, wasn't fit to sell.

Q. The peaches were not good?

A. They wasn't no good, he said.

Q. That was on Monday, wasn't it?

A. No.

Q. What day was it?

A. It must have been the last part of the week.

Q. The last part of the week?

20 A. I think —

Q. Following the 6th?

A. Well, I don't know, I don't exactly remember the date, could not tell you the date.

Q. Now, you know Mr. Repp, don't you?

A. Yes.

Q. Was he over to your house sometime after this dispute arose?

A. I don't think so; I don't remember at all.

Q. Do you know a man named Zimmerman?

30 A. Yes.

Q. Were Mr. Repp and Mr. Zimmerman over to your house about a week ago?

A. No, last Saturday.

Q. Well, last Saturday?

A. Yes.

Q. Were they there last Saturday?

A. Yes.

Q. At your home?

A. Yes.

Q. Did you tell them on that occasion that these peaches were soft and nobody could expect them to be kept in the ice plant?

A. I did not, exactly.

Q. No, did you tell them that?

A. Not exactly that way.

Q. Not exactly—now, wait a minute. There was 10 some talk about the peaches, wasn't there?

A. Yes.

Q. Did you tell him they were soft?

A. No, I didn't tell him that.

Q. You did not tell him?

A. No.

Q. All right, did you tell him that they were not fit to be kept in the storage plant?

A. I did not tell him they were not fit.

Q. What did you tell him about it? 20

A. I told them maybe they weren't quite as good as the others that were picked right away and took to the storage.

Q. But you are quite sure you did not tell him that all these peaches you had hauled for Mr. Miller were soft peaches, and that they could not be expected to be kept?

A. We wouldn't haul them if they had been soft.

Q. Did you tell Mr. Repp that?

A. No. 30

By Mr. Marshall:

Q. Mr. Eifert, you said that Mr. Repp and Mr. Zimmerman came to you last Saturday?

A. Yes.

Q. What was their object in coming to see you—  
did they state it?

A. They subpoenaed me.

Q. They subpoenaed you?

A. Yes.

Q. Did they say anything to you, ask you as to  
what you would testify to?

A. Mr. Repp, he said, "You know, that Saturday  
there were twelve hundred baskets of peaches left  
10 over." I said, "There was not; we loaded three  
trucks up, and we was going to get the rest over that  
afternoon, but we could not get unloaded, we didn't  
get unloaded that night at two o'clock, and I waited  
from two in the afternoon until twelve that night,  
so we had to leave them until the next day, only we  
loaded them up to get them out of the orchard for  
Monday morning; three trucks were loaded up."

Q. What was said by them to you as to the condi-  
tion of the peaches?

20 A. What we brought in on Monday?

Q. Yes.

A. They didn't say nothing, the peaches looked all  
right.

Q. Did they ask you what you would say as to  
that?

A. Well, he said, "You know they were soft." I  
said, "No, they wasn't exactly soft, but they wasn't  
maybe not quite as good as the ones picked right  
away off the trees and put in."

30 Q. Oh, that is what you told him as to what you  
thought of the condition of the peaches?

A. Yes.

By the Court:

Q. How many baskets were there in the three  
trucks?

A. That Saturday?

Q. Yes.

A. There must have been around—one truck holds over three hundred, the other had about two hundred and twenty-five on, and the other about a hundred and fifty; then the balance was left for Sunday; we put them on two trucks.

Q. The balance was left for Sunday?

A. Yes, we had to take them in on Sunday, load them. 10

Q. Well, what I am trying to find out is, how many baskets were taken in on Sunday that were held over from Saturday?

A. I know I had 330 on my truck, and the other truck had somewhere around 225 on; I think that cleaned it up.

Q. Do I understand that these peaches were actually moved to the warehouse on Sunday?

A. No, they were standing. 20

Q. I thought you said they were taken in?

Mr. Cole: He did say both ways.

The Witness: On Sunday night we went over early, late on Sunday afternoon; it was after twelve o'clock. I know Mr. Repp don't like you to come there —

Q. No, just a moment. Did I understand you to say they were hauled to this storage Sunday night? 30

A. After 12 o'clock, yes.

Q. Oh, that is what you mean?

A. Yes, we waited until morning; so we would be ahead of the others.

By Mr. Cole:

Q. What time on Monday morning did you haul them over?

A. Why, after 12 o'clock; we went right over.

Q. Right after twelve?

A. Sunday night.

Q. How long did these peaches that were picked on Saturday, and that were not taken over until  
10 Monday morning, after midnight Sunday—how long did they remain in the sun?

A. They didn't exactly remain in the sun; they remained in the orchard under the trees.

Q. How long?

A. Well, we always—what was picked first, we would take in first, and they were the last ones that were picked that Saturday.

Q. Well, can you tell us how long —

A. I think Mr. Miller stopped picking at noon  
20 when he found out that they could not get them in.

Q. He stopped picking at noon on Saturday?

A. I don't know exactly, you know, but I think he did.

Q. They stopped picking at noon on Saturday, because you found you could not get them in?

A. Yes.

Q. Get them in where?

A. The storage.

Q. Why couldn't you get them in?

A. There was such a jam there, they couldn't un-  
30 load them.

Q. Such a jam of what?

A. Trucks.

Q. Trucks—you had difficulty in getting your peaches into this storage warehouse because there were so many trucks ahead of you, didn't you?

A. Well, yes, it was slow getting unloaded.

Q. How many trucks would you find ahead of you when you would get there?

A. Sometimes three, sometimes five and sometimes, the last Saturday when they were left over there were over forty trucks there.

Q. How many?

A. Over forty.

Q. Waiting to get peaches in this cold storage plant? 10

A. Yes.

Q. And because you found you could not get in, you quit work Saturday noon and did not haul until Sunday night?

A. On Saturday afternoon, between two and three, I came there with another load, and I stayed there until 12 o'clock; it was just twelve o'clock when I was getting unloaded.

Q. At night?

A. Yes, at night; I stayed there. 20

Q. In other words, it took you from three o'clock in the afternoon until 12 o'clock at night to get your peaches in the store room?

A. Yes.

Q. On Saturday?

A. That was that Saturday afternoon and Saturday night.

By the Court:

30

Q. When did you tell Mr. Miller about that—how did Mr. Miller know that you were having trouble or delay in getting your peaches into the house?

A. When I came back I said, "Don't pick too many today."

Q. Just a moment; when you came back, that was 12 o'clock?

A. That was in the morning, before dinner time. I said, "I think we will have trouble getting them in." He was going to stop his pickers at noon, he said; I don't know whether he did or not; he told me that, and I loaded another load, and, well, we got our dinner, and it must have been around 2 o'clock when I left with my load. I went over there, and then my other trucks came along, and they loaded up; there were some in back of me  
10 that afternoon, too, in the line.

By Mr. Cole:

Q. Do you know whether it was because the peaches were ripening so fast that everybody was crowding to get them in on that Saturday afternoon?

Mr. Marshall: I object to that.

20

The Court: The objection is sustained.

Q. Were you trying to get all of these in on that Saturday afternoon because they were ripening so fast?

Mr. Marshall: I object to that.

The Court: I overrule the objection.

30

(Exception noted for the plaintiff.)

A. Well, they wasn't exactly too ripe, but we was going to get them cleaned up; always, like any other time in other years, we done that, never like to leave them over.

Q. Were you carrying more peaches there this summer, 1927, than 1926?

A. I carried more that year, on account of Mr. Miller's orchards were getting bigger every year. They were young trees before, and they didn't bear that many.

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WILLIAM RUNGE, SWORN.

10

By Mr. Marshall:

Q. Mr. Runge, where do you live?

A. Aura.

Q. In 1927, were you farming?

A. No.

Q. What is your business?

A. Farmer.

Q. Do you, together with your brother and mother, 20  
operate a fruit farm there at Aura?

A. Yes.

Q. Did you do any work at all for Mr. Miller, Edward E. Miller, during the summer of 1927, at the time he harvested the peach crop?

A. Only hauled out these two truck loads that Sunday.

Q. When you hauled them, Mr. Runge, where did you haul them from and to what place?

A. From the orchard to the truck on the road. 30

Q. For how many years have you been accustomed to hauling and growing peaches?

A. Fourteen years.

Q. Did you have an opportunity to see these peaches and know what condition they were in?

A. What, Mr. Miller's?

Q. Yes.

A. Only that Sunday.

Q. That is what I mean; confine yourself to those peaches, those peaches that you hauled from the orchards to the trucks.. What day was it you hauled them?

A. Sunday.

Q. Now, what condition were they in when you saw them?

A. Well, I thought they were in good condition.

10 Q. When you say "good condition," what do you mean?

A. They were highly colored, but not soft.

Q. Highly colored but not soft?

A. Yes.

Q. Had you ever had the experience of storing any of your fruit in cold storage?

A. Yes.

20 Q. Would you consider these peaches that you saw that Sunday were proper fruit to be placed in cold storage?

Mr. Cole: I object to that.

A. Yes, we put them in —

30 Mr. Cole: Just a moment. I object to that. I do not think he is competent to testify to that, and I do not think that is competent under the state of the pleadings or the issue here.

The Court: No, I think I will sustain the objection. He may tell what condition they were in; I don't think he is qualified to express an opinion as to whether they were in proper condition for storage.

Q. Had you ever hauled peaches in that same condition before for yourself?

A. Yes we have.

Q. And had you placed peaches of that same character, highly colored, in storage before?

Mr. Cole: I object to that as being incompetent and irrelevant; the question is about these peaches.

The Court: I sustain the objection. 10

Q. The peaches, you say, were in good shape, highly colored?

A. Highly colored.

Q. But hard?

A. And solid.

Cross-examination.

By Mr. Cole: 20

Q. Did you handle these peaches with your hands?

A. No, I did not; I just picked the baskets up and helped haul them out. I just happened to be there, I wasn't working for Mr. Miller, I just happened to be there Sunday afternoon.

30

FREDERICK W. WINTERBERG, SWORN.

By Mr. Marshall:

Q. Mr. Winterberg, you live in Glassboro, don't you?

A. I do.

Q. What position do you hold there?

10 A. Freight agent for the Atlantic City Railroad Company.

Q. And as such agent, you have performed that duty for how many years at Glassboro?

A. Twenty-two years.

Q. During that period of time, I presume you have handled a lot of peaches shipped from that point, haven't you?

A. Yes.

20 Q. When they are shipped from Glassboro, in what kind of cars are they stored?

A. The carload lots are loaded in refrigerator cars, of course.

Q. And where are they iced?

A. At the Repp Ice & Cold Storage there.

Q. Iced there and loaded and shipped on your line?

A. Yes.

30 Q. Do you recall handling any peaches, carload lots from Glassboro during the fore part of September, 1927?

A. We did.

Q. Do you remember the dates?

A. Well, right along, various dates; I couldn't mention the specific dates that we handled cars.

Q. You do not remember any specific dates?

A. Yes.

Q. Do you remember whether you had any diffi-

culty with the peaches that were handled out of the cold storage in Glassboro in September, 1927?

A. We had an inspector from the Moorehead Inspeccion Bureau in Philadelphia to look after our peaches.

Mr. Cole: I object; this appears to be hearsay, and it is not confined to the plaintiff's peaches.

Mr. Marshall: No, it is not confined to the plain- 10  
tiff's peaches.

Q. I don't want you to tell us what the inspector did, what they said to you, but as a result of the inspection, what did you as agent do with the peaches that were delivered to you or offered to you for transportation?

Mr. Cole: I object to that.

20

A. I required a guaranty of the charges.

Mr. Cole: What he did is of no moment.

The Court: I do not see how it could be evidential, Mr. Marshall, against the defendant.

Q. Did you have an opportunity to examine any of the peaches that were taken from the cold storage plant in the latter part of September? 30

A. Not personally.

Q. Personally you did not?

A. No.

Q. Can you tell us how many cars you shipped out of the cold storage that were loaded from the cold storage?

A. I know of four or five; I don't know, I couldn't give you the exact amount.

Q. Then were any others offered to you for shipment after that?

A. All that were offered to us we accepted.

Q. All that were offered to you were accepted?

A. Yes.

10 Q. There were none offered to you that you refused?

Mr. Cole: I object to that; even if he did, I do not see what it has to do with this.

The Court: The objection is sustained.

(No cross-examination.)

20

FRANK GOTTI, SWORN.

By Mr. Marshall:

Q. Mr. Gotti, where do you live?

A. Aura.

Q. What business are you in?

A. Farming.

30 Q. How many years have you been engaged in farming?

A. Well, I have been eleven years for myself.

Q. With respect to Mr. Miller, where do you live, the plaintiff?

A. Right at Aura, right across from Mr. Miller's house.

Q. Have you had experience in raising peaches on your farm?

A. Yes, sir.

Q. Do you know whether or not Mr. Miller raises peaches on his farm?

A. Yes, sir, he does.

Q. Did you have an opportunity of seeing the fruit that Mr. Miller raised, the peaches he raised during the year 1927?

A. Yes, because one of his orchards is right across the road from my place.

Q. Did you have an opportunity of examining the fruit while it was still on the trees? 10

A. Well, the orchard that was across from my place, yes, I seen the fruit.

Q. What condition would you say that fruit was in as you saw it on the trees?

A. Well, it was in good condition.

Q. What have you to say with respect to that fruit as to the care that it was given while it was on the trees?

20

Mr. Cole: I object to the care the peaches were given; it is a question of what the condition was when they were picked and put in the storage.

Mr. Marshall: Well, I presume we would be permitted to show that that which we delivered to the storage was a good, sound peach.

Mr. Cole: I have no objection to that.

30

The Court: Well, does the care relate to the time before the picking or after the picking?

Mr. Marshall: I think so.

The Court: The objection is sustained.

Q. Did you see the peaches as they were being picked, Mr. Gotti?

A. Yes, the peaches what was picked across from my farm, I seen them.

Q. How many acres are there in that piece across from your farm?

A. Well, I don't exactly know how many acres are in there.

10 Q. Are you able to give us an opinion, how many acres are there?

A. Well, I heard Mr. Miller say between ——

Q. No, just using your own knowledge?

A. What I have heard, there is about twenty-six acres there, that is, between apples and peaches.

Q. Between apples and peaches?

A. Yes, that is mixed.

Q. Those peaches that you say you saw picked, while they were being picked, what condition were those peaches in?

20 A. Well, them peaches, they were all right.

Q. When you say "all right" what do you mean?

A. Well, they were good, them peaches right there, they were the first ones he picked.

Q. When you say the first ones he picked, are they the early peaches or late peaches?

A. No, they are late, Elbertas.

Q. You mean the first he picked of the late peaches?

30 A. Yes, the first I seen he picked there; I don't know which farm he picked first, but they were the first ones I see picked.

Q. Are they the only ones of Mr. Miller's that you saw picked?

A. It was.

Q. And those that you saw picked you say were in good shape?

A. They were in good shape.

Q. And did you see them at all after they were picked?

A. What do you mean?

Q. Did you see those peaches at all after they were picked and placed in baskets?

A. Well, I seen them one day at the storage, that is all, after he started to haul out; then I didn't see them any more.

Q. You saw them at the storage after he started 10 to haul out?

A. Yes.

Q. What was the condition there?

A. Well, they claimed they were in fair condition.

Q. No, what condition were they in, as a man who knows peaches?

A. They were soft.

Q. Did you go in the storage?

A. No.

Q. What could you say about the storage? 20

A. I don't know, Mr. Marshall.

Q. What was your object in being over there, Mr. Gotti, do you recall, or was it just a visit?

Mr. Cole: I object to his object.

The Court: I will allow the question.

A. Well, I just stopped there one day, I just wanted to see Mr. Repp, that is all, on a business 30 affair, that is all.

Cross-examination.

By Mr. Cole:

Q. What day of the month and what month was it that you saw the peaches being picked from this twenty-six acre tract?

A. Well, they were the first ones, the first day he started to pick.

10 Q. You mean August 27th?

A. Well, it was the first peaches that he picked in that orchard.

Q. How far were you away from the trees?

A. Oh, well, I was right there.

Q. Do you live across the highway?

A. Just across the highway, yes.

Q. How wide is the highway?

A. Well, that is a thirty-three foot road.

20 Q. You were standing in your own yard, and you saw those picked?

A. No, in Mr. Miller's yard.

Q. Oh, you went over to his yard?

A. Yes.

Q. I see; you were over there when they were being picked?

A. Yes.

Q. Now, where were you when you saw them hauling peaches out of the storage?

30 A. Well, I just was there; I went up there one morning to see Mr. Repp, I did, and I didn't go exactly on the peach affair. Then I seen all this excitement going on there, that is all I know about it; I don't know anything else.

Q. How do you know they were Mr. Miller's peaches that were being hauled out?

A. Well, I seen him packing them.

Q. Mr. Miller?

A. Yes, he was packing them there when I went to see Mr. Repp.

Q. Do you remember what day of the week it was?

A. No, I don't recall.

Q. Do you remember whether it was Monday?

A. No, I don't recall.

Q. Do you know what day of the month it was?

A. I don't recall at all.

10

J. HOWARD PORCH, SWORN.

By Mr. Marshall:

Q. Mr. Porch, where do you live?

A. Richwood.

Q. What is your business?

A. Farming.

Q. With relation to fruit, do you grow any fruit? 20

A. Yes, sir.

Q. What kind of fruit do you raise?

A. Peaches and apples.

Q. How many acres do you have in peaches?

A. I judge about fifty.

Q. During the summer of 1927, the fall of 1927, did you have any business relations with the John Repp Ice & Cold Storage Company?

A. I did.

Q. You entered into a contract with them, too, to 30 store peaches, didn't you?

A. Yes, sir.

Q. Do you remember when you last hauled peaches into the storage?

A. September 3rd.

Q. At the time you finished hauling your peaches

into the storage on September 3rd, had you then any knowledge or notice that the plant was not in shape to handle the fruit or other fruit in the storage?

Mr. Cole: I object to that, it is not relevant in this issue. He is not the plaintiff.

10 Mr. Marshall: No, but it is in the same storage.

Mr. Cole: I object.

The Court: The objection is sustained.

Q. After you had finished hauling your fruit into the storage, did you have any conversations with Mr. Repp in company with Mr. Miller?

A. On Wednesday—I can give you the date if you want it —

20 Q. Give us the date if you have it.

A. On the 7th.

Q. Wednesday the 7th?

A. Yes, sir, that is the date—a week later.

Q. A week later?

A. Yes.

Q. That would be then Wednesday the 14th, wouldn't it?

A. Yes, sir.

30 Q. All right; now, on that day you say you had a conversation with Mr. Repp in company with Mr. Miller?

A. Yes, sir.

Q. And where was the conversation—where was it, where did you meet?

A. In his office.

Q. Where, at Glassboro?

A. Yes, sir.

Q. What did he say with respect to the conditions at his cold storage plant?

A. Why, as I can recollect, he said he was expecting something like this.

Q. And was there any suggestion made at that time as to what should be done?

A. I think he proposed to meet at a lawyer's office the next morning and that a committee be appointed to meet there.

Q. Were you one of the members of that committee? 10

A. I was.

Q. And the other members of the committee were whom?

A. Edward Miller and Mr. Mawson.

Q. Did you meet in accordance with that arrangement?

A. Yes, sir.

Q. And where did you meet?

A. Watkins' office here in Woodbury. 20

Q. Who was there?

A. Who was there?

Q. Yes.

A. You and Mr. Watkins and Mr. Repp and Mr. Avis and the three committeemen.

Q. The three of the committee were whom?

A. Mr. Miller, Mr. Mawson and myself.

Q. And what was said at that meeting between Mr. Repp and any of you as members of the committee with respect to what was to be done with 30 the peaches?

A. Well, we said that the peaches were no good to us.

Q. What did Mr. Repp say?

A. Mr. Repp himself said the peaches were no good.

Q. Well, what was decided then to be done with them?

A. Well, as far as I know, Mr. Repp took it on himself to dump the peaches.

Q. And did he say why he wanted to get the peaches out of there?

A. Well, there was something spoke about his apples, he wanted to get room for his apples.

10 Q. Did you have any occasion, Mr. Porch, to be at the cold storage plant after the various men, including yourself and Mr. Miller, started to haul peaches out of the storage?

A. Well, we received the notice, we took our equipment over to the plant, got ready, and Monday morning we went over, and we had to wait an hour or an hour and a half before any peaches were ready for us to pack.

Q. Well, while you were there—you were there then on Monday, weren't you?

20 A. Yes.

Q. Were you there Tuesday?

A. Yes.

Q. Were you there Wednesday?

A. Yes, until we stopped.

Q. Did you have an opportunity to go in the storage?

A. I was not in there on Monday, Tuesday nor Wednesday.

Q. Not in there Monday, Tuesday or Wednesday?

30 A. No.

Q. Did you have an opportunity of seeing Mr. Miller's peaches while he was packing them from the storage?

A. Now, I might have passed by his table.

Q. But you are not sure of it, are you?

A. Not sure that I saw the peaches.

Q. You were there working with yours?

A. Yes.

Q. And Mr. Miller was there working with his?

A. Yes.

Q. But you are not quite sure that you can tell us whether you observed his peaches or not, is that right?

A. I wouldn't like to say.

Q. I don't want you to say if you are not sure. That is all.

10

Cross-examination.

By Mr. Cole:

Q. Mr. Porch, what is the book you have in your hand?

A. I have some accounts and some memoranda of these proceedings.

Q. Now, you have mentioned September 7th as a certain date; what was that date; what was that about?

20

A. Well, I rectified it, one week later.

Q. Oh, then you made a mistake about that?

A. I did, because it was a week they were in storage that I forgot.

Q. Now, you say you were at this plant on a certain Monday?

A. That must have been on the 13th of September.

30

Q. Well, you said you were there on Monday; now, were you there on Monday?

A. On the 13th.

Q. Do you remember testifying you were there on Monday?

A. Yes.

Q. Were you?

A. Yes.

Q. Were you there on Monday?

A. They say we commenced to —

Q. Pardon me, Mr. Porch; you said in answer to Mr. Marshall's question that you were there on Monday. Now, I ask you, were you there on Monday?

A. Yes, I was there on a certain Monday, yes.

Q. What certain Monday was that?

10 A. It must have been the 13th.

Q. Now, Monday happened to be the 12th—this is 1927 you are talking about, isn't it?

A. Then it was on the 12th.

Q. All right, that is so, isn't it—you were there Monday the 12th?

A. Well, if the 12th was that day.

Q. All right, the calendar will show that. Now, what were you doing there—why did you go?

A. Why, I commenced to pack the peaches.

20 Q. For what reason?

A. To find out what condition they were in.

Q. Yes; you saw Mr. Miller there?

A. Not that day he wasn't there.

Q. Did you see any of his men there?

A. I can't say.

Q. Did you see any of his trucks there?

A. I can't say.

Q. You knew when you went there on the 12th that your peaches were in bad condition, didn't you?

30 A. Now, do you want me to answer you directly? From what we found out, the peaches were in bad condition.

Q. No, if you don't mind, you can answer that question, if you can; if you can't, just say so. (To the reporter) Just repeat it to him.

(Question repeated.)

A. We were refused to ship peaches —

Q. No, pardon me.

(Question repeated.)

A. I did not.

Q. Why do you say you went there?

A. To commence to pack the peaches.

Q. At that time you had no intimation there was anything wrong with your peaches? 10

A. Only what that letter stated.

Q. Yes, you had had a letter from Mr. Repp, hadn't you?

A. I did, yes.

Q. And you went there on the 12th in response to the letter, didn't you?

A. Well, he ordered us to get them out of there.

Q. Exactly, that is all.

20

EASTLACK PORCH, SWORN.

By Mr. Marshall:

Q. Mr. Porch, you live at Richwood?

A. Yes.

Q. And you are the son of J. Howard Porch, are you?

A. Yes.

Q. You are one of the sons interested with him in the operation of the peach farm? 30

A. Yes.

Q. You are acquainted with the John Repp Ice & Cold Storage Company?

A. Yes.

Q. And you know Edward E. Miller?

A. Yes.

Q. Do you know when he finished hauling peaches to the John Repp Ice & Cold Storage Company from this farm?

A. On Saturday.

Q. Do you remember the date?

A. Saturday the 3rd.

Q. September 3rd?

A. Yes, sir.

10 Q. And did you see any of Mr. Miller's peaches while they were going in the storage?

A. Yes, sir.

Q. Now, where were his peaches when you saw them being unloaded?

A. Where?

Q. At the storage?

A. At the storage, yes, sir.

Q. What condition were they in?

A. Good.

20 Q. And when you say "good" what do you mean?

A. Good, firm fruit for storage.

Q. And were you at a later date at the storage when Mr. Miller and others who had fruit in storage were taking the fruit out?

A. Yes, sir.

Q. Can you tell us what day you were at the storage or what days?

A. I was there Monday, Tuesday and Wednesday, the 12th, 13th and 14th, I think.

30 Q. Did you see any of Mr. Miller's fruit, his peaches, as he was taking them from the storage?

A. Yes, sir.

Q. What condition were the peaches in at that time?

A. They were soft.

Q. You actually saw them?

A. Yes, sir.

Q. And when you say "soft" were they speckled, or were they just simply soft?

A. No, they were over-ripe, fallen.

Q. What do you mean by "fallen"?

A. Gone down.

Q. They had gone down?

A. Yes.

Q. Do you know whether the peaches were cold, or were the peaches warm?

A. Warm.

10

Q. The peaches were warm?

A. Yes.

Q. Did you have an opportunity of going in the storage?

A. I was in there, yes.

Q. Will you tell us when you were in?

A. I cannot.

Q. You mean you can't tell which of the three days, Monday, Tuesday or Wednesday, you were in?

20

A. No, I can't.

Q. But you were in one of those three days?

A. Yes.

Q. Just describe to the Court and jury what you saw generally as to the condition of the storage when you were in there?

A. I saw some ice in cakes.

Q. How large were those cakes of ice?

A. Well, they were a three hundred pound cake, I presume, when they were put in, but they were melted some.

Q. Was there water around—what was the condition of the floor?

A. Very sloppy, lots of water around, and some lime.

Q. Some lime, you say?

A. Yes.

Q. With respect to the pipes, the piping in the cold storage plant, did you have an opportunity of observing that?

A. Yes.

Q. What condition were they in?

A. Dripping.

Q. Dripping what?

A. Water, I imagine.

10 Q. Dripping a liquid?

A. Yes.

Q. Did you see any of the pipes in the cold storage at that time coated with ice?

A. No, sir.

Q. Your peaches at that time had been in the storage how long?

A. Well, we finished carting Saturday, September 3rd, and we went over as his notice called for to get them out on Monday the 12th.

20 Q. What would cause the peaches to become ripe while in the storage?

A. Not enough temperature to preserve them.

Q. If the temperature had been high, would that have a tendency to ripen the fruit?

A. Sure.

Q. What is the object of having a low temperature in a cold storage plant?

A. To preserve the fruit.

30 Q. Did you have any conversation with Mr. Charles Repp as to the condition in the cold storage in the presence of Mr. Miller?

A. I don't recall it.

Q. Did you have any talk with Mr. Miller at all as to the cause of the condition at the cold storage plant?

The Court: Mr. Repp, you mean?

Mr. Marshall: Mr. Repp.

A. No, sir.

Q. You personally did not?

A. No, sir.

Cross-examination.

By Mr. Cole:

Q. Mr. Porch, when did you begin to put peaches  
in? 10

A. Monday, August 29th.

Q. And finished September 3rd?

A. Yes, sir.

Q. Were there any cakes of ice on the floor at  
that time?

A. I don't know.

Q. Did you go in?

A. No, sir, not that I recall. 20

Q. And you were not in the plant at any time  
during the storage of your peaches?

A. Not that I can definitely recall.

Q. Were you at the platform?

A. Yes, sir.

Q. And who took care of the peaches from your  
truck into the plant?

A. Repp's men.

Q. Now, the water that you saw when you were  
there on the 12th was from the melted ice, wasn't  
it? 30

A. Well, it was coming from above, some drop-  
pings.

Q. The ice was melting, wasn't it?

A. Yes, sir.

Q. And there must have been some water from  
that?

- A. Yes, sir, I imagine so.  
Q. How many cakes of ice were there?  
A. I couldn't say.  
Q. Have you any idea?  
A. I have not.  
Q. Were there half a dozen?  
A. Yes, sir.  
Q. A dozen?  
A. Yes, there was more than that.  
10 Q. Fifty?  
A. I wouldn't want to say.  
Q. What part of the plant were these cakes of ice?  
A. Just inside the doors. I noticed them; I didn't go all over the plant.  
Q. Do you know why they were put there?  
A. No, sir.  
Q. Were you ever in this plant before the 12th of September?  
20 A. Yes, sir.  
Q. And on previous occasions when you were there, were the pipes frosted?  
A. I have saw pipes frosted there.  
Q. Had you ever seen them drip before?  
A. I can't recall it.  
Q. Did you ever see any ice on the floor before?  
A. No, sir.  
Q. The condition you saw on the 12th was different from anything you had seen there before?  
30 A. Yes, sir.  
Q. Did you have any report between the day you began to store your peaches and September 3rd that there was anything wrong with the temperature?  
A. No, sir.  
Q. You got your notice when?  
A. Saturday, September 10th.

By Mr. Marshall:

Q. Did you observe at any time while you were in the place any thermometer in the cold storage plant?

A. There were thermometers in there, but I couldn't say.

Q. You did not notice the reading of them?

A. No.

10

Q. You are not able to tell us what the temperature was, are you?

A. I couldn't say.

Q. Could you say whether it was warm or cold?

A. It was pretty warm.

By the Court:

Q. Where were these pipes that you say were dripping?

20

A. Overhead.

Q. In the ceiling?

A. Yes, sir.

Q. Where were the peaches?

A. On the floor.

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WILLIAM LEONARD, SWORN.

By Mr. Marshall:

30

Q. Mr. Leonard, what is your business?

A. Working on a farm for my father.

Q. And your father's name is Edward Leonard?

A. Yes.

Q. A fruit grower, too, is he?

A. Yes, sir.

Q. Did you have any opportunity of seeing Mr. Miller's peaches?

A. I did.

Q. I mean Mr. Miller, the plaintiff here?

A. Yes.

Q. Did you see the peaches while they were going into the storage?

A. I did.

10 Q. Where were the peaches when you saw them?

A. I saw them on the trucks and I saw them on the sleds.

Q. You saw them on the trucks?

A. Yes.

Q. And where were the trucks?

A. In front of the cold storage.

Q. And the sleds were the vehicles that they loaded peaches on from the trucks?

A. Yes.

20 Q. What condition were those peaches in when you saw them?

A. They were in good condition.

Q. Did you see those peaches at a later date when Mr. Miller was moving them out there?

A. I did.

Q. What were you doing there?

A. Packing peaches.

Q. Packing your own?

A. Yes, I was.

30 Q. And you had an opportunity of seeing Mr. Miller's peaches then, did you?

A. I did.

Q. What condition were they in then?

A. They were in poor condition.

Q. When you say "poor condition" what do you mean?

A. I mean they were soft.

Q. Were they cold or were they warm?

A. I did not feel any of the peaches; I just noticed them.

Q. You just noticed them?

A. They were soft, and the baskets had melted away very much, the baskets of peaches.

Q. When you say "melted away" what do you mean by "melted away"?

A. Well, they just simply dropped down to about 10 half, sometimes a little better.

Q. You say you were sorting your own peaches there?

A. I was.

Q. Were your peaches warm or were they cold?

A. They weren't warm or they weren't cold, either one; they were just simply in between; they weren't real warm, but they weren't cold.

Q. Do you remember when that was, Mr. Leonard?

A. We started packing on the 12th of September 20  
ber.

Q. The 12th of September, and you packed what days?

A. We packed Monday, Tuesday and Wednesday; we quit Wednesday.

Q. Then you could not do any more after that?

A. No.

Q. You did not see Mr. Miller there after that, did you?

A. Well, I was back other days, I saw Mr. Miller 30  
there, yes.

Q. Were you in the cold storage plant?

A. I was at times, yes.

Q. What did you observe generally in the cold storage plant?

A. I observed a lot of water on the floor.

Q. A lot of water on the floor?

A. Yes.

Q. Could you tell what that was from?

A. I presume it was from the drippings of the pipes; the pipes were dripping when I was in there.

Q. The pipes were dripping?

A. Yes.

Q. What pipes do you refer to?

A. The pipes that were on the ceiling, the cold  
10 storage.

Q. Did you see any pipes that were covered with  
ice?

A. I did not.

Q. Did you see any ice in the cold storage?

A. Yes.

Q. Where was the ice?

A. Up and down the aisles mostly around the ther-  
mometers, underneath of them.

Q. Mostly around the thermometers?

20 A. Yes.

Q. Can you say how many cakes of ice you saw?

A. I could not.

Q. A large number or a small number?

A. A very large number.

(No cross-examination.)

Mr. Avis: If the Court please, we have a witness,  
Mr. Arthur J. Farley, a fruit specialist, from the  
30 experiment station, and we would like to call him  
out of order. Mr. Marshall has consented.

The Court: Very good.

ARTHUR J. FARLEY, SWORN.

By Mr. Avis:

Q. Where do you live, Mr. Farley?

A. New Brunswick.

Q. What is your occupation?

A. Pomologist is the scientific term.

Q. What is it in plain language—what do you 10  
do?

A. Why, it is a—we do experimental teaching and  
demonstrating work in fruit growing.

Q. What are you connected with, what State De-  
partment or —

A. The State Agricultural College and Experi-  
ment Station.

Q. At New Brunswick?

A. Yes, sir.

Q. In that position do you examine fruit, that is 20  
growing on trees and that has been picked, for the  
purpose of ascertaining its quality and condition?

A. Sometimes.

Q. In 1927, what did you do with relation to the  
growing of peaches in the State?

A. I carried on some demonstration work, some  
experimental work, observed the condition of the  
crop from time to time with particular reference  
to varieties.

Q. And conditions? 30

A. The general condition of the fruit.

Q. And did you or did you not get reports from  
various growers as to the condition of fruit?

A. Reports through conversation and to a certain  
extent through correspondence.

Q. Did you examine any peaches, Elberta peaches  
or Hale peaches, in South Jersey during that year?

A. Yes, sir.

Q. And in what neighborhood?

A. Why, in various sections of South Jersey, some in the Bridgeton section, some in the Glassboro, some in Camden and Burlington counties.

Q. Do you know whether you made any examination of the orchard of Mr. Miller at Aura?

A. I did not to my knowledge.

Q. Have you any recollection as to what examination you made in that neighborhood, whether you  
10 examined any special orchards in that neighborhood that you now recall?

A. As I recall now, the only one, specific one that I recall being in during that season, specific peach orchard in that neighborhood, was Mr. Allen's orchard at Glassboro; there may have been others, but I don't recall them now.

Q. What were the conditions that year as to  
20 moisture and sunshine as compared with the average from your recollection?

Mr. Marshall: I object to that, if it please the Court; I can't see where it is relevant to this issue at all. He is talking about a general peach condition, and he has already testified he knows nothing about the plaintiff's peaches.

Mr. Avis: I am leading up, if the Court please,  
30 to a proposition as to whether—I may state to your Honor just what it is so that you can say whether it is proper or not—up to the general condition of peaches of the character grown by Mr. Miller in that neighborhood in that year as to water, whether they were watery or not, and if there was an excess of water in the peaches over the normal, and as to the effect of a watery condition of the peaches; that

is the question I am leading up to, and it does seem to me we have a right to show it. Of course, it is out of place to some extent; we can't prove our case all at once and we are calling this witness out of order with Mr. Marshall's consent, expecting to tie that up with testimony showing the actual condition of the peaches of Mr. Miller as they were placed in the cold storage plant.

The Court: The objection is overruled. 10

(Exception noted for the plaintiff.)

(Question repeated.)

A. As I recall it, during the summer of 1927, we had an excessive amount of rain-fall, and naturally not as much sunshine as normal.

Q. And what effect would an excessive amount of rainfall and lack of sunshine have upon peaches, Mr. Farley? 20

A. It would tend to change the texture of the peach, that is, the peaches would be more watery than they would under normal rainfall and sunshine conditions.

Q. And would that have any effect upon the taste of the peach?

A. Yes, sir.

Q. Would that have any effect upon the keeping qualities of the peach? 30

A. It would.

Q. What effect would it have?

A. A peach with a high percentage of water and a low percentage of solid matter and sugar would not keep as well as one with a normal composition.

Q. What effect, if you have had experience in it,

would the fact that peaches, after being picked, were allowed to stand on trucks in the sunshine for four, five or six hours—would that have any effect upon the peach itself as to its keeping quality?

A. Yes, sir.

10 Mr. Marshall: I was probably a little slow in objecting to that. I move it be stricken out; I don't think the testimony was that they stayed in the sunshine for four or five hours. If counsel will now offer the proof or expect to show that the peaches were left in the sunshine —

Mr. Avis: We expect to show that, if the Court please; if we do not show it, this will be stricken out.

20 The Court: Yes, the testimony now is that they were not left in the sunshine.

Mr. Avis: Yes, if we cannot show that, it will be stricken, of course.

Q. What effect would it have upon the keeping qualities, Mr. Farley?

A. They would not keep as well, the ripening process would go on very rapidly under those conditions.

30 Cross-examination.

By Mr. Marshall:

Q. You say they wouldn't keep as well, Mr. Farley, but they would keep, wouldn't they, under proper refrigeration?

A. They would not keep as long under any conditions.

Q. How long would you say they would keep?

A. I couldn't say.

Q. You are not able to tell us that?

A. No.

Q. Would they keep a week?

A. I couldn't say.

Q. Would they keep three days?

A. Well, I can't answer the question, because I 10  
don't know what sort of peach you are talking about.

Q. Now, let's confine ourselves to a Hale and Elberta peach?

A. In what condition?

Q. 1927 peaches that you are talking about; would they keep in cold storage under proper refrigeration?

A. They would keep for a certain length of time, yes.

Q. That is what I want to know. Now, what is 20  
that certain length of time that in your opinion they would keep?

A. I wouldn't want to keep them over a week at the outside?

Q. Not over a week at the outside?

A. No.

Q. In your opinion as an instructor you would say that if they were kept over a week, Hale or Elberta peaches, that they would be no good, or wouldn't you say that? 30

A. No, I wouldn't say that.

Q. Well, what condition would they be in if kept over a week?

A. They would be in much poorer condition than they were in when they went in the storage.

Q. Now, you say that you inspected the peaches that were grown during the summer of 1927?

A. Yes, sir.

Q. And you came to the conclusion that there was an abundance of rainfall and a lack of sunshine which caused in the fruit an excess of water and a low percentage of sugar?

A. Yes.

Q. Now, did you likewise carry out your experiment to learn what the results were to peaches that year that were placed in cold storage?

10 A. I did not.

Q. So you are not in a position to say whether fruit such as you described would not keep did in fact keep in any cold storage or not?

A. I know that fruit —

Q. No, can you answer that question?

A. Will you please repeat the question?

(Question repeated.)

20 A. Yes, I am.

Q. Did you examine any fruit taken from the cold storage of Mr. Shober of Aura, New Jersey, or Monroeville, New Jersey?

A. No, sir.

Q. Mr. C. J. Riley, at Pitman—Mr. Riley's cold storage?

A. No, sir.

Q. What cold storages did you find that the fruit did not keep, Hale and Elberta peaches?

30 A. The storage in which I put some of my own fruit.

Q. What storage was that?

A. That was a small storage in Monmouth County, Keansburg.

Q. How many peaches did you put in?

A. About two hundred bushels.

Q. About two hundred bushels?

- A. Yes.
- Q. And those did not keep?
- A. Not as well as they kept before.
- Q. How long did you keep them in there?
- A. I kept them in there about a week.
- Q. Were you able to sell them?
- A. Some of them; I was able to sell some of them.
- Q. You say it was a small cold storage?
- A. Yes. 10
- Q. What was its capacity?
- A. I couldn't say, probably—I couldn't say—it was around four or five thousand bushels or more.
- Q. A small cold storage plant?
- A. Yes.
- Q. Did it also have an ice plant in connection with it?
- A. Yes.
- Q. And were they pulling ice during the time they were storing your fruit? 20
- A. I couldn't say.
- Q. That would have an effect on it, wouldn't it?
- A. I don't know.
- Q. You can't tell us that either?
- A. No, sir, I am not a cold storage man.
- Q. What kind of peaches did you put in?
- A. Elbertas.
- Q. You did not put any Hales in, did you?
- A. No, sir.

(At this point a five minute recess was taken.)

WILLIAM E. KINCAID, SWORN.

By Mr. Marshall:

Q. Mr. Kincaid, you are engaged in growing fruit, are you?

A. Yes, sir.

Q. Your father is what, James Kincaid?

10 A. Yes.

Q. Do you have a farm together or have separate farms?

A. I farm part of his farm, rent it from him.

Q. Now, did you have any occasion to have any of your fruit stored in the cold storage plant at Glassboro in 1927?

A. I did.

Q. Do you know Edward E. Miller?

A. Yes.

20 Q. When was the last of your fruit that you delivered at the cold storage plant at Glassboro?

A. I can't just recall.

Q. You don't remember the exact date?

A. No.

Q. Can you tell us with respect to Labor Day?

A. Yes, we were hauling on Labor Day.

Q. Do you remember whether you finished on Labor Day or not?

A. I do not; I know I hauled on Labor Day.

30 Q. Did you see any of Mr. Miller's peaches being hauled there?

A. Why, I saw them carted for him; I saw his truck there.

Q. You saw Emil Eifert?

A. Yes, Emil Eifert's truck.

Q. You knew Emil Eifert, did you?

A. Yes, I know of him.

- Q. You know of him—you saw his truck there?  
A. Yes.  
Q. And saw the peaches on his truck?  
A. Yes.  
Q. In what condition were those peaches on that truck?  
A. I couldn't say, I never examined anybody's.  
Q. You did not examine those?  
A. No, sir.  
Q. Were you at the cold storage plant, while he 10 and others were there taking the peaches out?  
A. Was I there? Yes.  
Q. Can you tell us what day you were there, what day or days?  
A. Monday after I received my notice.  
Q. Monday after you received your notice?  
A. Yes.  
Q. That would be around September 12th?  
A. That is right, I believe.  
Q. What days were you there? 20  
A. Monday and Tuesday.  
Q. Did you have an opportunity of being in the storage during any one of those two days?  
A. Yes, sir.  
Q. What do you say you found there as to general conditions in the cold storage plant?  
A. A warm condition.  
Q. A warm condition?  
A. Yes.  
Q. Did you notice any pipes covered with any 30 refrigeration?  
A. No, sir.  
Q. Did you observe the pipes?  
A. Yes, sir.  
Q. What did you observe about them?  
A. They were dripping.

- Q. Dripping what?  
A. Water, I presume.  
Q. Some liquid?  
A. Some liquid, water, I suppose.  
Q. Did you observe any ice in the cold storage plant?  
A. Cakes of ice, yes, sir.  
Q. Can you say how much ice was in the cold storage?  
10 A. I was told twenty tons, I don't know.  
Q. You saw ice there?  
A. Yes.  
Q. Are you able to give us an estimate of how much ice was there?  
A. I presume I saw twenty cakes; and I was told there was twenty tons; I don't know how much.  
Q. What was the condition of the floor in the cold storage plant?  
A. Wet.  
20 Q. What was the condition of the peaches that were coming out of the cold storage plant?  
A. Soft, mushy.  
Q. Soft and mushy? Were they solid—I mean, were they warm or were they cold?  
A. They were at an average temperature, I would say warm.  
Q. Average temperature, warm?  
A. Yes.  
Q. At that time, how long had your fruit been in  
30 the cold storage plant?  
A. I think about one week.  
Q. Just about a week?  
A. Yes, I don't know exactly.  
Q. Do you recall seeing any of Mr. Miller's?  
A. I didn't examine any of his.  
Q. You had fruit in other cold storages, hadn't you?

A. I did.

Mr. Marshall: I will call him later on that line of testimony. That is all, you may cross-examine.

(No cross-examination.)

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LOUIS REUTER, SWORN.

10

By Mr. Marshall:

Q. Mr. Reuter, you are a farmer?

A. Yes, sir.

Q. A peach grower, too?

A. Yes.

Q. And you had fruit in the cold storage plant at Glassboro?

20

A. Yes.

Q. Can you tell us when you delivered your last fruit there?

A. On Saturday.

Q. What date?

A. The third.

Q. Saturday, September 3rd?

A. Yes, sir.

Q. Did you see any of Mr. Miller's fruit as it was going in?

30

A. Yes, sir.

Q. Are you in a position to tell us what its condition was?

A. What, of his fruit?

Q. Mr. Miller's fruit.

A. What I seen of it I should say was good, solid fruit.

- Q. That is, when it was going in?  
A. When it was going in.
- Q. Were you there with others at the time they were endeavoring to take fruit out of the cold storage plant?  
A. Yes, sir, I was there Monday and Tuesday.
- Q. During that period of time, did you have occasion to see Mr. Miller's fruit?  
A. Yes.
- 10 Q. What was its condition then?  
A. Soft.  
Q. Was the peach itself warm or was it cold?  
A. Well, it wasn't cold nor I wouldn't say it was warm; it was an average temperature; it wasn't cold like a cold storage peach should be.
- Q. Did you have an opportunity to go in the storage?  
A. I was in on Monday, I was in on Tuesday.
- 20 Q. Will you tell the Court and jury what you observed generally as to the condition of the storage when you went in?  
A. Well, there was lots of water.  
Q. Where?  
A. On the floor.  
Q. Can you tell us what that was from?  
A. Well, I suppose a good bit of it was from the drippings of the pipes; it was dripping all the time.
- Q. Where were the pipes?  
A. Overhead.
- 30 Q. Any of it dripping on the fruit?  
A. Yes, sir.  
Q. Did you notice any ice in the plant?  
A. Cakes of ice around on the floor.  
Q. Did you notice whether that had melted or not?  
A. Oh, I suppose it had melted some.

Q. Did you notice any thermometer in the cold storage plant?

A. Yes, there were thermometers in there.

Q. Did you have any occasion to read them?

A. No, sir.

Q. Are you able to say whether the cold storage, while you were in there on the 12th and 13th, wasn't it, of September —

A. Yes.

Q. Whether it was warm or whether it was cold? 10

A. Well, it was warm.

Q. And your fruit had been in there then since the 3rd, hadn't it?

A. Since the third, yes.

Q. You say you saw Mr. Miller's peaches when he was taking them out?

A. Yes.

Q. And that they were soft?

A. Yes.

Q. What was he doing with them? 20

A. He was trying to bushel them, what I seen of them.

Cross-examination.

By Mr. Cole:

Q. On what days did you see Mr. Miller's peaches being stored there?

A. On what days? 30

Q. Yes.

A. Well, I put in from the 31st to the 3rd, from the 31st of August to the 3rd of September, and I believe I seen some of his peaches there every day while I was there.

Q. Yes, during the time you were storing?

- A. During the time I was storing.
- Q. Was his truck ahead of yours or after your truck?
- A. Well, sometimes he was ahead and sometimes he was after.
- Q. Now, when you were there on Monday, the 12th of September, whom did you see?
- A. Whom did I see?
- Q. Yes, anybody there beside yourself?
- 10 A. Yes, pretty near everybody that had any peaches in there, I guess, outside of Mr. Miller; I did not see him there on September 12th.
- Q. Tell us whom you did see?
- A. I see Mr. Porch, Mr. Leonard and Evans from Aura—I don't know what his first name is—and I have seen several people there I didn't know, I think Mr. Tomlin was there.
- Q. Were you there on Tuesday?
- A. I was there on Tuesday, yes, sir.
- 20 Q. Whom did you see that day?
- A. Well, I seen all the same people, mostly all.
- Q. Did you see Mr. Miller that day?
- A. Yes, sir.
- Q. How long were you there on Monday?
- A. I don't know how long I was there; I hauled my peaches home. I went there—sometimes I was there for an hour for to get in and get a load on, before I could ever get my truck backed up to the door.
- 30 Q. What was the trouble, you couldn't get in?
- A. They couldn't get them out fast enough.
- Q. There was a crowd there trying to get them out.
- A. A crowd there trying to get them out. They didn't seem to be able to get them out. There was lots of gas there that first morning, they couldn't get in, they said.

Q. That was on Monday?

A. That was on Monday.

Q. Did you see any of the employes of Mr. Repp there while you were trying to get the peaches out?

A. Yes.

Q. How were they dressed?

A. Well, I seen one fellow there with a gas mask go in, and later on in the day, I seen some of them go in a little while, then they would come out and stand out in the air while others went in for a little 10 while; that is how they were working.

Q. Did you see what they had on their feet?

A. Gumboots, the most of them.

Q. Why did they have gumboots?

A. I suppose on account of the water; I got my feet wet in there when I went in there to try to load.

Q. Did you have a gas mask?

A. No.

Q. Were you in there on Monday?

A. No, sir, I went in Tuesday, because one of the men said, "Come in and help me get a load out on the sled," and I went in.

Q. Was there gas there on Tuesday?

A. Not as bad.

Q. Anybody there with a gas mask on on Tuesday?

A. Not as I saw.

Q. The only person you saw with a gas mask on was on Monday?

A. On Monday I seen a fellow with a gas mask on.

20

30

EDWARD E. MILLER, recalled.

By Mr. Marshall:

Q. Mr. Miller, you said yesterday that you would bring up today your storage tickets.

A. Yes, sir.

10 Q. I show you a package of tickets and ask you whether they are your storage tickets?

A. They are.

Q. That were issued to you by the John Repp Ice & Cold Storage Company?

A. Yes.

Mr. Marshall: I don't know whether you people want to see these papers or not.

Mr. Cole: I do not.

20

Mr. Marshall: Then I offer these in evidence and ask that they be marked Exhibit P5.

(Said papers are marked as one Exhibit P5.)

30 Q. Mr. Miller, something has been said with respect to a conversation you had with Mr. Eifert, instructions in telling him not to go over to the cold storage plant. Was that after you had started to take your peaches out or before you had started to take your peaches out?

A. After I had started to take mine out.

Q. Now, Mr. Miller, have you at my request prepared a memorandum showing the number of bushels of peaches that would be made of sixteen thousand two hundred and twenty-five five-eighths baskets?

A. I have.

Q. How many bushels would sixteen thousand two hundred and twenty-five five-eighths baskets represent?

A. I figure they would represent ten thousand one hundred and forty bushels.

Q. Now, in estimating or ascertaining your loss, you figured that you would have been able to have obtained an average price of how much per bushel for your peaches?

10

Mr. Cole: I object to that.

The Court: I think that that is for the jury, Mr. Marshall.

Q. Are you able to tell us at the present time what your loss is?

Mr. Cole: I object to that; the jury should determine that.

The Court: Yes.

Q. From the prices that have been quoted per bushel, the deductions that would be made from that are what, if you will tell us?

A. Well, I would have twenty-five cents a bushel carting, fifteen cents a bushel commission on a price of a dollar and a half per bushel.

Q. Well, whatever the price would be per bushel, it would be ten percent?

30

A. Ten percent of that price, yes. Then I would have ten cents packing and ten cents storage making a total of sixty cents.

Q. The price you have given us includes the package, does it, the basket?

A. Includes the package, yes.

Q. So that would be a total of sixty cents, wouldn't it?

A. Yes.

Q. That would be deducted from—when I say sixty cents, I don't mean that, I mean it would be a total of forty-five cents plus ten percent for commission that would be deducted from any price you obtained for your peaches, is that right?

10 A. Yes.

A. Yes.

Q. In other words, if you obtained a dollar and a half for your peaches, it would be sixty cents off of that?

A. It would be sixty cents off of that, yes.

Q. And if it was two dollars for your peaches it would be seventy cents off of that, and if it was only a dollar you received for your peaches, it would be fifty-five cents off, is that right?

20 A. That is right.

Q. Now, Mr. Miller, I want to ask you one other question—I think possibly I asked you before, but to make sure I will ask you again—with respect to why you gave your notice to the John Repp Ice & Cold Storage Company on the 16th; why did you give that notice on the 16th?

A. Because I knew by the contract —

30 Mr. Cole: How is his motive competent? He did it on the 16th, and that is all we are concerned about. I object to the reason for doing it.

Mr. Marshall: I will withdraw the question.

Q. When did you realize, Mr. Miller, that you would not be able to recover out of this matter without filing a claim for damages?

Mr. Cole: I object; I don't think it makes any difference when he realized it. The contract states the conditions; his realization of them is of little moment. It reads, "Claims for damages must be made in writing within seventy-two hours after discovery of the damage otherwise they are waived." Now, we have the facts in this case as to the notice he got from us, as to what he knew; now, for him to state a conclusion or opinion it seems to me is improper.

10

The Court: Well, I understand he is not asked to do that; he is asked to explain why the notice was not given earlier, I presume.

Mr. Cole: Then I object on the further ground that it is irrelevant.

The Court: I think the question is objectionable in that form. I do think it is competent to show, 20 as there has been some evidence thus far, to show what was done by the parties, what negotiations there may have been prior to that time, so that it may be ultimately a question for the jury.

Q. When did you get your returns from the peaches that you had shipped from the cold storage plant?

Mr. Cole: I object to that as being irrelevant 30 and immaterial.

Mr. Marshall: I submit to the Court that that would be one guide by which Mr. Miller or any other bailee in the storage would know that he was up against a loss. He had been there for two days,

probably not realizing whether he was going to realize a loss or not. That is my purpose in asking that question.

The Court: Yes, as I recall the testimony, Mr. Miller was at the plant on Tuesday the 13th.

Mr. Avis: He was there Monday.

10 The Court: He took his equipment there Monday but made no attempt to move any of his property until Tuesday; I think that was his testimony; so that it might very well be that having examined the peaches on Tuesday he would be chargeable with notice from that time of the defective condition.

Mr. Marshall: Yes.

20 The Court: Isn't that within the time limit fixed by the contract itself?

Mr. Marshall: No, the contract says seventy-two hours from the time of discovering the damage, and my effort now is to show that Mr. Miller, together with the other men, did not know at that time that there would be any damage; they were there in an effort to get their fruit out, to market their fruit, and that is what they did, and it was on the next day, Wednesday, that they found it was impossible  
30 to handle it and to do it, and therefore they filed the claim for damages.

Mr. Cole: I just want to get myself on the record. I don't think it makes any difference about negotiations that may have been had, for the reason that there is no suggestion in the pleadings in this case

that we have waived any rights. They rely on this contract. We set up their failure as a defense. Now, we have the fact that we notified them a week before that we could not care for these peaches; we have the fact that the plaintiff was there on Monday and prepared to take the fruit away, that he was there on Tuesday and discovered that the fruit was damaged. Now, it is the damage to the fruit that this contract speaks about, I think, and not the damage he is going to suffer. He could not help but be damaged if the fruit were damaged; that would follow unescapably. 10

The Court: "Claims for damages must be made in writing within seventy-two hours after discovery of damage, otherwise they are waived." Well, of course, I am not going to dispose of that question now, but I will admit the testimony that is now offered subject to this objection and overrule the objection. 20

(Exception noted for the defendant.)

(Question repeated.)

A. When did I receive my returns?

Q. Yes.

A. I think it was on about Thursday from the first lot I had packed.

Q. Are you able to tell us when you made discovery of your damage? 30

Mr. Cole: That calls for a conclusion on this contract or his opinion of the contract, his interpretation of it.

The Court: Yes.

Mr. Marshall: I take it, if the Court please, the damage would be the damage that would probably result from some failure on the part of the defendant company, but the plaintiffs would not know what their damage was until they had tried at least to see what could be done with what they had; that is when they would learn what their damage was.

The Court: Well, Mr. Marshall, that question  
10 might involve the determination either of a legal question or a question of fact, either for the Court or jury. I think it is entirely competent to show all that he did and what he did discover in reference to the condition of the peaches, but you see, his answer to that question might be dispositive of what would be a very vital question in the case.

Q. On Monday, you say, you told us, I believe, you hauled your equipment over there, didn't you?

20 A. Yes.

Q. What time did you get over there on Tuesday?

A. We generally got over there about seven o'clock in the morning.

Q. Do you remember what time you got there that morning?

A. I can't say exactly, but I judge it was seven o'clock in the morning.

30 Q. And you started in then to take your fruit out, did you?

A. Yes, sir.

Q. Did you at that time know that you had sustained any damage?

Mr. Cole: It is the same question; I object to it, and beside, we have had this before; this is repetition.

The Court: I sustain the objection to the question in that form.

Q. What did you do on Tuesday?

A. I started packing out some of these peaches as they got them to us.

Q. Prepared them to ship away, did you?

A. Prepared them to ship.

Q. And you shipped them, did you?

A. I shipped them.

10

Q. And when did you get your returns of those?

A. I think I got it on Thursday; I couldn't positively say about that date, but they generally mail out their checks right away as soon as the sales are made in New York.

Q. You think you got it on Thursday.

A. I think I got it on Thursday.

Q. Was that the first knowledge that you would have in regard to what your returns were of what you had shipped out of the plant on Tuesday?

20

A. That would be, yes.

Q. What did you do on Wednesday?

A. On Wednesday I started to pack another lot.

Q. Did you ship some on Wednesday?

A. I shipped some on Wednesday.

Q. You had not yet received any word on the Tuesday shipment, had you?

A. No.

Q. Then you got your first knowledge of the returns on Thursday?

30

A. I think it was Thursday.

Q. And filed your notice on Friday?

A. I filed my notice on Friday, yes, sir.

Q. Did you notice how any of the Repp employes were dressed while they were taking the fruit out?

A. I noticed how some of them were dressed.

Q. How were they dressed?

A. Had gumboots on; some might have had shoes.

Cross-examination.

By Mr. Cole:

Q. Now, Mr. Miller, will you please re-state, so that there may be no misunderstanding about it,  
10 what you say is to be deducted from —

A. From the price?

Q. Yes.

A. Whatever the price might be —

Q. The cost to you?

A. There has got to be ten percent commission, twenty-five cents for carting, if you are carting to New York or Newark, ten cents packing per bushel.

Q. That means sorting?

A. That means sorting, grading.

20 Q. Yes.

A. And ten cents storage.

Q. What about the basket?

A. The basket goes with the fruit.

Q. Don't you pay for that?

A. I pay for it.

Q. What does it cost?

A. What did the package cost? It cost at that time two dollars and sixty-five cents or sixty cents a dozen.

30 Q. Twenty-two cents?

A. Twenty-two or twenty-four.

Q. Are they bushel baskets?

A. They are bushel baskets.

Q. Or five-eighths?

A. They are bushel baskets, bushels.

Q. You sort those or pack those in bushel baskets to ship them, don't you?

A. Yes, sir.

Q. Now, what do you say the storage is?

A. I say the storage is ten cents per basket, five-eighths baskets.

Q. Five-eighths—what would it be on the bushel?

A. What would it be on the bushel? I never stored any bushels.

Q. Anyhow, your storage was how much on a five-eighths?

A. Ten cents.

10

Q. It would be more, of course, Mr. Miller, wouldn't it, for the bushel basket, than the five-eighths?

A. I would naturally suppose so.

By Mr. Marshall:

Q. In other words, your storage was ten cents for a five-eighths basket?

A. For a five-eighths basket; that is the only way 20 we stored.

Q. And three more eighths would make the charge for the number of eighths that would make a bushel?

A. I would suppose so.

PLAINTIFF RESTS.

30

Mr. Cole: Will your Honor hear a motion from me?

The Court: Yes, I will hear the motion at side bar.

(Court and counsel then adjourned to the Judge's room.)

10 Mr. Cole: If it please your Honor, the defendant moves for a non-suit upon the following grounds: 1. By the terms of the contract, which is the sole basis of the action, it is provided, "This contract is for number of packages only; the storage company has no knowledge of contents and condition; it is not responsible for damage to perishable stock."

Mr. Avis: Pardon me, Judge, that original contract uses the word "goods" instead of "stock."

20 The Court: It is "stock" in the copy.

Mr. Avis: I think there is an error in it; I don't know that it makes a bit of difference.

Mr. Marshall: It makes no difference for the purposes of this motion.

30 Mr. Cole: The stock or goods were in fact perishable, therefore there is no liability. Second, the contract contains this clause: "Party of the second part shall not be responsible for failure to maintain any given temperature unless same is caused by its negligence." The burden of proof by the terms of this contract is on the plaintiff to show that there was negligence in not maintaining a given temperature, and there is no such proof. Third, the

contract provides, "Claims for damages must be made in writing within seventy-two hours after discovery of damage, otherwise they are waived." The plaintiff discovered the damage to the peaches and did not serve a written notice within the seventy-two hours. Fourth, there is no evidence in this case of any negligence on the part of the defendant that is properly averred in the complaint.

The Court: (After argument.) The first ground 10  
on which the motion for non-suit is based, that provision in the contract in which it is stated that the storage company has no knowledge as to contents of the packages and condition and is not responsible for damage to perishable stock, I think undertakes to read in or insert in the contract a restriction on the bailee's liability which is counter to the requirement of the Warehousing Act that no provision shall be effective in such contract or warehouse receipt which shall relieve the bailee of the duty of 20  
exercising the care that a reasonably careful man would exercise with regard to his own property. I may say that I feel that under the pleadings in this case the plaintiff has undertaken to show a loss, and that that loss was due to the negligence of the defendant in the care that it took of the property which was stored with it. I think that there is evidence from which the jury would be justified in finding, if it saw fit, not only, of course, that the loss did occur—they are bound to find that as the evidence 30  
stands—but further that that loss was due to the failure to exercise the degree of care which the law required of the defendants in the custody of the plaintiff's property. I think the jury might find that there had been a failure to maintain a temperature which a reasonably careful person would have main-

tained under the circumstances, and that that was due to negligence. Now, as to the claim for damages—I may be wrong in my computation, but the evidence as it stands is that the claim was written out on Thursday, which I think was the 15th, and delivered to Mr. Repp on the 16th. Suppose the damage had been discovered on Tuesday, would that not bring it within the time limit?

10 Mr. Cole: Discovered at seven o'clock on Tuesday morning and it was not served until 9 o'clock.

The Court: So your thought would be that it was not strictly within seventy-two hours?

Mr. Cole: I do not see how it could be under the most favorable interpretation for the plaintiff.

20 The Court: What I am getting at is this, Judge, if the loss was discovered or the damage was discovered at 7 o'clock on Tuesday and notice given at 7 o'clock on Friday, that would be within the time, would it not, or six o'clock? I only want to get your thought.

Mr. Cole: Three times twenty-four hours after the time he had knowledge.

30 The Court: Now, I take it that that provision in this contract, that claims for damages must be made in writing seventy-two hours after discovery of damage, otherwise they are waived, being in the nature of a forfeiture, certainly would have to be construed strictly against the party who seeks to take advantage of it, and in that situation I certainly cannot hold as a matter of law that under the evi-

dence in this case the plaintiff has precluded himself from any recovery by his failure to comply with that clause in the contract. I say that for more than one reason. It is not entirely clear what the duty is that that clause imposes upon the bailor. For instance, it says, "Claims for damages;" it does not necessarily follow that that means that the seventy-two hours were to begin to run as soon as the plaintiff went to the storage warehouse and found perhaps that his peaches were soft or were not in the condition that he thought they ought to be, because he might have felt there might be some loss then, but he at that time had no basis for a claim of damages and did not know whether he would suffer any damages. Again I cannot say that that clause means, as a matter of law, so as to preclude the plaintiff from any recovery in this case as presented, that claims for damages must be made in writing and must be served upon the other party within seventy-two hours. Clearly he made his claim, that is, he did not present it, but he prepared a claim which was served the following morning. I do not think I would be justified in holding as a matter of law that the plaintiff should be non-suited on the ground of waiver under that provision of the contract. I think what I have already said would apply to the remaining grounds urged that there was no evidence of negligence within the purview of the complaint. I may say now that I am not so sure—counsel has cited cases showing the views of other Courts in other jurisdictions—as to whether the presumption as to negligence arising from the return of goods in a damaged condition applies to perishable stock. If that were the only basis on which I could feel that I could properly put my action in refusing a non-suit, I certainly

would not be willing to go so far as to say that that rule, the ordinary rule, did not apply in this case under the evidence in this case. For instance, the jury can find from the evidence that peaches in the condition that these peaches were at the time of storage should under normal storage conditions last a month, and the evidence is that they were found to be deteriorating within two weeks, I think, something like that, after the first were stored. I am  
10 mentioning that because I would like counsel to give me any help that they can on that question as to whether the rule I have mentioned that has been discussed would apply in a case of this sort, or whether under the evidence in this case it would be a question for the jury to determine whether the presumption is applicable.

Mr. Marshall: I know of no New Jersey cases on  
20 the subject.

The Court: No, I don't think there are any.

Mr. Cole: I am resting my motion on the theory that that contract controls, certainly with respect to the question of negligence when it says—and that is the only ground of negligence that is attempted to be shown here—that we are not liable for failure to maintain any given temperature except we are  
30 negligent, and there is a burden on them to show that. Of course, I make the further point—your Honor probably won't follow me—but when we talk about negligence there, we talk about some active work on the part of the defendant and not mere inaction; when it says we are liable for negligence, that means some affirmative act.

The Court: It is your theory that they must show an affirmative act of negligence, is it?

Mr. Cole: Yes.

The Court: Well, the motion will be denied.

(Exception noted for the defendant.)

(At this point a recess was taken until 1:30 10 o'clock, P. M.)

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THE CASE FOR THE DEFENDANT.

ADELAIDE C. PARK, SWORN.

By Mr. Avis:

Q. Where do you live? 20

A. Glassboro.

Q. What is your employment?

A. Stenographer.

Q. With whom?

A. John Repp Ice and Cold Storage Company.

Q. How long have you been employed by them?

A. Over eight years.

Q. You were in their employ September 9, 1927?

A. Yes.

Q. I show you a letter marked Exhibit P2, and ask 30 you if you prepared that letter?

A. It was under my supervision.

Q. Prepared under your supervision?

A. Yes.

Q. What did you do with it after it was prepared, if anything?

A. I mailed them.

Q. You mailed it?

A. I did.

Q. To Mr. Miller this one. When did you mail it?

A. On Friday night, September 9th, 1927.

Q. Do you know about what time?

A. I think it would go out in the 5:30 mail.

Q. Before 5:30 was it?

10 A. Yes.

Q. Where did you mail it?

A. Glassboro Post-office.

Q. Was it in an envelope addressed to Mr. Miller at that address?

A. Yes.

Q. Was postage on it at the time it was mailed?

A. Yes, it was.

20 Q. I show you a sheet headed in red type "1926" and also headed "Peaches stored each day" and ask you whether you had anything to do with the preparation of that sheet?

A. Yes, I made it out.

Q. What did you make it out from?

A. From our records at the office.

Q. You keep a book record from day to day as matters happen and transpire, and this is taken from that?

A. Yes.

Q. Is this a correct copy of that record?

30 A. Yes, it is.

(Marked for identification.)

Q. I show you another paper headed in red type-written figures "1927, Peaches stored each day" and ask you if you prepared that paper?

A. Yes, I did.

Q. And what form, what did you use in the preparation of it?

A. From our book record at the office.

Q. The same record you used for 1926, the same style of record?

A. Yes.

Q. That is accurate in accordance with the books as to what it states there?

A. It is.

10

(Marked for identification.)

Q. I show you another paper headed "Comparative Summary peach season storage 1927, 1926" showing "name of storer," "amount of contract" "baskets in storage" for the two years, "when storing began" and "storing finished" and when the "removal began," and ask you if you prepared that?

A. I did.

20

Q. From what did you prepare that?

A. From our book record.

Q. The same book records that were kept each day as things occurred down there?

A. Yes.

(Marked for identification.)

Cross-examination.

Mr. Marshall: No questions.

30

WM. H. PARKHURST, SWORN.

By Mr. Avis:

- Q. Where do you live, Mr. Parkhurst?  
A. Hammonton, New Jersey.
- 10 Q. What is your business?  
A. Principally growing peaches.  
Q. How long have you been growing peaches?  
A. 25 to 30 years.  
Q. How many acres, how many trees of peaches have you been using or having each year, about, Mr. Parkhurst?  
A. Between 7,500 and 10,000 trees.  
Q. How many peaches does that mean each year, about. It depends on the season, does it?  
A. Ordinarily, about 20,000 to 25,000 crates.
- 20 Q. Have you given your personal attention to the growing of peaches?  
A. I have.  
Q. Studied the condition of the crop, and cause and effect of weather for a number of years?  
A. I have.  
Q. What is the difference in the texture or composition of peaches, directing your attention to Elbertas, in a relatively wet season, or a relatively dry season, the comparison of the texture?
- 30 A. In seasons of excessive rainfall, and during the growing and development of the peach, the excessive rainfall and the lack of sunlight will cause the fruit to be tender.  
Q. What do you mean by cause it to be tender, Mr. Parkhurst?  
A. The fruit will have more moisture in it than it would in an ordinary season.

Q. And what effect upon the fruit has that with relation to its preservation and keeping or ripening or both?

A. It would be likely to ripen very quickly, and would not keep as well.

Q. In 1927, directing your attention to that year, what was the condition of the Elberta fruit which you grew, with reference to its moisture or tenderness?

Mr. Marshall: Objected to, not being binding on the defendant. He is over in Hammonton, unless they show the weather conditions there are exactly the same as they would be in our locality.

10

Mr. Avis: It is a question as to his experience there. It is not very far away, and we would tie it up with similar conditions locally. He is an expert in the growing of peaches, and we expect to show that the same condition existed in Glassboro as well as Hammonton.

The Court: Your offer is to show the results of this condition in his territory, and show that similiar conditions prevailed here.

(Objection overruled.)

(Exception noted for plaintiff.)

(Question repeated.)

30

A. The fruit was very tender, and the Elberta peach was very tender and had a surplus of water in it.

Q. Have you any experience in peaches being

picked and allowed to remain in the sun for two or three hours before either shipping or storing?

Mr. Marshall: I object to that. It is not based upon any of the testimony produced by the plaintiff at this time.

The Court: Objection overruled.

10 (Exception noted for plaintiff.)

Mr. Marshall: My objection is based on the fact that there is no testimony at the present time that shows that the plaintiff's peaches were permitted to remain in the sun a number of hours.

The Court: I understand that, and I am admitting it on the offer of counsel to show evidence that that situation in this case occurred.

20

(Question repeated.)

A. Yes.

Q. Would the effect of that be to do any injury to the peach so far as its keeping qualities were concerned?

Mr. Marshall: Objected to as leading.

30 The Court: Yes, objection sustained.

Q. What effect, if any, would that have on the peach with reference to its keeping qualities?

A. The peach would go down very rapidly.

Cross-examination.

By Mr. Marshall:

Q. Why were you hesitating so long, Mr. Parkhurst, to recall a time when peaches had been picked by you and allowed to remain in the sun for two or three hours before removal? Did you have difficulty in recalling an incident of that kind?

A. I was trying to think of some specific time that that had occurred. 10

Q. What time did you learn that that did occur. When did that occur, according to your recollection now?

A. The peach season of 1927.

Q. You had experience in 1927?

A. Yes.

Q. Where you had picked some peaches and allowed them to remain in the sun for how many hours? 20

A. I don't like to specify the exact number of hours.

Q. According to the best of your recollection?

A. From two to five hours.

Q. Then what did you do with them after that?

A. They were taken to the fruit stand on the White Horse Pike.

Q. And sold from the fruit stand?

A. Yes.

Q. You then don't know of any incident where you have done that and placed these peaches in storage, do you? 30

Mr. Avis: Objected to. This witness is not called as a storage expert at all, purely with relation to his knowledge as to peaches.

The Court: Objection overruled.

Mr. Avis: My theory is that it is not cross-examination, and I ask for an exception.

(Exception noted for defendant.)

(Question repeated.)

10 Mr. Marshall: That is, peaches exposed to the sun for a period of two to five hours.

A. No.

Q. You are not prepared to say whether such peaches would keep or would not keep from any actual experience?

A. Not from actual experience.

20 Q. You say that during 1927 that you were growing 25 to 35 acres of peaches. Did you store any of your peaches in cold storage?

A. I did not say I was growing 25 to 35 acres of peaches.

Q. How many acres did you grow?

A. Between 50 and 60 acres.

Q. During 1927 you were growing peaches on 50 to 60 acres near Hammonton, and did you have any of your crop of Hale or Elbertas, or did you handle Hale?

A. We handled Hale.

30 Q. Hale and Elbertas. Did you place any of them in cold storage in 1927?

A. Only in a small way, an experimental way.

Q. You mean you were experimenting in cold storage itself for the first time, or experimenting with Hale and Elbertas?

A. I was experimenting with Hale and Elbertas in the local cold storage place.

- Q. What cold storage place was that?  
A. Known as the Littlefield Ice and Coal Company.  
Q. Where is that located?  
A. Hammonton, New Jersey.  
Q. What is the capacity of that plant?  
A. I can't tell you what the capacity is.  
Q. How many did you put in there. How many baskets of peaches did you put in there?  
A. From between 200 to 500 bushels. 10  
Q. How long did you leave them in there?

Mr. Avis: Objected to. I was letting him go to the point where it seems to me it is objectionable. We did not ask this witness anything about peaches in cold storage. I do not know what the idea of Counsel is, but whatever it is, it is an effort, apparently, to open up a matter which your Honor ruled out yesterday. I object to it on that ground, and it is not cross-examination. 20

The Court: I don't think it is new ground. I think it is part of the defense of the defendant company that peaches during the year 1927 were generally not up to par, that is, they had an excess of water, and that they had an excess of water and lacked sugar. The peaches did not have keeping qualities. This man is offered as a witness and he is testifying as to what he found the condition of the produce of 1927 to be. It does open up a matter 30 that was not within the scope of the direct examination, clearly. I will sustain the objection that it is not proper cross-examination.

Q. You mean then Mr. Parkhurst to confine your testimony to the condition of peaches in 1927, and

don't undertake to tell us anything about the keeping qualities of fruit, do you?

Mr. Avis: Objected to, as not being cross-examination, and not a fair question.

The Court: Objection sustained.

10

LATON M. PARKHURST, SWORN.

By Mr. Avis:

Q. Where do you live?

A. Hammonton, New Jersey.

Q. What is your business?

A. Peach growing and apple growing.

20 Q. How many acres of peaches or number of trees?

A. About 4,000.

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

A. About 40 years.

Q. Can you tell us from your experience what the effect upon a peach of a large amount of water, or an unusual amount of moisture or rainfall is?

A. Makes it weak in transportation and keeping.

30 Q. How about the year 1927. Can you tell us what the conditions were then with relation to Elberta peaches?

A. Before they were really ripe, they kept fairly well. As soon as they ripened, they began to go fast, very fast.

Q. Was it a year when there was moisture?

A. Excessive.

Q. Was excessive moisture the cause?

Mr. Marshall: Objected to.

Q. What, in your opinion, was the cause of the Elberta peaches in 1927 being weak in either storage or transportation?

A. Water, rapid growing, and murky, nasty weather.

Cross-examination.

10

By Mr. Marshall:

Q. You say, then, that peaches in 1927 were weak in storage, do you?

A. Yes.

Q. What kind of peach are you referring to?

A. Elbertas.

Q. Any Hale peaches?

A. Yes, sir.

Q. When you say weak in cold storage, did you mean they did not keep in cold storage? 20

A. That is what I meant.

Q. Didn't keep at all?

A. Didn't keep well.

Q. How long would they keep, and keep properly?

Mr. Avis: Objected to.

The Court: He said they didn't keep well, so the objection is overruled.

30

(Question repeated.)

A. It depends on their condition when they went in.

Q. If you had dry weather when they went in, would they be apt to keep?

A. Yes, sir, providing the conditions were favorable.

Q. And if it was not excessively hot they would be bound to keep, or were quite sure to keep?

A. If they were in favorable conditions.

Q. Would you say if it was dry, Mr. Parkhurst, and was not excessively hot, that the peach would have a pretty good chance of keeping in cold storage?

10 A. If properly handled.

Q. Properly handled, you mean by those who hauled, picked and carted in storage?

A. Yes, sir.

By Mr. Avis:

20 Q. What is the effect of the sun upon peaches after they are picked, if they are allowed to be in the sun for two or three hours?

Mr. Marshall: Objected to, on the same ground as my former objection.

The Court: The same ruling. Objection overruled.

(Exception noted for plaintiff.)

30 (Question repeated.)

A. If they were handled within two or three hours, the deterioration would probably be trifling. I don't think it would amount to a whole lot.

Q. If standing in the sun on a wagon in the road, waiting to be put in storage, would that have any effect?

A. It is natural to expect it would, yes, sir.

By Mr. Marshall:

Q. But that fruit, when placed in storage of proper temperature, that would cure the defective peach?

A. I don't think so. It would take that much out of the original peach, abuse.

Q. A peach that would stand out on the roadside for two or three hours before being placed in storage?

A. Yes, sir.

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CHARLES F. REPP, SWORN.

By Mr. Cole:

20

Q. What is your business?

A. Fruit growing and cold storage.

Q. How long have you been in the cold storage business?

A. Since 1884.

Q. Continuously?

A. Yes, sir.

Q. Where did you begin?

A. Where?

Q. Yes.

30

A. Glassboro.

Q. Did you construct the present plant?

A. That was built in 1905. I built it, yes, sir.

Q. What has been your relation to that plant since it was built?

A. I have been manager.

Q. Do you remember the summer and fall of 1927?

A. Yes, sir.

Q. You recall the contract in question here between the defendant and Mr. Miller?

A. I do.

Q. Do you recall when he began storing peaches under this contract?

A. Yes, sir.

10 Q. And when he stopped storing under the contract?

A. Yes, sir.

Q. Did there come a time when you went to see him about his peaches?

A. Yes, sir.

Q. State that time, please?

A. It was Monday morning.

Q. What date?

A. Labor Day.

20 Q. 1927?

A. Yes, sir.

Q. Do you happen to recall what day of the month that was. If so, tell us?

A. Fifth of September.

Q. Where did you see him?

A. He was on the road from up a lane from the main road that runs from Aura, that goes to —

Q. Did you hunt him out?

A. Yes, I hunted him.

30 Q. What did you say to him?

A. I said, "Mr. Miller, the temperature in the cold storage is not satisfactory. I did not get the temperature down over Sunday as I expected and I ask you not to put any more peaches in."

Q. What did he say?

A. He said, I don't know what else to do with

them. Today is Labor Day, there is no market. I said, get your packing house force going, and put them into bushels, and put them in refrigerator cars, which I will ice up, but do not put any more into cold storage. He says, I have no bushels. I said, I have lots of them, and will have them in your packing house inside of an hour if you say the word. He said, I do not want to take my force from the packing because they are getting overloaded, and I want to take them off if possible not later 10 than tomorrow, and then I would like to take my force and pick the peaches. I said, if that is what you want to do, I will ice up some refrigerator cars standing on the track. Place your peaches into five-eighths baskets in these refrigerators cars, which is colder than my cold storage. Then, after you get your peaches picked, take them out of the five-eighths baskets and put them into bushels and ship them. The demurrage on the refrigerator cars will be less money for you than storage charges would 20 be, and I do not want to put any more in storage. He says, I do not want to do that, but if you will take these peaches, I will guarantee to store, to take them out immediately, as soon as I get through picking. I says, it is against my judgment, but we will put them in the ice house. On that Monday morning —

Q. Was that about all the talk you had, as far as you can recall?

A. Yes. 30

Q. What happened then?

A. What I did?

Q. Yes.

A. I went from there to Mr. Porch, Howard Porch, saw him and his son —

Q. I don't care about that. What did he say as

to whether he would put the peaches in the ice house?

A. He says, I am going to send them and put them in the ice house.

Q. You say he told you he would take them out Wednesday morning?

A. He said, I guarantee to take them.

Q. How many peaches did he store between that date and the finish?

10 A. I will have to refer to these records. He had about 600 baskets in cold storage Monday morning, put there before I left. These loads Mr. Eifurt testified to was on the truck before I left to go to Mr. Miller's. I examined the peaches and found they were very soft.

Mr. Marshall: Objected to as not responsive.

20 Q. How many peaches were stored between the time you had the talk and the finish of his storage?

A. As near as I can get it, about 5,000 baskets.

Q. Were they put in the ice plant?

A. Most of them were.

Q. Did you tell him why he ought to put them there?

30 A. Because in the ice plant, Judge, we have greater expansion in that building, and there is less space and area to cool off than there is in the main cold storage building, and we didn't have as many peaches in there.

Q. Did you think his peaches would be better preserved there than in the main building?

A. Yes, but I didn't —

Mr. Marshall: Objected to. He has answered the question.

Q. When did you next see Mr. Miller?

A. About—he finished picking on Tuesday after Labor Day, and I think it was on Thursday he came over there.

Q. He came to you?

A. Yes, I was there.

Q. What took place?

A. I told him the condition of the cold storage room, that it was impossible for me to bring the temperature down where I liked, and that I would 10 advise him to proceed to take them out.

Q. What did he say?

A. He said there was no market. He didn't know where to put them.

Q. When next did you see him?

A. I don't remember that I saw him before Monday.

Q. What, if anything, took place on that day?

A. I don't think anything in particular. There was quite a jam around there. So many people trying to get it out I don't remember anything. 20

Q. When next you saw him, what took place?

A. He was around about there all day Tuesday. I am not sure about this date. It was Wednesday or Thursday, but I was up to Woodbury, and when I came back, he came into the office with Mr. Porch and Mr. Mawson.

Q. Tell us what took place at that time?

A. And they came in the office and said they would like to have a talk about peach conditions, 30 and I said I am expecting to hear this, and they said what are you going to do about it. I said, what are you going to do. Mr. Mawson said, I am the spokesman for the group, and we had a conference last night with Mr. Watkins, and Mr. Watkins said for us not to take out any more peaches until

- you had had a talk with Mr. Watkins. I said, I will get in touch with Mr. Watkins and see what he means, and I said I will go directly to Woodbury and you fellows stay here, and as soon as I have a conference with Mr. Watkins I will let you know what takes place. I came to Mr. Avis' office and he telephoned to Mr. Watkins' office, and the information he got was that Mr. Watkins was in Ocean City and was not to be seen. And then I called Mr.
- 10 Mawson on the telephone at our office and told him Mr. Watkins was out of town and had been, and that he must have been mistaken. He said the facts were that we were not talking with Mr. Watkins. We were talking with Mr. Marshall, and that Mr. Marshall would be the man to talk to me about it. Directly after that Mr. Avis and I went into Mr. Marshall's office, and he called Mr. Watkins on the phone, and over the phone they made arrangements to have a conference in Mr. Watkins' office next
- 20 morning. Mr. Mawson asked me over the phone if I would meet with this group, and I told him I didn't care to, and I told him I didn't care to, because I wanted these men to have a free and open discussion of the situation without any hindrance from me being present, and the best way to handle it would be to have a representative group there, that group to meet in Mr. Watkins' office to devise some ways and means of disposing of these peaches, and I did not care to attend.
- 30 Q. Did you go to Mr. Watkins' office?  
A. I did. I went the next morning.  
Q. What took place?  
A. These men said they could not handle their peaches because of the condition of the peaches and it did not pay them to do it, and they would not have a thing more to do with them. Then I said it

was up to me to handle, and they said as far as they were concerned, yes.

Q. Did Mr. Miller remove any of these peaches during the period of these what I will call negotiations?

A. He did not.

Q. Did you remove any of them?

A. Not during that period, but after that I did.

Q. Did he remove any of them after the negotiations?

10

A. I think not.

Q. When was it Mr. Miller did remove some of the peaches?

A. On Tuesday, and if I remember right they quit sorting peaches about 9 or 10 o'clock Wednesday morning.

Q. What became of the remaining peaches. He didn't take them all out, did he?

A. No, only a few. A couple of thousand baskets.

Q. What became of the others?

20

A. I sold part of them.

Q. Where did you sell them?

A. I sold them to the Philadelphia market.

Q. On what dates did you sell any of them?

A. From the 16th of September up to the 29th.

Q. Did you take peaches that belonged to other persons than Mr. Miller?

A. Yes, we were getting them out as fast as we could.

Q. Did you direct the sending of the letter to Mr. Miller under this 72-hour clause?

30

A. I did.

Q. Was that before or after you had your first talk with Mr. Miller?

A. That was after the first talk, on Thursday after Labor Day, and that letter was mailed out the next day, which was Friday.

Q. One or two witnesses have said that when the talk began on one of these occasions you testified, you said "Well, I have anticipated this." You said you said you expected this. What did you mean to expect?

Mr. Marshall: Objected to.

Mr. Cole: The inference that other witnesses,  
10 I think, sought to convey was he meant he was expecting that the peaches would be damaged, and I say that that is not what he intended. I think he has the right to say what he was talking about.

The Court: Objection overruled.

(Exception noted for plaintiff.)

A. I was told there was a meeting at Mr. Marshall's house the night before, and they would be out  
20 to see me, and I was expecting it.

Q. And that was what you referred to when you said "I was expecting it"?

A. Yes.

Q. How many peaches in baskets did you have in that plant between the 1st and 10th of September, we will say?

A. What year?

Q. 1927?

A. 117,326.  
30

Q. Did that include those that were in the ice house?

A. Yes, that included what was in the ice house.

Q. Can you separate them? Can you say —

A. No, I can't do that.

Q. How many baskets of peaches did you have stored in your plant at the same period of 1926?

A. 122,932.

Q. Did you have any difficulty in maintaining a preserving temperature in 1926?

Mr. Marshall: I object to that.

The Court: Objection overruled.

(Exception noted for plaintiff.)

A. Yes. When you are putting in a large amount  
of peaches ———

10

Mr. Marshall: Objected to as not responsive.

Q. Did you have any peaches that decayed or spoiled in 1926?

Mr. Marshall: Objected to, as not having any bearing on this issue.

20

The Court: Objection overruled.

(Exception noted for plaintiff.)

A. We had an accident at the plant in 1926 that caused some small damage.

Q. What was the character of it?

A. One was the shaft on the brine pump that circulates the brine through the cold storage room crystallized and broke and was out of commission for about 18 hours.

Q. Barring the time of this accident, was there any other period you could not in 1926 maintain the proper temperature?

A. I never maintained a low temperature when I

30

was putting in a large volume of peaches any year for the last 20 years.

Q. What about after they were in?

A. Just as soon as I closed the doors and got the men out of the cold storage who were putting the peaches away, the temperature would immediately fall.

10 Q. Barring the period of this accident in 1926 did any peaches spoil in your plant because of inability to maintain the temperature after you closed the doors?

Mr. Marshall: Objected to, as not being pertinent to this issue.

The Court: Objection overruled.

(Exception noted for plaintiff.)

20

A. A very small quantity.

Q. What is the character of the construction of this plant?

30 A. The cold storage plant is composed of brick and steel structure, and part of it is reinforced concrete, insulated on the roof and on the sides and on the floor with four inches of cork board. The system that we use in our cold storage plant is what is known as the brine system. I have in that cold storage building about 600,000 cubic feet space of 100,000 feet of lineal pipe, of one and a quarter pipe. In other words, a foot of one and a quarter inch pipe for every six cubic feet of space. The ordinary specifications for a fruit storage —

Mr. Marshall: I object to that.

Q. What is the ordinary specifications for standard refrigerating plants with respect to lineal feet?

A. One foot to ten.

Q. What is yours?

A. One to six.

Q. Is that better or worse for keeping storage?

A. Better.

Q. Proceed.

A. The brine is circulated through these pipes. It is made cold in the ice and refrigerating plant, and in that department I have two machines, one is a 65-ton York and the other a 75-ton ammonia compressor. That means that they have the capacity of absorbing the heat from any object, equal to the melting of 150 tons of ice every 24 hours. In order to do that you have to have ammonia condensers and everything hooked up with it in unison, so you will keep the proper distribution of the fluid. My system is that I cool the brine into a tank that when I am not using for cold storage purposes I use it for the purpose of pulling ice, and when I start for cold storage I do not pull any of the ice out of this tank. In that tank I have 5,600 feet of one and a quarter inch pipe submerged in about 75 tons of brine, made with calcium chloride. These coils of pipe that are submerged in this brine contain ammonia, and the boiling point is 28 below zero, and that brine being circulated over these ammonia coils extracts the heat from the brine, and also when it is passing through the cold storage room it extracts the heat from your fruit or anything else in there. In 1927 there was no breakdown —

Mr. Marshall: I object to that as not responsive.

Q. Did you have any breakdowns in your plant in 1927?

A. I did not.

Q. Was this plant in 1927 during the period of the storage of the Miller peaches in good working order?

A. It was.

Q. Was there any difference in the character of the plant or its operation in 1927 than in 1926?

A. There was not.

10 Q. Is your plant—that includes buildings and machinery—a standard refrigeration plant?

A. It is. I didn't finish telling you the construction of the ice house.

Q. Proceed.

A. In the other building, where I stored about 30,000 bushels of peaches, is what we call our ice house. We built it to store ice in, and we use what is known in that building as direct expansion. The pipes are placed on the ceiling, and there is no brine in that building. Ammonia goes in these  
20 coils, 28 degrees below. It usually doesn't make any difference what the temperature of the room is, you start to get frost immediately, but where you use the brine system, of course, brine is much warmer, and you have more pipes, and you do not get frost unless you have the brine considerably below freezing point.

Q. Is there more than one building?

A. Yes.

Q. Is there a street between?

30 A. Yes, a street between.

Q. How are these plants tied up?

A. A six-inch brine pipe passes under the road in a tunnel. That is protected with granulated cork.

Q. How long have you been receiving peaches from Mr. Miller before 1927?

A. I think about two years, possibly three. I haven't got those records here.

Q. What about the question whether you were running this plant at its full capacity during the period of 1927 when this trouble occurred?

A. We were.

Q. What was your supervision over this plant? What did you do?

A. I had so many duties, I can hardly tell you.

Q. I am talking now about the operation of the plant?

A. As far as operation, I have a chief engineer, 10  
and I look to him for the operation of the machinery, and then I have a day engineer, and a night engineer. The chief engineer's duty is to keep the machinery in working order all the time, and I have a foreman, who has charge of the storing of the peaches and keep count as they go in and come out, see that they are stored in their respective places. That is his duty, and my job, of course —

Q. Do you have general supervision over the whole system?

20

A. Yes.

Q. Did you maintain a general supervision in 1927?

A. I did.

Q. During the period when these peaches were being stored?

A. I did.

Q. Any report made to you of anything wrong with any of the machinery?

A. There was not.

Q. You know that from your own examination?

30

A. I do.

Q. When did you discover or thought you discovered there may be some difficulty?

A. On Monday morning.

Q. You are certain about that. You say Monday morning.

A. Labor Day.

Q. How did that come about?

A. I didn't expect the temperature to be low while I was putting the peaches in, and I was not alarmed as to the condition while they were putting in this amount of peaches from the experience I had other years. The experience I had in other years as soon as the doors were closed, and I got the men who were working there out of there, the heat from their bodies out of the room, the temperature would be lower, and I was down there two or three times on Sunday. They were putting in peaches six o'clock Sunday morning. They worked all night Sunday night. Forty-five trucks were standing out in line at nine o'clock Sunday night. Some of them had as high as 600 to 700 baskets. When I went down Monday morning I saw the temperature had not fallen since I was there Sunday. I then became alarmed, and that was the cause of my going to see Mr. Miller and Mr. Porch, and Mr. Kincaid, James Kincaid, although I was hoping that the temperature would go down, and on Monday night I saw that the brine in the tank was melting the ice that is in the cans, and I knew if they would freeze up after they were thawed, it would ruin all these cans, they would burst, and so I got a ton of salt and put a scoop shovel full of salt on top of each and every can, knowing that would give the brine a little boost, which it did hold it a little, and of course, that salt immediately got to work on the ice and Monday morning or Tuesday morning that was all gone, and then I commenced to haul ice from Camden and I think some from Pitman. We mashed up the ice and bought a ton of salt and dumped in these 300 ice cans submerged in this tank.

Q. What was the object in that?

A. I knew that ice and salt which we used to preserve ice cream keeps a temperature of about nine above zero, and I was pretty sure that by putting in several hundred tons of ice and several tons of salt, it would help to keep the temperature in the building, and in addition to that I got what ice I could and pulled it in the aisles in the fruit storage where the peaches were, knowing that as that melted that would assist in absorbing heat units out of the peaches. 10

Q. How many tons of ice did you use?

A. I could not say offhand.

Q. Your best judgment?

A. I would say several hundred tons.

Q. Did you take any ice you used in the way you have indicated from your own plant?

A. I did not.

Q. You are sure about that?

A. Absolutely positive.

Q. It has been said here that the pipes were dripping water on the floor. Will you explain that? 20

A. Yes. We were circulating brine through the pipes at a temperature of about 38. That was the temperature of the brine in the ice tank, and the temperature of the room was about 50 to 52, and as this air ascended and struck the pipes, of course, it condensed, and that is what was dripping, the condensed air, just the same as a pitcher of water gets moisture on it on a hot day.

Q. Was there anything that you could have done more than you did do to lower the temperature after you discovered the situation? 30

A. I know of nothing to do. I spared no expense, or anything that I know of.

Q. Was there a reason for the inability to maintain a proper temperature?

A. I have never had that experience before, but from my experience with peaches, I knew that excessive rain and heat would cause the latent heat of the fruit to be higher than in the case where they were not produced in that kind of weather, although on the Saturday preceding Labor Day the thermometer was 90 out doors at the plant. It was, according to the Weather Bureau, it was 81, but Glassboro it was 90. I do not have the record of what it was  
10 the year before.

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

Q. In 1927?

A. On the Saturday before Labor Day.

The Court: It may be stricken.

20 Mr. Marshall: My motion was to strike out the latter part of the testimony.

Mr. Cole: I consent to it being stricken.

Q. Did this temperature outside have something to do with the ability to maintain the temperature inside?

A. Very little after you get the fruit in. Of course, hot fruit going in has all to do with it. After  
30 you get it in and closed up it has very little.

Q. Did you observe the character of the peaches in color?

A. I did.

Q. As they came in there?

A. I did. Previous to the Monday I did not, but all day Monday I did.

Q. What was the character of the peach that came in on Monday?

A. They were green in color, but soft in texture.

Q. Why is it that peaches that are wet, as you say, will require more cold to maintain the temperature than if not in that condition. What happens?

A. There is more water in them and less sugar, and the latent heat is higher.

Q. Does the presence of people in the plant affect your ability to keep the temperature down? 10

A. Oh, my, yes. I had 40 men employed there, and the heat from their bodies requires a great deal.

Q. What about the number of baskets of fruit that came to you within a certain period of time, say a week. Did you answer that question? How many came there during the week of between August 27th and September 6th?

A. Per day?

Q. Yes?

A. From everybody? 20

Q. Yes?

A. On August 27th, 1,930. 29th, 9,927. 30th, 11,560. 31st, 16,427. September 1st it rained in torrents all day.

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

The Court: Strike it out.

A. (Continued.) September 1st, 8,632. 2nd, 22-30  
012. On the Saturday, 27,085. Monday the 5th, 13,-  
269. On the 6th, 5,402. On the 7th, 750.

Q. Was that an unusual number of baskets to come within that period?

A. The Saturday previous to Labor Day and the Friday previous to Labor Day was the largest

amount of peaches I ever put in storage in any one day. Even Friday was.

Q. Was there any market for peaches at that particular time?

A. There was no market at all on Monday, Labor Day, and very little market on Saturday previous to Labor Day.

Q. How many trucks do you say there were there at times waiting to deliver peaches?

10 A. From three o'clock in the afternoon until nine o'clock Saturday night 45 in line all the time, 40 to 45.

Q. What was the condition of the weather?

A. The thermometer was about 90 to 92 outdoors.

Q. Sun shining?

A. Sun shining, yes.

Q. These peaches were exposed to the sun in the trucks?

A. Most of them about three hours.

20 Q. You had to have your doors open when they were being put in?

A. Yes.

Q. Were they open continually during that period?

A. No. I had a man up-stairs and down, whose duty it was to rush the door closed as soon as the man went through with the truck, and that is the only duties he performed during all the time, up-stairs and down.

30 Q. What was the object in closing the door as soon as the peaches went in?

A. To conserve the temperature inside as much as possible.

Q. You had men during 24 hours doing that?

A. Whenever peaches were coming in that was his job.

Q. No other duty?

A. No other duty.

Q. Is that the standard method to take them in through a door such as yours?

A. I only provide that when I put in peaches. I do not do it when storing apples.

Q. Why not apples?

Mr. Marshall: I object to that as not pertinent to this issue.

10

Q. Explain to the jury about these doors to this plant?

A. We call it an ante-room. We have a door built in a small room about eight by twelve. They have cold storage or refrigerator doors on them, and a man comes in through the first door, and he closes that door before he opens the one in the cold storage room, so the cold air from the cold storage does not rush out into the open air.

20

Q. You spoke about 40 men in there, and their presence sending off heat. What were they doing there?

A. Piling peaches.

Q. What became of them after they were piled up, after they were all in. Did they leave?

A. Yes.

Q. There was one day 8,632 put in?

A. Yes.

Q. What day was that?

A. Thursday.

30

Q. What was the weather that day?

A. Raining.

Q. Did these peaches get damp?

A. They were wet.

Q. Would that affect the temperature in your plant?

A. I would say not.

Q. Did it affect the ability to freeze the peach?

A. I would say not.

Q. What about the effect the next day when the sun came out on them if they had been in the rain. Would it make any difference to the peach, or the ability to keep them frozen?

A. Let me have that again.

Q. If these peaches are rained on, and the sun  
10 comes out and shines on them. Does that affect the peach?

A. Yes.

Q. Someone testified here these peaches were highly colored. Did you observe whether they were highly colored peaches or not?

A. I didn't have time to examine many peaches. Most of them were not highly colored.

Q. Will you tell us as much in detail as you can  
20 remember what you did yourself during the period that these peaches were coming in in this large number, up to the end when you found disaster was near?

A. I made myself busy around the plant, in the cold storage room, and among the men, and over in the engine room, and on the ice tank, and trying to get the trucks lined up so they could be unloaded. We had a lot of difficulty. Some of the farmers would try to get ahead of their neighbors, and we  
30 devised two or three schemes so that that would not happen. They would steal each other's turn getting up to the door, and it took me two or three days to get that straightened out. A great deal of annoyance and trouble was caused. I was there practically all the time, there during the night, and whatever was done, I tried to push the thing along as fast as I could.

Q. You were trying to save these peaches?

A. I was.

Q. Someone testified about there being water on the floor. If there was water there, where did it come from?

A. A little of it came from the ice that was melting in the room. A great deal of it came—it was not six inches deep as one person testified—but it would come from the condensation on the pipes.

Q. It has been testified that one or more men in this plant on some occasion was wearing a gas mask. Do you know about that? 10

A. Yes.

Q. Explain that, please, to the jury?

A. There was one man there that I employed to have charge of giving the slips out to the men as they brought their peaches, and try and keep the account straight. In the construction of the cold storage, the valve that controls the circulation is at the far end from the door, and these peaches were throwing off a lot of gas, and we had these peaches piled up, stacked six high. These baskets were one on top of the other, and it was dangerous for men to climb back over these peaches to see that the valves were open, and so I went and got a gas mask so he could go back there in safety and see if that was so, and several times after that he put the gas mask on. I don't know why. I will admit the gas was very bad in there. 20

Q. What do you say caused the gas? 30

A. It came off from the peaches.

Q. What would cause the peaches to emit gas?

A. In all my experience in 23 years of storage I never had it before.

Q. How do you know this gas was coming from the peaches?

A. There was nothing in there but the peaches.

Q. Nothing else there it could come from?

A. No.

Q. Could it have come from your plant in any way?

A. No.

Q. Could it have been ammonia gas?

A. No.

Q. Nothing of that sort?

10 A. No.

Q. You are not able to account for the gas except for the peaches?

A. That is all.

Q. You know Mr. Eifurt?

A. I do.

Q. Did you talk with him concerning the condition of Miller's peaches?

A. I did.

Q. About when was it?

20 A. Last Saturday afternoon.

Q. Anyone with you?

A. Mr. Mawson.

Q. Where did you see Mr. Eifurt?

A. His garage.

Q. Did he on that occasion tell you that all Miller's peaches were soft?

30 Mr. Marshall: Objected to as not binding on this plaintiff. I presume it is a question of contradiction, but I think it ought to be confined, and Mr. Miller is not present.

The Court: He was asked on cross-examination if he did not make a certain statement, which he denied. Now this is for the purpose of contradicting him, not binding on Mr. Miller, but only as affecting the question.

Mr. Marshall: I am objecting to that, because it should be predicated on questions as propounded to Mr. Eifurt.

Q. Did Mr. Eifurt tell you on that occasion that Miller's peaches were soft and nobody would expect them to be kept in cold storage?

A. He did.

Mr. Marshall: I object. I don't think that was 10 his testimony.

The Court: One question was, did you tell Mr. Repp that Miller's peaches were soft. He denied that. Did you tell him they were not fit to be kept in storage? That was substantially the two questions that were asked.

Mr. Marshall: His answer was no.

(Question repeated.)

20

A. Yes, he said that.

Cross-examination.

By Mr. Marshall:

Q. Did you ever have the air tested in the cold storage plant while the peaches were being stored there? 30

A. I did not. You mean as to humidity and density?

Q. Yes, and as to oxygen?

A. No.

Q. Did you tell any of the employes, Mr. Clements, you had tested the air as to oxygen?

A. I did not.

Q. Do you keep a chart showing the temperatures in your cold storage from day to day?

A. No, I did not.

Q. You used to, did you not?

A. I can explain that to you.

Q. Did you used to keep a chart prior to 1927 showing the temperatures?

A. We have self-recording thermometers.

10 Q. And did you have a circulation record?

A. Yes.

Q. That would be put out each day, so you could refer to the chart and get the temperature of the room at any hour throughout the 24 hours?

A. Yes.

Q. Have you discontinued that?

A. No.

Q. You still have that?

A. Yes.

20 Q. Was that in process in 1927?

A. I could not use it.

Q. For what reason?

A. The moisture from the pipes made the paper so damp that it would not stay in place. It crumpled up and we could not keep it straight.

Q. In the absence of that, did you make any other readings, thermometer readings?

A. I was not there every hour.

30 Q. Did you make any temperature readings of the room in the absence of this self-recording chart?

A. No.

Q. You don't have any record relating to what the temperature was in the cold storage from August 27th to September 6th, or even down to September 14th or 15th?

A. The charts would not work. The paper would not stay put.

Q. Independent of that you didn't have any record kept?

A. No.

Q. You spoke of the temperature in your cold storage plant once as being between 50 and 52, and assigned that as a reason for causing the precipitation on the pipes?

A. Yes.

Q. When was that?

A. That was practically all the time.

10

Q. During what time?

A. When they were putting them in, and the following week.

Q. Even in the morning when you would open the storage it would still be around 50 to 52?

A. Yes.

Q. When did you last draw ice out of the cold storage bin to sell to consumers prior to your peach season?

A. I never pulled ice out of the cold storage.

20

Q. You pulled ice out of your ice manufacturing plant?

A. Out of the tank we use for brine.

Q. Yes?

A. I would say it was all frozen solid. I can't tell you, but not for several days.

Q. Not within several days before?

A. Yes.

Q. Whose duty was it to turn on the brine in the cold storage plant?

A. Mr. Tice.

30

Q. Do you of your own knowledge know when he turned it on?

A. I do.

Q. Did you see him do it?

A. No, he didn't turn it on.

Q. He didn't turn it on?

A. No.

Q. Who did turn it on?

A. I could not tell you that.

Q. You don't know?

A. I don't know. It was turned on some time in the morning.

Q. Do you know what day?

A. Yes.

10 Q. What day?

A. About four o'clock in the morning, so they told me. That is all I know. It was turned on August 26th.

Q. On August 26th, the day before. How long would it ordinarily take you to get the room, the cold storage room which you were undertaking to prepare for the storage of these peaches, down to preserving temperature for the peaches?

A. At least two days.

20 Q. At least two days to get it down to storage temperature?

A. Yes.

Q. Do you know how many peaches you had contracted to put in your cold storage?

A. At that time?

Q. Yes.

30 A. Yes, if you will let me have Mr. Porch's contract there. He is the only one. In fact I don't think he signed his contract. He only told me. I don't think I had any contracts at all when I turned it on.

Q. He had a contract?

A. I don't think he signed his contract. He might have done it that afternoon, but his was the only contract I have. No, according to this he didn't sign a contract.

Q. According to your recollection the brine was turned on on what day?

A. 26th August.

Q. On the 26th August how many contracts had you entered into for the storage of peaches in your plant?

A. I can't tell you from memory, but I think ——

Q. Could you tell by reference to that sheet?

A. No, you will have to look at the contracts, and I have them here if you want me to look them over. 10

Q. You had a contract with Mr. Miller?

A. On the 26th I had not.

Q. Boden Brothers they put some in the 26th, didn't they?

A. My record doesn't show it.

Q. It doesn't show it?

A. No.

Q. You entered into a contract with Jacob G. Tomlinson on the 26th?

A. I can't tell you without looking at the contracts. These contracts were made by Mr. Zimmerman in the office. I was not there. 20

Q. Are you prepared to tell us how many contracts you had entered into on the 26th for the storage of peaches, which was the same day you turned the brine on?

A. The only way I can tell is by looking at the contracts.

Q. We won't take the time to do that now?

A. I think Mr. Zimmerman could determine that for you if you want to take the time. 30

Q. Prior to the time you turned on the brine on August 26th, the room, of course, was without any refrigeration whatever?

A. Yes.

Q. It has a concrete floor in it?

A. Yes.

Q. You say ordinarily it would take you two days to get it down to a temperature that would be of a preserving quality for peaches. What do you figure that temperature to be?

A. 33.

Q. You stored peaches how many years?

A. Since 1908.

10 Q. Do you consider it to be consistent with the theory of cold storage of peaches that peaches should be placed immediately in an extremely cold temperature?

A. They will keep better.

Q. If shocked, so to speak?

A. Yes.

Q. Is it not better to have the peaches put in a room that is probably between 30 and 33 at once when brought in from the heat?

20 A. They are better if put in at 24 and held there a few hours.

Q. Why is it better?

A. Because it extracts the heat from them, and that is what makes them deteriorate.

Q. That prevents them throwing off gas, or so much gas?

A. I don't know.

Q. What was the lowest you know you were able to get your plant down to?

30 A. It was down to about 48 when I notified the men.

Q. Was that the lowest you had it ever during between August 26th, the day you turned the brine on, and September 6th or September 9th when you sent out the notice to take the fruit out. The lowest record you have of the temperature of the room was 48?

A. That is right.

Q. How many days did it stay at 48?

A. It was that practically all the time.

Q. From the time the storage —

A. From the time I got the peaches in. Of course, on that Saturday when we put in 27,000 baskets, it was higher then, up near 60.

Q. Before that, you have a record there, you don't have a duplicate of it, on the 27th, according to this record, you had in 1930 baskets on August 27th? 10

A. Yes.

Q. You had started on August 26th, in the morning of August 26th and turned the brine on, and you say ordinarily it would have taken you 48 hours to have got the temperature of the room down to what? 24?

A. No, 34.

Q. That is all you were attempting to get it down to, probably 34?

A. Yes. 20

Q. Because you look on that as the preserving degree for fruit?

A. Yes.

Q. On the next day, being August 28th, was Sunday, is that right?

A. It was, yes.

Q. No fruit was put in on that day?

A. No.

Q. Between August 26th and August 29th you had more than your 48 hours to get the brine temperature down to 34 if your plant was working right? 30

A. Without putting any peaches in the house.

Q. You only had 1,930 and would that have much of an effect?

A. That is all I put in Friday and Saturday.

Q. That is all that was put in on the 27th?

A. We put it in on Saturday. Was that the 29th?

Q. 27th.

A. That is right.

Q. You had started on the 26th to turn the brine on, and between that, the 26th and the 29th, three days, you had only put in 1,930 baskets of fruit, hadn't you?

A. Yes.

10 Q. Would that seriously affect you in getting the temperature down to 33 degrees?

A. Yes, it would. Not very much, but the building was hot, and it would generate heat.

Q. You knew that you had contracts for some—we will find out from you later how many you had—you knew then you already had a number of storage contracts for the storage of fruit, didn't you?

A. I could not tell you how many.

20 Q. Do you know how long prior to August 26th arrangements had been made by various farmers to start to store peaches?

A. Nobody.

Q. Nobody at all?

A. No, the first one was Mr. Porch.

Q. That was on August 26th?

A. Yes.

Q. That was the first time any of the farmers said anything to you about storage?

30 A. Mr. Clement came to see me a couple of days before that, I think one day before, and he asked me what I thought about storing peaches, and he went away without signing a contract. He was the first one, and he was only gone a few minutes when Mr. Porch came.

Q. Do you know Mr. C——?

A. Yes.

Q. He is a buyer?

A. Yes.

Q. Was he around your cold storage plant considerable?

A. Yes.

Q. He was around there considerable?

A. Yes.

Q. Prior to the time you began taking in peaches for storage, do you recall he said anything to you about turning your brine on in order to have the rooms chilled off? 10

A. I do not.

Q. Did he have a conversation with you about turning the brine on?

A. Not that I remember.

Q. On the 29th you put in 9,927 baskets of peaches, and you can't tell us because you have no record what success you had in getting your brine down to 34 between the 26th and the 29th?

A. No. 20

Q. As a cold storage man you knew that it was important to get the temperature down so as to shock the fruit, or chill the fruit, as it came in?

A. No, I don't say so.

Q. You mean that is not an important factor in the storage of peaches?

A. It helps very little. You take a cold storage room, and rush in a lot of hot fruit. It doesn't make much difference how cold you had it, the temperature will rise almost to the temperature of the fruit. 30

Q. I asked whether or not it is an important factor in the storage of peaches that the peach be immediately placed in a room or place of low temperature. That is an important factor, is it not?

A. It helps.

Q. The doors to your cold storage plant, did they open directly on the outdoors, or is there an ante-room?

A. An ante-room.

Q. When moving fruit in and out of there, some air goes in?

A. Yes.

Q. You don't open to the outdoors?

A. No.

10 Q. And there is a corridor from the ante-room to the outdoors?

A. No.

Q. An ante-room?

A. Yes, between the two doors.

Q. You had a man stationed there, whose duty it was to open and close those doors all the time, so there was very little opportunity for heat going through those doors, other than that which came in when the doors were opened and closed to permit the fruit to go in?

20

A. Yes.

Q. Do you have any method of ventilation of your plant?

A. No, sir.

Q. I am inquiring now from the standpoint of wanting to know. Is that cold storage procedure, or is that not cold storage procedure?

A. It has been tried by a lot of newer cold storages and it does not work out.

30 Q. You have in the cold storage plant where you store most of this fruit a brine system, haven't you?

A. Yes, sir.

Q. It takes longer, does it not, to chill the room with a brine system than it would with direct expansion?

A. Yes.

Q. At the time you undertook to enter into these various contracts for the storage of this fruit, had you contemplated likewise using the ice house?

A. I had not.

Q. You were figuring wholly on the storage room that you had chilled off by the brine system?

A. An hour before Porch came I was not figuring on taking any peaches from anybody.

Q. The brine system, so we might get that, is where you make ice and put in the ice house, don't you? 10

A. In ice tanks.

Q. And that is made by what, warm water, or hot water?

A. As cold as we can get.

Q. As cold as you can get?

A. Yes.

Q. Can you tell us—I asked this once before—when you last pulled ice prior to August 26th, or were they solid? 20

A. Solid and the temperature of the brine in the brine tank was three above zero when I turned it on.

Q. Have you any way of accounting to us, or to give us the reason why the temperature of the room did not get down to 34 between August 26th and August 29th?

A. Yes.

Q. What is the reason for that?

A. I closed the cold storage, the entire building, 30  
off around the first week in August. I have no use for it, and I never washed the building out until I get ready to use it again, because there is no ventilation in the cold storage, and naturally it would pick up mould and fungus disease, and so I delay washing out the cold storage room until I am going

to start them again, and then I usually get the fire hose from the borough and turn it on and scrub the building out, the side walls, floor, and everything else, and while Mr. Porch was still in the office I went over and directed the men to get the fire hose and clean the building out, and they worked that day right away, I should say about two or three o'clock in the afternoon, and I told the men to stay on the job until they got the job completed so they  
 10 could turn on the brine, and they worked all night, and of course, as the hot days are in the summer, the hot air gets in these rooms and seems to be bottled up, and we had a lot of hot weather, and the temperature of the cold storage room was very, very warm when I turned the brine on. I should say 80 to 85.

Q. I understand you to say that on the day that Mr. Bliss, one of your witnesses, testified the temperature was 81?

20 A. 83 I saw afterwards.

Q. September 3rd?

A. Yes.

Q. In Philadelphia. What was your temperature?

A. 90 at our cold storage plant.

Q. Do you keep a record of that?

A. No. I remember that very well. I will never forget that Saturday.

Q. Although you don't dispute that it was 83 in  
 30 Philadelphia?

A. No, I believe that.

Q. You knew on Monday, that was the 29th, your temperature was not down very low?

A. Yes.

Q. And then you turned around and received, how many peaches did you receive on Tuesday? How many did you have on Monday?

- A. 9,927.
- Q. Did you watch your temperature then?
- A. Yes.
- Q. Did it get any better?
- A. Not much.
- Q. Stayed the same?
- A. I didn't expect it to get any better while putting in that amount of peaches.
- Q. The next day you put in 11,560?
- A. Yes. 10
- Q. Over night then your temperature didn't vary?
- A. It might go up a degree or two in the afternoon, but it would come down during the night.
- Q. Most of the time it would stay around what, 50 or 52?
- A. Yes.
- Q. On the 30th you put in 16,427?
- A. Yes.
- Q. 31st 8,632? 20
- A. Yes.
- Q. During that period of time the temperature remained the same?
- A. Yes.
- Q. You say you were not at all alarmed about it?
- A. Not a bit.
- Q. These peaches were in there several days. It was perfectly all right with them to have been in that temperature, around 50 to 52, and I expect as 30 high as 60?
- A. I don't think it was until Saturday.
- Q. On September 1st you put in 22,000?
- A. Yes.
- Q. On September 2nd you put in 27,000?
- A. Yes.

Q. Weren't you then getting at all concerned about the peaches in there since August 26th?

A. No, I was not.

Q. You still thought that as a cold storage man these peaches that had been brought in your storage and placed in a room where the temperature did not get lower than 50 or 52 degrees, and that at that time was around 60, was all right?

10 A. I knew that peaches shipped from Georgia in refrigerator cars with a temperature of 50 stayed in there about a week, and they are ripe or almost ready to go in the market when shipped.

Q. Are they shipped in refrigerator cars?

A. Yes, from Georgia.

Q. They would not be apt to be injured at your cold storage plant?

A. Running 50 to 55, and these peaches were being picked harder and firmer on the stalk.

Q. What peaches?

20 A. In my cold storage. They picked them very green.

Q. How long did that condition of the peach continue?

A. Up until Friday.

Q. All the peaches the Friday from the time they started, that was the day 22,000 went in, and including that day?

A. Yes.

30 Q. Including that day all the peaches were firm and hard?

A. Yes.

Q. I think you said they did not have a high color, but were green?

A. Yes.

Q. You put some peaches in on the 3rd, 13,269?

A. Most of them went in the ice house.

Q. On the 3rd?

A. Yes. We didn't open the ice house until Saturday.

Q. Prior to the time Mr. Miller sent his peaches over on Labor Day, you had already started filling the ice house?

A. I put a lot in there on Saturday.

Q. The ice house was then your main cold storage?

A. Yes.

10

Q. What was the temperature in your ice house?

A. I could not tell you.

Q. How many degrees under what it was in your main storage room?

A. 8 or 10.

Q. After you had put in 13,269 on the 3rd, were you then much concerned as a cold storage man as to the fruit that had gone into the cold storage plant?

A. Yes, I was.

20

Q. Did you on that day, or prior to that time, or prior to the time you started to take them, up until that time, knowing you had not got your temperature down any, say anything to any of the men about taking the peaches out?

A. No, up to what day?

Q. Up to the 3rd, September 3rd?

A. No, I had not.

Q. Had you examined the peaches in the storage for the purpose of seeing whether or not the temperature you were maintaining in your cold storage plant was having any effect on the fruit? 30

A. Yes.

Q. What effect did you find it had on them, if any?

A. They seemed to be hard yet, up until then.

- Q. Up until when?  
A. Up until Tuesday morning.  
Q. After Labor Day?  
A. Up until Tuesday morning after Labor Day.  
Q. Up until Tuesday morning after Labor Day?  
A. Yes.  
Q. That would be up until September 6th the peaches were yet hard. Did you examine any of those same peaches the following day?  
10 A. Yes, I examined them every day.  
Q. That was on the 7th?  
A. Yes.  
Q. When did you first notice the peaches were becoming soft?  
A. Of course, I can't tell you exactly what date, but I know they were getting soft.  
Q. You knew up to Tuesday, September 6th, the peaches were hard and firm, appeared to be?  
A. Yes, all except those held over from Monday.  
20 They were soft.  
Q. I will talk of those in a special class. All of the other peaches put in were examined, actually examined by you?  
A. Not all of them. I could not possibly examine 111,700 baskets of peaches.  
Q. From the examination you made you formed an opinion the peaches were then in good shape?  
A. Fairly good shape, yes.  
Q. There was no cause for alarm then?  
30 A. What date?  
Q. Tuesday, the day you were speaking of?  
A. Yes. I was alarmed when I told Miller.  
Q. That was on Monday?  
A. Yes, the Monday before.  
Q. I am talking about the 3rd, when you put in 13,269, the 3rd of September?

A. I was not alarmed then. I expected the temperature to go down over Sunday.

Q. On Monday you found the temperature just the same?

A. Yes.

Q. As it had been Saturday when you closed the doors?

A. Yes.

Q. It had not come down?

A. No.

Q. It was not any lower than it was when you started to cool off your cold storage plant?

A. No, just about the same.

Q. Did it ever occur to you at any time during your inability to get this temperature down you should have told the men that were storing at your plant to take their peaches out so that they might place them on the market while still hard?

A. I had hoped by putting this cracked ice in the cans, and putting ice into the cold storage room, I could get the temperature down, knowing there was no market, and there was no place for them to put their peaches, I did what I could to keep their peaches, as long as I could.

Q. Do I understand you to say that peaches, particularly Hale and Elberta peaches, during 1927, did not keep in cold storage anywhere?

A. I didn't say that.

Q. There was nothing particularly wrong with the peaches in 1927. There was no reason why they should not be kept, with proper refrigeration?

A. I don't know. I never had that experience before.

Q. Do you know of any other peaches that were preserved in 1927, Hale and Elberta?

A. Not directly. I don't say there were, but I heard of a lot that were not.

Q. You heard of a lot that were not?

A. Yes.

Q. You would not be prepared to say that it was because of any peculiarity in the 1927 peach it would not keep?

A. If a man would store a small amount of peaches in a small cold storage room, putting them all in there in a day or two, he would have a better chance.

10 Q. These men delivered the peaches to you, delivered them to your door?

A. Yes.

Q. It was your employees that took them off, and it was your employees that placed the peaches in your cold storage room?

A. Yes.

20 Q. These men had absolutely nothing to do with the maintaining of the temperature, and they were not obliged to inquire of you what temperature you maintained in your plant?

A. No.

Q. You had no method of sharing the responsibility with them or they with you?

A. No.

Q. As to keeping them posted, or their inquiring as to what the temperatures were, that was purely your business?

A. Yes.

30 Q. It was in a measure none of their business. As long as you had the fruit there, you were expected to take care of it, and take reasonable care?

A. You mean when we piled the peaches?

Q. No, the men putting them in?

A. The owners of the peaches?

Q. They delivered them to you at your place of business, and that is the end of their responsibility?

A. Yes.

Q. It was simply up to you from that time on to take care of the peaches. When you saw Mr. Miller on Monday, Labor Day, you then had received something over 11,000 baskets of his peaches?

A. Yes.

Q. Of that 11,000 baskets you had placed some in the main cold storage room?

A. As far as I know.

Q. Personally, do you know where any of his 10 peaches were put?

A. Yes, sir.

Q. Were they put in the cold storage plant?

A. I could not say that for sure.

Q. Were any put on the second floor of the ice house?

A. I could not say.

Q. Were they put in the ice house, any of them?

A. Yes.

Q. Some of them were put in the ice house? 20

A. Yes.

Q. When you saw him on Monday you told him that you were having trouble then in getting the temperature down?

A. Yes.

Q. But you didn't tell him about taking his peaches out that he had already put into cold storage then?

A. No.

Q. At that time you had no occasion to feel 30  
alarmed about it?

A. Yes. I was a little alarmed because I told him not to put any more in.

Q. The only ones that he did put in were the ones that he was yet to pick, and those you told him you would take care of them by putting them in the ice house?

- A. Yes.
- Q. As far as you know they were put in the ice house?
- A. Yes, except those that were hauled there while I was over talking to him and Mr. Porch.
- Q. That was two lots?
- A. I think there was more than that.
- Q. You told him not to bring any more peaches over. You intended to advise him that you would
- 10 not take any more peaches from him that were to go into the main storage room?
- A. Yes.
- Q. You gave no indication as to what he was to do with the peaches already there?
- A. No.
- Q. When you undertook with him to tell him to send over the peaches that he said he was yet to pick, you undertook to take the same care of them you had of the other peaches?
- 20 A. Yes, I was endeavoring to save his crop for him.
- Q. If you felt you were not in a position to have done it you would have simply told him you could not have handled it. On Monday you would have told him if you felt you could not handle that fruit, you would have told him so?
- A. I think I did.
- Q. Told him what?
- A. I didn't want to handle them.
- 30 Q. The fact that you did tell him you would handle them, you undertook by that to take the same care of them as you were taking of his other fruit?
- A. Yes.
- Q. You were getting ten cents for every basket you handled?
- A. I hope to.

Q. Regardless of the time it was in your plant up to October 1st?

A. Yes.

Q. Every basket coming in there meant ten cents to the company?

A. I tried to get him to put them in a refrigerator car so he would not have to pay me the ten cents, but he would not do it.

Q. I understand you to say that in the year 1927 you had absolutely no break down? 10

A. Yes.

Q. Nothing that you could attribute the failure to maintain the temperature to from a mechanical standpoint?

A. Yes.

Q. Nothing in the machinery?

A. Nothing from a mechanical standpoint, no.

Q. The brine. The brine that you use does it ever lose its efficiency?

A. No, sir. 20

Q. Never loses its efficiency?

A. No, the only thing it will do if it gets to be too weak it will crystallize.

Q. When it crystallizes what effect does that have in being able to maintain a low temperature?

A. It will not circulate. Just freeze up like water.

Q. Did you have any trouble on that score?

A. I don't think so.

Q. Do you know whether it didn't?

A. I know it didn't. I could not get it cold enough 30 to crystallize.

Q. And in no other way does this brine deteriorate. Brine won't —

A. The only reason you use brine is because it will not freeze any liquid that passes through it, and put salt in it, or calcium so it will freeze easily.

Q. I understood you to say that during 1926 you handled about 5,000 baskets more than you handled in 1927?

A. Yes. I had the peaches stored in the same room, in the same place where Mr. Miller had his peaches. They were stacked nine high that year. This year, 1927, I only stacked them six high.

Q. This room you speak of as the ice house, is that the factory entirely regulated by the direct expansion system?

A. Yes.

Q. No brine in that at all?

A. No.

Q. All direct expansion?

A. Yes.

Q. Is that quicker in operation than the brine system?

A. The whole thing depends on how many feet of pipe you have in the cold storage room. You would get frost on the pipes regardless of the temperature in the room with direct expansion. You would not with brine.

Q. You have one foot or a foot and a half of pipe very —

A. Six cubic feet.

Q. Every six cubic feet in your cold storage plant?

A. Yes.

Q. You say the custom in regular standard refrigeration equipment is what?

A. One in ten.

Q. The dripping of the pipes. Do you remember any time between August 27th and September 12th that the pipes or piping in the cold storage plant were covered with ice?

A. They were not.

Q. Any frost on them?

A. They were not.

Q. Do you know whether they dripped water during all that time?

A. They what was commonly known as sweat.

Q. They would continue to sweat?

A. They would continue to sweat until the frost come.

Q. And that would continue to drip down on the peaches?

10

A. Yes.

Q. And rise from the floor and go up and collect on the pipes again?

A. Yes, the same as rain.

Q. On Monday when you saw Mr. Miller and told him about putting these peaches in the ice house, you could take them in the ice house, but no more should go in the cold storage plant, and you went on back. Did you make an examination when you went back?

20

A. I was in there every hour almost, day and night.

Q. On Tuesday you found things not very satisfactory, did you, and you didn't say anything to any of the fruit growers, did you?

A. No.

Q. You didn't say anything to them Wednesday?

A. They were around there quite a lot. I can't tell you which ones.

Q. Particularly Mr. Miller. Did anybody start to take peaches out of there prior to the time they got the notice?

30

A. The first one to take them out was Locust Grove Farm.

Q. None of them took any peaches out prior to the time you sent out the notice on September 9th?

A. No.

Q. The notice was sent out September 9th, so that the earliest it could be received by any of them to whom you mailed was September 10th?

A. Yes.

Q. From you the first knowledge they would have would be September 10th, and you would have the knowledge since Tuesday that the peaches were soft?

10 A. I didn't say the peaches were soft.

Q. They were getting soft?

A. They were commencing to get a little.

Q. And it was almost mandatory as far as peaches are concerned to get them out of there the very first moment, was it not?

A. I still hoped I could get it down.

Q. If the peaches were getting soft?

A. They were not enough to be dangerous yet.

Q. Did you examine the peaches again Wednesday?

20

A. I was in there every day.

Q. Were they any worse Wednesday?

A. Very little.

Q. On Thursday?

A. All fruit, peaches, apples, everything else continually deteriorate from the time it gets off the tree, regardless of what you do with it.

Q. Knowing that all fruit gradually deteriorated in cold storage, and knowing what was the condition of these peaches on Tuesday, that they were becoming soft, as to the peaches you could not expect them to get better again?

30

A. No.

Q. It was fruit, and it had started already to decay?

A. It starts to do that as soon as you pick it from the tree.

Q. Then I take it from the mere handling of it it was getting soft?

A. Not much.

Q. How did you know they were soft?

A. I could tell.

Q. Baskets began to shrink?

A. No, general condition.

Q. You could tell they were soft without handling them?

A. I did feel some of them.

10

Q. You felt they were beginning to give?

A. Yes, but not to make them unmarketable.

Q. They were marketable that day?

A. Yes, but there was no market.

Q. No market where?

A. Anywheres.

Q. New York?

A. Anywheres.

Q. What do you mean, no market?

A. They would not bring anything.

20

Q. What were they bringing?

A. Bringing hardly anything, 50 cents, 75 cents to a dollar a bushel.

Q. That would be better than nothing?

A. That would not when you started to take them out, I don't think so.

Q. Knowing these peaches were all ripe, and were becoming soft, you kept that knowledge to yourself until you sent the letter which got into the hands of your growers at the earliest moment Saturday?

30

A. Mr. Miller was there Wednesday, but he knew it, or Thursday.

Q. Did you tell him to take his peaches out?

A. No, I did not.

Q. You were the cold storage man, and told him you thought you were going to be able to take care of him?

A. I didn't tell him that.

Q. What did you tell him?

A. I told him the temperature would not come down.

Q. Did you tell him you were alarmed about it?

A. Yes.

Q. Did you tell him what you were going to do?

A. No.

10 Q. He was not the cold storage man. He didn't undertake the contract. It was not for him to tell you how to run your plant?

A. No.

Q. Did you tell him to take them out?

A. When I did tell him to take them out he would not do it.

Q. You say on Wednesday he did not undertake to tell you what you should do with your plant, or how you should run it. Still you didn't tell him that day to take his peaches out?

20 A. No.

Q. Is the reason you didn't tell him that day to take them out because you knew he would not?

A. Yes, I knew he would not.

Q. You knew he would not take them?

A. Yes.

30 Q. Yet, knowing you had a contract wherein you could order him to take them out, and despite the contract you knew existed and the Warehouseman's Act gave you the right to order the peaches out after 72 hours' notice?

A. I suppose I did.

Q. Then you waited until Friday and sent the letter. Did it occur to you, Mr. Repp, that you might have gone round and informed some of these men that had fruit in storage about taking their peaches out, the same as you had gone round Labor Day and told them not to bring any more in?

A. I was still trying to get the temperature down with ice and salt.

Q. You had got to the point to know whether the peaches were getting beyond control?

A. I said I was trying to control the temperature.

Q. Were you not still trying to control the temperature on Labor Day when you went round to them?

A. Yes.

Q. In that way in the course of probably three or four hours you could have a lot of the men notified? 10

A. I only could see Mr. Miller, Mr. Porch and Mr. Kincaid.

Q. You testified that this letter was mailed on September 9th, on the morning of that day?

A. I think so.

Q. On the morning of that day?

A. Yes.

Q. You could have gone round to these men, who were all within what, at the outside, possibly within four miles of the plant, except Mr. Clements? 20

A. Yes.

Q. You could notify them all in three hours by telephone and by personal visit?

A. I suppose I could.

Q. They could have started immediately to take them out. In addition to the letter you sent you used no other method of informing these men of the condition of their peaches?

A. No, only from the information that I had. They were around there a lot, and they knew the condition. 30

Q. During all of that time you say they knew of the condition?

A. I think they all knew it.

Q. Yet at the same time you allowed them to believe you were still going to conquer the situation?

A. I was going to help it if I could.

Q. Even after, Mr. Repp, they started taking them out on the 12th and 13th, were you still trying to?

A. I was trying, sure, and after they started to take them out, within two days the frost commenced to come on the pipes and I got the temperature down.

Q. When did you get the temperature down?

10. A. The frost commenced to come on I think about Friday after they commenced to take them out. That relieved it.

Q. Your doors were open then while you were taking them out. The doors were open just as much while they were taking them out as they were when they were taking them in?

A. Yes.

Q. Was not the warm air from outside going in then?

20. A. Instead of putting peaches in with ninety degrees, I was bringing out peaches.

Q. You had then some 40 men in there helping?

A. No, they were not there then.

By the Court:

Q. I understand there was nothing but peaches in the storage house?

A. At that time, yes.

30

By Mr. Cole:

Q. You stated that you had not figured on taking peaches in in 1927?

A. Yes.

Q. How did it come about you did?

A. On account of the failure of the peach crop in North Carolina. The Carmine peaches, and early peaches, these were bringing tremendous prices, and the fruit growers who happened to have these varieties were getting good money, and Mr. Clements, of the Locust Grove Farm, came down to see me and asked me if I was going to open my cold storage. I think that was on Thursday. I told him I didn't think I was going to open the cold storage at all because the farmers were getting good prices for their peaches, and it would be foolish to store peaches if they were getting high prices, and he went away. He was not gone but a few minutes when Charles Brown, of Swedesboro, came and asked me the same question, and I gave him the same answer. I didn't expect to store any peaches at all. A short time after that in came Mr. Porph, son of Howard Porph, and wanted to know if I could sell him some space for a few thousand baskets of peaches. I said I didn't expect to store any. I said, "Why don't you take them down to Pitman?" He said, "I didn't suppose I could get in there." I knew Mr. Porph stored there the year before, and I thought it peculiar for him to come to Glassboro. He said the Pitman plant sold all their space. 10

Mr. Marshall: This would not be binding on Mr. Miller.

A. (Continuing). I explained that it cost \$500 to cool the room and \$250 a day to keep it going, and I didn't think it was necessary to cool it off without some proposition and revenue, and dropped the idea of starting until I knew I was going to have some. 30

Q. Have you had any occasion to repair the machinery in this plant since the summer of 1927? Has

there been any breakdown since then? Is it being operated and all operating now as it was in 1927?

A. I have not had none. A minor thing, a bolt breaking, or something, not enough to tie it up. I have duplicate machinery.

Q. There has been no change in your plant?

A. No.

Q. The plant is being run? You are taking in stuff? You have stuff stored there?

10 A. I have 200,000 bushels of apples stored there now.

Q. You were asked about people not taking their fruit out after you had some concern as to whether you were going to be able to keep the temperature down. What could these people have done with the peaches?

A. I don't know.

Q. They had nowhere else they could take them?

20 A. I don't know of any place. There was a telephone call on Saturday in the afternoon from Millville cold storage plant —

Mr. Marshall: Objected to as not responsive.

Q. Did you have any experience with any peaches in 1927?

A. I did.

Q. How many peaches do you raise? How many acres do you farm?

30 A. I don't have many peaches, but I can tell you how many I had. We had 3868 Elbertas.

Q. Did you see them while on the tree?

A. I did.

Q. What happened to those peaches with respect to ripening?

A. I went out with the foreman on the Monday

previous to Labor Day, and we decided the peaches were too —

Mr. Marshall: Objected to.

Q. What kind of peaches?

A. Elbertas.

Q. What did you do and say?

A. They were too green to pick.

Q. On Monday?

10

A. On Monday, and Wednesday they started to pick peaches, and picked about a third off the trees and left two-thirds, because they were too green. We went back Friday, and all the peaches on the trees were ready to pick. They picked the rest of the orchard Friday and Saturday, and one-third of the peaches left on the trees when we started to pick Wednesday was over-ripe and not fit to go in cold storage.

Q. Was that unusual?

20

A. That was the most unusual condition for ripening peaches I ever experienced.

Q. Have you any reason for that? Can you explain that?

A. The temperature and the wet.

By Mr. Marshall:

Q. Were they in a very light soil?

A. They were.

Q. That tends to cause them to ripen in the manner you have described?

30

A. We could usually make two pickings every year, and it would last about two weeks from the time we started to pick them.

Q. Don't you think the light soil had anything to do with the manner in which they ripened?

- A. Not any more that year than any other year.
- Q. In general they would ripen in that manner?
- A. No.
- Q. Three thousand eight hundred and sixty-eight baskets?
- A. Yes.
- Q. Did you put yours in cold storage?
- A. In the cold storage house and these that I put in Saturday.
- 10 Q. What Saturday is that?
- A. Before Labor Day.
- Q. September 4th?
- A. Yes.
- Q. No, September 3rd?
- A. Yes. I hauled them on trucks, and had them standing out —
- Q. When did you take yours out?
- A. I haven't answered the first question yet.
- Q. Go ahead.
- 20 A. I let them stand out on the trucks out in the sun so that the farmers could put their peaches in. We didn't get these in until very late Saturday night or early Sunday morning.
- Q. Where did you put them in storage?
- A. Those that were left out were put in the ice house. Those that were picked previous to that were put in cold storage.
- Q. When did you take your peaches out of cold storage?
- 30 A. I could not tell you that. I dumped them.
- Q. Didn't you sell any of them?
- A. I sold all those out of the ice house. Those in cold storage we took and put them back, and they piled some other fellow's peaches in front of them, and they didn't take them out, and I could not get to them. When I did get to them they were spoiled.

Q. They were spoiled because of the temperature of the room?

A. Yes.

Q. It was not because of the condition of the peach when you put it in?

A. Partly yes and partly no.

Q. From the major standpoint because of the lack of temperature?

A. Yes.

Q. Because the peaches you put in the ice house 10 kept, didn't they?

A. Fairly well.

Q. When did you take them out of your ice house?

A. I started that the Monday after Labor Day.

Q. On the Monday after Labor Day that would be September 6th?

A. No, the Monday after that.

Q. On the 12th you started to take them out of there. That is the same day the rest of the men started to take theirs out?

A. Except Mr. Miller.

20

Q. He started in on the next day?

A. Yes. I suppose they started. There was enough round there. I don't know whether they all started or not.

Q. You didn't take any of yours out before that?

A. As far as I remember. I have not my records here.

Q. Have you your records at home?

A. Yes.

30

Q. Will you look at them for me tonight and tell me when you took yours out of the cold storage?

A. Maybe it says there on that report.

Q. It doesn't say on this report. Those you put in the ice house were those you left in the sun?

A. Yes.

- Q. How long had they been in the sun?  
A. About three o'clock until, I don't know when they reached there, sometime during the night.  
Q. Do you recall — Can you tell the amount you got for those peaches?  
A. Thirty-five cents a basket.  
Q. Soft?  
A. Not very soft.  
Q. Not very soft?  
10 A. No.  
Q. That was because of the prevailing market price?  
A. Yes.  
Q. Thirty-five cents Philadelphia price?  
A. I can get you the amount.  
Q. Netting you 35 cents?  
A. No, I think that is what they sold for. Thirty-five or forty cents. I can't get you the amount here.  
Q. Will you also bring that with you tomorrow?  
20 A. Yes.

(At this point a recess was taken until ten A. M. February 7th, 1929.)

Woodbury, N. J., February 7, 1929.

Trial of the cause resumed at 10 o'clock, A. M., pursuant to adjournment, in the presence of counsel for the respective parties.

10

CHARLES F. REPP, resumed in cross-examination.

By Mr. Marshall:

Q. Mr. Repp, I think I asked you yesterday if you would bring today some records—I see you have brought those up?

A. Yes, sir.

Q. Do you have any records showing us the number, the total number of peaches you had on storage, how many you had in your storage warehouse and how many you had in your ice house? 20

A. I have not; I have no record of that.

Q. Can you tell us when you started to put the peaches in the ice house?

A. The Saturday before Labor Day.

Q. That would be September 3rd—why did you start to put them in there, because the other place was filled?

A. No, because we couldn't put them in the other cold storage any faster than we could get them in and out of the doors, and we did it to relieve the trucks standing out in the sun. 30

Q. That was the sole reason for putting them in the ice house?

A. And also to relieve the situation over in the

cold storage, incidentally to relieve the situation there.

Q. And to get them in?

A. And to get the peaches off the street, yes.

Q. I may have asked you yesterday, but I will ask you again to make sure, the difference in the temperature, if you know it, between the ice house, which was on direct expansion, wasn't it?

A. Yes.

10 Q. And the cold storage, which was on the brine system?

A. I have no record of it.

Q. Do you think it was as much as ten degrees colder?

A. Possibly it might be.

Q. You have no way of telling us, of the total of a hundred and seventeen thousand, wasn't it, your total?

A. Yes.

20 Q. Of the total of one hundred and seventeen thousand, you can't even approximate, can you?

A. I can make a guess.

Q. Well, do that the best you can and let it go for what it is worth.

A. I would say there was twenty-five thousand put in the ice house altogether.

Q. Twenty-five thousand?

A. Twenty-five to thirty thousand.

30 Q. Twenty-five to thirty thousand put in the ice house altogether?

A. That is only a guess, understand.

Q. Yes, I understand that. You started putting those in there on September 3rd?

A. Yes.

Q. When did you start to cool your ice house off, or didn't you have to make the same effort to cool the ice house off as you did the cold storage?

A. No, you just turn the expansion valves on, that is all.

Q. And when did you turn these expansion valves on?

A. On Saturday morning.

Q. On the same day you put them in there?

A. Yes, I didn't expect to put them in there at all, you know, did not plan for it.

Q. How many peaches could you conveniently have accommodated in your cold storage proper, 10 not counting your ice house?

A. In 1925 I had ninety thousand baskets in there.

Q. Ninety thousand?

A. Yes, and about the same thing in 1926, and about the same thing in 1927.

Q. You were getting pretty close to your maximum there when you started to put them in the ice house, weren't you?

A. Yes.

Q. And you knew that peaches were yet coming, 20 didn't you?

A. No, I had no way of telling, because everybody practically was over their contract, and I had no way of telling how many more was coming. I knew they were coming that day.

Q. Knowing the cubic contents of your cold storage, did you know how many peaches you could have handled as a minimum or maximum per day with safety, chilling them off from say ninety degrees down to a preserving temperature? 30

A. Down to thirty-two?

Q. Yes.

A. The minimum? No, I have no way of telling; no.

Q. How about the maximum?

A. I have no way of telling.

Q. Could you handle as many as five thousand baskets a day and keep the temperature down to thirty-two?

A. No.

Q. Not overnight, you couldn't do it?

A. No.

Q. Could you handle as many as three thousand baskets?

10 A. No, not if the temperature outdoors was ninety.

Q. Well, say the temperature outdoors was not over eighty-three?

A. You couldn't do it then.

Q. Could you handle two thousand?

A. Possibly by dividing them up in the four rooms, yes.

Q. Now, with respect to your cold storage equipment in the ice house, how many could you safely handle there, that is, and maintain the temperature?

20 A. And maintain the temperature?

Q. Yes.

A. Not to keep the temperature at the same degree all the time; two or three truckloads would change it, or the heat from the body of a few men would change it.

30 Q. I don't mean, Mr. Repp, to maintain the temperature all the time, I mean to maintain a temperature which you, in your judgment as a cold storage warehouse man, would know would preserve the fruit?

A. What you want of me is this, you want me to keep an even temperature, how many could I put in so the temperature would not rise at all?

Q. No, I want to know how many you as a cold storage man knew it would be safe to put in your cold storage per day without destroying the fruit?

A. The only thing I know is the experience I have had in other years. The records show in 1926 how many I put in and how many I put in in 1925.

Q. What was the most you put in on any day in 1926?

A. Twenty-one thousand and fifty-eight.

Q. Twenty-one thousand and fifty-eight?

A. Yes, that was the Saturday before Labor Day, but I might say —

Q. How many did you put in on the day before 10 that?

A. 17,255, but there was a difference of sixteen degrees in the temperature outdoors between those two storages.

Q. Now, you have the 1926 record there, haven't you?

A. Yes.

Q. In 1926, you put in a total, I think, of 122,000 baskets, didn't you?

A. 122,932.

20

Q. Suppose you give us the days of that, reading from your chart that you have?

A. The 30th of August we put in seventy-eight.

Q. August 30th?

A. Yes. The 31st — Wait a minute; George, I looked on the wrong line. I put in ninety-three.

Q. On the 30th?

A. Yes, the 31st, 769; September 1st, 2,561; on the 2nd, 3,687; the 3rd, 11,182; the 4th—that must have been the Saturday before Labor Day, 19,502—that 30 was the Saturday before Labor Day of that year—on the 6th, Labor Day, 14,095; on the 7th, 17,255.

Q. Seventeen thousand what?

A. Two hundred and fifty-five.

Q. Yes.

A. The 8th, 21,058.

Q. Yes.

A. The 9th, 16,933.

Q. 16,933?

A. Yes. The 10th, 10,803, and on the 11th, 2,395, twelve days putting them in that year and ten days in 1927.

Q. That made your total of a hundred and twenty-two some odd thousand for 1926?

A. Yes.

10

By the Court:

Q. I understand they were not all put in the storage warehouse?

A. Practically the same division between the storage and the ice house both years.

By Mr. Marshall:

20

Q. May I ask you to again refer, Mr. Repp, if you will, to 1927. In 1926, Mr. Repp, you had seven consecutive days, didn't you?

A. Yes.

Q. In which you placed over ten thousand baskets a day in cold storage?

A. I had six consecutive days that I placed over eleven thousand.

Q. Yes, there were six consecutive days that you placed in your storage over eleven thousand?

30

A. Yes.

Q. And seven consecutive days that you placed in the storage over ten thousand?

A. Yes.

Q. And in 1927 you had five days which were not consecutive in which you placed in over eleven thousand, didn't you?

A. Yes.

Q. You had first 11,560 on the 29th, if I am correct?

A. Yes.

Q. 16,427 on the 30th?

A. Yes.

Q. And then you had a lot of 8,632?

A. I might say —

Q. Then you put in 22,012, 27,085 and 13,269?

A. That eighty-six thirty-two was a very hot, 10  
rainy day.

Q. I am talking about the number.

A. Yes.

Q. You say that your plant, in 1927, was run in the same manner as it was run in 1926?

A. Yes, sir.

Q. And that in 1926 you had a breakdown?

A. Yes.

Q. That you didn't have in 1927?

A. Yes, sir. 20

Q. And that you did everything in 1927 that you had done in 1926 to preserve the fruit?

A. Yes, sir.

Q. When did you start to cool your cold storage off in 1926, prior to August 30th, for the receipt of these peaches on cold storage?

A. I haven't got the records, and I can't remember, but my usual custom is not to do it until I receive the contracts, and I think that sheet would tell me when I received the first contract, possibly. 30  
No, it doesn't; it doesn't show it.

Q. You may have answered it yesterday, but I will ask you again, to clear the record—how much did you say that it cost you to lower the temperature in the cold storage per day?

A. It cost me about \$250.00 a day.

Q. \$250.00 a day to get it cold?

A. No, it cost five hundred dollars to turn it on.

Q. All right, it costs you five hundred dollars, then, when it is turned on?

A. Yes, sir.

Q. And it costs you \$250.00, did you say —

A. I will tell you how I arrive at that.

Q. Just a moment, Mr. Repp; I will get at that afterward.

10 A. Yes.

Q. It cost you five hundred dollars to turn it on?

A. Yes.

Q. And it cost you \$250.00 for every day that you maintain —

A. In the hot weather.

Q. Well, would you say that the weather such as was experienced in 1927 was such weather as would necessitate the expenditure on your part of \$250.00 a day to maintain the temperature?

20 A. I do.

Q. So that every day that you would have started your cold storage in 1927 for the purpose of getting the temperature down to the preserving point would have cost you five hundred dollars to start and two hundred and fifty dollars for every day prior to the time the peaches came in?

A. Well, there is a limit on that, George; you know after you get the thing really down cold—I am talking about putting the peaches in, too, see. No, it wouldn't cost that with the bare room, no.

30 Q. Well, it costs you five hundred dollars to turn on the brine, doesn't it?

A. Yes.

Q. Then you say it takes you forty-eight hours, did you say, to get your temperature of that cold storage plant down to, we will say, thirty-two degrees?

A. Yes.

Q. And after you have got it down to thirty-two degrees without the fruit being in there, how much does it cost you to maintain that temperature?

A. I couldn't tell you.

Q. Would you say it costs you \$150.00 a day?

A. I couldn't tell you.

Q. A hundred dollars a day?

A. It all depends on the temperature outside.

Q. Well, assume that the temperature outside was 10 not in excess of eighty-three degrees?

A. I couldn't say.

Q. You simply wouldn't know what it would cost?

A. No.

Q. It wasn't, then, a question of the cost of maintaining that temperature that prevented you from turning the brine on —

A. Oh, my, no.

Q. Prior to August 27th, for the receipt of peaches? 20

A. No.

Q. On August 26th, I think it was?

A. The only reason was, I did not know that I was going to use it.

Q. And when did you start to clean out the cold storage for the receipt of peaches?

A. In 1927?

Q. In 1927.

A. Before Mr. Porch came in the office to talk about them, while he was still standing there, I went to the office, went in and instructed the men to get ready; I would say it was between two and three o'clock on Thursday afternoon. By the way, I want to correct that; it was Friday morning that we turned on the juice, instead of Thursday. 30

Q. That was on —

A. Friday.

Q. Friday instead of Thursday?

A. Yes, Thursday afternoon is when we cleaned the building out.

Q. Thursday you cleaned it out?

A. Started and worked all night.

Q. And Friday you turned on the brine?

A. Some time early in the morning.

Q. And you started to put in peaches on that same  
10 date, didn't you?

A. Yes.

Q. That was August 26th, wasn't it?

A. The 27th.

Q. Or the 27th of August?

A. Yes.

Mr. Avis: Friday was the 26th.

Q. Let's just get this straight. Now, your rec-  
20 ords show, Mr. Repp, I think, the date that you first  
put peaches in as being the 26th of August, don't  
they?

A. The 27th; I have got it right here.

Q. The 27th—I thought it was the 26th.

The Court: Well, is that Friday?

Mr. Avis: Saturday, the 27th.

30 Q. The 28th you put none in, did you?

A. No, that was Sunday.

Q. You put none in and started in on Monday and  
put in ninety-some hundred, didn't you?

A. Practically ten thousand, yes.

Q. Yes, ninety-nine hundred and twenty-seven,  
and 1930 baskets you put in on the 27th?

A. Yes, that is right.

Q. Put none in on the 28th?

A. No.

Q. And on the 29th you put in ninety-nine hundred and twenty-seven?

A. Yes.

Q. And at that time, after the brine had been on for two days, your temperature then was not down to thirty-two?

A. No, it was not.

10

Q. And despite the fact that your temperature was not down, you received over ten thousand the following day?

A. Yes, sir.

Q. Didn't you think it was your duty, as a warehouseman, to instruct the farmers that you could not receive their fruit because your storage was not down to a preserving temperature?

A. I followed the same proceeding I did for years before. They were all practically stored by the same people. Mr. Miller knew —

20

Mr. Marshall: No, I object to that.

Q. Mr. Repp, I asked you yesterday if you were prepared to tell us something concerning your own peaches?

A. Yes, sir.

Q. You said you had, I think, 3,868, wasn't it?

A. That is right.

30

Q. 3,868 baskets of peaches?

A. Yes, sir.

Q. And when did you start to pick those, Mr. Repp?

A. Let me have that sheet, will you—it is on that sheet.

- Q. This sheet here?  
A. Yes. August 31st.  
Q. You started on August 31st?  
A. Yes.  
Q. Where do you get your information from, Mr. Repp?  
A. Right here.  
Q. First I see "Repp N. G. Farm"?  
A. Yes.
- 10 Q. That indicates when you started?  
A. Yes; wait a minute, when we finished storing, we will get that, too, while we are about it. We finished storing September 5th.  
Q. You started picking, then, on August 31st and finished on September 5th, didn't you?  
A. Yes.  
Q. Labor Day?  
A. Yes, I guess I had that here, too.  
Q. Now, where did you store your fruit, Mr. Repp?
- 20 A. Both in the cold storage building and in the ice house.  
Q. Where did you put the first of your fruit?  
A. In the cold storage building.  
Q. And how many did you put in the cold storage building?  
A. I will have to do some figuring for you.  
Q. Do you want some paper?  
A. I have got it. I put twelve hundred and seventeen in the cold storage and 2,651 in the ice house.
- 30 Q. You started putting yours in the cold storage, then, on August 31st, I assume, didn't you?  
A. Yes.  
Q. And when did you put the last of yours in the cold storage?  
A. On Friday previous to Labor Day I put all that I picked on storage in the ice house.

Q. Well, those of the 1217, then, that you picked between the 31st and September 3rd, you put in the cold storage?

A. George, that thing don't quite —

Q. Jibe up?

A. No, most of this is guesswork, because I didn't keep any records.

Q. Yes, I will ask you to just get as near as you can.

A. The only thing I can go by is that the counter sales here show the peaches that were got out of the ice house that were sold, and that shows how many baskets were sold. Now, I know that the peaches we stored in the cold storage were in such a place that I couldn't get at them.

Q. Yes, you told us that yesterday.

A. That is the only way I can get at it.

Q. But as near as your recollection—the best your recollection serves you now is that there were twelve hundred and seventeen baskets or approximately that of yours that went into the cold storage plant between August 31st and September 3rd; now, that is the Saturday before Labor Day?

A. Yes.

Q. That included the Saturday crop, the Saturday picking?

A. No, Saturday, as I said yesterday, I picked my peaches—I have four or five trucks; I loaded those trucks and let them stand out; I didn't load them until late Saturday night, so as to give the farmers

Q. Where did they go?

A. They went into the ice house.

Q. Then we will say, from August 31st down to and including September 2nd—that would be Friday, wouldn't it—went into your cold storage?

A. Yes.

Q. In other words, three days picking went into the cold storage?

A. Yes, that is right.

Q. And the balance of them went into the ice house?

A. Yes, 1426 baskets here. No, I must have got some out of the —

10 Q. Now, at the time, Mr. Repp, that you put your peaches in the ice house, you knew that was a colder place, didn't you, colder than your cold storage?

A. No, I didn't think anything at all about it; I only done it for convenience.

Q. Well, you knew it was colder?

A. No, it wasn't then, because the ammonia had only been turned on a few hours. No, I did not.

Q. How long did it take you to cool your room off to a preserving temperature by direct expansion?

A. Well, it would take at least a day.

20 Q. At least a day?

A. Yes.

Q. And you did not turn that on until Saturday morning?

A. Yes.

Q. It was not then because you thought they would keep better in the ice house?

A. No, it was only on account of convenience.

Q. You had plenty of room, I expect, for your peaches in the cold storage place?

30 A. Well, I suppose I could have put them where I wanted them.

Q. But you would have had difficulty in putting them with your other peaches?

A. No, the idea is that the farmers who store there have their piles of peaches started, and we don't like to have very many piles for each farmer; it makes confusion.

Q. That would be your experience, too, wouldn't it?

A. I started a small lot back—I forget whose peaches were next to them, but they overlapped on me, and it was impossible to get back to my pile.

Q. So it made it difficult to have added to your peaches by going over the top of somebody else?

A. Yes.

Q. Now, did you find, in taking your peaches out, Mr. Repp, that those that you had in the ice house had kept better than those you had in the cold storage? 10

A. The fact was that I could not get at my own peaches in the cold storage for at least ten days or two weeks after I took those out of the cold storage, as they were piled back and other peoples' peaches were in front of them, and then refused to take them out, so I couldn't get at them if I wanted them.

Q. And when you did take them out ——— 20

A. They were spoiled.

Q. They were spoiled and you dumped them, didn't you?

A. Yes.

Q. What I ask you is whether or not the peaches in general that were in the ice house—they kept better than the peaches in the cold storage, didn't they?

A. Yes.

Q. That is, take the general run of peaches?

A. Yes. 30

Q. Do you know what percentage of loss you had on peaches that were stored in the ice house?

A. Practically none.

Q. Practically none?

A. Another reason for that was that they were practically the first ones that were taken out.

Q. And secondly because the temperature of that room was much colder than that in the cold storage?

A. Yes.

Q. And it had not been run—that is, what do you say you did, you turned the valve on?

A. Opened the expansion.

Q. Opened the expansion valves and that had only been on for a few days, whereas the other had been on for practically —

10 A. Well, in the ice house, it only came on — Of course, we piped the ice house for the purpose of storing ice and that has to be kept below freezing all the time, see.

Q. What was the temperature of the ice house when you turned on the valve, do you know that?

A. I don't know, but I guess it was practically the same temperature as outdoors.

20 Q. About the same as outdoors; then it would have been about the same temperature as your cold storage place at the time you turned the brine on in there?

A. Yes, about eighty.

Q. Not much difference. Now, I think I asked you yesterday if you would be prepared this morning to tell us the number of signed contracts you had on August 26th?

30 A. Yes, sir, I had Ed Leonard, twenty-five hundred; James Kincaid, ten thousand, afterward changed to fifteen thousand, but at that time it was only ten; W. Jenkins, five hundred —

Q. How many?

A. Five hundred; Locust Grove Farm, thirty-five hundred.

Q. Thirty-five hundred?

A. Yes, sir; Edward Miller, ten thousand; A. Madara, five thousand; McClure Brothers, four

thousand; Tomlin, two thousand, making thirty-seven thousand five hundred.

Q. They were the contracts that you had on August 26?

A. Yes, they were made in the office. Of course, I didn't have anything to do with making the contracts, the people came in the office and went out and I was busy getting the temperature down, and I didn't pay any attention to it; I knew we were going to take fruit, and so I just got ready. 10

Q. A lot of that was delegated, I presume, to Mr. Zimmerman?

A. Yes, he signed them all; I didn't sign any of them.

Q. Now, there were some contracts, I assume, that you sent out on the 26th that you did not get back until the following day?

A. Mr. Zimmerman might remember that, but the only think I can go by is by these contracts.

Q. Now, tell us what you can, if you can, about those that were made on the 27th, and we won't 20  
bother with any after that?

A. None made on the 27th.

Q. But 37,500 that you knew of that came on the 26th?

A. Well, the contract was signed; I don't say that I knew it.

Q. Well, you signed contracts, and you knew —

A. I knew peaches were coming.

Q. And you knew that the farmers had reserved 30  
space in your cold storage for the immediate preservation of 37,500 baskets of peaches?

A. I wouldn't say that I knew that, George; I wouldn't say that I knew that.

Q. You mean you thought maybe the peaches might never be delivered?

A. No; all I know was that Mr. Porch came in and said he wanted to put peaches in, and then I bothered no more with the contracts and immediately got ready to take care of the fruit.

Q. When was Mr. Porch's contract?

A. The only thing I know here is —

Q. Was it the 29th?

A. I will get it here in a minute. Yes, the 29th.

Q. He was among the first, I understand?

10 A. He was the cause of my getting ready.

Q. You started to get ready?

A. Yes.

Q. Well, you knew it was coming, didn't you?

A. Well, I thought it was.

Q. And then I assume with the other contracts you had entered on the 26th, 37,500, you felt it safe to add Mr. Porch's, I expect, of ten thousand, didn't you?

A. No, I did not.

20 Q. You did not?

A. No.

Q. The reason you didn't feel like adding it, you had no signed contract?

A. He took the contract away and did not bring it back. Well, in fact, Mr. Zimmerman told me he had not signed the contract, either, but from his conversation I knew other peaches were coming.

30 Q. And immediately after your conversation with Porch, you had entered into contracts with a number of farmers contracting for space?

A. That was done in the office, yes.

Q. For thirty-seven thousand five hundred, which did not include Mr. Porch?

A. No.

Q. Who had taken away with him a contract not signed for space for ten thousand more, which

would have made forty-seven thousand five hundred?

A. Well, I didn't count that much.

Q. I say, if that were added, it would have made it ten thousand more?

A. Yes, but I am not going to add it.

Q. Then we won't add it.

A. I don't add in a contract until I get them.

Q. I think that is all.

A. Don't you want to know about my peaches? 10  
You asked me that question yesterday; you wanted to have that result.

By Mr. Cole:

Q. What hours in the day, Mr. Repp, were the peaches received at the plant in 1927?

A. What is that?

Q. What hours of the day —

A. What hours? 20

Q. Yes.

A. We opened up at quarter of seven and kept open; we had a rule that no peaches were to be delivered at the plant after 4:30, but they usually came—everybody arranged to have their load there exactly at 4:30, and the men usually worked until sometimes eight or nine o'clock to get them in.

Q. Were they being received into the plant as late as eight and nine o'clock at night?

A. Oh, yes. 30

Q. Due to the congestion?

A. Yes, and on Saturday night all night until six o'clock in the morning, so they say.

Q. What about Saturday night?

A. They were all night.

Q. You mean until Sunday morning?

A. Yes, until six o'clock Sunday morning.

Q. Now, I think you have told us, but I will ask you, when was it you opened the ice house?

A. Saturday.

Q. Well, what Saturday?

A. Saturday before Labor Day.

Q. And why was it you opened it at that particular time—did you have any reason for it?

A. Yes, the trucks were coming so fast and I knew  
10 I could not get them in the cold storage any faster than I could open and close the doors; I thought it would relieve the congestion and also relieve the load on the refrigerating plant.

Q. Now, tell us the net amount that you realized from the sale of your peaches per basket or bushel, whichever way you sold them?

A. Well, Mr. Marshall asked me that question, so I am prepared for it. The peaches we got out of the ice house, that shows you the amount of sales.

20 The first lot we took out was on the 9/9, and they sold in Philadelphia at seventy-five cents a basket.

By Mr. Marshall:

Q. What date was that, Mr. Repp?

A. 9/9. On the 12th, a hundred and sixty-nine; they sold for fifty cents, and then we took them out every day until the 15th, and I have the average price and net returns for them.

30

By Mr. Cole:

Q. What was the average net to you?

A. The average net on those peaches returned back for the fruit after all expenses were deducted was \$.0539, a little over five and a third cents a basket, a five-eighths basket.

Q. Now, you were about to say, when counsel interrupted you, that Mr. Miller knew something; what was it that Mr. Miller knew?

A. That the cold storage room was not cold.

Q. When did he know that?

A. He came to see me after he was in the office and wanted to know if I would reserve the same space for him that I did in 1926, and I told him that was impossible, unless he would bring some peaches in and place them in that position, then I would hold 10  
it for him, as I wouldn't reserve space for anybody. He said, "How many do I have to bring?" I said, "A load." He came back in about two or three hours and had twelve baskets of peaches on his truck, and he said, "I have got my load of peaches for my space." That was the number of baskets he put in that day.

Q. What was that date?

A. That was the 27th.

Q. At that time he knew your plant was not yet 20  
cold, did he?

A. Yes, he knew it.

Q. Now, do you want to make a correction in the testimony you gave yesterday, and if so, will you do it?

A. Yes, I made the statement that we had a hundred thousand feet of pipe in the cold storage room, and I made that on the thought that I built my cold storage plant in two units, and I had it in my mind that there was fifty thousand feet of pipe in each 30  
unit, and by having two units, I had one hundred thousand feet of pipe. The fact is that I added the units together before, and I only had fifty thousand feet of pipe in both units. I checked up on the cubic feet of space, and there is about a half a million feet of cold storage space in that building; that is, one to ten instead of one to six.

Q. With your testimony as corrected, what is the ratio?

A. One to ten. The other statement I want to correct is that you asked me if we had had any interruptions or breakdowns in our machinery since 1927 until now and I said no, but in June, 1928 —

10 Mr. Marshall: I object to that as not being relevant to this issue.

The Witness: I just want to correct myself, that is all, George.

The Court: He wants to correct a statement he made yesterday.

Mr. Marshall: Well, that is perfectly all right if he made a mistake.

20 The Witness: I did not think about it; I said no when there was.

Q. Now, you were interrupted—had you finished telling what happened in 1928?

A. In June, 1928, we had a return bend on the ammonia coils and in the brine tank that broke, and the brine rushed in and saturated my ammonia, so we had to clean the whole charge of ammonia out of the entire system and tied up the plant for at  
30 least ten days.

Q. That was in 1928?

A. That was in June, 1928.

Q. Was that before you began to receive peaches?

A. Oh, that was a year after.

Q. A year after and before you began to receive any peaches?

A. Well, I had a lot of apples in there at that time but no damage.

By the Court:

Q. Mr. Repp, you told us yesterday about a conversation you had with Mr. Miller when you advised him that you were unable to keep down the temperature, and you thought he ought not to bring any more, send any more peaches there; then I understood you to say that after that conversation about five thousand baskets of peaches were sent to the plant? 10

A. Yes, sir.

Q. Where were they placed?

A. Most of them in the ice house.

Q. Most of them—do you know what proportion?

A. I do not.

Q. But most of them, you say, were placed there? 20

A. Yes.

Q. I understood you to say this morning that there was practically no damage to any of the fruit in the ice house; is that correct?

A. Yes.

Q. Does that apply to the peaches that Mr. Miller placed there?

A. I don't think Mr. Miller got anything out of the peaches that were in the ice house; he didn't start to take them out, and I pretty sure that the peaches that I sold of Mr. Miller's, on the account of sales that I have here—in fact, I know they came out of the ice house, and I have a report here to show what they brought. 30

Q. Are you able to say what condition they were in?

A. They were soft.

Q. They were soft?

A. Yes.

By Mr. Cole:

Q. Did you testify what you realized—you did, didn't you—from the peaches that you sold?

A. Yes, they didn't ask me what they brought; they asked me when I sold them.

10 Q. Tell us about that.

A. Understand, the prices I quote are the prices before the deductions are made; I would have to figure that out. On the 16th of September there was two hundred and fifty baskets sold by Culver; they sold for twenty-five cents a basket. I hold those to Culver. On the 19th—No, this is hauling he sent me a credit for. On the 24th, the 26th —

Q. After the 16th did you have one?

20 A. I was going to read you one, but I found out it was a credit he sent us for hauling the peaches and had nothing to do with the sale. On the 24th, 113 baskets brought forty cents; on the 26th two hundred baskets brought forty cents; on the 26th again forty-seven brought thirty-five and one hundred brought twenty-five. On the 28th there were two hundred and six brought thirty cents, and on the 29th 134 at twenty-five cents, but there is a deduction from these if the storage is paid and expenses of about twenty-eight cents a basket. On the 21st  
30 there were fifty-eight baskets at thirty cents. Going back to September 16th, 116 at thirty, 101 at twenty-five and 46 at twenty. On the 17th there was nine at forty and three hundred and four at thirty-five. On the 16th there was 125 at twenty-five cents, eighty at thirty cents and two hundred and four at thirty cents. On the 15th there were 295 at thirty-five

cents; on the 16th there was 198 at forty cents, 204 at thirty-five cents, 204 at thirty-five, 205 at thirty-five cents, 205 at forty cents—no, that was on the 17th; on the 17th there were 205 at forty cents and on the 17th there was 204 at fifty cents. On the 19th, 94 at forty cents, 295 at thirty cents, 204 at sixty cents, and 206 at forty cents. They are all gross sales.

Q. Now, while you are on the stand, Mr. Repp, is there a sum of money due from Mr. Miller to the 10 defendant for storing the peaches?

A. He hasn't paid me anything for it.

Q. Well, how much is due?

A. I will have to get that; we have given him credit —

Q. Would this paper help you?

A. Yes, the storage amounted to \$1625.40. We sorted 609 baskets at five cents, and carted 876 baskets at eight cents, and 180 baskets at five cents, then we charged one cent a basket for taking the 20 peaches out of storage, hauling them out and dumping them; it made a charge of \$2034.93. We have given him credit for peaches sold of \$1281.91, leaving a balance of \$753.02.

By Mr. Marshall:

Q. It is quite true, you say, Mr. Miller has not paid the storage of ten cents a basket; that was for the number 16,254 that you checked rather than 30 16,225?

A. Yes.

Q. And you, of course—whatever moneys you have made or received from the sale or salvage of any of these peaches, you of course, have retained?

A. Yes.

Q. And the prices that you have read to us a few minutes ago were the prices that you got for the peaches as you took them out of your storage?

A. Yes, no charges against them.

Q. Yes, no charges against them, and the most of those peaches were not in A No. 1 shape, were they?

A. No.

10 Q. So that the prices you quote would be the prices that you got for peaches that were not in first class shape?

A. Yes.

Q. Are you prepared to tell us what the price was during those corresponding days of good Elberta and Hale peaches?

A. I don't know; I don't know as there was any.

Q. What?

20 A. I don't know there was any that year anyhow. I don't know that there were any good Elberta peaches that year any way any time.

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ROBERT E. ZIMMERMAN, SWORN.

By Mr. Cole:

Q. Did you go with Mr. Repp to the home of Mr. Miller sometime recently?

30 A. To the home of Mr. Eifert—what was the question?

(Question repeated.)

A. Went to Mr. Miller's home?

Q. Mr. Eifert, I mean.

A. Mr. Eifert's home, yes.

Q. About when was that?

A. That was last Saturday afternoon about 4 o'clock.

Q. Was there some talk about the peaches in question?

A. There was.

Q. What if anything did Mr. Eifert say about the condition of Mr. Miller's peaches?

A. As we were leaving, Mr. Eifert said that nobody would expect the peaches to keep because they were soft. 10

Cross-examination.

By Mr. Marshall:

Q. Do you know what occasioned him saying that?

A. We went down to talk to Mr. Eifert about a piece of testimony that was brought out by the plaintiff; we wanted to inquire about six or seven hundred baskets of peaches that were picked on Saturday and left out in the orchard to late Sunday afternoon and brought into the cold storage Monday morning; we wanted to inquire as to that. 20

Q. And you went there to inquire and left a subpoena, didn't you?

A. Left a subpoena.

Q. What else did he say to you about that?

A. He volunteered the information. 30

Q. Came out like a bolt out of the clear sky, that the peaches were soft! Did he mean all the peaches of Miller were soft?

A. He made it general; he didn't say this particular lot.

Q. He told you generally that all of Miller's

peaches were soft, and he should not have expected to keep them?

A. He didn't say all; he said the peaches were soft.

Q. What peaches were you talking to him about?

A. We talked about the crop in general.

Q. What peaches were you talking with Mr. Eifert about?

10 A. The question we asked him was about this particular lot which was carried over from Saturday until Monday morning.

Q. Did he say anything to you about those peaches?

A. He did not.

Q. He didn't answer you on those at all?

A. He just spoke about the peaches in general, about the crop of peaches.

20 Q. When you asked him about the five or six hundred baskets of peaches, he replied to you by saying that all Miller's peaches were soft?

A. We were in the back —

Q. No, is that what he said?

A. He said the peaches were soft.

Q. And you inferred from that he meant that all of Mr. Miller's peaches were soft?

Mr. Cole: I object to that; he didn't say —

30 The Court: He simply said what this man said.

Q. Just tell us then again.

A. He said the peaches were soft and nobody would expect them to keep.

Q. And you were talking about five or six hundred baskets of peaches, weren't you?

A. There probably had been five minutes elapsed

between the time we spoke of the particular lot and when he volunteered the information I have just given you.

Q. What answer did he give you then with respect to the five or six hundred baskets of peaches—did he answer you at all?

A. He told us the peaches were picked on a Saturday morning and were loaded on a truck, left out in the orchard until Sunday night; he loaded them Sunday night and brought them over on Monday 10 morning.

Q. Didn't he tell you at that time that the peaches had colored up a little bit but were proper peaches to put in the cold storage?

A. He told us all the peaches this year were full of water.

Q. Oh, did you forget that on your direct examination?

A. No.

Q. That is something else he told you, was it? 20

A. He told us the peaches were soft, and subsequently told us they were full of water because of the condition of the season, a rainy season.

Q. That is the conversation—you have told us all now—the conversation you had with Eifert about the peaches?

A. I told you the circumstances; if you will give me just a minute, I will tell you how it occurred.

Q. I would like to hear it.

A. When we took the subpoena to him, he was 30 back in his wood lot, and I handed him the subpoena. He was through for that day, and he walked up toward the house and as we were leaving, he gave us the testimony that I have just given you, that the peaches were soft and nobody would expect them to keep.

Q. And they are his exact words, are they?

A. Those are his exact words.

Q. "The peaches were soft and nobody would expect them to keep."

A. Yes.

Q. Were you talking generally at that time about all of Mr. Miller's peaches?

A. We were speaking generally of the crop of peaches.

10 Q. Of all peaches, regardless of whether they were Miller's or whose they were?

A. No, peaches for the season apparently.

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MULFORD TICE, SWORN.

By Mr. Avis:

20 Q. Where do you live, Mr. Tice?

A. Pitman.

Q. What is your occupation?

A. Chief engineer.

Q. Where?

A. Glassboro.

Q. For whom?

A. John Repp Ice & Cold Storage.

Q. When you say "chief engineer," what do you mean by that?

30 A. Why, I have charge of all the machinery, the pumps and boilers and so forth.

Q. What time do you spend around the plant?

A. Well, that is according.

Q. I beg pardon?

A. That is according; some days eight hours, some days ten, some days twelve; whatever happens, why, I am there on the job.

Q. The eight hours is your usual occupation there, is that right?

A. Yes.

Q. How long have you been working there, Mr. Tice?

A. I went there in 1903.

Q. In 1903?

A. Yes.

Q. Have you been continuously employed?

A. No, I was away six years.

10

Q. When?

A. 1917 to 1923.

Q. Then you were continuously employed from 1903 until 1917?

A. Yes.

Q. And then from 1923 up to date?

A. Up to now.

Q. From 1923 to date, is that correct?

A. Yes, sir.

Q. What sort of plant is this, Mr. Tice—will you explain generally, the cold storage plant?

A. Well, what do you mean?

Q. Well, I mean, how is it cooled?

A. How is it cooled? Why, it is cooled by brine and also ammonia.

Q. Brine and ammonia?

A. Yes.

Q. Where is the brine kept, in tanks?

A. Yes, sir, a big tank.

Q. Where is that tank?

30

A. It is in the engine room.

Q. And that is on the other side of the road from the cold storage plant?

A. Yes.

Q. Do you know how the brine is gotten to the cold storage plant?

A. Yes, sir, by a pump.

Q. Yes, and through a pipe?

A. Yes.

Q. Where is the pipe?

A. Runs from one plant across the road to the other.

Q. Did you have anything to do with installing that pipe?

A. Yes, I was there on the job.

10 Q. How was that installed—how big is it?

A. A six inch pipe.

Q. How was it installed?

A. Well, it was put in—we dug a trench—the men did, I didn't do it, but I helped dig the trench there and put this pipe in there and we covered it up with granulated cork and put a cover on it, a concrete cover. I suppose there is about six or eight inches of cork in there all around the pipe.

20 Q. Do you have anything to do with the care of the cold storage rooms?

A. Well, if there is anything wrong, they generally come to me.

Q. You look after that, too?

A. Yes.

Q. Do you know whether in 1927 the piping and the other apparatus in the cold storage plant was in good condition or not?

A. The same as it always was, it was nothing different.

30 Q. Well, had you examined it before that time?

A. Yes, sir.

Q. And how about the operating plant?

A. Fine condition.

Q. Had you or had you not kept that plant in the best condition that you can keep it in?

A. We tried to, tried to keep it running. We have

one engine there and while that is down we fix the other one, so we keep one going all the time.

Q. During 1927, in August, have you any recollection as to when the brine was turned on?

A. Well, as near as I can tell—I wasn't the night man—when he turned it on, he said about ——

Mr. Marshall: I object.

Q. You did not turn it on yourself? 10

A. No, I did not turn it on, no, sir.

Q. When was your first personal knowledge that the brine had been turned on?

A. Well, the night man told me the next morning.

Q. No, your personal knowledge—when you came in the plant, could you tell whether the brine was on or not?

A. Yes.

Q. Now, when did you first ascertain that?

A. When I came in the next morning. 20

Q. What morning was it, do you remember?

A. Well, the following morning.

Q. The following morning to what, Mr. Tice—can you tell us?

A. It was Friday morning.

Q. Oh, it was Friday morning?

A. Yes.

Q. That was when you first had the knowledge, personal knowledge that the brine was on?

A. Yes. 30

Q. Now, what portion of the plant was working at that time?

A. What portion?

Q. Yes.

A. It was all working.

Q. How many engines have you there?

A. Two.

Q. Do you always work both of them?

A. No, sir.

Q. How about this morning, on Friday?

A. This morning, on Friday, they were both working.

Q. Is that usual when the plant is first opened to cool it off?

A. Yes, sir.

10 Q. Was the plant working—was it or was it not working at this time at full capacity?

A. Yes.

Q. Was there any trouble with the brine?

A. No.

Q. Or ammonia?

A. No.

Q. The pipes, or anything of that kind?

A. No.

20 Q. How was the plant conducted after that time up to, say, the 15th of September?

A. What do you mean?

Q. Well, with relation to efficiency—were you there supervising it?

A. Yes.

Q. How much time did you spend there during that period?

A. Some days I was there ten hours, some days I was there twelve hours.

30 Q. Did you have an assistant or man to take your place when you went off?

A. Yes.

Q. Who was he?

A. The night man.

Q. Who?

A. The night engineer.

Q. What was his name?

A. Why, Frank.

Q. A man you call Frank, was it?

A. Yes, that is what we call him; I can't think of his last name.

Q. Was there any time during that period, Mr. Tice, that there was anything the matter with this plant?

A. No, sir.

Q. Was there any time during that period that it was worked less than one hundred percent or as efficiently as you could work it? 10

A. The plant was running full, and we couldn't do any more; both engines were running, the pumps were all running, and everything was running, and that is all we could do; we couldn't do any more.

Q. What happened to the ice in the ice cans in your ice manufacturing plant during that period, if anything?

A. Well, it melted.

Q. It melted? 20

A. Yes.

Q. What did you do, if anything, to endeavor to raise the temperature of the brine with relation to the ice cans or ice plant?

A. Well, we put salt in the ice.

Q. Or bring it down?

A. Put ice and salt in the cans to help bring the temperature down.

Q. What effect would that have?

A. Well, it had some effect. 30

Q. Was that a recognized method of endeavoring to cool off the brine?

A. We never done it before, but we tried to do it to cool it off.

Q. What else was done, if anything, to lower the temperature in the cold storage rooms?

A. Well, Mr. Repp hauled ice and put it in the cold storage.

Q. Was any ice taken from your ice plant and put in cold storage?

A. No, sir.

Q. What did you say that you did with relation to the ice cans to endeavor to lower the temperature of the brine?

10 A. Why, we put ice, cracked ice in the cans, then covered it with salt, the same as you would do with an ice cream cooler.

Q. What do you know, if anything, about the temperature in the cold storage rooms?

A. I don't know anything about the temperatures.

Q. You did not go over and examine it?

A. I was over there, but I was in a hurry, and I didn't stop to look.

Q. How about in 1926, were you employed there then, Mr. Tice?

20 A. Yes, sir.

Q. And running the plant?

A. Yes, sir.

Q. In 1925 also?

A. Yes, sir.

Q. Did you have any trouble during those years in preserving the fruit that was in the cold storage?

A. Never had no trouble before.

Q. Was or was not the plant conducted the same way in 1927 as it was in 1926?

30 A. Yes, sir.

Q. Had you ever before that time resorted to ice and salt in the ice freezing cans?

A. No, sir, didn't have to.

Q. Or to putting ice in the refrigerating house proper?

A. No, sir.

Cross-examination.

By Mr. Marshall:

Q. You, I understand, Mr. Tice, are the chief engineer, aren't you?

A. Yes, sir.

Q. Of the plant?

A. Yes.

Q. And your duties are almost wholly in the ice house, aren't they? 10

A. Well, yes.

Q. I presume while you were there as chief engineer you had some knowledge of the fact that the pipes were dripping in the cold storage plant, didn't you?

A. Sure.

Q. And when you had knowledge that the pipes were dripping and you had knowledge that you had turned the brine on, what did that indicate to you? 20

A. What did it indicate? I couldn't say; I couldn't tell. It was there, and that was all there was to it. I couldn't do any more.

Q. Well, what did you do after you heard that the pipes were dripping water?

A. What did I do?

Q. Yes.

A. Why, put salt and ice in the ice cans.

Q. Do you know whether or not any other engineers came down, any consulting engineers, to ascertain whether there was anything wrong with the plant while you were there? 30

Mr. Cole: I object to that; he has simply testified to facts. It is not cross-examination.

The Court: Yes.

Q. You say the plant was running the same in 1926 as it was in 1927?

A. Yes.

Q. You don't know whether the brine was turned on earlier in 1926 for the receipt of the peaches or not, do you?

A. No, sir.

Q. you don't know that?

10 Q. And you don't know whether that would have any effect upon the preservation of the fruit or not, do you?

A. I don't have any record of that at all.

Q. Is it part of your duty to maintain the temperature charts, or isn't it?

A. No, sir, I have nothing to do with the charts.

Q. Do you know whether there were temperature charts in 1927?

A. I couldn't say.

20 Q. You don't remember any occasion when you observed the temperature?

A. No, sir.

Q. In the cold storage plant?

A. At that time I didn't bother with no temperature at all.

Q. Are you able to tell us, however, when you went in the cold storage plant, whether it was warm or whether it was cold?

A. Well, it wasn't warm and it wasn't cold.

30 Q. It wasn't as cold as you expected?

A. It wasn't as cold as we wanted it, no.

Q. It was not cold enough to preserve the fruit, was it?

A. No, sir.

(At this point a recess was taken for five minutes.)

CHARLES H. BROWN, SWORN.

By Mr. Avis:

Q. Where do you live, Mr. Brown?

A. Swedesboro.

Q. What is your business?

A. I am in the farmer's supply and also fruit grower. 10

Q. How much fruit do you grow, Mr. Brown, either in trees or acreage?

A. About ninety acres.

Q. And how much peaches?

A. Half of that.

Q. How long have you been growing peaches?

A. Twenty years.

Q. Does the moisture, rain and lack of sunshine while the peaches are growing, have any effect upon the quality of the peach, Mr. Brown? 20

A. It does in my experience.

Q. And what effect does it have?

A. Well, they are watery, and they ripen quicker, don't keep as well.

Q. What about the year, 1927—what was the condition of Elberta peaches that you were growing that year?

A. Well, we had had a lot of rain, and they ripened quicker and were tender; when you broke them open, they were watery, didn't have the firm texture that a peach should have. 30

Cross-examination.

By Mr. Marshall:

Q. You said you raised twenty acres of fruit, of peaches?

A. No, I said I had ninety acres, and about half of them were peaches.

Q. Did you raise any Hale or just Elbertas?

10 A. I have Hale.

Q. Hale and Elbertas?

A. Yes.

Q. Do you say the same of the Hale peaches that you had?

A. No, the Hale is a better peach, heavier, better shipper and better to store than the Elberta.

Q. You say that the season of 1927 there was lots of rain?

A. Yes.

20 Q. And lots of sun?

A. No, I said the weather was hot; I don't know about the sunshine.

Q. Did you have a good crop of peaches?

A. Yes.

Q. Of Elbertas?

A. Yes.

Q. Did you store those?

A. Yes, some of them.

30 Q. You say that the rain and the sun made a watery peach?

A. Yes.

Q. So when you opened it, it was watery?

A. I don't recollect that I said the sun; I meant the heat, if I did say the sun.

Q. Well, you mean lots of rain and general heat?

A. Yes.

Q. Made a peach that was poor for storage?

Mr. Avis: He didn't say that, and I object to the question.

Q. What did you say then, the effect it had upon the peach with relation to their sale or storage?

Mr. Avis: I object to that.

The Court: I think he said so in his direct examination, something about storage. 10

Mr. Avis: No, not in my examination was there anything said about storage.

The Court: He said they didn't keep as well.

Q. You don't know then about storage or don't mean ——

Mr. Avis: That is objected to. 20

Q. What do you mean by "don't keep as well"?

A. Well, on the other hand, they don't arrive as well when we ship them, for one reason.

Q. Are you talking now about fruit that you had picked from the tree and shipped immediately?

A. Yes.

Q. You are not undertaking to tell us anything about the keeping qualities of fruit in storage, are you?

A. No. 30

T. ALVIN MAGEE, SWORN.

By Mr. Avis:

Q. Where do you live, Mr. Magee?

A. Glassboro.

Q. What is your occupation?

10 A. Foreman of the Delsea Orchards.

Q. How much fruit, peaches particularly, have you charge of as foreman of the Delsea Orchards?

A. At the present time we only have about twenty acres of peaches

Q. And in years gone by —

A. In years gone by we had 250 acres.

Q. How long have you been the foreman for Delsea Orchards?

A. I have been foreman since 1919.

20 Q. And how long have you been in the peach growing business?

A. I was born and raised on the same farm.

Q. And peaches have been grown on there for about how many years?

A. About twenty some years, twenty-two, I guess.

Q. And amongst those peaches, were there any Elbertas?

A. Yes, sir.

30 Q. Have you watched, during the period that you have been interested in growing peaches, the effect of the different kinds of weather on the peach itself, its quality?

A. Yes, sir.

Q. What effect on the quality of the peach has a rainy or wet and warm season while the peach is growing?

A. In my experience, if it comes a rainy day and

then comes out exceedingly warm, it has a tendency to ripen up the fruit very rapidly.

Q. And as to the texture of the peach itself, is there any effect upon that?

A. It would make it, naturally make it soft.

Q. What have you to say about the growing year of 1927?

A. The year of 1927, we started to pick peaches, I think it was on a Wednesday.

Q. I mean as to the quality of the peach. 10

A. The quality?

Q. Yes.

A. The quality was good up until picking time.

Q. I see; had it been a wet season or a dry season?

A. Before that period I am not—I wouldn't want to say, because I don't know.

Q. At the picking season, was it rainy then part of the time?

A. It rained the day before; we picked one day, 20 and it rained the next, and the following day the peaches were very ripe.

Q. Do you remember what day you started to pick?

A. I haven't the date, but I think it was on a Wednesday.

Q. Wednesday?

A. Prior to Labor Day.

Cross-examination.

30

By Mr. Marshall:

Q. Would you say, Mr. Magee, that the time that you devoted to the picking of your peaches in 1927 was a rainy season?

A. I wouldn't say it was a rainy season, no.

Q. It was comparative dry, wasn't it?

A. It was, all but one day.

Q. All but one day, and by far the majority of days were absolutely dry, no rain at all, weren't they?

A. Yes.

Q. And it wasn't excessively hot either, was it?

A. It was.

Q. It was excessively hot?

10 A. Yes.

Q. What was the temperature if you recall?

A. I am not in a position to tell you the temperature, but I know it was awful warm.

Q. During any of the time that you say you were picking—you started in Wednesday before Labor Day?

A. If I remember right, that was the day we started.

Q. On down until what time did you quit?

20 A. Saturday prior to Labor Day.

Q. Saturday before Labor Day?

A. Yes.

Q. And during all that time, do you remember whether it was over eighty-three or eighty-four or eighty-five degrees?

A. I wouldn't want to say; I didn't look at any thermometer during all that time, but I just know it was hot, that is all.

Q. You say if it rains one day and comes out warm the next, if that happens, it ripens the peach?

30 A. Yes.

Q. You mean, I expect, that if those things occur while you are in the act of picking, don't you?

A. That is when the peaches are almost matured, yes.

Q. That is, the rain, if it rains, has a tendency to ripen up the fruit probably prematurely?

- A. Yes, sir.
- Q. Now, you picked the 1927 crop?
- A. Yes.
- Q. Did you have Elbertas and Hales or just the Elbertas?
- A. Just the Elbertas.
- Q. And your peaches were in what kind of shape?
- A. When we started to pick our peaches were in good shape.
- Q. For how many days did they continue in good 10 shape?
- A. One day.
- Q. Just one day?
- A. Yes.
- Q. And after that what?
- A. After that it rained, after the first day's picking, the second day it rained, and the third day we went out to pick. The reason I know is because the first day I told the men just to pick the ripest and leave the greenest. 20
- Q. Did you only pick two days?
- A. No, sir.
- Q. How many days did you pick?
- A. Three and a half. I think it was.
- Q. Three and a half days; how many baskets did you pick altogether?
- A. About twenty-eight hundred.
- Q. Did you ship them all?
- A. No, sir.
- Q. Did you store any of them? 30
- A. Stored them all.
- Q. You stored them all?
- A. If I remember right.
- Q. Where did you store those?
- A. Repp's Cold Storage.
- Q. And you lost yours, too, did you?

A. The biggest percentage of them, yes, sir.

Q. When did you start putting yours in, do you know?

A. I think on a Wednesday before Labor Day; I don't know the date.

Q. Wednesday before Labor Day, and you stopped on the Saturday before Labor Day, didn't you?

A. Yes, sir.

10

## DEFENDANT RESTS.

## PLAINTIFF'S REBUTTAL.

EMIL EIFERT, recalled.

By Mr. Marshall:

20 Q. Mr. Eifert, with respect to the time that Mr. Repp and Mr. Zimmerman came to your home on last Saturday, where were you at the time they came out to your place?

A. I was coming up from the woods back to my place.

Q. Do you recall having made this statement to Mr. Zimmerman, that all the peaches were soft and nobody would expect them to keep?

A. No, sir.

30

Mr. Cole: Now, just a moment; he said he didn't on cross-examination and we contradicted him, and besides that, our proof didn't say he used the word "all" so it is not rebuttal.

Mr. Marshall: I am asking him now to rebut what Mr. Zimmerman said he told him

The Court: I think he was asked the question on cross-examination for the purpose of laying a foundation.

Mr. Cole: Exactly.

The Court: To impeach that testimony.

Mr. Marshall: Yes, now I am asking him the precise language that Mr. Zimmerman says, that all the peaches were soft and nobody would expect them to keep. 10

The Court: He did not say "all."

Mr. Marshall: Well, I might correct that by saying "The."

The Court: However, I don't know where you could stop, Mr. Marshall; after this testimony Mr. Zimmerman might be recalled. You see, he was confronted—the idea was to ask him the same question, to ask Zimmerman the same question that was asked Eifert as to what Eifert is alleged to have said. He denied that he made the statement. Now, the jury has that denial, and they have the statement of Mr. Zimmerman that he did make it. 20

Mr. Marshall: Yes, then Mr. Zimmerman goes on and relates all the conversation he had 30

Mr. Avis: That was on cross-examination.

The Court: That was brought out on cross-examination.

Mr. Marshall: Well, I won't go on any further.

(Witness withdrawn.)

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EDWARD E. MILLER, recalled.

10 By Mr. Marshall:

Q. Mr. Miller, with respect to the conversation that you had with Mr. Repp on Labor Day, September 5th, do you recall any conversation with Mr. Repp pertaining to the icing of cars, and a statement made by you that "If you will take these peaches, I will guarantee to take them out as soon as I finish picking"?

20 A. I never made that statement, that I would guarantee to take them out as soon as I finished picking them; that part of it I didn't make, but I did have some —

Mr. Cole: No, no.

(No cross-examination.)

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30 CHARLES RILEY, recalled.

By Mr. Marshall:

Q. Mr. Riley, you live where?

A. Pitman.

Q. And you are a cold storage operator, are you?

A. Yes, sir.

Q. Were you operating a plant in Pitman in 1927?

A. Yes, sir.

Q. Do you recall whether or not during the year, 1927, you stored in your plant at Pitman any Hale or Elberta peaches?

A. Yes, sir, we did.

Mr. Cole: I object to that at the threshold, that it is not rebuttal, and it is not relevant to the issue. 10

Mr. Marshall: If the Court please, I am particularly referring to the testimony of Mr. Leighton Parkhurst who gave some testimony to the effect that the peaches in 1927—he gave us the condition of them and spoke about their storage qualities, and I think opened the door for just this testimony. We offer to show that peaches that season did keep in cold storage plants.

The Court: The objection is overruled. 20

(Exception noted for the defendant.)

(Question and answer repeated.)

The Court: Which?

The Witness: Stored both.

The Court: Both? 30

The Witness: Yes.

Q. Can you tell us, Mr. Riley, either exactly or approximately, how many Hale or Elberta peaches you had in your cold storage plant?

A. I can't tell you exactly the quantity of each; we had approximately about 30,000 in storage.

Q. 30,000?

A. Yes.

Q. Do you know how long those peaches were in your storage?

A. Some of them were in there as long as five weeks.

10 Q. And do you know about when they started to put them in?

A. I don't know exactly the date; it was the latter part of August; I couldn't say.

Q. And over Labor Day?

A. Yes, sir.

Q. And do you know the condition of those Hale and Elberta peaches when they went into your storage?

20 A. Well, I didn't notice any difference from former years, excepting that they were a little—had a little moisture in them, but nothing as far as I could see.

Q. Did you see these peaches when they were taken out of your storage, Mr. Riley?

A. Yes.

Q. What condition were they in when they came out of your storage?

A. Better, if anything, than in former years.

Q. Better than they were in former years?

A. Yes.

30 Q. When you say that they were better, will you just describe to the Court and jury what those peaches were like after being in your storage for, as you say, four or five weeks?

A. Well, they were in such condition that the buyers were offering to buy them —

Mr. Cole: I object.

Q. No, don't tell us that, but can you describe the peach itself?

A. Well, as far as I could see, apparently they weren't any different from other years.

Q. Well, were they hard or were they soft?

A. That is a hard question to answer, in this way, that some will come out soft and some come out hard, but take the average the condition of the peach was good.

Q. Would you say as a cold storage man that they had been preserved or had not been preserved during that period of time? 10

A. I would say that they had preserved.

Cross-examination.

By Mr. Cole:

Q. There are several other questions I want to ask Mr. Riley. What temperature do you undertake to maintain at your plant? 20

Mr. Marshall: I object to that.

Mr. Cole: Just a moment until I finish that—for the purpose of preserving peaches.

Mr. Marshall: I object to that in the light of our contract, and beside that it is not rebuttal or relevant what he undertakes to do. 30

The Court: I sustain the objection to the question in that form as to what he does at his plant.

Mr. Marshall: If it please the Court, we had one more witness and not anticipating that we would

wind up quite so soon, he said he would not be here until noon today.

The Court: Come here a moment, please.

(Court and counsel then held a conference at sidebar.)

The Court: We will recess until one o'clock.

10

(At this point a recess was taken until one o'clock P. M.)

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(Trial of the cause resumed at one o'clock P. M., pursuant to adjournment, in the presence of counsel for the respective parties.)

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WILLIAM SCHOBBER, SWORN.

By Mr. Marshall:

Q. Mr. Schober, where do you live?

A. Monroeville.

Q. Monroeville, did you say?

A. Yes.

30

Q. And what business are you in?

A. Fruit growing, farming and growing fruit.

Q. Farming and growing fruit—do you also store fruit?

A. We store our own and a little for others, you know.

Q. A little for others?

A. Yes.

Q. Do you recall whether or not during the summer season of 1927 you stored any peaches?

A. Well, we stored a thousand baskets outside of our own.

Q. One thousand baskets outside of your own?

A. Yes.

Q. Do you remember what time you started to put your peaches into the storage?

A. Well, around the 25th of August. 10

Q. And do you remember when you ceased, when you finished?

A. Labor Day.

Q. You finished on Labor Day?

A. Yes.

Q. With respect to those peaches that you placed in storage between those dates, how long did you keep them in your storage?

Mr. Cole: I object to that on the same ground, 20 that it is not rebuttal, neither is it material under the issue made.

The Court: The objection is overruled.

(Exception noted for the defendant.)

Q. Answer the question as to how long those peaches, that you say were placed in storage between August 25th and Labor Day, how long did they keep 30 in your cold storage?

A. Well, I don't know just exactly when we took out the last one, but we took out peaches right away just as soon as we finished picking, and we kept on until we had to move them on account of the apples.

Q. You kept them in the storage until you had to move them?

A. So as to get the apples in, you know.

Q. To get the apples in?

A. Yes.

Q. Now, tell us when you began to put the apples in, Mr. Schober?

A. Around the 1st of October.

Q. What variety of peaches were there that you had in your cold storage?

A. Mostly Elbertas.

10 Q. And in what condition were those peaches when they were taken out of the cold storage?

A. Well, they were fairly good.

Q. Were they any different than they were in former years?

A. No.

Q. Would you or would you not say that the peaches that you had placed in your storage between August 25th and Labor Day, when you had taken them out, were they preserved?

20

Mr. Cole: I object to that as calling for a conclusion, and it is not rebuttal.

(Objection overruled.)

Mr. Cole: Nor is it relevant.

The Court: He may answer.

30

(Exception noted for defendant.)

A. What do you mean "preserved"?

Q. What is that?

A. What does that mean, "preserved"?

Q. Well, what effect, if any, had the cold storage had upon them?

- A. Well, I didn't see any.
- Q. Had it kept the peaches or had it ruined them?
- A. No, it didn't ruin them.
- Q. Well, did it keep them?
- A. Oh, yes.
- Q. And did you market the peaches that you took from the cold storage?
- A. Yes.
- Q. Do you recall the prices you got for the peaches when you marketed them? 10
- A. Well, we had—of course, we took some to Atlantic City and some to Philadelphia and some to New York; the prices were different in different places, on different days.
- Q. Well, with respect to the Philadelphia markets.
- A. Well, we marketed them all in half bushel baskets, and I think it was about an average of a dollar a basket, around that.
- Q. A dollar for a half bushel basket? 20
- A. Some brought a little more.
- Q. What did they average in the New York market?
- A. Well, we had some as low as two dollars a bushel, and we had some as high as \$3.75.
- Q. As high as \$3.75?
- A. It was in between that.
- Q. As low as two dollars a bushel and as high as \$3.75?
- A. Yes. 30
- Q. And were they Elberta peaches that you had had in your storage?
- A. Yes.
- Q. Can you tell us how long those peaches that you got between two dollars and three dollars and seventy-five cents brought in the market —

Q. What was it?

A. How long those peaches that brought between two dollars and \$3.75 a bushel, how long they had been kept in your storage?

A. Well, I think three weeks, four weeks, something like that.

Q. And what was the capacity, Mr. Schober, of your cold storage plant during 1927?

A. Well, we had about 12,000 baskets in it.

10 Q. 12,000 altogether?

A. Yes.

Q. Do you recall the Philadelphia price—or you said the Philadelphia price was a dollar a half bushel, wasn't it?

A. Yes.

Q. The Atlantic City price—what price did you get for peaches sold there?

A. Well, it was very different, you know; it wasn't quite as good as Philadelphia.

20 Q. Not quite as good?

A. Yes.

Q. Can you tell us how much it was?

A. It was about a dollar, but it was more work to sell them.

Q. Now, when you say a dollar, do you mean a dollar for a bushel?

A. Half a bushel, that is the way we sell them.

Q. A dollar for half a bushel?

A. Yes.

30 Q. What was the price at Philadelphia—wasn't that a dollar?

A. Yes.

Q. Then the Philadelphia and the Atlantic City prices were the same?

A. Yes.

Q. I thought you said the Atlantic City price was less?

A. The only difference was in Atlantic City it takes longer to sell them, you know, you couldn't sell them so readily.

Q. You mean more overhead to sell them? When you speak of peaches selling in New York for two dollars to three dollars and seventy-five cents, do you mean a bushel or half bushel?

A. Bushel.

Cross-examination.

10

By Mr. Cole:

Q. Did you keep a record, something in writing, of the dates that you put your peaches in the storage and the dates you took them out?

A. Yes.

Q. Have you that with you?

A. No, I have —

Q. Did you get a subpoena to be here?

20

A. Yes.

Q. Did the subpoena call on you to produce your records?

A. Well, they asked me for bills.

Q. Why didn't you bring your records?

A. Well, I didn't know that I needed it.

Q. You knew you were going to be asked to testify about the time you put peaches in and the time you took them out?

A. I got here when I put them in, but I don't know—we took them out all the way from the third of September or fifth of September, we put the last ones in, and we took—the sixth of September we started to take out, and took out all the way —

30

Q. You have records to show this, haven't you?

A. Well, no, not in the beginning, because I took them to Atlantic City.

- Q. Took what to Atlantic City?  
A. Peaches.  
Q. What peaches?  
A. What I took out first.  
Q. And when did you begin to take them out?  
A. Oh, the 6th of September.  
Q. That was the first?  
A. The first we took out, yes.  
Q. And you started to put them in on what date?  
10 A. The 5th.  
Q. The 5th of September?  
A. The 25th of October—August, I mean.  
Q. Then you started to take peaches out on the 5th or sixth of September that had not been in the storage plant more than about ten days?  
A. One day, because we just kept on packing.  
Q. Exactly, you picked them, put them in and took them out the next day?  
A. Yes.  
20 Q. And took them to Atlantic City?  
A. Some of them.  
Q. Some of them?  
A. Yes.  
Q. What was the longest you had peaches in that plant?  
A. We had some on Thanksgiving Day; that was the longest.  
Q. You spoke of having how many bushels for some one else in that plant?  
30 A. One thousand baskets.  
Q. Whose peaches were they?  
A. A neighbor of mine, Mr. Hubert.  
Q. What is his name?  
A. Hubert.  
Q. When were they put in?  
A. About the same time.

- Q. When were they taken out?  
A. Well, sometime in September.  
Q. Is that the best you can tell us—you haven't any nearer date?  
A. No.  
Q. How did he dispose of his peaches?  
A. Sold them in Philadelphia.  
Q. How do you know?  
A. Well, he took them to a commissionman, he told me. 10  
Q. That is what he told you?  
A. Yes.  
Q. That is the only way you know?  
A. Yes.  
Q. You picked your peaches and stored them the same day you picked them, didn't you?  
A. Yes.  
Q. In every case?  
A. Every time.  
Q. That was also true of the man whose peaches you stored? 20  
A. Yes.  
Q. Went into the storage house the same day that they were picked?  
A. They were never out more than half an hour.  
Q. Yes, from the time they were picked, in a half an hour they were in the storage?  
A. Yes.  
Q. When you spoke about getting so much for your peaches, of course, you did not deduct from 30 that the expenses?  
A. No, sure not.

By Mr. Marshall:

- Q. Mr. Schober, I show you a statement of W. O. and H. W. Davis, and ask you what it is?

A. That is right.

Q. What is it?

A. Well, that is a bill what I got for one week.

Q. For one week on merchandise, peaches that you sold where?

A. Shipped to New York.

Mr. Marshall: I want to offer it in evidence.

10 Mr. Cole: I object to it.

Mr. Marshall: For the purpose of showing the prices that he obtained for merchandise he sold in New York.

Mr. Cole: I object to it; we can't cross-examine that letter.

20 The Court: No, I think the only way that would be admissible is for him to say of his own knowledge, as that might necessarily refresh his knowledge as to what he received.

Q. Well, just take the paper; with the knowledge of what is on the paper, can you tell us again what prices you got for the peaches you sold in the New York markets?

A. As I said from about \$2.00 to \$3.75; \$3.75 was the highest we got.

30

WILLIAM KINCAID, recalled.

By Mr. Marshall:

Q. Mr. Kincaid, you have been sworn before, I believe?

A. Yes.

Q. During the summer of 1927 did you store any peaches, Elbertas or Hales, in any other cold storage other than the John Repp Ice & Cold Storage Company at Glassboro? 10

A. I did.

Q. At what other cold storage did you store them?

A. Charles Riley, Pitman.

Q. At what time, if you can recall, did you put your peaches into cold storage at Pitman?

A. I just don't remember the date that I started.

Q. Do you remember whether it was before or after you had put them in at the John Repp Ice & Cold Storage Company? 20

A. After I had finished with the Repps.

Q. After you had finished with the Repps?

A. Yes.

Q. And do you know what condition those peaches were in when they went into cold storage at Pitman?

Mr. Cole: I object to that as not being rebuttal, it is not relevant, the conditions are not the same. 30

The Court: The objection is overruled.

(Exception noted for the defendant.)

A. They were full ripe.

Q. Full ripe?

A. Yes.

Q. How long were they kept in the cold storage at Pitman?

A. They were in there about a week to the best of my knowledge.

Q. And when they were taken out, what condition were they in?

A. They seemed to be firmer than when they went  
10 in.

Q. And generally speaking, were they saleable peaches or weren't they saleable peaches at that time?

A. They were.

Q. And you disposed of them?

A. I did.

Q. Are you able to tell us the price you obtained for them?

A. I can.

20 Q. What price did you obtain for them?

A. I shipped to Washington and received \$2.25 a bushel.

Q. Where else did you ship them?

A. I shipped some to New York, some to Wilkes-Barre.

Q. What did you get for the peaches sold in New York?

A. I just forget, I think about \$1.25.

Q. \$1.25 for what kind of package?

30 A. The same kind.

Q. For a bushel?

A. Yes.

Q. And you shipped some, you say, to Wilkes-Barre?

A. Yes.

Q. What did you get for peaches shipped to Wilkes-Barre?

A. I don't just recall that price, but it was more than what I got at New York.

Q. And less than what you got at Washington, I suppose?

A. Yes, sir.

The Court: Did he say what variety of peaches?

Mr. Marshall: I don't think he did.

Q. What variety of peaches were they? 10

A. Those were Elbertas.

Q. Elbertas?

A. Yes.

Q. Did you have any Hale peaches in that lot at all?

A. No, sir.

Q. You said you had no Hale peaches in it?

A. No Hale peaches.

Q. Do you grow any Hale peaches? 20

A. Yes.

Q. With respect to the Hale and Elberta peach are you able to tell us which is the better peach for keeping?

A. The Hale usually.

Cross-examination.

By Mr. Cole:

Q. Have you a record of the cost to you of the shipping, the cartage and commission on those peaches? 30

A. Yes, sir.

Q. Have you it with you?

A. I have it from memory.

Q. Will you tell please what the expense was?

A. The expense of packing was about ten cents a bushel.

Q. What do you mean by "about" ten cents a bushel?

A. As near as any one can figure, unless they kept strict account.

Q. Didn't you keep strict account?

A. I did not.

10 Q. All right, tell us.

A. Ten cents for packing, twenty-five cents for carting, and the usual commission, which is ten per cent.

Q. What about the expressage to Washington?

A. I have that in my pocket; I can tell you.

Q. Well, that is part of the expense, isn't it?

A. Yes, sir. The freight on 387 bushel was \$144.50. I take that to be about thirty or thirty-one cents a bushel—is that correct?

20 Q. Now, will you tell the jury, please, what the total expense to you was which must be deducted from what you say was gross?

A. The gross sales were \$872.50, and the expenses were \$254.70.

Q. That includes everything?

A. Icing, freight, cartage and the commission.

Q. That is everything, is it?

A. Yes, sir.

Q. Does that include the storage?

30 A. No, sir, that includes the shipping charges.

Q. Well, then the storage has to come off that, doesn't it?

A. That comes off of growing charges, you might say.

Q. What?

A. That comes off producing charges.

Q. Well, you had to pay storage to the plant you kept them in, didn't you?

A. Yes, but that is not the shipping charges, that is producing charges.

Q. They are charges, aren't they?

A. Yes.

Q. How much storage did you have to pay?

A. Ten cents for five-eighths.

Q. That has to come off then, doesn't it?

A. It does.

10

Q. What does that amount to?

A. I just can't tell you exactly; it figures on the relative size of the package.

Q. Anyway, you have to deduct that from that amount you have told us?

A. Yes, you do.

Q. It is suggested you also have to pay for the package—you don't get those back, do you? Have you that in your account?

A. No, sir, I have not.

20

Q. Shouldn't that go in also?

A. Yes.

Q. How much is that?

A. About twenty-two cents, between twenty-two

---

Q. A package?

A. Yes.

Q. How many packages were there?

A. In this car?

Q. Yes.

30

A. 387.

Q. Why didn't you include that in your statement of deductions?

A. That is in producing charges, not in shipping charges. You asked me about shipping charges.

Q. I don't care about that, sir; what I want the

jury to understand is what these peaches netted to you after you had paid all the costs incident to storing and shipping them and whatever may have been the cost.

Mr. Marshall: If it please the Court, I think we are getting pretty far afield on that. It seems to me if we are going into the price of the package, that is hardly relevant to this issue; if we are going  
10 on back to the charges that are to be deducted, I expect we would go back and include the actual farming charges, the cost of spraying the trees, how much he would pro rate a basket to fertilization and so forth.

The Court: Well, I suppose that any cost that enters into the actual marketing of the products would be a proper deduction, whatever that may be. I understand that this is such a charge.  
20

Mr. Cole: Well, I am not going to press it any further; the jury have all the statement now.

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LOUIS REUTER, recalled.

By Mr. Marshall:

30 Q. Mr. Reuter, you were sworn yesterday. Did you place any of your peaches in any other cold storage plant excepting the defendant company's plant at Glassboro?

A. Yes, sir.

Q. What other plant did you store your peaches in?

A. Charles Riley at Pitman.

Q. What variety of peaches did you store in Mr. Riley's —

A. Elbertas.

Q. How many baskets of peaches did you store in Mr. Riley's storage?

A. 1,472.

Q. Can you tell us when you put them in Mr. Riley's storage?

A. The 29th and 30th of August.

10

Q. The 29th and 30th?

A. Yes.

Q. And can you tell us when you took them out?

A. I started on the 19th and finished up on the 22nd.

Q. You started to take out on the 19th of September?

A. And finished up on the 22nd.

Q. What condition were those peaches, those Elberta peaches, when you placed them in Mr. Riley's cold storage? 20

A. I should say they were in good shape.

Q. And what condition were they in when you took them out of Mr. Riley's cold storage at Pitman?

A. Still in good shape.

Q. Did you market those peaches?

A. Yes.

Q. Where did you market them?

A. Some in Philadelphia.

Q. Do you recall what prices you received for the peaches that you delivered to the Philadelphia markets? 30

A. I think from seventy-five cents to ninety; I think that is what it was in the Philadelphia market.

Q. Did you ship them anywhere else excepting the Philadelphia market?

A. Some to Newark.

Q. Newark?

A. Yes.

Q. What price did you receive—are these by the bushel?

A. Yes. Those in Philadelphia were in five-eighths baskets.

Q. Seventy-five to ninety cents was for the five-eighths baskets?

10 A. Yes.

Q. Do you know, have you figured that out as to how much that would be per bushel?

A. No, I do not.

Q. At any rate, the seventy-five and ninety refers to simply a five-eighths basket. Now, the Newark packages, what were they?

A. From seventy-five cents to two dollars a bushel, that is what it was sold at.

20 Q. From seventy-five cents to two dollars a bushel?

A. Yes.

Q. What other place did you ship them besides there?

A. Well, I sold some of them at the storage.

Q. That is where, at Pitman?

A. At Pitman storage.

Q. What price did you get for those?

A. I got one dollar and thirty-five cents a bushel at the storage, loaded in the car.

30 Q. One dollar and thirty-five cents, loaded in the car?

A. I had to load them in the car.

Q. Did you have to ice the car?

A. No.

Q. Just simply deliver the merchandise?

A. Just simply packed them and delivered them to the car.

Q. Can you tell us how many you sold at the cold storage at Pitman?

A. I think it was four hundred and sixteen.

Q. Four hundred and sixteen what?

A. Bushels—no, it was 418 bushels.

Q. How many years do you say you have grown peaches, Mr. Reuter?

A. About five years.

Q. With respect to the condition of these peaches that you placed in the storage and took out of the storage, was there any difference in their general condition than the peaches of other years? 10

A. No, sir, not as I seen of.

Cross-examination.

By Mr. Cole:

Q. You have brought a suit against Mr. Repp, haven't you? 20

A. Yes, sir.

Q. Why didn't you put all your peaches in this other storage plant?

A. Because I couldn't get them in there.

Q. What?

A. Because I had filled up my space.

Q. In other words, you came to him after you had exhausted the other place?

A. Yes, sir, after I had—the storage was not filled when I came to Mr. Repp's, Riley's space was not filled, but my space was gone. 30

Q. So you stopped storing them there because he could not take any more from you?

A. Couldn't take any more from me.

Q. How many baskets do you say you stored in this other plant?

A. 472, or 1472, I mean.

Q. 1472? Now, can you account for the disposition of all those 1472 from your book, what you did with them?

A. Yes.

Q. Tell the Court and jury what you did with the 1472 baskets.

A. I shipped some to Philadelphia.

10 Q. Tell us the number you shipped to Philadelphia, the number you shipped to Newark, and how you disposed of the 1472 and how much you got for them.

A. On September 19th I sent 109 baskets to Philadelphia; they sold for seventy-five to ninety cents, September 21st I sent ninety-seven baskets to Philadelphia; they sold for from sixty-five to seventy-five. I said from seventy-five to ninety; it was from sixty-five to seventy-five cents. On September 20th I shipped 104 bushels to Newark; they sold from \$1.75  
20 to \$2.00. September 22nd I shipped 150 bushels to Newark; they sold from \$1.75 to \$2.00. September 22nd, I shipped 48 bushel to Newark; they sold from \$1.75 to \$2.00. On September 22nd I sold 418 bushels at the storage for \$1.35 a bushel.

Q. Where?

A. At the storage.

Q. You mean delivered them there at the storage plant?

A. Yes, I sold them, I loaded them in the car there.

30 Q. That accounts for the full 1472?

A. 1472.

Q. Of course, those figures you have given us are the gross figures?

A. That is the gross figures.

Q. Now, that seemed to figure only 1328 as against your 1472; would that be accounted for in the

shrinkage of the peaches from the time they were put in until you sold them?

A. 1428 what? There was 1472 five-eighths baskets.

Q. All right, now, we figure 1328 five-eighths baskets. You say you sold 1328 according to our figures. I want to know if that could be accounted for, the difference, in the shrinkage of the peach.

A. 1328 what, bushels or baskets?

Q. Baskets—don't let's have any misunderstanding. You put in 1472 five-eighths baskets, didn't you? 10

A. Yes, I put in 1472 baskets.

Q. Five-eighths?

A. Yes.

Q. Now, how many baskets did you sell, five-eighths baskets?

A. Two hundred and sixteen in five-eighths baskets.

Q. No, but I mean in the total. Now, you understand my question; I want to know in the total how many five-eighths baskets did you sell out of the 1472? 20

Mr. Marshall: Judge, I don't think he quite understands you; he means they were sold in five-eighths baskets.

Q. Let me put it like this: Do peaches shrink between the time you put them in the storage and the time they are sold? 30

A. No, sir, they do not.

Q. They don't shrink at all?

A. No, sir, not those didn't.

Q. Do peaches ever shrink between the time you put them in the storage and the time you take them out?

A. You understand, these peaches, when they are put in storage, is not the rounded up five-eighths basket like we haul to market, because they would be impossible to put in like that.

10 The Court: Gentlemen, let me ask this: Is it possible that this discrepancy arises from the fact that in his testimony he said he stored 1472 baskets and then when he was asked the items of sales, he, as I recall, said he shipped so many baskets in one case and in other cases so many bushels.

Mr. Avis: We figured it, if the Court please, if I am correct —

The Court: Did you reduce it to baskets?

20 Mr. Avis: We reduced it to baskets, and instead of being 1472 it would be 1368, and we are asking how he accounts for the difference of 104 baskets.

Q. You understood what I was trying to arrive at?

A. You want to know how many baskets of marketable peaches that would make in five-eighths baskets?

Q. Yes.

30 A. I didn't figure that up, but when we put them up, we don't put them up like rounded baskets to haul to market.

Q. You told us you had put in 1472 rounded baskets, I think, told us you had sold all those peaches, and endeavored to account for 1472 baskets. Now, I call your attention to the fact that you have accounted only for 1368 five-eighths baskets. What became of the others, the difference?

A. It took the difference of the others to make up these full baskets, or otherwise, if we stored a hundred baskets of peaches in storage, we wouldn't take out a hundred baskets of peaches if every peach kept, not for market.

Q. Why not?

A. Because we daren't put them full on account of the piling.

Q. What is the difference—how many would you get out? You say you would put them all in—what 10 is the difference in quantity?

A. I mean when you come to re-pack them in bushel baskets. I don't understand what you mean now.

PLAINTIFF RESTS.

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DEFENDANT'S REBUTTAL.

20

CHARLES H. BROWN, recalled.

By Mr. Avis:

Q. Mr. Brown, during the year 1927, did you store any peaches?

A. I did.

Q. Where?

A. Swedesboro Ice & Cold Storage Company. 30

Q. What varieties did you store there?

A. Elbertas and Hales.

Q. Can you tell what dates or approximately what dates you put them in storage?

A. Why, I think I stored the Hales on the 31st of August.

Q. How many had you?

A. About four hundred, then I stored — No, I stored the Hales the 30th of August, and on the 31st I stored about five hundred bushels of Elbertas. On the 1st day of September it rained, and the next two days, September 2nd and 3rd, I put away about three thousand bushels of Elbertas.

Q. What effect did the rain have upon the peaches as to ripening?

10

Mr. Marshall: I object to that as not proper testimony at this point.

Mr. Avis: All right, we won't go into the question of the ripening.

Q. You put them in storage; how long did you leave them there, Mr. Brown, especially with relation to the Elbertas?

20

A. Well, I began to take them out in about a week or a little less; I think I began to take them out about the 8th or 9th of September.

Q. How many peaches did you have in storage that year?

A. About forty-one hundred bushels.

Q. Was there any loss on those peaches when you took them out?

Mr. Marshall: I object to that, if the Court please,  
30 in that manner.

Mr. Avis: I don't mean money loss—I am speaking of loss of quantity of peaches.

Mr. Marshall: I object to the form of the question.

The Court: Then reframe the question.

Q. All right. How did those peaches come out, Mr. Brown?

A. Those that went in first kept fairly well; the ones that were put in Friday and Saturday, they had a great many ripe ones in them and they weren't fit to ship, the ripe ones were not.

Q. How many peaches did you take out as compared with what you put in that were marketable peaches? 10

A. I think I shipped six cars to Baltimore or five to Baltimore and one I shipped to Richmond.

Q. Can you tell as to the quantity, what quantity were not marketable peaches?

A. Approximately fifteen hundred bushels.

Q. Those that you did take out and ship at that time, about a week after, what price did you get for them, Mr. Brown?

A. I think the Elbertas in Baltimore brought from right around \$1.50, a few of them \$1.75. 20

Q. And what was the storage and shipping cost of a bushel of the peaches that you got \$1.50 or \$1.75 for?

A. Well, I haven't added that up; I know the items.

Q. Well, tell us the items.

A. I think the freight to Baltimore is about thirty-five cents.

Q. How about the package? 30

A. The package is about twenty.

Q. And the packing?

A. Well, ten cents, as near as we can figure.

Q. The carting?

A. Cartage on the other end would probably be eight cents.

Q. Icing?

A. Fifteen cents, approximately.

Q. And the basket or container?

A. I think I said twenty cents for the container, the basket, twenty or twenty-two.

Q. And the storage per bushel?

A. At Swedesboro is ten cents either five-eighths or a bushel.

Q. And the commission?

10 A. Commission ten per cent.

Q. On a dollar and a half it would be fifteen cents, then?

A. Yes.

Cross-examination.

By Mr. Marshall:

20 Q. You say you stored these peaches, Mr. Brown, in the Swedesboro Ice & Cold Storage Company?

A. Yes.

Q. Then you had in there 4140 or fifty baskets?

A. Approximately 4100, it might have been a hundred over or a hundred less; I didn't keep any record of it or haven't any record with me.

Q. They were all Elbertas?

A. No, four hundred and over of them were Hales.

30 Q. Were there other peaches in the cold storage beside yours?

A. Yes.

Q. Are you able to tell us approximately how many peaches including yours were in the cold storage?

A. No, I don't know, George.

Q. Well, were there as many as seventy-five thousand?

A. No.

Q. As many as fifty thousand?

A. No, probably around ten, might have been twenty, I don't know.

Q. Around ten or twenty thousand?

A. Yes.

Q. You have told us of the peaches that you put in; the peaches that you put in were put in between August 30th, wasn't it —

A. August 30th.

10

Q. And what date, September 3rd?

A. September 3rd, yes.

Q. You don't know anything about the keeping qualities of peaches that were put in before that, do you?

A. No.

Q. Or the keeping qualities of any peaches put in after September 3rd?

A. No.

Q. And yours were not a total loss?

20

A. No.

Q. When you stored them, Mr. Brown, what kind of container were they in?

A. Most of them were in bushels.

Q. Did you have them lidded?

A. Yes.

Q. Would they have tendency to keep as well when lidded as they would have kept had they not been lidded?

A. If they are not filled too full, I have found they keep all right.

30

Q. Wouldn't the lidding of the container have a tendency to keep some of the heat in the basket?

A. It might, yes.

Q. As a general principle, peaches would be more apt to keep better with the lids off while in storage, wouldn't they?

A. Well, it is not a tight lid; I don't see why they would.

Q. There are no open spaces on the sides of the bushel baskets like there are on the five-eighths baskets, are there?

A. Yes, the top panel has.

Q. As many?

A. No, not quite as many. They have air vents, though.

10 Q. An air vent, but it is a tighter package?

A. Well, it is according to make, according to who builds the baskets. I think the baskets we had that year were not so tight.

Q. A Swedesboro basket?

A. No, they were made in Baltimore.

Q. The container that you placed them in, Mr. Brown, — They were placed in these containers to avoid the necessity of re-packing?

A. No.

20 Q. You re-packed them anyway, did you?

A. Oh, yes.

By Mr. Avis:

Q. How about those that did keep, did they have a lid on, too, and in the same container, those that you shipped?

A. The J. H. Hales kept very well.

30 Q. Were they in the same style of container?

A. I think they were in hampers.

Q. Hampers?

A. Yes.

Q. And were there other Elbertas in the same style of container, the bushel package with the lid on?

A. Yes.

Q. And did some of those keep?

A. The ones that I stored before that rainy day, September 1st, I think it was, kept pretty good.

Q. So that the trouble that you had was with those stored after the rainy day?

A. That is where we got most of our waste.

Q. That would be on Friday and Saturday before Labor Day, wouldn't it?

A. Yes.

10

By Mr. Marshall:

Q. When were the Hales put in, Mr. Brown?

A. The 30th we put in the first.

Q. You say those peaches kept very well?

A. Yes.

Q. If there had been a rainy season, lots of rain and lots of heat, that rain and that lots of heat had no detrimental effect on the Hale peaches, did it?

A. The Hale is a better keeper than the Elberta. 20

Q. Can you answer my question?

A. No. What was your question—let me have that.

(Question repeated.)

A. Not much.

By Mr. Avis:

Q. They were all put in, however, before this 30 rainy day that you speak of?

A. Yes.

Q. What was the temperature on Friday and Saturday, Mr. Brown?

A. I didn't look at the thermometer.

Q. Do you know whether it was cool or warm?

A. It was warm.

W. H. PARKHURST, recalled.

By Mr. Avis:

Q. Now, Mr. Parkhurst, we have asked you to come back again on another line of testimony. Did you in the season of 1927 store in cold storage any peaches?

10 A. Yes, a few.

Q. Where?

A. In Littlefield's Ice & Cold Storage.

Q. What kind of peaches did you store and how many?

A. We stored between three and five hundred bushels, mostly J. H. Hale, a few Elbertas.

Q. And what success did you have in taking them out of storage?

A. The Hale peaches sold for very satisfactory  
20 prices.

Q. What condition, I mean — I don't mean so much the price, but what condition were they?

A. The Hale peaches kept well; the Elberta peaches we were unable to ship.

Q. Were they put in under the same conditions as the Hale peaches and kept under the same conditions as the Hale?

A. The same day, I think.

Q. Do you know when they were stored, what  
30 date?

A. I have a copy from my diary. September 3rd, 152 bushels of Hale in storage.

Q. Can you tell us about any of the rest, when you put the rest in? You said 152 bushels of Hales; how about Elbertas, can you tell us?

A. On September 4th, I have a record here, 32 bushels of Elbertas in storage.

Q. Yes, any other?

A. That is the only entry I have.

Q. Those are the only entries you have?

A. There were more put in, but I just didn't happen to make a note of it at the time.

Q. Those that were put in, do you think they were put in before or after these?

A. I can't tell, can't remember.

Cross-examination.

10

By Mr. Marshall:

Q. You say the Hale peaches kept very well, Mr. Parkhurst?

A. Very little shrinkage.

Q. And how many Hales did you say you had in the storage?

A. I should say it might have been in the neighborhood of 350, but I am not sure about that, 325. 20

Q. Three hundred and fifty, and the Elbertas, how many Elbertas did you have?

A. I have a record here, 32 bushels of Elbertas.

Q. That is all you had of those, as far as you know?

A. That is all I can remember of.

Q. What kind of containers were those placed in, Mr. Parkhurst?

A. They were placed in the ice house in bushel baskets. 30

Q. Lidded?

A. Yes.

Q. Were the lids fastened on the package?

A. The bushel basket that we used has cleats on the lids that go under the handle; that was the only way that they were fastened.

Q. That would have a tendency to cause the heat, if any, in the peach to be retained there longer, wouldn't it?

A. Yes.

Q. The Hale, you say, sold well, and the Elbertas, the 32 baskets of Elbertas —

Mr. Avis: Bushels.

10 Q. Bushels of Elbertas were a complete loss, you say?

A. No, not a complete loss.

Q. Oh, they were not a complete loss?

A. No.

Q. What did you sell them for?

A. We are located on the pike, and there is a stand —

Q. Oh, I beg your pardon; you told us yesterday about that, didn't you—didn't you tell us yesterday

20 you sold them on your fruit stand on the pike?

A. Some of them we sold on the fruit stand.

Q. Did you sell any of them by the bushel in the market?

A. No.

Q. Were you able to dispose of them all?

A. No.

Q. What percentage of them were you unable to sell?

A. I should say that there was a loss of at least  
30 fifty per cent.

Q. A loss of at least fifty per cent?

A. Yes.

Q. And how long were they in the storage?

A. From September 4th to September 16th.

Q. Did you tell us yesterday how large this cold storage was?

A. I told you yesterday that I didn't know, but I have since found out that it has a capacity of between twenty and thirty thousand bushel.

Q. Between twenty and thirty thousand?

A. Between twenty and thirty thousand bushel.

Q. Were they grown on light land, your peaches grown on light land?

A. The Hales? We don't call it light, some people might, but it is a sandy section around there.

Q. A sandy section around Hammonton, isn't it? 10

A. We call that land that these Hales and these Elbertas were grown on as heavy for us.

Q. Heavy for you?

A. Yes.

Q. How many years have you been engaged in the fruit business?

A. Thirty years or more.

Q. In Hammonton?

A. Yes.

20

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LEIGHTON PARKHURST, recalled.

By Mr. Avis:

Q. Mr. Parkhurst, did you have any experience in the storage of Hale or Elberta peaches?

A. I did.

Q. During the season of 1927?

30

A. I did.

Q. Where did you store?

A. Stored in Littlefield's Ice & Cold Storage, Merchants Store House in New York and some store house in Brooklyn, which I don't know.

Q. What experience did you have in relation to the keeping of these peaches?

A. What I put in in New York and Brooklyn or Jersey City and Brooklyn kept fairly well; what I put in in Hammonton kept very well.

Q. Did the Elberta peaches come out—what proportion—did you have any trouble with them?

A. I didn't have any trouble with them; I didn't put anything in that I expected to have trouble with. I sold a good many cars that I wouldn't put in for any price.

10 Q. You mean why?

A. Because I knew they wouldn't come out right.

Q. Why?

A. They were ripe.

Q. And when were they, what date?

A. Well, I couldn't tell you exactly, but they were somewhere in the neighborhood of the 1st of September.

Q. Did you allow them to get too ripe?

A. I couldn't help myself.

20 Q. Why not?

A. They ripened faster than my men did.

Q. Was that after that Thursday rain?

A. Why, some of them were, yes.

Q. Was there any unusual condition with relation to the ripening of peaches in 1927?

A. Most decidedly.

Q. And what was that unusual quality?

A. The heat and the water, and they just ripened over night, so fast that you couldn't gather them and

30 get them in the condition they should be in.

Cross-examination.

By Mr. Marshall:

Q. But despite all of them, Mr. Parkhurst, you say that your peaches kept very well?

A. Yes, sir.

WESLEY BROWN, sworn.

By Mr. Avis:

Q. Where do you live, Mr. Brown?

A. Between Glassboro and Cross Keys.

Q. What is your business?

A. I grow fruit and have a cold storage fruit  
produce house. 10

Q. What experience did you have, if any, with re-  
lation to the storage of Elberta or Hale peaches in  
the season of 1927?

A. My peaches, you mean?

Q. Well, your peaches or those that you had in  
storage—what experience, if any, with relation to  
the keeping of them?

A. We attempted to begin to pick out peaches  
on the 1st of September; it rained a little and we  
picked a few—that was the first we could find ripe  
enough. On the second and third we discovered they  
were getting so ripe so fast that we picked Sunday  
as well as Monday, finished in four and a part days.  
We couldn't pick all day the 1st because it rained  
so. 20

Q. Did you pick them as fast as you conveniently  
could?

A. We gathered about fifteen thousand packages  
in those four and a part days.

Q. And what did you do with them? 30

A. Put them in my own cold storage.

Q. How long did you keep them there?

A. Why, I think we were done in a little less than  
three weeks. We started at them immediately.

Q. What experience did you have with relation to  
their keeping?

A. They didn't keep very well.

Q. What experience did you have with keeping other peaches, Elbertas that were brought to your cold storage plant at or about that same time?

A. For the most part they were overripe, and, of course, came out in the same condition, and overripe fruit will show considerable waste.

Q. Did they keep any better than those that you put in of your own?

10 A. Only with one exception that I have in mind, one man's fruit in there that kept almost totally sound, I don't know why.

Q. You mean that fruit in the same cold storage place —

A. The one section reserved where the man put his fruit in, it kept well, or practically well, and right adjoining that, where another man's fruit was, it didn't keep, two different men's fruit, yes.

20 Q. Yes, I mean different fruit. Now, how do you account for that?

A. The condition in which the fruit came in, entirely. We had one man that came in front of the storage —

Mr. Marshall: I object, there is no question pending.

Q. Tell us about the one man that came there.

30 Mr. Marshall: I object; we are entitled to know what it is.

Q. Have you in mind some one man who brought peaches there that kept?

A. Yes.

Q. Tell us about him, will you?

A. He put his peaches in, and he and I were discussing how hard ——

Q. No, you can't tell us what happened.

A. Well, he put the peaches in, and they were hard.

Q. Was that before or after this rainy day?

A. That was before this rainy day.

Q. And his peaches were the ones that kept?

A. His were the peaches that kept.

Q. Now, were there any other instances of peaches that kept well? 10

A. Not that I have in mind, no.

Cross-examination.

By Mr. Marshall:

Q. What was the rainy day, Mr. Brown?

A. The first.

Q. The first day of September? 20

A. Yes, if my memory serves me right.

Q. And you say that your peaches as well as the peaches of other growers were placed in your storage?

A. Yes.

Q. And were any peaches placed in your storage before September 1st?

A. One lot.

Q. When were they put in?

A. The day before that, that would be the last of August. 30

Q. August 31st?

A. Yes.

Q. That was the first lot of peaches that you had put in in 1927?

A. That was the first peaches that came in my

storage; that would be Wednesday, yes, that was the first.

Q. How did those peaches keep, Mr. Brown?

A. This lot I have reference to, the one lot, that did keep.

Q. That did keep?

A. That did keep, yes.

Q. And do I understand you to say that none of the other peaches that were brought in after that  
10 kept?

A. I mean to say that they had more waste than we usually expect to find.

Q. What temperature did you maintain in your cold storage plant during that time that they were stored there?

A. During the mornings, that is, after the night, when it was closed, we got it down toward thirty-two, but during the day when they were putting in would get forty—I don't know, away up.

20 Q. Get up around forty or forty-five?

A. Yes, forty-six.

Q. But as soon as you would stop bringing the peaches in, it would go down to thirty-two, would it, is that right?

A. I am afraid it is a little low, thirty-four or five, I think would be better for the mornings.

Q. Well, we will say thirty-four or thirty-five.

A. That would be in the morning.

Q. Is that a preserving temperature for peaches?

30 A. If the fruit was that cold, you mean? Yes, I am not talking about the air in the room.

Q. I am talking about the temperature of your cold storage plant.

A. Because you could put a peach in a room, say, that was ninety, and have the temperature in the room thirty-two, and tomorrow morning that peach would not be thirty-two or nowhere near it.

Q. I am asking you about the temperature of your cold storage, after you had closed your doors at night, the next morning, these peaches or the rooms that you were using for the storage of these peaches?

A. You mean during the filling season?

Q. Yes.

A. Well, thirty-four or five would be as low as you can get it.

Q. Thirty-four or thirty-five, I see; that is a preserving temperature in a room, isn't it, in which to 10 keep peaches?

A. Well, if the peach is that cold, it is.

Q. The peaches have to be that cold or kept cold if the temperature of the room is made cold, is that right?

A. Let's get the straight of that.

Q. You can not expect a peach to get cold unless the room is cold, can you?

A. No, surely.

Q. Did you have any experience with your pipes 20 dripping?

A. When you put hot peaches underneath them, they will drip.

Q. And they dripped the whole time the peaches were in there?

A. They would freeze up during the night.

Q. But after you stopped putting peaches in, then they remained solid, I expect, didn't they, the pipes?

A. Do you mean frozen together?

Q. No, but I mean, they ceased to drip? 30

A. Yes.

Q. They didn't drip any more after you stopped putting your peaches in?

A. No.

By Mr. Avis:

Q. What system do you have, Mr. Brown, in your storage plant, direct expansion, brine or ammonia?

A. Direct expansion, ammonia.

By Mr. Marshall:

10 Q. Might I ask you, Mr. Brown, one question—  
whose peaches were they that were put in and kept so well?

A. Clark Shuster.

Q. Clark Shuster?

A. Yes, sir.

Mr. Cole: We rest.

20 Mr. Marshall: Wasn't there some testimony of  
Mr. Bliss that you wanted to read into the record?

Mr. Avis: Didn't we offer that?

Mr. Marshall: I don't think you did.

Mr. Avis: We offered it, but I don't think we read it.

30 Mr. Marshall: If you would rather have it read  
in the record—it doesn't make any difference to me—I will read it in the record or offer it in evidence. Here is a certificate of Mr. Bliss; maybe we had better read it in, because somebody has been figuring on the back of it.

Mr. Avis: As I understand it, we offer now, and I understand it will go into the record that the tes-

timony Mr. Bliss would give as to the temperatures of the year 1926, if he were here as a witness, are as follows: "August 30th—this is all with relation to 1926—midnight, seventy-nine; 6 A. M. seventy-two; noon, seventy-eight; 6 P. M. seventy-eight. August 31st, midnight, sixty-nine; 6 A. M., sixty-three; noon, seventy-one; 6 P. M., seventy-three. September 1st, midnight, sixty-six; 6 A. M., sixty; noon, seventy-five; 6 P. M., seventy-five. September 2nd, midnight, sixty-nine; 6 A. M., sixty-nine; noon, 10 seventy; 6 P. M., sixty-four. September 3rd, midnight, sixty; 6 A. M., fifty-eight; noon, sixty-eight; 6 P. M., seventy. September 4th, midnight, sixty-four; 6 A. M., sixty-one; noon, sixty-six; 6 P. M., sixty-six. September 5th, midnight, sixty-three; six A. M., sixty-two; noon, sixty-five; 6 P. M., sixty-five. September 6th, midnight, sixty-five; 6 A. M., seventy; noon, eighty; 6 P. M., seventy-one. September 7th, midnight, seventy; 6 A. M., seventy-one; noon, seventy-seven; 6 P. M., seventy-eight. Sep- 20 tember 8th, midnight, seventy-one; 6 A. M., sixty-four; noon, seventy-four; 6 P. M., seventy-six. September 9th, midnight, sixty-six; 6 A. M., sixty-seven; noon, seventy-six; 6 P. M., seventy-one. September 10th, midnight, seventy-one; 6 A. M., sixty-three; noon, seventy; 6 P. M., seventy-two. September 11th, midnight, sixty-two; 6 A. M., fifty-nine; noon, seventy-two; 6 P. M., seventy-two."

DEFENDANT RESTS.

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BOTH SIDES REST.

Mr. Cole: I move to direct a verdict for the defendant, without specifically naming them, upon the same grounds that were stated in the motion for the non-suit, and further that we say we have now by our proof excluded any idea of negligence on our part.

The Court: The motion will be denied.

10 (Exception noted for the defendant.)

(At this point an adjournment was had until Friday morning, February 8th, 1929, at 10 o'clock, A. M.)

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## THE CHARGE OF THE COURT.

JESS (J.):

Ladies and gentlemen of the jury: The plaintiff in this case is Edward E. Miller, and the defendant is the John Repp Ice and Cold Storage Company. The action is brought to recover damages sustained by the plaintiff, Mr. Miller, as the result of the deterioration of a large quantity of peaches which he had stored in the cold storage warehouse of the defendant. The plaintiff is a farmer and peach grower. The defendant operates a cold storage warehouse at Glassboro. 10

Late in August, 1927, it appears that the plaintiff had a large crop of Elberta and Hale peaches ready to be picked. Desiring to hold his crop for a better market than then existed, he decided to place the peaches in cold storage. In pursuance of that purpose, he entered into a written contract with the defendant, by the terms of which he rented space in the defendant's cold storage plant for ten thousand five-eighths baskets of peaches at the rental of ten cents a basket for a period beginning August 27th and ending the following October 1st. It appears that between August 27th and September 6th not less than 16,225 baskets of peaches were delivered by the plaintiff to the defendant's premises and placed either in the cold storage warehouse or what has been referred to in the evidence as the ice house. 20 30

On September 9th the defendant cold storage company addressed to Mr. Miller the following letter:

"We have had some trouble in attempting

to keep the temperature down in the storage warehouse, and find that the fruit is not keeping as it should. This appears to be caused by some peculiarity in the fruit itself, as the plant has been operated in its usual manner, and to capacity. Conditions are such that we deem it necessary to notify you that the peaches of yours in the cold storage in our Glassboro warehouse should be removed within seventy-two hours, in accordance with the terms of your signed contract.”

There is another paragraph in the letter which I will not read. The plaintiff testifies that he received this letter, while it was dated on the 9th September, on the 12th September, and that on the 13th he started to sort and pack the peaches for removal. It was found that the fruit had so softened and wilted it was for the most part unmarketable. For the loss he thereby suffered he brings this action to recover compensation from the defendant. There appears to be no question when the plaintiff started to remove his peaches from the warehouse they had materially deteriorated in condition. The theory upon which the plaintiff seeks to hold the defendant liable is that this deterioration was due to the negligence of the defendant. The specific negligence alleged is that the defendant negligently failed to maintain a temperature necessary for the preservation of the peaches, that he continued to receive the plaintiff's peaches and store them in this warehouse, knowing that the temperature of the warehouse was not in a condition properly to preserve them.

In order to recover in this suit, it is incumbent on the plaintiff to establish one or the other of these

claims by a fair preponderance of the evidence. It is conceded by Mr. Repp, the manager of the defendant's plant, that the temperature in the defendant's warehouse was at no time while the plaintiff's peaches were stored there, low enough to be effective as a preservative of the fruit. That is the way I understand the testimony, at least. You will, of course, depend on your own recollection as to what he said on that phase of the case, but if my recollection be correct, that fact is not conclusive against the defendant, that is, the fact that the temperature was not maintained at a degree which would preserve the fruit, is not conclusive against the defendant on the question of negligence. In the first place it must be borne in mind that the warehouseman, the defendant, was not an insurer of the goods that he received from the plaintiff, that is, the fruit. The defendant was not bound to return the peaches in as good condition as they were in when they were stored, or to make good any loss suffered by the plaintiff in consequence of their deterioration. The defendant was charged, however, with ordinary care for the protection of the fruit, and by ordinary care in this connection is meant the care that a reasonably careful owner would exercise in regard to similar property of his own. This degree of care the defendant was bound to observe, regardless of any condition of the contract that might conflict therewith. The law imposed that obligation, and it could not be impaired by any stipulation of the contract in pursuance of which the peaches were stored.

As I have pointed out, the plaintiff charges that the fruit deteriorated in consequence of the defendant's failure to maintain the proper degree of temperature in the warehouse in which the peaches

were stored. As I further pointed out, Mr. Repp apparently admits that the proper degree of temperature was not maintained. My recollection of his testimony is that the temperature in the warehouse did not go below 48 while the plaintiff's peaches were stored there, and was sometimes higher; and I also understand him to say that the proper storage temperature was somewhere about 33 degrees.

- 10 The first question for your consideration is whether the decay or deterioration of the peaches was due to the temperature which prevailed in the place of storage, or was it due to a cause with which the defendant was unconnected? One such cause, which has been suggested by the defendant in this case, is that the peaches were not in sound condition when stored, either because of the way in which some of them were picked or handled, or because of what the defendant has attempted to show were
- 20 unfavorable growing conditions for peaches in the season of 1927. You have the evidence of both sides which bears on this question, and it is for you to determine what the facts are. If the peaches were not sound when stored, and their deterioration was due to natural causes inherent in the fruit itself and not to the failure to maintain the requisite low temperature, then, of course, the defendant is not liable for any part of the loss due to such deterioration.
- 30 The plaintiff has undertaken to show by his own testimony, and testimony of those who picked and handled the fruit, and hauled the fruit to the storage plant, and of other witnesses, that the peaches were in good condition when delivered for storage. The defendant has adduced evidence, from which he asks you to find that the peaches, or some por-

tion of the quantity stored, were not sound when delivered to the warehouse, and that the loss of them was attributable to their unsound condition.

A finding that the peaches, or any part of them, were not in a good state of preservation at the time of storage, cannot be based on conjecture, but must be founded on direct evidence of the fact, or on reasonable inferences to be drawn from the evidence. If you find that the peaches were sound when delivered for storage, you would be justified in finding that that deteriorated condition, or damaged condition when removed, was due to the temperature to which they were subjected while in the defendant's storage plant. Even such a finding, however, would not be dispositive of the case, because that would bring you to the next question: Was the failure to maintain a proper temperature due to the negligence of the defendant? The contract for storage explicitly provided that the defendant should not be responsible for failure to maintain any given temperature, unless the same should be caused by the negligence of the defendant. This stipulation in the contract is in accord with the rule of law which, independently of the contract, imposed upon the defendant the duty to exercise ordinary care to protect and preserve the property of the plaintiff while in its custody. Did the defendant exercise such a degree of care? Did he use the care that a reasonably careful owner would exercise in regard to his own property of the same or similar nature? That is the test you are to apply to the evidence, that is, as to what the defendant did, or failed to do, in caring for the plaintiff's property, in order to determine this question of negligence.

The defendant's manager has told you of the dif-

difficulty he encountered in the effort to obtain a proper storage temperature, and of the measures he adopted to overcome that difficulty, or attempt to overcome it. He has testified, in effect, that there was no breakdown in the freezing plant, that it was in good working order, and in the same or relatively the same condition that it was in the preceding year, when, with a larger storage of peaches, it had functioned effectively. The fact remains that the  
10 temperature of the warehouse was not reduced to the point regarded as effective to keep in good condition the fruit which the plaintiff had stored there for the purpose of preserving it for future sale. If you find that the plaintiff has shown by the greater weight of the believable evidence that the failure so to reduce and maintain a proper storage temperature was due to any negligence of the defendant to exercise ordinary care in the circum-  
20 stances, having regard to the nature of the property and the purpose of its storage, then the defendant would be liable for any loss to the plaintiff resulting wholly from such negligence.

As to the claim that the defendant was negligent in that it received the plaintiff's peaches into the warehouse, knowing that the temperature was not sufficient to preserve the fruit, was there negligence in that respect? A finding of negligence cannot, of course, be based upon conjecture. There is always a presumption in law against negligence. The  
30 presumption is that people are careful, so that there must be proof of negligence. A mere error of judgment does not, of itself, necessarily import negligence. The defendant, however, was chargeable with the exercise of that judgment which a reasonably prudent person would have used in the care of his own property of a similar nature and in like

circumstances, taking into consideration all the evidence shows as to the conditions that confronted the defendant, and as to the previous experience of the defendant's manager in the storage and care of fruit. If you reach the conclusion that the charge of negligence in either of the respects alleged is not supported by a fair preponderance of the evidence, the plaintiff has no cause of action. If you reach the conclusion that the greater weight of the evidence has established the claim that the negligence of the defendant is the proximate cause of the plaintiff's losses, then the plaintiff is entitled to a verdict, unless the defendant has, in your judgment, made out its claim that the plaintiff was guilty of contributory negligence. The claim in that regard is that the plaintiff stored overripe peaches, and peaches that were overheated and watery. Has the defendant established this defense by the greater weight of the evidence, either as to all of the peaches, or as to any portion of the quantity stored? If you find it has not done so, then the defense of contributory negligence falls.

If you find in favor of the plaintiff you must by your verdict award him such damages as will in your judgment, based upon the evidence, compensate him for whatever loss resulted to him proximately from the defendant's negligence. The measure of damages would be the difference in the fair market value of the peaches in good condition at the time notice was given to the plaintiff to remove them, and the market value of the peaches in their damaged condition. It will be for you, ladies and gentlemen, to determine from the evidence what the fair market values were. If you should find, or believe, that they were somewhere between the extreme high price and the extreme low price testi-

fied to by the witnesses, of course, you would use that figure in determining what the difference in value was. In other words, it would be open to you to consider and weigh the testimony of all the witnesses upon that phase of the case, namely: as to the market value, exercising your own judgment as to what the fair market value was in determining the loss, if any, sustained by the plaintiff. You will bear in mind, of course, that you would have  
10 to deduct from the market value as found by you, the commission, cost of storage, package, cartage, and whatever the evidence may show as to any other marketing expenses. So that if you find that all the peaches of the plaintiff, when delivered to the defendant for storage, were in good sound condition, and that their subsequent deterioration was due to the defendant's negligence, the plaintiff is entitled to his entire loss in whatever sum you find will fairly compensate for that loss. If you find  
20 that some of the peaches were not in sound condition when stored, and that the loss as to them was due to deterioration from natural causes inherent in the fruit itself, or to any cause with which the defendant was unconnected, such loss could not be charged to the defendant, and any damages awarded would have to be abated accordingly. What I have said with reference to damages is for your guidance in case you find that the plaintiff's loss was due to the negligence of the defendant. If you do not so  
30 find, you will, of course, have no occasion to consider the question of damages. In that case, your verdict would be that the plaintiff has no cause of action.

I call your attention to the fact that a counter-claim has been filed by the defendant, by which the defendant seeks to recover in this suit damages for

the amount of the storage rental and other charges which it incurred in the removal and sale of the peaches. In that connection I say to you if you should find a verdict in favor of the plaintiff, and award damages to him which in your judgment would make good whatever loss he sustained from the negligence of the defendant, then you should also award to the defendant damages on his counterclaim for the sum claimed, which I think is \$753.02.

The defendant submits a number of requests to charge. I charge request No. 1 as follows: Plaintiff is not entitled to recover unless the damage he suffered was due to the negligence of the defendant. 10

No. 2, I charge: Negligence in this case means the failure to discharge some duty which the defendant owed the plaintiff.

No. 4, I charge: The jury should not find the defendant guilty of negligence unless the plaintiff has established the same to their satisfaction by the weight of the believable evidence. 20

I charge request No. 11 modified: It was the duty of the plaintiff under the contract to remove the peaches within 72 hours after receiving the notice he admits he received, and to do every reasonable act to minimize his damages.

Request No. 14 is charged: Defendant was not an insurer against damage to the peaches by reason of a rise in the temperature. 30

The other requests are not charged except to the extent that they may be covered by the instructions already given to the jury.

Ladies and gentlemen, you may retire to deliberate upon your verdict.

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DEFENDANT'S EXCEPTIONS.

Judge Cole: The defendant excepts to the Court's refusal to charge its 3rd, 5th, 6th, 7th, 8th, 10 9th, 10th, 12th, 13th and 15th requests to charge, in the following language:

3. The duty which the defendant owed the plaintiff, if any, was to exercise such care for the preservation of the peaches as a reasonably prudent person would exercise in the circumstances.

5. The only negligence the jury is permitted to find is that which is charged in the complaint that 20 defendant received peaches well knowing that the temperature was not sufficient to properly preserve them.

6. The jury cannot find negligence outside of the written contract.

7. The jury cannot find negligence based upon the claim of negligence in not maintaining a proper temperature.

30 8. There is no evidence to justify a finding of negligence based upon failure to maintain a proper temperature.

9. There is no evidence to justify a finding of negligence based upon a claim that defendant's plant was in any way defective or negligently operated.

10. If the plaintiff did not claim damages in writing within 72 hours after discovery of damage there must be a verdict for the defendant.

12. Plaintiff cannot recover damages from defendant in excess of what they were within the period of 72 hours after receiving notice from defendant.

13. If after the defendant had knowledge that the temperature was rising, it did all that a reasonably prudent person could do to maintain a proper temperature, the plaintiff cannot recover. 10

15. If plaintiff knew or ought to have known that any peaches he stored in defendant's house were likely to be damaged by reason of defendant's inability to maintain a proper temperature, he cannot recover damages for loss of such peaches.

Defendant also excepts to the Court's statement in its charge that the jury should ignore the feature in the agreement which runs counter to the Commission Law or the Warehouseman's Act, and whatever the Court said on that subject. 20

And also as to what the Court said if the jury should find that when the goods went in they were in good condition, and when they came out they were in poor condition, they might consider that fact in determining whether the defendant was guilty of negligence in not maintaining a proper temperature. 30

Also to what the Court said, which permitted the jury to find negligence with respect to the temperature, our theory being that there was no evidence to justify a finding of negligence in that aspect of the case.

(Exceptions noted for defendant.)

The Court: The court will remain in session pending the return of the jury in the case of Miller versus John Repp Ice and Cold Storage Company, and if the trial Judge should not be in court at the time the verdict is returned, the clerk is authorized to take the verdict as returned by the jury.

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EXHIBIT P1.

UNLESS this CONTRACT is DULY SIGNED and RETURNED in 5 DAYS, SPACE WILL NOT BE RESERVED

S T O R A G E   C O N T R A C T

20

John Repp Ice & Cold Storage Company, Inc.

Agreement, made this 26th day of August 1927, between E. E. Miller of Aura, N. J., party of the first part and the JOHN REPP ICE & COLD STORAGE CO., INC., of Glassboro, N. J., party of second part.

Witnesseth,

30

That the party of the first part hereby rents storage space for the following goods in the COLD STORAGE WAREHOUSE of the party of the second part at Glassboro, N. J. namely

Number of Packages 10,000 (PEACHES) kinds of Packages 5/8 baskets

The space to be designated and assigned by the party of the second part at the rate of 10¢ cts., per Bas. for a period of time beginning on the 27th day of August 1927 and ending 1st day of October 1927

which said space so rented the party of the second part hereby agrees to reserve for the exclusive use of the party of the first part.

In consideration of said rental and reservation by the respective parties it is understood and agreed that this contract shall bind both parties hereto whether said space shall be occupied or not, and in case said space is occupied, then the party of the first part agrees to pay therefore on or before removal of peaches and in case said space is not so occupied then the party of the first part agrees to pay for the space reserved for him hereunder on the first day of January following the date hereof. 10

In case party of the first part desires to dispose of the space hereby reserved for his use it is understood and agreed that the party of the second part shall have the first right to take over said space from said first party at the agreed price hereinabove set forth, but if after two days' notice in writing to it, the said party of the first part fails to avail itself of such right by a written acceptance, then the party of the first part shall have the right to sell and assign the space hereby reserved for him. 20

This contract is for number of packages only and Storage Company has no knowledge as to contents and condition and is not responsible for damage to perishable goods.

Party of the second part shall not be responsible for failure to maintain any given temperature unless same is caused by its negligence. 30

Party of the second part shall not be liable for, and the party of the first part hereby releases party of the second part from any and all damages that may arise on account of the inability of the second party to obtain electric power necessary for the

operation of its cold storage plant or breaking of any machinery or due to any cause beyond the control of the party of the second part or the act of "God or the Public Enemy."

Party of the second part shall not be liable for loss by failure to insure property covered hereby or for loss or damage caused by leakage, ratage, vermin, breakage, accidental or providential causes, riot or insurrection.

- 10 If the goods stored herein are of a perishable nature, or by keeping will deteriorate greatly in value, or by their odor, leakage, inflammability or explosive nature, will be liable to injure other property, the party of the second part may give seventy-two hours notice in writing to the party of the first part, which notice may be served by mail, addressed to party of the first part at the address appearing below, with postage prepaid, which notice shall require the party of the first part to satisfy the lien upon said goods, and to remove them from the warehouse within the period aforesaid, and in the event of the failure of the party of the first part to satisfy the lien and to remove the goods within the time so specified the party of the second part may sell the goods at public or private sale without advertising. If the party of the second part, after a reasonable effort, is unable to sell such goods, he may dispose of them in any lawful manner, and shall incur no liability by reason thereof. In case
- 20
- 30 of sale the party of the second part shall satisfy his lien including the reasonable charges of notice, advertising and sale, and the balance, if any, of such proceeds shall be paid to the party of the first part.

The party of the second part shall not be liable or responsible for any shortage in goods stored,

unless the packages are clearly marked or stenciled with name of party of the first part.

In case property stored hereunder shall be released in installments remainder left in storage shall be responsible for all unpaid charges.

Claims for damages must be made in writing within seventy-two hours after discovery of damage, otherwise they are waived.

Depositor's goods in warehouse of the same general class are deemed "fungible" within the statutory definition. 10

Party of the second part is not responsible for shrinkage in weight or measurement.

This agreement shall bind the heirs, executors, administrators, successors and assigns of the respective parties hereto.

IN WITNESS WHEREOF the parties have hereunto set their hands and seals this 26th day of August, 1927.

..... 20  
Post Office Address.....

JOHN REPP ICE & COLD STORAGE CO., Inc.

Per R E Zimmermore

RETAIN THIS COPY

## EXHIBIT P2.

JOHN REPP ICE &amp; COLD STORAGE CO.

Incorporated  
GLASSBORO, N. J.September Ninth  
19-2710 Mr. Edward Miller,  
Aura, N. J.

Dear Sir:—

We have had some trouble in attempting to keep the temperatures down in the storage warehouses, and find that the fruit is not keeping as it should. This appears to be caused by some peculiarity in the fruit itself, as the plant has been operated in its usual manner and to capacity.

20 The conditions are such that we deem it necessary to notify you that the peaches of yours now in storage in our Glassboro warehouse should be removed within seventy-two hours in accordance with the terms of your signed contract.

We have such a large quantity of peaches on storage that it will be somewhat difficult to remove all within the above period, but if early application for removal is made we will do the best we can in getting them out.

Your storage bill is herewith enclosed.

30 Very truly yours,  
JOHN REPP ICE & COLD STORAGE CO.  
INC.

R E Zimmermore  
Secretary

REZ/EJ

EXHIBIT P3.

September 15th 1927.

CLAIM FOR DAMAGES  
AGAINST  
JOHN REPP ICE AND COLD STORAGE  
COMPANY, INC.

10

The undersigned, renting storage space in the Cold Storage Warehouses of the John Repp Ice and Cold Storage Co., Inc., at Glassboro, N. J., for 16225 5/8 baskets hampers of Peaches as per contract dated Aug. 26—1927, hereby makes in writing and files his claim for damages for the complete loss of said products so stored occasioned by the negligence of said John Repp Ice and Cold Storage Co., Inc. Said amount of damages to be such as shall be later ascertained or determined by suit or otherwise. 20

Edward E Miller

30

## POSTEA.

NEW JERSEY SUPREME COURT.  
GLOUCESTER COUNTY.

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10 EDWARD E. MILLER,  
*Plaintiff,* }  
 v. } Action at Law.  
 JOHN REPP ICE & COLD } On Postea.  
 STORAGE COMPANY, INC., }  
*Defendant.* }

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20 This action was tried before Judge Frank B. Jess, with a jury, at the Gloucester County Circuit Court on February 5th, 6th, 7th and 8th, 1929. The jury rendered a general verdict in favor of the plaintiff, Edward E. Miller, and against the defendant, John Repp Ice & Cold Storage Company, Inc., for the sum of seven thousand seven hundred ninety-three dollars and sixty-four cents (\$7,793.64), and also rendering a verdict for the defendant, John Repp Ice & Cold Storage Company, Inc., against the plaintiff, Edward E. Miller, on the defendant's counter-claim, for the sum of seven hundred fifty-three dollars and two cents (\$753.02).

30

FRANK B. JESS,  
*J.*

A true copy.  
 FRED L. BLOODGOOD,  
*Clerk.*

RULE FOR JUDGMENT.

NEW JERSEY SUPREME COURT.

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EDWARD E. MILLER,	}	Action at Law.	10
<i>Plaintiff,</i>		On Postea.	
v.		Judgt. for Pltff. on	
JOHN REPP ICE & COLD	}	Compl't and for	
STORAGE COMPANY, INC.,		Deft. on Counter-	
<i>Defendant.</i>		Claim.	

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It is ordered that judgment be and hereby is entered in favor of plaintiff and against the defendant on the plaintiff's complaint for the sum of seven thousand seven hundred and ninety-three dollars and sixty-four cents, besides costs to be taxed *nisi*; and in favor of defendant and against the plaintiff on the defendant's counter-claim for the sum of seven hundred and fifty-three dollars and two cents.

Entered February 14, 1929. On motion of  
 DAVID O. WATKINS, 30  
 GEORGE B. MARSHALL,  
*Attys. for Plaintiff.*  
 AVIS & AVIS,  
*Attys. for Deft.*

358

*Judgment*

Damages of Pltff. \$7,793.64  
Costs

—————  
\$  
Damages of Deft. \$753.02

A true copy.  
FRED L. BLOODGOOD,  
*Clerk.*

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—————  
JUDGMENT.

NEW JERSEY SUPREME COURT.

20

EDWARD E. MILLER,  
*Plaintiff,*  
v.  
JOHN REPP ICE & COLD  
STORAGE COMPANY, INC.,  
*Defendant.*

Action at Law.  
On Postea.  
Judgt. for Pltff. on  
Compl't and for  
Deft. on Counter-  
Claim.  
David O. Watkins,  
George B. Marshall,  
Attys. for Plaintiff.  
Avis & Avis,  
Attys. for Defendant.

30

—————  
Judgment entered this fourteenth day of Febru-  
ary, A. D. nineteen hundred and twenty-nine, in  
favor of plaintiff and against the defendant on the  
plaintiff's complaint for the sum of seven thousand

seven hundred and ninety-three dollars and sixty-four cents damages and ..... costs; and in favor of defendant and against the plaintiff on the defendant's counter-claim for the sum of seven hundred and fifty-three dollars and two cents damages.

WM. S. GUMMERE,  
*C. J.*

Damages of Pltff. \$7,793.64

Costs

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—————  
\$

Damages of Deft. \$753.02

A true copy.

FRED L. BLOODGOOD,  
*Clerk.*

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W. A. ...

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NEW JERSEY

Court of Errors and Appeals

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EDWARD E. MILLER,  
*Plaintiff-Respondent,*  
*vs.*  
JOHN REPP ICE AND COLD  
STORAGE COMPANY, INC.,  
*Defendant-Appellant.*

} On Appeal from  
Supreme Court.

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APPELLANT'S BRIEF.

Statement.

Respondent sued appellant, claiming damages for the breach of a written contract dated August 26, 1927, a copy of which is made a part of the complaint. Appellant owns and manages an ice and cold storage plant at Glassboro, New Jersey, and respondent stored peaches with it during the months of August and September of that year. They spoiled, and respondent was unable to sell them at the market price for prime peaches. Negligence on the part of the appellant was averred and sought to be proved. There was a verdict in his favor, and from the judgment thereon this appeal was taken. In substance, the defense was that there was no liability under the agreement. Refusal to direct a verdict and trial errors are alleged.

## ARGUMENT.

## I.

The Court refused to charge Appellant's Seventh Request as follows: "The jury cannot find negligence based upon the claim of negligence in not maintaining a proper temperature."

The agreement expressly provides as follows:

"Party of the second part shall not be responsible for failure to maintain any given temperature unless same is caused by its negligence."

The Court refused to charge the submitted request and permitted the jury to find a verdict in favor of plaintiff, if they found there was negligence in failing to maintain a temperature sufficient to preserve the peaches. We contend there was no evidence to justify the submission to the jury of the question of negligence in failing to maintain any given temperature.

The facts upon this phase of the case are not in dispute. The temperature maintained was not sufficiently low to prevent the peaches from spoiling. At no time from the time the peaches were received by appellant until they were removed by the respondent was the necessary temperature maintained, but the contention is that this failure was not due to the negligence of appellant. Its plant had been in operation for a number of years and never before had it been unable to maintain a temperature to preserve peaches received by it. The cause of the failure to preserve was beyond the control of the appellant, but just what that cause was may concededly be one in dispute. The proof is that the plant was an up-to-date, standard ice and cold storage plant. There was no defect in any part of the plant or machinery, nor any failure to properly operate it. Such is appellant's proof and respondent offered no proof in rebuttal. The manager, Charles F. Repp, has been in the cold storage business continuously since 1884, and

constructed the present plant in 1905, and always has been its manager. He describes the character of the plant, &c., beginning with page 200. He was asked:

“Q. Is your plant—that includes buildings and machinery—a standard refrigeration plant?

A. It is.

Q. Did you maintain a general supervision in 1927?

A. I did.

Q. During the period when these peaches were being stored?

A. I did.

Q. Any report made to you of anything wrong with any of the machinery?

A. There was not.

Q. You know that from your own examination?

A. I do.

Q. Was there anything that you could have done more than you did do to lower the temperature after you discovered the situation?

A. I know of nothing to do. I spared no expense or anything that I know of.

Q. Was there a reason for the inability to maintain a proper temperature?

A. I have never had that experience before, but from my experience with peaches, I knew that excessive rain and heat would cause the latent heat of the fruit to be higher than in the case where they were not produced in that kind of weather, although on the Saturday preceding Labor Day the thermometer was 90 out of doors at the plant.” (The latter part of his answer was stricken.)

As we have said, respondent offered no proof to show improper construction of the building or plant, or that it was not a standard, up-to-date plant; there was no proof to show that the plant was out of order to the slightest extent, nor was there any proof to show im-

proper or negligent management. Appellant's proof was plenary as to the construction of the buildings and plant, its condition during the time the peaches were stored and the character of the management, and no one suggested nor was any proof offered to show that in any of these respects could negligence be found.

In this situation of the proof, we contend it was error to refuse the request and permit the jury to find negligence in failing to maintain a proper temperature. The failure to charge the request had the practical effect of making the appellant an insurer, despite the limitation of obligation expressed in the agreement.

## II.

The Court refused to charge Appellant's Eighth Request as follows: "There is no evidence to justify a finding of negligence based upon failure to maintain a proper temperature."

What has been said under Number I covers this point. We repeat there was no evidence to justify submitting to the jury the question of negligence for failure to maintain a proper temperature, nor do we perceive any evidence in the case from which an inference of negligence could properly have been drawn.

## III.

The Court refused to charge Appellant's Ninth Request as follows: "There is no evidence to justify a finding of negligence based upon a claim that Defendant's plant was in any way defective or negligently operated."

Anticipating that the Court might submit to the jury, in general terms, the question of appellant's negligence in not maintaining a proper temperature, we sought to safeguard appellant's rights by having the Court inform

the jury that as to certain features they could not properly find negligence. The foregoing request was made with that thought in mind.

We are justified in repeating that there is a total absence of any testimony, direct or inferential, that appellant's plant was in any way defective or negligently operated. The only affirmative proof was offered by appellant, and this remained unimpeached and uncontradicted.

#### IV.

The Court refused to charge Appellant's Fifth Request as follows: "The only negligence the jury is permitted to find is that which is charged in the complaint that Defendant received peaches well knowing that the temperature was not sufficient to properly preserve them."

The complaint has five paragraphs. The fourth reads:

"The said defendant, by its servants, agents and employees, was further negligent in that it did negligently fail to maintain a proper temperature necessary for the preservation of the said merchandise."

Requests seven, eight and nine deal with this averment.

Paragraph five reads:

"Said defendant, by its servants, agents and employees, was further negligent in that it continued to receive merchandise and placed the same in its said warehouses, well knowing that the temperature of the said cold storage warehouse was not then sufficient to properly preserve the said merchandise."

The fifth request deals with this averment. Appellant did not dispute that at the time he received respondent's peaches, the temperature was not low enough to preserve them, but the manager's testimony is to the effect that his experience of previous years justified his receiv-

ing the peaches and warranted his belief that his experience of previous years would be duplicated, to wit, that he could thereafter lower the temperature sufficiently and maintain it properly to preserve the peaches. Events show that as to this he erred, and for the reasons which appear in his testimony.

Our claim is that this charge of negligence is the only one that was proper for the jury's consideration, in the light of the appellant's unmet proof, and that the Court should have limited the question of negligence to the one of receiving the peaches knowing that the temperature was too high.

The effect of the Court's refusal to charge any of the foregoing requests was to permit the jury to infer negligence, and this, we submit, they were without legal right to do.

## V.

The Court refused to charge Appellant's Thirteenth Request as follows: "If after the Defendant had knowledge that the temperature was rising, it did all that a reasonably prudent person could do to maintain a proper temperature, the plaintiff cannot recover."

The proof shows that after the storage of a quantity of peaches the temperature began to rise. The appellant then resorted to every means known to its manager to prevent the rising of the temperature, and to lower it sufficiently to prevent the peaches spoiling, but failed in the effort. What was done appears in the direct testimony of Repp, the manager, and he said he knew of nothing more that could have been done. His testimony was uncontroverted. His testimony was unimpeached.

The refusal of the Court to charge the request permitted the jury to find, in spite of his sworn testimony, that there was something more that a reasonably prudent person could have done to maintain a proper temperature.

## VI.

The Court erred in saying to the jury as follows: "If you find that the peaches were sound when delivered for storage, you would be justified in finding that that deteriorated condition, or damaged condition when removed, was due to the temperature to which they were subjected while in the Defendant's storage plant. Even such a finding, however, would not be dispositive of the case, because that would bring you to the next question: Was the failure to maintain a proper temperature due to the negligence of the defendant?"

This language appears at page 343.

What immediately followed manifests that the trial court recognized the provision in the contract that appellant could not be held responsible for failure to maintain a given temperature unless due to its negligence.

But the vice of the charge is in permitting the jury to consider the question of negligence in failure to maintain a temperature, when, as already we have urged, there was no testimony to justify a finding of negligence.

The Trial Court recognized the rule that there could be no inference of negligence, and that it must be proved.

The inquiry is, how can a jury be justified in finding negligence when the undisputed proof is that there was no negligence. To conclude there was negligence would be to find that the mere fact that the temperature not maintained must have been due to negligence. It does not follow.

## VII.

The Court refused to direct a verdict for Appellant.

The contract provides as follows:

"Claims for damages must be made in writing within seventy-two hours after discovery of damage, otherwise they are waived."

Respondent recognized the validity of this portion of the contract, and served a written notice, as provided therein. See Exhibit P-3. Concededly the notice was not served within seventy-two hours. This fact is pleaded as a defense (page 14), and respondent did not reply thereto.

The grounds for the motion for a direction are a repetition of the motion for non-suit, and this point is covered at the top of page 175.

That notice was not served within seventy-two hours appears not only in the proof but in the colloquy between the Court and counsel, page 176.

In addition to the motion, the Court was requested by appellant's tenth request to charge as follows:

"If the plaintiff did not claim damages in writing within seventy-two hours after discovery of damage, there must be a verdict for the defendant."

The Court did not treat this subject in its charge to the jury.

We conclude that the Court was of the opinion that, notwithstanding the notice was not served within seventy-two hours, the appellant was not relieved. The argument of counsel for respondent was that the seventy-two hours began to run only after the exact amount of damage suffered was known, or in other words, seventy-two hours after all the peaches had been disposed of and it could be figured the exact damage to the respondent. The Court, it would seem, concurred in this view. Respondent admittedly knew, at the time he prepared the written notice, that he would suffer damage by reason of the condition of his peaches. His notice says:

"hereby makes in writing and files his claim for damages for the complete loss of said products so stored, &c."

We have, therefore, his interpretation of the agreement which is the same as appellant's interpretation.

Upon a settled principle, the Court will accept the interpretation which the parties to the agreement place upon it.

The provision reads:

"claims for damages must be made in writing within seventy-two hours after the discovery of damage, otherwise they are waived."

Respondent discovered damages before the written notice was prepared, and he claimed a total loss. He stated:

"said amount of damages to be such as shall be later ascertained or determined by suit, or otherwise."

He drew a distinction between the discovery of damage and the ascertainment of the amount. We submit that is the correct interpretation of the language.

The obvious purpose of the provision was to afford the appellant an opportunity to minimize the damage when discovered, and, in any way that it thought possible, among others, that of taking over the peaches and disposing of them at the best possible price and under the best market conditions.

The failure to direct a verdict and to charge as requested was manifest error.

What is said applies as well to the motion to non-suit, because when plaintiff rested, it appeared that the notice had not been served as required.

The agreement also provides as follows:

"This contract is for number of packages only and the storage company has no knowledge as to contents and condition and is not responsible for damage to perishable stock."

The stock of plaintiff was perishable. Included in the motion for a non-suit and a direction was that as the stock was admittedly perishable there could be no recovery. The Court treated that provision in the contract as violative of the Warehousemen's Act and not available as a defense to appellant. His reasoning may be found at page 175.

As companion to the motion, we refer to appellant's sixth request, as follows:

"The jury cannot find negligence outside of the written contract."

And the Court saying to the jury that,

"The defendant was bound to observe ordinary care, regardless of any condition of the contract that might conflict therewith. The law imposed that obligation, and it could not be impaired by any stipulation of the contract in pursuance of which the peaches were stored."

All of these raised the question of whether the quoted provision had any binding effect.

The provision of the Warehousemen's Act, which the Trial Court had in mind, relates to a receipt which may be given by the warehouseman for the goods received, and states that such a receipt shall not contain a provision, "and in any wise impair his obligation to exercise that degree of care in the safe-keeping of the goods entrusted to him which a reasonably careful man would exercise in regard to similar goods of his own."

We remember that it has been decided in this court that a common carrier cannot agree to be relieved of damages which result from its negligence. This is because of the public character of a railroad corporation and the unique relation it holds to its patrons. The Warehouseman's Act does not apply to the instant case. The appellant gave no receipt. The agreement upon which the action is grounded was executed and delivered before the receipt of the peaches. The complaint rests solely upon the agreement. The quoted provision is set up as a defense. There was no motion to strike nor does the reply answer the defense. All it does is to deny the allegations in the answer, which, we submit, is not sufficiently comprehensive to cover the defenses. This may be regarded as technical and criticized by the Court.

However, the appellant is not a public corporation; its character is not legally similar to that of a railroad corporation and there seems no valid reason why it should not, in advance of receiving goods for storage, agree with its customer as to the terms upon which they will

be received. The instant case shows the wisdom and justice of the provision.

An examination of the testimony will make it plain that the conditions both at the time of the receipt of the peaches and during the period of their storage, as well as the condition of the peaches themselves, made it humanly impossible, in spite of the exercise of the highest degree of care, to prevent the peaches from spoiling. It was against such a possibility that the appellant desired to protect itself, and against which the respondent was willing it might be protected.

There is no claim or pretended claim of gross negligence or indifference. Indeed, as already stated, the failure to maintain the temperature was quite beyond the control of the appellant.

The case is not brought within the provision of the Warehouseman's Act, neither expressly nor by implication, and therefore it has no application. Aside from cases which provide that railroad corporations may not attempt to agree against their own negligence, we know of no case in this State which holds that one may not agree to be relieved against damages where perishable goods are involved.

The Warehouseman's Act is declaratory of the common law—*Levine v. Wolff*, 78 Law, 306—but there is no prohibition against contracting against certain common law principles, so long as they are not violative of some public policy which can withstand the constitutional test. In Williston on Contracts, Section 1628, it is said:

“Though the power of courts to invalidate agreements of parties on grounds of public policy is unquestioned, and obviously necessary, the impropriety of a transaction should be clear in order to justify the exercise of the power. If there is one thing more than any other which public policy requires, it is that men of full age and competent understanding shall have the utmost liberty of contracting and the contracts when entered

into freely and voluntarily shall be held good and shall be enforced by courts of justice."

The business in which appellant is engaged, is not affected with a public interest as is that of railroads and similar corporations.

If it can be held that the provision in the Warehouseman's Act touching the character of the receipt to be taken is within the instant case, then to that extent it must be declared inoperative in violation of the right of freedom of contract.

### VIII.

**The Court refused to strike certain testimony of Witness Moore.**

At page 91 he was asked :

"Q. Could you tell what had caused that to the peach?

A. Not sufficient cold air, cold storage, I suppose; that was my idea.

Q. Did you know from your experience in handling fruit when you saw a peach as to what was the trouble?

A. Yes.

Q. And what did you say it was?

A. Not sufficient refrigeration.

Q. That would be, sufficient refrigeration to at least preserve the fruit?

A. Yes.

On cross-examination he was asked :

"Q. Mr. Moore, at first you said that you supposed that it was lack of refrigeration—what do you mean by that?

A. Well, I have never had any actual experience in cold storage."

The motion was then made to strike his testimony because he admitted that he was merely supposing and had had no experience. The Court refused to strike,

saying that it was a question of weight and not competency.

We submit that the testimony was incompetent, should have been stricken and that the refusal to do so was harmful error. He was not qualified as an expert in cold storage, but we had a right to assume, when he was asked the questions, that he would testify of knowledge based upon experience. The cross-examination developed this was not true. The result was that his opinion went to the jury with nothing but speculation to support it, and the testimony went to the nub of the case.

### IX.

It was error to permit Respondent to answer the following question: "Well, Mr. Miller, when you went over to the warehouse after you had received your notice on September 12th, what did you find was the condition of the warehouse?"

There was no allegation of any defect in any part of the plant of appellant. There was no proof that the "conditions of the warehouse" had any relation to the alleged failure to maintain a proper temperature. The effect of allowing an answer to the question created a new issue, with manifest injury to the appellant.

What the witness saw in the plant was due measurably to the gas which was emitted from the peaches and the quantity of ice which appellant had stored in the plant with the hope of reducing the temperature. His testimony was well calculated to prejudice the jury and turn their attention from the issue as made by the contract and the pleadings.

## X.

The Court erroneously permitted Witness Riley to answer the following question: "Do you recall whether or not during the year 1927 you stored at your plant in Pitman any Hale or Elberta peaches?"

This witness managed a cold storage plant at Pitman. It was sought to show by him that during 1927 his plant was able to preserve peaches stored there. Objection was made to the question at the threshold and upon the ground that it was not rebuttal, and not relevant to the issue. The question was permitted and an exception allowed.

This was followed by other questions and answers which tended to show that Riley's plant was able to preserve peaches. The evident purpose was to persuade the jury that therefore appellant's plant should have preserved them. There was no testimony to show the character of Riley's plant, the number of peaches he had stored, the character of the peaches as related to those stored with appellant, or anything from which a jury would have had the right to reduce any relation between the two. Moreover, it rebutted nothing. The claim was that it rebutted the testimony of appellant's witness Parkhurst. We submit that there is nothing in Parkhurst's testimony to have justified the alleged rebuttal. If this be so, it cannot successfully be maintained that the testimony was not harmful.

What is said with relation to Riley's testimony applies equally to that of Schober, who, over objection, was permitted to answer this question:

"Would you or would you not say that the peaches you had placed in your storage between August 25 and Labor Day, when you had taken them out, were they preserved?"

In addition to what has been said touching the testimony of Riley, the foregoing question called for a conclusion.

## XI.

The Court refused to charge the Fifteenth Request as follows: "If Plaintiff knew or ought to have known that any peaches he stored in Defendant's house were likely to be damaged by reason of Defendant's inability to maintain a proper temperature, Plaintiff cannot recover."

There was satisfactory evidence to justify the jury in finding that an unusual situation confronted the appellant in this that there was a very hot and rainy spell shortly before the peaches were picked which made them soft and likely to speedily rot; many of the peaches were permitted to stand in the hot sun several hours before delivery to the plant, which tended to accelerate their spoiling; they were taken to the plant in great quantities, unusually so, in order to save the Sunday and Labor Day intervening when there was no market. The condition of the peach and the large quantity tended greatly to reduce the temperature and make it impossible for appellant to maintain it sufficiently low to prevent spoiling. Plaintiff knew of these conditions, or ought to have known. He was notified of the unusual quantity being stored, and was told in advance of their actual spoiling that the proper temperature could not be maintained.

In the light of the fact, as we claim it is, that it was beyond the power of the appellant in the exercise of the greatest care to prevent the rising of the temperature, it was pertinent to request the Court to charge as above, upon the theory that the respondent could not hold the appellant liable in damages when he knew that no amount of care could prevent his peaches spoiling.

## XII.

We contend that it was error to submit to the jury the question of negligence averred in paragraph five of the complaint. It is true that appellant knew at the time it

received respondent's peaches that the temperature was too high to properly preserve. This came about by reason of respondent's offering the peaches for storage too closely upon the heels of the plant being opened and before the temperature had been reduced to a point required to properly preserve. Appellant's past experience however, justified the acceptance of the peaches, but it cannot be said it was negligent in doing so because it was under contract to receive, and had it not done so it would have breached its written agreement. Had it not received the peaches, and they had spoiled, as inevitably they would, then the case of the respondent would have been clear, and appellant would have been defenseless.

It results that the only ground upon which the case could legally have been submitted to the jury was that of failing to maintain a temperature after the acceptance of the peaches, and we have shown that in this regard there was no negligence.

It is apparent upon the whole record, and for any one of the reasons urged, that the verdict and judgment thereon were erroneous and that the judgment should be reversed.

Respectfully submitted,

AVIS & AVIS,  
*Attorneys for Appellant.*

CLARENCE L. COLE,  
*Of Counsel.*

