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Clerk Supreme Court of Appeals
Richmond, Va.

# Record No. 4966

## In the Supreme Court of Appeals of Virginia at Richmond

## SWIFT AND COMPANY

v.

## JEAN C. WELLS

FROM THE HUSTINGS COURT OF THE CITY OF RICHMOND, PART II

### RULE 5:12—BRIEFS.

§5. Number of Copies. Twenty-five copies of each brief shall be filed with the clerk of the Court, and at least three copies mailed or delivered to opposing counsel on or before the day on which the brief is filed.

§6. Size and Type. Briefs shall be nine inches in length and six inches in width, so as to conform in dimensions to the printed record, and shall be printed in type not less in size, as to height and width, than the type in which the record is printed. The record number of the case and the names and addresses of counsel submitting the brief shall be printed on the front cover.

HOWARD G. TURNER, Clerk.

Court opens at 9:30 a. m.; Adjourns at 1:00 p. m.

IN THE

# Supreme Court of Appeals of Virginia

AT RICHMOND.

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## Record No. 4966

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VIRGINIA:

In the Supreme Court of Appeals held at the Supreme Court of Appeals Building in the City of Richmond on Friday the 28th day of November, 1958.

SWIFT AND COMPANY, Plaintiff in Error,

*against*

JEAN C. WELLS, Defendant in Error.

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From the Hustings Court of the City of Richmond, Part II

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Upon the petition of Swift and Company, an Illinois corporation, a writ of error and *supersedeas* is awarded it to a judgment rendered by the Hustings Court of the City of Richmond, Part II, on the 25th day of July, 1958, in a certain motion for judgment then therein depending wherein Jean C. Wells was plaintiff and the petitioner was defendant;

And it appearing from the certificate of the clerk of the said court that a suspending and *supersedeas* bond in the penalty of seven thousand dollars, conditioned according to law has heretofore been given in accordance with the provisions of sections 8-465 and 8-477 of the Code, no additional bond is required.

## RECORD

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page 32 }

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Filed by order December 13th 1957.

Teste:

CHAS R. PURDY, Clerk
By IRA R. PURDY, D. C.

O. B. 38, page 392.

### SECOND AMENDED MOTION FOR JUDGMENT.

The plaintiff moves the Court for judgment against the defendant for the sum of TWENTY THOUSAND DOLLARS ($20,000.00) as hereinafter set forth:

### COUNT I.

1. That on the 22d day of September, 1956, there was purchased by the husband of the plaintiff, as her agent, from Lemuel T. Roberson, trading as Roberson Super Market, a Swift Premium shoulder ham for use and consumption by the plaintiff and her family.

2. That the defendant, Swift & Company, warranted as a matter of law that the said ham was wholesome and fit for human consumption; that the plaintiff relied upon such warranty; that by reason of the failure of the defendant to comply with its warranty, the plaintiff was severely injured and sustained substantial damages as hereinafter set forth.

3. That on September 23, 1956, the plaintiff prepared said ham for cooking and placed it in the oven in her home to bake according to instructions on the wrapper, and after said ham had been cooked, as aforesaid, the plaintiff ate some of the ham on September 23 and 24, 1956, and within a short period thereafter the plaintiff suffered severe stomach cramps and became violently ill, and she suffered with vomiting and with elevated temperature, disturbed

page 33 } vision, rapid pulse and severe pain in stomach and abdomen; and on September 25, 1956, the plain-

tiff was taken to the Medical College of Virginia Hospital for treatment and she remained there for about a week.

4. That the ingestion of the meat from the Swift Premium shoulder ham by the plaintiff was the cause of her gastro-enteritis and of the illness, pain and suffering, as aforesaid.

5. That the plaintiff was injured by the unwholesomeness and unfitness of the Swift Premium shoulder ham, which was purchased for immediate consumption, as aforesaid, and as a result thereof the plaintiff was required to incur medical, doctors' and hospital bills, and the plaintiff was required to incur other expenses.

6. That the defendant for a long time prior to the aforesaid 22nd day of September, 1956, advertised extensively all of its products in the area where the plaintiff lives through the media of newspapers, magazines, radio and television.

* * * * *

page 34 }

* * * * *

## COUNT III.

1. That on the 22d day of September, 1956, there was purchased by the husband of the plaintiff, as her agent, from Lemuel T. Roberson, trading as Roberson Super Market, a Swift Premium shoulder ham for use and consumption by the plaintiff and her family.

2. That the said Swift Premium shoulder ham was contaminated, diseased, unwholesome, deleterious and otherwise unfit for human food, and the defendant violated the laws and statutes of the Commonwealth of Virginia, and
page 35 } particularly Article 3 of Chapter 15 of Title 3 of the Code of Virginia of 1950, as amended, and Section 3-303 of the Code of Virginia of 1950, as amended.

3. That as a result of the aforesaid violation by the defendant of the aforesaid laws and statutes of the Commonwealth of Virginia, and particularly Article 3 of Chapter 15 of Title 3 of the Code of Virginia of 1950, as amended, and Section 3-303 of the Code of Virginia of 1950, as amended, the plaintiff became violently ill within a short period of time after eating some of the aforesaid Swift Premium shoulder ham, and she suffered with vomiting and with elevated temperature, disturbed vision, rapid pulse and severe pain in stomach and abdomen; and on September 25, 1956,

the plaintiff was taken to the Medical College of Virginia Hospital for treatment and she remained there for about a week.

4. That the ingestion of the meat from the Swift Premium shoulder ham by the plaintiff was the cause of her gastro-enteritis and of the illness, pain and suffering, as aforesaid.

5. That the plaintiff was injured by the contaminated, diseased, unwholesome, deleterious and otherwise unfit ham, as aforesaid, and as a result thereof the plaintiff was required to incur medical, doctors' and hospital bills, and the plaintiff was required to incur other expenses.

WHEREFORE, plaintiff demands judgment against Swift & Company for the sum of TWENTY THOUSAND DOLLARS ($20,000.00) for damages resulting to the plaintiff, as aforesaid, and costs.

JEAN C. WELLS
By Counsel.

* * * * *

page 42 } INSTRUCTION NO. 1.

The Court instructs the jury that when the defendant delivered the Swift Premium Shoulder to Roberson Super Market for sale to the public the defendant warranted to the plaintiff that the Shoulder was then wholesome and fit for human consumption, and the Court further instructs the jury that if you believe from a preponderance of the evidence that when the Shoulder was delivered to Roberson Super Market it was not wholesome and fit for human consumption then the defendant failed to comply with its warranty, and if you believe that any such failure was the sole proximate cause of any illness sustained by the plaintiff on September 23 and 24, 1956, and thereafter, then you must find your verdict for the plaintiff.

M. R. D.

page 43 } INSTRUCTION NO. 2.

The Court instructs the jury that where a person is injured due solely to the fault of one of several persons, independent suits may be instituted against each of such persons but only one recovery may be had, and the issue

for determination in each suit is—was the defendant in that suit solely the cause of the plaintiff's injuries.

M. R. D.

* * * * *

page 45 } INSTRUCTION NO. 4.

The Court instructs the jury if you believe from the evidence that the plaintiff's failure to follow the instructions printed on the wrapper of the meat in question resulted in its being unfit for human consumption, then she cannot recover in this action.

If, however, you believe from the evidence that the plaintiff's manner of storage, preparation and cooking of the meat would accomplish the same safety results as would have resulted from following the instructions specified on the wrapper, or if you believe from the evidence that following the said instructions would not have prevented her illness, then her failure to follow the instructions will not bar her recovery if you believe from the evidence and the other instructions of the Court that she is entitled to recover.

M. R. D.

* * * * *

pag 57 }

* * * * *

ORDER.

This case came again this day to be heard upon the defendant's Motion To Set Aside the Verdict of the Jury rendered herein on December 20, 1957, the said Motion heretofore having been argued by counsel and taken under advisement by the Court;

And the Court now being of opinion, for reasons set forth in a written opinion of the Court, hereby filed as a part of the record herein, that the Motion should be overruled;

Therefore, the Court doth adjudge and order that the defendant's Motion To Set Aside The Verdict of the Jury be, and the same is hereby, overruled; and in accordance with the verdict of the jury it is ordered that the plaintiff, Jean C. Wells, do recover of the defendant, Swift & Company, an

Illinois Corporation, the sum of Four Thousand Dollars ($4,000.00) with interest thereon at the rate of 6% per annum from December 20, 1957, until paid, and her costs by her in her behalf expended incident to this proceeding; to all of which foregoing action, the defendant, by counsel, objects and excepts.

And the Court not being informed at this time whether an appeal by the defendant is indicated herein, the Court doth suspend execution upon the foregoing judgment rendered against the defendant herein for a period of one hundred and twenty (120) days from the date of this order, July 25, 1958, and if a petition for a Writ of Error from and *supersedeas* to the aforesaid judgment is presented to the Supreme Court of Appeals of Virginia or page 58 } one of the justices thereof within the said 120 days then the operation of the aforesaid judgment is suspended thereafter until the said Court or justice thereof shall have acted upon the said petition; all of the foregoing suspension of execution of judgment upon the condition that the said defendant, or someone for it, within 42 days from the date of this order shall enter into bond in the penalty of $7,000.00 with surety to be approved by the Clerk of this Court conditioned and payable as the law applicable hereto directs.

Enter 7/25/58.

M. R. D.

* * * * *

page 59 }

* * * * *

Filed by order July 25th 1958.

Teste:

CHAS. R. PURDY, Clerk
By IVA R. PURDY, D. C.

O. B. 39 page 211.

OPINION.

Doubles, J. This is an action by the plaintiff against the

defendant to recover for damages sustained by the plaintiff as a result of eating a meat product (a picnic shoulder) packed by the defendant. The jury returned a verdict of $4,000.00 for the plaintiff, which the defendant has moved to set aside.

The plaintiff's Motion for Judgment was in three counts: (1) Implied Warranty, (2) Negligence; (3) Violation of Virginia Pure Food Laws. The Court struck the plaintiff's evidence as to the latter two counts and permitted the case to go to the jury solely upon the First Count. It is this action of the Court that is assigned as error by the defendant.

## THE FACTS.

The evidence establishes that the defendant, a national meat packing house, conducts national advertizing of its various products on a large scale—through the media of television, radio, magazines, newspapers and by direct mail. The particular product involved in this litigation (a picnic shoulder) had not been the subject of advertizing for several years prior to the occurence involved herein. It appears that the advertizing budget of the company is allocated among the 200 or more products of the company as the judgment of the advertizing department dictates and that in advertizing one product the company hope that people "will buy a lot of other Swift products, too." (R., p. 322) The plaintiff had seen Swift Company advertizing on numerous occasions, liked the television programs, knew that Swift products were good, and continued to buy them. (R., pp. 96-100)

page 60

On Saturday, September 22, 1956, the husband of the plaintiff went to Roberson's Super-Market around Noon and did the family marketing. On the list prepared by his wife was "a picnic ham"—so he bought a Swifts Picnic Shoulder smoked ham. The item was in the regrigerated meat case of the grocer in its original cellophane wrapper. He took the product home, a five-minute trip, and it was put in a General Electric refrigerator immediately. There it stayed until after church on Sunday; it was then cooked thoroughly, cooled, a slice eaten by the plaintiff, followed later in the day by illness of the plaintiff. The following day the plaintiff and all other members of the family who ate portions of the product became ill; the plaintiff being hospitalized for six days. This illness was caused by the presence in the product of staphylococcus enterotoxin.

Enterotoxin (a toxin poisonous to the intestinal tract) is an excretion resulting from the multiplication of staphy-

loccus organisms. This organism is a common one to the skin, mucous membrane and nasal facings of man, and is found on the skin of some animals. The organism does not multiply under refrigeration and is killed by cooking temperatures. Under room temperatures it will multiply and give off the poisonous enterotoxin—and if the meat product is later cooked, the staphyloccus organism will be killed, but the enterotoxin previously formed will remain unaffected and will poison the human who eats the cooked meat.

The theory of the plaintiff, which was believed by the jury, is that this enterotoxin was created in the meat product while it was in custody of the defendant and before it was delivered to Roberson's Super-Market. The evidence on behalf of the defendant established that it was not page 61 } negligent, and as stated before, the Court struck the evidence as to Count 2 and so instructed the jury.

## THE ISSUE.

May the consumer of a wrapped meat product sue the manufacturer thereof, who is not the immediate vendor, on the theory of breach of implied warranty of wholesomeness, when there is no privity of contract between them?

## VIRGINIA CASES.

In *Colonna* v. *Rosedale Dairy Co.*, 166 Va. 314, (1936), the father of the plaintiff purchased from the defendant milk processed and sold by the defendant. The plaintiff became ill due to drinking the milk which was contaminated with Malta fever germs. The Court held that the defendant had breached an implied warranty of wholesomeness, but that the plaintiff was not of a class who could sue thereon. The theory of the decision was that an implied warranty was a contract, and that those not in privity could not sue for its breach.

It may be noted in passing that the Court specifically limited its holding to the case at bar, saying:

"What is said to be limited to the facts in this case. We have not undertaken to pass upon the liability of * * * manufacturers who in final form and original packages send their product abroad to the general public. That was the case in *Norfolk Coca-Cola Bottling Work* v. *Krausse,* (1934) 162 Va. 107, 173 S. E. 497. It was a tort action and liability

on contract was left open. It is still open. The rule which applies to it may or may not apply to retailers in domestic trade." 166 Va. 314 at 321, 322.

In the *Colonna Case* the action was by a consumer, not in privity, against the retailer. In making the above reservation as to actions against a food manufacturer, the Court may have had in mind the possibility of holding such a manufacturer liable to a consumer even in contract on some one of the fictional theories of privity of contract used by courts of other jurisdictions who, feeling bound by a rule that actions on implied warranties were *ex con-*
page 62 } *tractu,* have resorted to all sorts of fictions to establish privity of contract between a manufacturer and consumer.

In *Kroger Grocery & Baking Co.* v. *Dunn,* 181 Va. 390 (1943) the Court, in holding that the immediate vendee of a ham purchased from the defendant vendor could recover for a breach of implied warranty of wholesomeness, nevertheless reaffirmed its statements made in the *Colonna Case* with respect to those who were not in privity of contract with the defendant.

Thus in both the *Colonna Case* and the *Kroger Case,* the defendant was the retail vendor and not the manufacturer.

In *duPont Co.* v. *Universal Moulding Products Corp.,* 191 Va. 525 (1950) the Court had before it a question as to whether a count for breach of implied warranty of fitness of paint materials could be joined with counts alleging fraud and negligence. The Court, holding that there was no misjoinder, took occasion to repudiate what had been said in the *Colonna Case* about implied warranty arising out of contract, and went on to review earlier Virginia cases to establish the fact that actions for breach of implied warranty sounded historically in tort, and may be joined with other counts *ex delicto.* The action was by the immediate vendee against his vendor, therefore one cannot say it holds that a remote sub-vendee or ultimate user or consumer may sue the original manufacturer. However, there can be no qustion but that it holds actions on implied warranties to be *ex delicto* or *ex contractu* at the plaintiff's election. Therefore it is bound to establish the rule that when sued on *ex delicto,* no privity of contract is necessary.

In view of what was said in the *duPont Case,* one is a little disturbed to see a remark made in the later case of *H. M. Gleason & Co.* v. *International Harvester Co.,* 197 Va. 255 (1955) in which the purchaser of a "fifth wheel" used in

attaching trailers to trucks sued both the retailer
page 63 } and the wholesaler for breach of implied warranty
of fitness thereof when it failed to work properly causing the equipment to overturn. The trial court struck the evidence as to the wholesaler, and there was a recovery against the retailer. The Supreme Court, in affirming the judgment, said:

"It is manifest from all the circumstances that * * * (the plaintiff) relied upon * * * (the retailer) to furnish a fifth wheel suitable for the purposes intended, and an implied warranty to that effect resulted."

Thus far there is no difficulty, and the Court could have stopped there on the expressed comment that the purchaser relied upon the retailer, which can be taken to mean that he did not rely upon any duty of the wholesaler. But the Court went further and said:

"So far as * * * (the wholesaler) is concerned, want of privity of contract with * * * (the plaintiff) is a complete defense to the charge that it was guilty of the breach of an implied warranty."

Here we find the Court slipping back into the language used in the *Colonna Case* which only five years before had been repudiated in in the *duPont Case.*

The situation thus presented is this. In 1950, after the decision in the *duPont Case,* the reasoning in the *Colonna* and other *food* cases had been repudiated, and no privity of contract was necessary. As to commodities other than food (e. g. paint) the same would be true, viz. a suit *ex delicto* could be maintained for breach of implied warranty—and if *ex delicto,* certainly no privity of contract could be required. Then comes the 1955 remark gratuitously volunteered in the *Gleason Case,* that in the sale of machinery, privity of contract is required if the purchaser sues a wholesaler—and it may be presumed that the Court would have included the manufacturer as well, although this is not necessarily true.

In the dilemma created by the foregoing, the Court is of opinion that in Virginia the question in cases involving com-
modities other than food is in a state of confu-
page 64 } sion;—that in food cases the question of liability
of the manufacturer upon implied warranty is still an open one.

## OTHER JURISDICTIONS.

When one looks to the cases from other jurisdictions one may find authority for any proposition he wishes to assert. Most of the older cases contain remarks similar to those found in the *Colonna Case;* on the other hand the distinct trend of the recent cases is to the contrary.

It must be recognized that with respect to implying warranties in the sale of foodstuffs, the law since the earliest times has made a distinction between foods and other articles of commerce. As far back as 1266 A. D. it was provided in England "It is ordained that none shall sell corrupt victuals." (51 Hen. III, stat. 6). The early English decisions held repeatedly that an action on the case lies against the seller of corrupt food whether the same was warranted to be good or not. See a note in 72 Eng. Reprint 254; *Roswel* v. *Vaughan,* 97 Eng. Reprint 196.

The foregoing principle, so well known to the common law, was adopted by the early decisions in America. The reasoning of the early decisions and adhered to in later cases shows clearly that in the sale of foodstuffs there is a type of implied warranty peculiar to that commodity and quite distinct from that implied in other sales. It was not based upon reliance by the buyer on the seller's representations, nor upon the seller's skill,—but was based squarely upon the public policy of protecting public health. And when it is said that a right of action springs from such an implied warranty, the warranty is not the more modern warranty springing from contract—but is from the duty existing *ex delicto* imposed by law to protect public health.

The erroneous remarks in many of the cases, including the *Colonna Case* in Virginia, to the effect that an action for breach of implied warranty is an action *ex con-*
page 65 } *tractu* and there must be privity of contract between the plaintiff and defendant, is attributable to the failure of such courts to appreciate the genesis of the whole doctrine of implied warranty. As observed earlier herein, the Virginia Supreme Court of Appeals had corrected this error and had repudiated the erroneous remarks made earlier in the *Colonna Case.* See *duPont deNemours and Co.* v. *Universal Moulded Products Corporation,* 191 Va. 525 1950), where, after tracing the history of the doctrine, the Court said:

"Expressions in the (Colonna Case and the Kroger Case) relied upon by the defendant to sustain its contention that

there was a misjoinder of courts, are purely dicta and contrary to previous Virginia decisions."

A well-reasoned case directly in point is that of *Decker* v. *Capps,* (Texas) 164 S. W. (2d) 828, 142 A. L. R. 1479. There the defendant company manufactured and sold certain sausage advertized as being suitable for human consumption under the trade name "Cervalet," which sausage was wrapped in a cellophane package. The sausage in question was sold by the defendant to a retail grocer, who in turn sold it three days later to Mr. Capps. Members of Mr. Capps' family ate it and were poisoned thereby, one child dying and others becoming seriously ill. Suits were instituted by Mrs. Capps (wife of the purchaser) for injuries sustained by her and on behalf of the children. The jury found that the defendant manufacturer was free from negligence, but that through unavoidable accident the meat became contaminated during the processing thereof. A judgment in favor of the plaintiffs was affirmed. Pertinent portions of the opinion, some of which has been used heretofore herein, are as follows:

"* * * We think the manufacturer is liable in such a case under an implied warranty imposed by operation of law as a matter of public policy. We recognize that the authorities are by no means uniform, but we believe the better reasoning supports the rule which holds the manufacturer liable. Liability in such case is not based on negligence, nor page 66 } on the usual implied contractual warranty, but on the broad principle of the public policy to protect human health and life. It is a well-known fact that articles of food are manufactured and placed in the channels of commerce, with intention that they shall pass from hand to hand until they are finally used by some remote consumer. * * * It seems to be the rule that where food products sold for human consumption are unfit for that purpose, there is such an utter failure of the purpose for which the food is sold, and the consequences of eating unsound food so disastrous to human health and life, that the law imposes a warranty of purity in favor of the ultimate consumer as a matter of public policy."

The Court then cites many cases pro and con upon the question, and continues:

"There is a growing tendency, however, to discard the requirement of privity and to hold the manufacturer liable

directly to the ultimate consumer. (Citing an array of cases)

"Many of the Courts which have allowed a recovery where there was no direct contractual relationship between plaintiff and defendant have done so by indulging in fictions, such as presumed negligence, fraud, assignment of cause of action from dealer to consumer, third party beneficiary contract, and agency of the buyer for the consumer. * * * Such authorities but evidence the efforts made by the Courts to place absolute liability on the manufacturer and vendor of products to the consumer for damages caused by impurities therein. Such fictions are indulged in merely because it is thought necessary to do so in order to get away from the rule which requires privity of contract where recovery is sought on an implied warranty growing out of a contract. We believe the better and sounder rule places liability solidly on the ground of a warranty not in contract, but imposed by law as a matter of public policy.

"* * * A party who processes a product and gives it the appearance of being suitable for human consumption, and places it in the channels of commerce, expects someone to consume the food in reliance on its appearance that it is fit for human consumption. But a modern manufacturer or vendor does even more than this under modern practices. He not only processes the food and dresses it up so as to make it appear appetizing, but he uses the newspapers, magazines, billboards and the radio to build up the psychology to buy and consume his products. The invitation extended by him is not only to the housewife to buy and serve his products, but to the members of the family and guests to eat it. In fact, the manufacturer's interest in the product is not terminated when he has sold it to the wholesaler. He must get it off the wholesaler's shelves before the wholesaler will buy a new supply."

page 67 } CONCLUSION.

In so far as the manufacturer of a food product put onto the market in a sealed container or wrapper is concerned, the Court subscribes to much of what was said in the Texas Case above quoted. There may be room for distinguishing such a product from one not sold in such a sealed container where deleterious substances could readily contaminate the product after it leaves the hands of the manufacturer. Also in cases of machinery which might readily be damaged while in possession of a dealer after it leaves the hands of the manufacturer. But where contamination of a food product

sets in while the product is in the hands of the manufacturer, and he seals this contamination in and puts the product into the streams of commerce, public policy demands that a warranty be implied on his part to the world that the product is what he impliedly represents, viz, that it is fit for human consumption; and this even though the misrepresentation be an innocent one. In this respect it is not unlike the rule in Virginia that scienter is not necessary to fraud, and that the *ex delicto* action of deceit may be brought upon a misrepresentation of fact even though it be an innocent one.

For the reasons heretofore stated the Court is of opinion that the Motion to set aside the verdict must be overruled.

July 24th, 1958.

page 68 }

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Filed in Clerk's Office September 4th 1958.

Teste:

CHAS. R. PURDY, Clerk
By IVA R. PURDY, D. C.

NOTICE OF APPEAL AND ASSIGNMENT OF ERROR.

To Charles R. Purdy, Esquire
Clerk, Hustings Court of the
City of Richmond, Part II
Richmond, Virginia

Defendant Swift & Company hereby notes an appeal from judgment entered on July 25, 1958, upon verdict of the jury on behalf of the plaintiff and against the defendant in the sum of $4,000, with interest from December 20, 1957, and defendant hereby signifies its intention of filing petition for writ of error and *supersedeas* with the Clerk of the Supreme Court of Appeals of Virginia or with one of the Justices of that Court within the time prescribed by law.

Defendant assigns the following errors:

1. Failure of the trial court to sustain defendant's demurrers to the motions for judgment.

2. Failure of the trial court to strike the evidence relating to Count I of plaintiff's second amended motion for judg-

ment on the ground that there was no privity of
page 69 } contract between plaintiff as a consumer of a
Swift Premium Picnic Shoulder and defendant as
the processor of the shoulder.

3. The granting by the trial court of Instructions Nos. 1, 2, 3, 4, 5, 6, 7, 8 and 9, and refusal of the trial court to grant Instruction F, all on the ground that there was no privity of contract between plaintiff and defendant, and therefore there was no issue of fact for submission to the jury.

4. Refusal of the trial court to set aside the verdict of the jury and enter up final judgment for the defendant on the ground that the verdict is contrary to the law and the evidence.

SWIFT & COMPANY
By ARCHIBALD G. ROBERTSON

LEWIS THOMAS BOOKER

* * * * *

page 70 }

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Filed in Clerk's Office September 12th 1958.

Teste:

CHAS. R. PURDY, Clerk
By IVA R. PURDY, D. C.

ASSIGNMENT OF CROSS-ERROR BY PLAINTIFF.

To: Charles R. Purdy, Esquire
Clerk, Hustings Court of the
City of Richmond, Part II
Richmond, Virginia

The plaintiff assigns as cross-error the following:

1. The error of the trial court in sustaining the defendant's motion to strike the evidence relating to Count III of the plaintiff's second amended motion for judgment,

(a) For the reason that under the facts of this case the plaintiff has a right of action against the defendant under the

laws and statutes of the Commonwealth of Virginia and particularly Section 3-303 of the Code of Virginia of 1950, as amended, and the Virginia Food Act, Section 3-306 et seq. of the Code of Virginia of 1950, as amended.

(b) For the reason that there was evidence to go before the jury to support the allegations of Count III of the plaintiff's second amended motion for judgment upon which the jury could have found that there was a violation of the statutory duties imposed by the laws and statutes of the Commonwealth of Virginia and particularly Section 3-303 of the Code of Virginia of 1950, as amended, and the Virginia
page 71 } Food Act, Section 3-306 et seq. of the Code of Virginia of 1950, as amended.

(c) For the reason that the verdict of the jury for the plaintiff under Count I of the second amended motion for judgment conclusively establishes the fact that there was a violation of the statutory duties imposed by the laws and statutes of the Commonwealth of Virginia and particularly Section 3-303 of the Code of Virginia of 1950, as amended, and the Virginia Food Act, Section 3-306 et seq. of the Code of Virginia of 1950, as amended, and, under the evidence, the jury would have had to find such a violation.

JEAN C. WELLS
By EMANUEL EMROCH
CHARLES P. ROSNER

* * * * *

FRANK H. WELLS,
was called as a witness on behalf of the Plaintiff and, being first duly sworn, was examined and testified as follows:

* * * * *

Q. Do you recall purchasing any food products from the Roberson Super Market in September, 1956?

A. Yes, sir.

Q. Before you went to that market, was any paper handed you by your wife?

A. Yes, sir.

page 3 } Q. What was the nature of that paper?

A. The grocery list.

Q. What was on that list, do you recall?

A. Well, the usual things, I imagine. I don't recall all of

*Frank H. Wells.*

it. I know it was a shoulder—a ham marked down on it and the meat and all for the week.

Q. Do you recall some of the other items you purchased that were on the list?

A. I think it was some mayonnaise, bread, canned food, stuff like that.

Q. Now, who asked you to go to the—or how did you happen to go to the Roberson's Super Market to purchase this shoulder and other products?

A. My wife. My wife asked me.

Q. Who gave you the money with which to purchase the products?

A. My wife.

Q. Now, about what time of day did you go to Roberson's Super Market?

A. Sometime before 12 o'clock. I couldn't tell exactly.

Q. And how far is Roberson's Super Market from your home, Mr. Wells?

A. I imagine it's two city blocks.

Q. Did you purchase a shoulder ham at Roberson's Super Market?

page 4 } A. Yes, sir.

Q. Do you remember the date?

A. The 22nd.

Q. Of what month?

A. September.

Q. What year?

A. 'Fifty-six.

Q. What type of shoulder did you purchase, what—

A. Swift Premium.

* * * * *

page 6 }

* * * * *

Q. After you purchased the Swift shoulder from Roberson's Super Market and left the Roberson's Super Market, where did you go?

A. Home.

Q. How long did it take you to get home?

A. Under five minutes.

Q. And what was done with the shoulder after it reached your home?

*Frank H. Wells.*

A. Put in the box.

Q. And what was done with the shoulder after it reached your home?

A. Put in the box.

Q. What type of box?

A. General Electric refrigerator.

Q. What model was it, do you know?

A. 'Fifty-six, I think. I think it was new at the time.

Q. You say you think it was a new refrigerator?

A. Yes.

Q. Who placed it in the box?

A. My wife.

Q. When it was placed in the box do you know whether the wrapper was still on the ham—on the shoulder?

page 7 } A. I am pretty sure it was.

Q. Now, do you recall when you next saw the shoulder?

A. Well, probably saw it in the box before then, but that was Saturday, and my wife took it out of the box after we come home from church Sunday to fix it.

Q. Who went to church?

A. My wife and two boys and myself.

Q. And what are their names?

A. Bruce Carson Wells and Dean William Wells.

Q. How old is Bruce?

A. He is four now.

Q. How old is the other boy?

A. Two and a half, I think.

Q. How old was Bruce in September, 1956?

A. About three.

Q. Were you in the home on Sunday after your wife came home from church, that would be September 23rd, 1956?

A. Yes, sir.

Q. After the ham was cooked did you eat any of it on Sunday, September 23rd?

A. No, sir.

Q. Did you eat any of the ham on Monday, September 24th?

A. Yes, sir.

Q. Where were you when you ate that ham?

A. I was in a house out on the West End work-

page 8 } ing, took it on my lunch.

Q. You were working in a house on West End?

A. Yes, sir.

Q. Setting tile?

*Frank H. Wells.*

A. Yes, sir.
Q. And what else did you eat for lunch?
A. Bologna sandwich and a ham sandwich and a lunch cake, Pepsi-Cola.

Mr. Robertson: A what?
The Witness: Lunch cake.

By Mr. Emroch:
Q. Did you work all that afternoon?
A. No, sir.
Q. Why not?
A. I got sick along about two o'clock and had to be brought home.
Q. What was the nature of your sickness?
A. Vomiting.
Q. And you went home at two o'clock?
A. Yes, sir.
Q. And how long did your sickness continue?
A. About five, I think.
Q. About five o'clock.
A. About five o'clock.
Q. Well, between the time you got home at two
page 9 } o'clock and five o'clock was any of the ham eaten by anyone else in the house as far as you know?
A. Yes, sir, my wife ate some ham bisquits off of the ham about four o'clock.
Q. All right, now, what happened? What was the condition of your wife that night?
A. Well, she got sick about six and started vomiting and then a little later she started with the diarrhea.

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page 10 }

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Q. While Dr. Lehmann was at the home, did anyone else get sick in your family?
A. Yes, sir, my oldest boy.
Q. What is his name?
A. Bruce.
Q. What was the nature of his sickness?
A. Vomiting and little diarrhea.

*Frank H. Wells.*

Q. And did Dr. Lehmann give a prescription to your wife?
A. Yes, sir.

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page 11 }

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Q. Do you know what happened to your wife after she took the medicine?
A. She still vomited, she couldn't keep it down.
Q. Was your wife taken to the hospital?
A. The next day.
Q. About what time?
A. About twelve, somewhere around there.
Q. How did she get there?
A. I took her over.
Q. In your automobile?
page 12 } A. Yes, sir.
Q. Did you go into the hospital with her?
A. Yes, sir.
Q. Now, the next day, do you recall what day of the week it was that she entered into the hospital?
A. Tuesday.
Q. And the day of the month?
A. Twenty-fifth, I think.
Q. Of September?
A. That's right.
Q. Now, what was her condition and her appearance when you took her to the hospital on Tuesday, September 25th?
A. Well, I was told she had dehydrated all of the moisture out of her body and she was then drawing the moisture out of her blood and she was in real bad condition. Her eyes were sunk back in her head, and you wouldn't even know who she was. In fact, Dr. Lehmann—

* * * * *

Q. What I want you to tell, Mr. Wells, is what you saw and what you observed.
A. Her eyes were sunk back in her head, and you wouldn't even recognize her if you had seen her before, probably, she was sick.
page 13 } Q. And do you know approximately how long she stayed in the hospital?

*Frank H. Wells.*

A. Seven days, I think.
Q. Did you visit the hospital during that time?
A. Yes, sir.
Q. Mr. Wells, do you know whether anyone else ate any of that ham after your wife went to the hospital?
A. Yes, sir, my step-father.
Q. What is his name?
A. Cloudy Truslow.
Q. Where does Mr. Truslow live?
A. At that time he was living in a trailer court right next door to us.

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page 15 }

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Q. Now, do you know where the ham—did you stay at home while your wife was in the hospital for that week?
page 16 } A. Not all the time, no, sir, I was visiting her, but I stayed at the house at night.
Q. Did you stay at the house at night?
A. Yes, sir.
Q. Do you know where the ham stayed during that week?
A. Wednesday—it was either Wednesday or Thursday I wrapped the ham up and put it in the freezer, out of the box, took it out of the refrigerator and put it in the freezer.
Q. Is the freezer a part of the refrigerator?
A. Yes, sir.
Q. Now, how long did it stay in the freezer?
A. Till the following Saturday.
Q. What day was that—date was that?
A. That was September the 29th.
Q. And what happened to it on that day, September 29th?
A. I took it to—actually, I went up for groceries at Roberson's Food Market, and I told them about the ham.

Mr. Robertson: Wait a minute, don't tell what he told them, tell what they did.
The Court: What he told.
Mr. Robertson: I thought he was embarking on what he told them. He can tell what he did.
The Court: Why can't he tell what he told them?

*Frank H. Wells.*

Mr. Robertson: I reckon you are right, Your Honor. I withdraw that.

page 17 } The Court: I thought so.

The Witness: I told him about my wife being in the hospital and she was sick and we thought it was the ham.

By Mr. Emroch:

Q. What did he do?

A. And I was advised to go back home and get the ham and bring it to the store.

Q. Who advised you to do that?

A. Roberson.

Q. All right, what did you do after that? Did you do that?

A. Yes, sir, I did that, brought it back up, and he split it down through the middle with a saw, and we couldn't find anything wrong with the ham.

Q. Did it smell all right?

A. It smelled all right, it tasted all right and everything.

Q. Did it look all right?

A. Yes, sir.

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page 18 }

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The Witness: It was put in the walk-in box back of the meat counter.

By Mr. Emroch:

Q. Did you see him do that?

A. Yes, sir, I saw him wrap both halves of the ham up and put it in the box.

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page 48 }

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Q. Who else ate the rabbit on Sunday or Monday—on Sunday with you?

A. Mr. Truslow, my two children and myself.

*Dr. Richard Lehmann.*

Q. Do you know whether Mr. Truslow was sick on Sunday night?
A. No, sir, he wasn't.
Q. Do you know whether your two children were sick on Susday night?
A. No, sir, they weren't.
Q. Were you sick on Sunday night?
A. No, sir.
Q. The only one that was sick on Sunday night was your wife, is that correct?
A. That's right, Sunday evening.
Q. Now, did anyone else eat the shoulder on Sunday besides your wife?
A. No, sir.
Q. Now, what was the youngest boy's name?
page 49 } A. Dean.
Q. D-e-a-n?
A. That's right.
Q. Did he get sick at all?
A. No, sir.
Q. Did he eat some of the rabbit on Sunday?
A. Yes, sir.

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page 50 } DR. RICHARD LEHMANN,
was called as a witness on behalf of the Plaintiff and, being first duly sworn, was examined and testified as follows:

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page 51 }

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Q. When you arrived at the home, in what condition did you find Mrs. Wells?
A. She was vomiting, complained about headache, cramps in the stomach, diarrhea and her vision wasn't all right. She couldn't see all right.
Q. Did you check her pulse?
A. Yeah; it was rapid.
Q. Did you check her temperature?

*Jean C. Wells.*

A. Her temperature was slightly elevated. She was very sick in the evening. I gave her a prescription and have her a shot, a shot with demarol and penicillin and gave page 52 } her a prescription with paregoric and sulfa, cremoxin.

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page 53 } A. The little boy was sick, too, and I gave him a shot, too, and husband complained also about feeling sick.

Q. And what was the nature of the little boy's illness?

A. The same.

Q. What did he have?

A. Vomiting and diarrhea. It was the same.

Q. What type of illness did the husband complain to you about, Mr. Wells?

A. I don't know exactly, but it was—they told me they have eaten something and after this they felt sick.

Q. Now, on that occasion did you diagnose the nature of the illness?

A. Food poisoning, yes.

Q. You diagnosed it as food poisoning?

A. Yes.

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page 56 }

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JEAN C. WELLS,

was called as a witness on her own behalf and, being first duly sworn, was examined and testified as follows:

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page 58 }

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Q. Did he have a shoulder ham?

A. Yes, he had Swift shoulder.

Q. Was it wrapped

A. Yes, wrapped good.

*Jean C. Wells.*

Q. You have seen the Plaintiff's Exhibit No. 1 which is marked here. Do you identify that as being the wrapper in which the shoulder was wrapped?
A. Yes, sir, it is.
Q. Who placed the shoulder in the refrigerator?
A. I did.
Q. And about what time of the day was it that you placed it in the refrigerator?
A. Between ten and noon. As soon as he gets home I always take my meat out or anything goes in the refrigerator then.
Q. Was it wrapped when you placed it in the refrigerator?
A. Yes.
Q. Was the wrapper intact?
A. Yes, sir.
Q. On the meat?
A. Yes, sir.
Q. And it was placed in the refrigerator?

Mr. Robertson: Don't lead her.

page 59 } By Mr. Emroch:
Q. Was it wrapped when it was placed in the refrigerator?
A. Yes, sir.
Q. What type of refrigerator was it?
A. 1956 General Electric.
Q. Do you know what the temperature of that refrigerator was on that date?
A. Thirty-five.
Q. Do you have a freezer with the refrigerator?
A. Yes, sir.
Q. Where is the freezer located?
A. The freezer is right over top the box. It's all one big door opens, and the freezer is a separate door inside the box.
Q. There is the main door to the refrigerator?
A. Yes.
Q. And the freezer is inside that main door?
A. Yes, sir.
Q. Does the freezer have a separate door on it?
A. Separate, yes, sir.
Q. And how long did the ham and the shoulder stay in the refrigerator?
A. From Saturday as soon as he got home from the grocery store until I took it out after Church Sunday.

*Jean C. Wells.*

Q. About what time was that on Sunday?
page 60 } A. Well, 12:30.
Q. Now, tell the jury and Court what you did with the shoulder after you took it out of the refrigerator.

A. Well, I took it out and I took the wrapper off of it, and I put it in a Guardian Service cookware pan and soaked it until I changed the children's clothes and mine, and then I washed it off and put it in the pressure cooker. And I went by the directions of the pressure cooker and cooked it for 35 minutes under 15 pounds of pressure. And then I took it out and took the skin off the top and put cloves and brown sugar on it and put it in the oven inside the roaster and glazed it for about 30 more minutes. Then I took it out and set it on the stove—top of the stove to cool to eat for dinner. I wanted it to be cool enough, because I can't eat wild meat.

Q. What was that statement?

A. I said I don't like to eat wild meat, and I wanted it cooled in time for dinner.

Q. Did you eat any rabbit?

A. No, sir.

Q. Mrs. Wells, I ask you to identify what this pan and glass container is that I am holding in my hand.

A. That is Guardian Service cookware.

Q. Is that the pan in which you soaked the ham?

A. Soaked it, and then after it was cooked in the pressure cooker I washed the pan and set it in that pan in
page 61 } the open to glaze it, the same pan.
Q. Now, what did you do with this pan before you put the ham in it, or the shoulder in it?

A. I washed it before I put it in.

Q. What is this pan that I am holding in my hand now?

A. It's a Presto pressure cooker.

Q. Presto pressure cooker. Is this the pressure cooker in which you cooked the ham?

A. Yes, sir.

Q. Mrs. Wells, I hand you a book called, "Recipe Book, New Presto Cooker," which I am now holding in my hands, and I ask you whether you went by any directions contained in this book when you cooked your ham.

A. Yes, sir.

Q. Now, will you tell us which directions you went by in that recipe book?

A. This, "Picnic Ham or Plain Cut (for Boiling)."

Q. Will you read those directions as contained in the pressure cooker book to the jury?

*Jean C. Wells.*

A. For four pounds of ham use three cups of water in cooker with rack. Wash and soak picnic ham—it says for two hours. That is for one that was not a reputable brand that is too salty.

Mr. Robertson: I didn't hear what she said.

The Witness: "Pour water in cooker. Place page 62 } ham on rack, fat side up. Close cover securely. Place indicator on vent pipe and cook 30 minutes after stem has reached COOK position." That's 15 pounds of pressure. "Let stem return to DOWN position. Remove skin from ham. Cloves and brown sugar may be added for flavor if desired."

I cooked it 35 minutes, and after I cooked it in there it was done completely, but I put in the oven to glaze it, and I cooked it in there at 375 degrees for another 30 minutes.

By Mr. Emroch:

Q. And what container did you put it in in the oven?

A. My Guardian Service cookware.

Q. This container that I am touching at this time?

A. Yes, sir.

Q. The one that you had used to soak the ham before you put it in the pressure cooker?

A. Yes, sir.

Q. How long have you been married, Mrs. Wells?

A. Six and a half years.

Q. How long have you been cooking?

A. Well, I cooked three or four years before I got married, because Mama worked, and I had to cook the meals at home. There were six of us at home.

Q. How old are you?

A. I am 25.

Q. So you have been cooking about 9 or 10 years, page 63 } is that correct?

A. Yes, sir.

Mr. Emroch: I ask that we mark the book as Plaintiff's Exhibit No. 3.

The Court: All right, the book may be indicated as Plaintic's Exhibit No. 3.

(The document above referred to was received in evidence as Plaintiff's Exhibit No. 3.)

*Jean C. Wells.*

By Mr. Emroch:

Q. Now, Mrs. Wells, may I ask you, please, when you got the recipe book that has been introduced in evidence?

A. With my cooker, inside the cooker when it was bought.

Q. Now, on the Plaintiff's Exhibit No. 1, which is the wrapper, contains this language: "Roasting—Cooking Directions. Roasting: Place skin side up on rack in open pan. Use no water. Roast in preheated slow oven (375 degrees Fahrenheit) according to cooking schedule. If a meat thermometer is used, roast at 170 degrees internal temperature. Cooking schedule: Weight, 4-6 pounds, total cooking time, 1½-3 hours."

Now, will you tell us, please, from your experience as a cook, is there any difference, insofar as the thoroughness of the cooking is concerned of the meat, between roasting a 4 pounds 5 ounce Swift Premium pork shoulder picnic in a preheated oven, 375 degrees Fahrenheit, according to the cooking schedule I have just read you off this wrapper, and cooking the same pork shoulder picnic in the pressure cooker, 15 pounds pressure, for 30 to 35 minutes?

page 64

The Court: Don't answer it, just a minute.

Mr. Robertson: I object to that, Your Honor. That is one of the issues to be decided in this case by the jury.

The Court: Now, Mr. Emroch, I realize that you asked her as to thoroughness, but that may be ambiguous, too. I think a housewife can testify as to something regarding the comparison of cooking one way with regard to another. Obviously, she can't testify to the scientific results with regard to toxins and bacteria and what not that are involved, and I just am a little bothered about the use of the word "thoroughness." If you mean the difference between rare, medium rare, well done, why, I think a housewife can testify to that. But beyond that I don't think she can.

Mr. Emroch: I mean cooked, if Your Honor please, so it will be ready for consumption.

The Court: No—

Mr. Emroch: Not getting to the scientific matter that we are going to follow through later on with scientific and expert evidence, merely for the purpose of whether the meat was done.

Mr. Robertson: I think, Your Honor, she has got a right

*Jean C. Wells.*

to say, "I cooked it the way I thought was all
page 65 } right. It was all right the way I wanted to eat
it," but she has got no right to say whether that Presto thing is the same as this other one, because she can't possibly know that.

Mr. Emroch: She says she has been cooking for ten years. I should probably ask her this question, if Your Honor please, whether she has roasted a shoulder in a preheated oven 375 degrees Fahrenheit for the period of time or approximately the period of time fixed in this wrapper of one and a half to three hours for ham or shoulder four to six pounds in weight.

Mr. Robertson: That is not the question.

The Court: I know it, but I think he asked her that.

Mr. Emroch: Whether she has ever done it.

The Court: Whether she has ever done it.

Mr. Robertson: I think what we are interested in is what they did on this occasion.

The Court: But the question is whether you have on any previous occasion ever cooked a ham according to the directions on this particular wrapper.

The Witness: Yes, sir, I always did until I got the pressure cooker about two years ago.

The Court: All right, now, Mr. Emroch, ask your question.

By Mr. Emroch:

Q. Your experience in cooking—

Mr. Robertson: Now, don't lead her.

page 66 } By Mr. Emroch:

Q. From your experience in cooking Swift Premium shoulder according to the directions in a preheated oven up to two years ago when you got your pressure cooker, can you tell the jury how the cooking of the shoulder up to two years ago in a preheated oven, 375 degrees Fahrenheit, compares with the cooking in a pressure cooker at 15 pounds pressure for 30 to 35 minutes?

A. It's about—

Mr. Robertson: I object.

The Court: That's all right. He's turned her loose now as to how it compares. Now she can answer that as a laywoman.

*Jean C. Wells.*

The Witness: Well, in my opinion it's just as done, but I think it's more so in a pressure cooker. It's completely done either way.

The Court: When you say "completely done" now, what do you mean?

The Witness: I mean it's cooked thoroughly all the way through, it's well done.

The Court: How many times have you cooked a ham in the pressure cooker and basted it in the oven afterward prior to this instance?

The Witness: I don't know, off and on for two years. Every time we had the shoulder after I started using the pressure cooker.

page 67 } The Court: All right.

By Mr. Emroch:

Q. Now, what was the temperature of the oven before you put the ham in on this particular occasion to baste?

A. Usually 375 to 400 degrees. I usually preheat it.

The Court: I didn't understand that. What?

The Witness 375 to 400, I usually have it.

The Court: We are not interested in what you usually have it. We want to know what you did on this particular occasion.

The Witness: I will say 375.

By Mr. Emroch:

Q. Three hundred seventy-five degrees. And it remained there for how long?

A. About 30 minutes.

Q. Now, how long did you let it cool off after you had put it in the oven?

A. Approximately 45 minutes, until the rest of the dinner was finished.

Q. All right, and then what did you do with the shoulder?

A. I sliced enough to eat for dinner.

Q. How much did you slice, do you remember?

A. I ate one slice.

Q. And what else did you eat with your Sunday afternoon dinner?

page 68 } A. I had some fresh string beans and tossed salad, and we had iced tea, hot rolls, creamed potatoes.

*Jean C. Wells.*

Q. What did you do with the shoulder after you took one slice off of it and ate it?

A. I went ahead and put it in the refrigerator. No one else wanted any for dinner.

Q. And what was it put on in the refrigerator?

A. On the top shelf, my meat shelf.

Q. Did you put it in any container?

A. Dish; regular plate.

Q. What is that?

A. Regular plate, dinner plate.

Q. Was it wrapped when you put it in the refrigerator?

A. No, sir, not then.

Q. Did you suffer any illness that Sunday?

A. I had cramps in the stomach.

Q. About what time of the day?

A. I reckon it was about four or five o'clock. After everybody finished and the table was cleaned up and everything else, I got cramps in the stomach.

Q. And what did you do? Did you call a doctor?

A. No.

Q. Did you take any medicine?

A. I took a laxative later on. I figured maybe I just had upset stomach. I felt nauseated. I never thought page 69 } it was anything I ate.

Q. And after you took the laxative, what was your condition?

A. I went to the bathroom and I felt all right. We went on to Mama's Sunday night.

The Court: Mr. Emroch asked you how much you ate?

The Witness: I said one slice?

The Court: That's right.

Mr. Emroch: Yes, I asked her.

By Mr. Emroch:

Q. Was the ham cold or warm when you ate that one slice?

A. Oh, it was warm.

Q. It was still warm?

A. Yes, sir.

Q. Now, did you slice any of that ham the next day?

A. That morning before my husband went to work I sliced some.

Q. How much of it did you slice for your husband?

A. I sliced enough for his lunch.

Q. Do you know how many slices?

*Jean C. Wells.*

A. Two or three slices, and I guess I put one slice, two slices on the bread; all depends on how thick I sliced it.

Q. And you fixed his lunch?

A. Yes, sir.

Q. And what else did you give him?

page 70 } A. I gave him Bologna and lettuce and tomato and the lunch cake and usually a piece of fruit.

Q. All right, what time of day did you see your husband again on that day?

A. About three.

Q. How did you happen to see him about three o'clock that afternoon?

A. He come home real sick and just as weak as he could be.

Q. Did anyone eat any of the ham that day besides your husband?

A. Well, about four—he wasn't going to be eating supper, so we ate early, and I ate it for supper.

Q. What did you eat? How much of it did you eat?

A. I ate four biscuits with ham on it. That's all besides something to drink.

Q. Now, when you sliced the ham for your husband's lunch that day early in the morning, what did you do with the ham after you had sliced it?

A. I put it back in the refrigerator.

Q. When did you take it back out of the refrigerator that day?

A. When I sliced it to eat it.

Q. What size biscuits did you eat?

A. Those Ballard biscuits that you buy in a little

page 71 } carton. You have to cook them.

Q. Do you have to cook those biscuits?

A. Um-hum.

Q. And how much meat did you put on each biscuit, approximately?

A. Oh, I imagine a piece about that big around (indicating), little bit bigger than the biscuit.

Q. Were your children at the table while you were eating the biscuits?

A. They were sitting there, and I had fixed them something to eat, and I was still running back and forth to my husband, was just checking on him and see if there was anything that he needed.

Q. Where was he?

A. He was in the bed at that time.

*Jean C. Wells.*

Q. All right, did anyone else eat any of the ham that afternoon?

A. My little boy, the oldest one, took a piece off that I had left when I went in the bedroom.

Q. After you ate those four biscuits with ham on it, did you feel any illness?

A. I felt fine for a couple of hours, and then I felt nauseated, and then all of a sudden I got just deathly sick, and I happened to be in the kitchen and had to throw up in the sink.

page 72 } Then I tried to get to the—I felt a little better in a few minutes, and I started to wash the dishes, and I got deathly sick again, and I just did make it out the back door. And I stayed out there until I had to go to the bathroom, and I went upstairs, and I threw up on the steps, and the lady upstairs had to clean that up, and from then on I stayed in the bathroom. I sat on the toilet and threw up in the bathtub. And my husband called my Mama. She stayed there and helped me until I reckon it was around eight o'clock they took me downstairs and called the doctor. And I laid in the bed, and they put two buckets by my bed. I couldn't control it at all, and I threw up in the bed, I had the diarrhea in the bed, I couldn't even get my head off the bed, and I was having chills and pains in my head, my stomach was cramping, and I just couldn't stop it, and the doctor gave me something to stop it. I couldn't even keep the medicine down, and he give it to me every two hours all night, and it would just come right back up. I never slept, and it just continued.

Then around 12 or one o'clock Tuesday they called the doctor and put me in the hospital.

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page 73 }

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A. Then when I got in the hospital I still couldn't control it. They put a bedpan under the sheet with me in the bed, and I still couldn't even sometimes get on the bedpan. And after I did get up and walk around, I'd go to the bathroom, I'd throw up every time I had to use the bathroom. And when they did feed me, they first fed me through my veins, and they let me put crushed ice in my mouth, and when I did get so I could eat, I just had awful cramps, looked like it

wouldn't—the whole time it was digesting my stomach would just cramp on me and I'd feel nauseated every time I tried to eat. And when I was at home I had thrown up everything in my system. I was throwing up blood in the bathtub and passing blood.

Q. Was that before you were taken to the hospital?

A. Um-hum, that was in the first night before the doctor got there I was throwing up blood.

Q. How long did your condition remain like that in the hospital?

A. Well, I stopped throwing up that night at the hospital after they fed me through my veins and got something in my stomach. And I was so dry I felt like cotton in my mouth, and they let me put that ice on my tongue, and I still had the diarrhea the whole time I was there, and I had to use a cup, and they took it to the lab every time.

Q. And how long were you in the hospital?

A. It was six days I was in the hospital.

page 74 } Q. And how long did they give you this ice treatment on your tongue?

A. All day that day, I think the next day. Things were so hazy and bleary they just—things would come and go at times, and I was just so thirsty I kept on asking for it, and they wouldn't let me have anything to eat, not even broth, for a couple of days.

Q. How long did you remain in that hazy and bleary condition?

A. I don't know, several days.

Q. Was any other type medicine given you while you were in the hospital?

A. They kept on giving me shots, and I don't think I took any medicine at all through the mouth, not when I first went in. I know I got shots, but they didn't give me nothing but the ice until it wore off.

Q. Where were the shots given to you?

A. Mostly in my arm.

Q. And did you have any pain during that period of time?

A. Yes, I had cramps in the stomach, and I had awful pains in my head. They give me some medicine to ease my headache. The whole back of my head right back here (indicating) just felt like it was going to pop off.

Q. And how long did the pains continue, Mrs. Wells?

A. Well, the pains in my stomach would stop

page 75 } until they started feeding me, and when they give me something to eat, then I'd get the cramps and

*Jean C. Wells.*

I'd feel nauseated, but the ones in my head, I still off and on had headaches when I come home.

Q. And were there any nurses in and out of your room during that period of time?

A. Oh, yes, sir.

Q. What were they doing?

A. Off and on all the time.

Q. What were they doing for you?

A. Well, they was taking the specimens and trying to give me the bedpan. They were putting the fluid in the arm, they was giving me the shots, they was feeding me ice.

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page 88 }

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Q. You have got another suit for $20,000.00 against Roberson's Super Market?

The Court: Do you know the answer to that question?

The Witness: I think we have.

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page 89 }

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Mr. Emroch: That case is pending in this court and has not been brought, and suit must be brought, if it is to be brought at all, against Roberson's Super Market individually and Swift and Company individually and not jointly. And this case is being tried here today against Swift and Company, and that case is against Roberson's Super Market, because, as I say, under the law we have to sue them separately and not together.

The Court: I will add to that, gentlemen of the jury, the plaintiff can only recover against one person for one incident, and if anybody is liable in this, the plaintiff can only recover against that person once and could not recover against the other person, and it may be that she can't recover against either one.

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page 95 }

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The Court: I am going to overrule the objection. I am going to let the witness answer questions as to what she has seen and read.

Mr. Robertson: The defendant excepts to the ruling of the Court for all the reasons stated in argument, and to avoid interruption and delay, will not interpose objections and exception to each succeeding question and answer, but wishes the record to show that the defendant objects and excepts to this entire line of testimony from this and all other witnesses.

The Court: The Court understands that.

(Whereupon, the Court and counsel returned to page 96 } the courtroom, where the following proceedings were had:)

DIRECT EXAMINATION. (Continued)

By Mr. Emroch:

Q. Mrs. Wells, I believe I asked you before we adjourned for lunch whether you had a television set.

A. Yes, sir.

Q. How long have you owned a television set?

A. Five years.

Q. Do you watch television?

A. Yes, sir.

Q. And prior to September the 22nd, 1956, did you observe any programs on television where there were any advertisements of Swift products?

A. I know of two of them.

Mr. Robertson: Get her to state the time, please.

The Witness: I know of two programs that I watch that advertise Swift.

By Mr. Emroch:

Q. Will you please state the name of those programs?

A. One was the Tennessee Ernie Ford program that comes on during the day, his daytime show.

Q. What time of the day did that program come on?

A. I think it was around one. He is not on this year.

Q. And what was the name of the other program?

*Jean C. Wells.*

A. The Horace Hite's Band Wagon. It was a talent show that travelled across the country. That was in 1953 and '54.

page 97 } Q. When did you see the Tennessee Ernie Ford program on television?

A. That was in '56 I saw his program.

Q. And can you just tell us generally the nature of the advertisement of the Swift products that you saw on the Tennessee Ernie Ford program?

A. Two of the singers on the program, Doris Drew and Molly Baker would hold up the Swift products and say that when they got off from work if they didn't have time to fix supper, they'd use the—fix some Swift steaks or Swift patties, something of that sort.

And the Horace Hite's program, when they advertised it they had models that come out and had a little rhyme with Swift and with Horace Hite's last name.

Q. Were you at home around one o'clock in the daytime to watch the Tennessee Ernie Ford program?

A. Yes, sir.

Q. And do you know how often it came on during the week?

A. Every day except—well, five days a week; not on weekends.

Q. Now, do you read magazines?

A. Yes, sir.

Q. Will you name some of the magazines that you read in 1956 prior to September 1956?

A. Well, it was the Redbook, the Cosmopolitan,

page 98 } Good Housekeeping, Life and Look.

Q. Do you recall seeing any Swift advertisements in any of those magazines?

A. Yes, I remember seeing Swift advertisements in the magazines.

Q. I hand you an issue of Life Magazine dated April 9, 1956, and I have opened the magazine to page 39, and it is a page containing an advertisement of Swift products, and ask you whether you recall seeing that advertisement or any advertisement similar to that of Swift products.

A. I have seen this advertisement. I have seen other advertisements of Swift.

Mr. Emroch: We would like to introduce in evidence that issue of Life marked as Plaintiff's Exhibit No. 5.

The Court: So ordered.

*Jean C. Wells.*

(The document above referred to was received in evidence as Plaintiff's Exhibit No. 5.)

By Mr. Emroch:
Q. I now hand you—

Mr. Emroch: Well, if Your Honor please, this is, I believe, the same ad but in a different issue of Life Magazine, and we would like to introduce this issue dated June 4, 1956, of Life Magazine and make that Plaintiff's Exhibit No. 6.
The Court: Ask the witness the question.

By Mr. Emroch:
page 99 } Q. Do you identify that advertisement of Swift products in Life Magazine?
A. Yes, sir.

The Court: Did you read it?
The Witness: Yes, sir, I usually look at it at home.

(The document above referred to was received in evidence as Plaintiff's Exhibit No. 6.)

By Mr. Emroch:
Q. Don't answer this question until I have asked it. What, if any, influence did the reading of these advertisements and seeing of these advertisements on television have on you insofar as purchasing Swift products.

Mr. Robertson: I think that is covered by my continuing objection, Your Honor, and exception.
The Court: Answer, please.
The Witness: Well, I saw it on television frequently, and I liked the program that I watched it on—I mean, they would get the point over to you, and I read it in several magazines, and I had used it before, and I knew it was a good product.
The Court: I didn't hear. You used what?
The Witness: I had used Swift products before and recognized the ad and enjoying the television program that they sponsor.

By Mr. Emroch:
page 100 } Q. And as a result of that what did you do?
A. I continued buying Swift products, and I'd buy them.

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page 101 }

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Mr. Emroch: If Your Honor please, I believe that we ought to have the stipulation in the record of counsel as to the report of the Virginia State Department of Health, Bureau of Laboratories, and with the Court's permission I will dictate the stipulation that: It is stipulated between counsel for the plaintiff and counsel for the defendant that the report dated October 25th, 1956, of the Virginia State Department of Health, Bureau of Laboratories, Lab No. 27318 shall be introduced in evidence as Plaintiff's Exhibit No. 7.

(The document above referred to was received in evidence as Plaintiff's Exhibit No. 7.)

Mr. Emroch: May I read this now? Name: Mrs. Jean Wells. Report on sample of ham for bacteriological examination. Results: Organisms isolated: Proteus, Bacillus subtilis; and Hemolytic staphylococcus aureus. Signed: Dr. Max D. State Department of Health, Virginia.

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L. T. ROBERSON,
was called as a witness on behalf of the Plaintiff and, being first duly sworn, was examined and testified as follows:

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page 103 } Q. Do you remember approximately the date that you purchased this particular shoulder?

A. No, sir, not exactly.

Q. Was it in the same month of 1956 that you sold it?

A. Well, yes, sir, I would think so. We usually bought them by the week and tried to sell them by the week.

Q. Was the shoulder delivered to your store by Swift's truck, or did you go to the Swift Company and pick up the shoulder?

A. All our meat from Swift was delivered.

Q. To your store?

A. Yes, sir.

*L. T. Roberson.*

Q. And when this shoulder arrived in your store, was it wrapped or unwrapped?

A. Well, all the shoulders that we bought from Swift and Company were wrapped in cellophane.

Q. And when you received this particular wrapped shoulder from Swift and Company, what did you do with it?

A. We kept all of our meats—kept the dry cured meats on refrigeration in a case.

Q. What kind of a case?

A. Well, one we had down there is a Hill, single duty.

Q. What size?

A. It's about 12 foot long.

Q. At what temperature did you keep the case
page 104 } while the meats were in it?

A. All the equipment we had, including the case, was fixed to run from around 35 to around 40.

Q. Do you recall selling Mr. Wells this particular shoulder involved in this case?

A. I couldn't be positive whether I waited on him or not. You see, we had several of us in the store there that were getting up orders or waiting on customers, and I wouldn't be positive about that.

The Court: That is not answering this question, though. Is this a market where everybody goes through and picks out the things and pays for them through a checker when they go out, or what is the way it is done?

The Witness: Everything in our store, Your Honor, is self-service, with the exception of our meats. That was not self-service. That is the type that we had to do the cutting, or most of it. We did have some packaged self-service meat in a self-service case.

The Court: How about the case that this product was sold from?

The Witness: This product that he is speaking of was in a case that we had to wait on the customer. It was not a self-service case.

By Mr. Emroch:

Q. Is 35 to 40 degrees temperature recognized
page 105 } by the grocery trade as being the proper temperature to keep these meats?

A. Any piece of equipment that a groceryman usually has, if it's not a type that freezes a product, is kept just above a

freezing point. Anything that they can get just above that is what they usually work for.

Q. Do you recall the salesman of Swift and Company from whom you purchased this particular shoulder?

A. Well, Mr. Collins with Swift and Company was the salesman that was calling on us at that time and still is with that company.

Q. Now, from the time you received that shoulder until the time that Mr. Wells purchased it was it kept in this showcase?

A. Absolutely.

Q. What is that?

A. Yes, sir.

Q. And did I understand you to say the temperature was kept between 35 and 40 the whole time it was in there?

A. That's the normal temperature on the box.

Q. And you can testify to that fact, that it was kept at that temperature during that time?

A. Yes, sir.

Q. Now, do you recall Mr. Wells bringing the part of the shoulder back to your store?

page 106 } A. Yes, sir.

Q. When he brought it back to your store, what did you do with the shoulder right at that time while he was there?

A. I took it and walked over to where we have an electric meat saw and cut the shoulder half in two, the part that was left.

Q. Why did you do that?

A. I wanted to examine the inside of the bone, the marrow part of the meat when he brought it back.

Q. And after you did that, what did you do with the shoulder?

A. Put it in the deep freeze.

Q. Did you wrap it up?

A. It was—he brought it back in brown paper, as well as I can recollect, and I think we just stuck it right back in that paper and put it right in the deep freeze.

Q. And do you recall how long it stayed in the deep freeze?

A. To the best of my recollection it was around two or three days. I am not positive on that, but it was in the deep freeze from the time that he walked in the store with it until just—

Q. Now, what happened after it left your deep freeze?

*L. T. Roberson.*

The Court: Let me ask you this: What temperature is the deep freeze kept on?

page 107 } The Witness: That's from zero below.

By Mr. Emroch:

Q. What happened to it after you took it out of the deep freeze?

A. We took it over to the State Health Department immediately from the deep freeze to have it analyzed.

Q. And did you receive a copy of the report?

A. Yes, sir.

Q. As to what they found in the meat?

A. Yes, sir.

Q. Did the shoulder stay wrapped in the cellophane during the entire time it was in your store?

A. Yes, sir.

Q. And was the wrapper intact as far as you know?

A. The wrapper was intact, and so far as I know, it was intact when it left the store.

Q. Can you fix, Mr. Roberson, the period of time that the shoulder was in your store from the time you received it from Swift and Company and the time that you sold it to Mr. Wells?

A. Not exactly, sir. We usually bought picnics practically every week. How long that particular picnic had been in the store I couldn't tell you.

Q. Can you approximate the time?

The Court: Can you give us the maximum

page 108 } time?

The Witness: Not over two weeks, I wouldn't say.

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Now, when you cut it in two, I believe you said that it was all right as far as you could tell?

A. As far as I could tell it was, yes, sir.

Q. Did it look all right?

A. Yes, sir.

Q. Did it taste all right?

A. I didn't taste it.

Q. Did it smell all right?

A. Yes, sir.

*Miles E. Hench.*

Q. Did the marrow part in the bone look all right as far as you—

page 109 } A. Well, so far as the nose could tell, yes.

Q. When it came back to you were there any cloves on it?

A. I didn't see any.

Q. Was there any brown sugar on it?

A. I didn't see any brown sugar, either.

Q. I believe Mrs. Wells has got a suit against you for $20,000.00 pending in this court at this time, has she not?

A. Yes, sir.

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page 110 }

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MILES E. HENCH,

was called as a witness on behalf of the Plaintiff and, being first duly sworn, was examined and testified as follows:

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page 112 }

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Q. Dr. Hench, assume that on September 22nd, 1956, at about 10:00 o'clock, a. m., a Swift Premium smoked shoulder wrapped in an intact cellophane wrapper was purchased by Mr. Wells for his wife and was taken home by him and placed by Mrs. Wells in her refrigerator, about 15 minutes elapsed from the time that the smoked shoulder was taken out of the display case in the store to the time that Mrs. Wells put the shoulder in her refrigerator, the smoked shoulder

page 113 } had been in the store approximately two weeks, no more than two weeks, in other words, no more than two weeks had elapsed from the time it was delivered to the store to the time it was sold to the Wells and it had been refrigerated between a temperature range of 35 and 40 degrees—

A. Fahrenheit?

Q. —while in the store. Fahrenheit. Mrs. Wells put the shoulder in her refrigerator. The temperature in her re-

frigerator is 35 degrees. The shoulder remained in her refrigerator—

Mr. Robertson: Assuming all of these. Don't state them as a fact.

Mr. Emroch: He started off with the word "assuming."

By Mr. Rosner:

Q. Yes, assuming all these facts; the shoulder remained in her refrigerator until about 12:30 or 1:00 p. m., the following day when it was taken out, soaked for 10 or 15 minutes in plain water and placed in a pressure cooker with three cups of ordinary tap water; it was cooked in the pressure cooker for 35 minutes under 15 pounds pressure; after 35 minutes, Mrs. Wells let the steam go out by itself—

Are you writing down everything I say?

A. No, not everything, just taking what I feel is
page 114 } pertinent.

Q. —and after the steam went out she put cloves and brown sugar on the smoked shoulder and baked it in a preheated oven for another 30 minutes at a temperature of 375 degrees; the smoked shoulder was taken out of the oven and allowed to cool for about 45 minutes; it was taken out by—

A. Excuse me, would you please tell me what you have stated following the time it was taken from the pressure cooker and placed in a preheated oven? Was that a continuous process? She put brown sugar and cloves—

Mr. Robertson: I am going to ask that he put "assuming" all the time.

The Court: That is understood all the way through.

Q. —she put brown sugar and cloves on the smoked shoulder and baked it in a preheated oven for another 30 minutes at a temperature of 375 degrees; the smoked shoulder was taken out of the oven and allowed to cool for about 45 minutes; it was taken out of the oven by sticking a fork into the shoulder; when the shoulder cooled off enough to eat, which was 45 minutes, Mrs. Wells ate a slice of the shoulder along with creamed potatoes, a tossed salad and iced tea, and there was Mrs. Filbert's dressing on the tossed salad, and some hot rolls; Mr. Wells, two children and Mr. Wells' stepfather didn't eat any of that shoulder at that time and they ate rabbit instead, along with the other things that Mrs. Wells ate, except the shoulder; Mrs. Wells put the shoulder back

in the refrigerator after the meal; approximately
page 115 } two hours after that meal Mrs. Wells had cramps
in the stomach and nausea; she took a laxative and after going to the bathroom felt better; the following day in the morning she took the shoulder out of the refrigerator and fixed a sandwich for her husband to take to work with him for lunch from the shoulder, and she also fixed him a Bologna sandwich, both with lettuce and tomato; she put the shoulder back in the refrigerator; Mr. Wells ate his lunch, which also included a lunch cake that had some cream in it at around 12:00 o'clock, Noon, that day and in about two hours became nauseous, had abdominal cramps, vomited and had diarrhea and had to come home from work; about four o'clock that afternoon Mrs. Wells took the shoulder out of the refrigerator again, fixed herself four sandwiches of shoulder and biscuits and put the shoulder back in the refrigerator; she ate all of the four sandwiches except a part of one sandwich that her three-year-old son Bruce snuck off the table and ate; about two hours later Mrs. Wells became violently ill; she had severe abdominal cramps, diarrhea, nausea and vomiting, she had slightly elevated temperature, disturbed vision and rapid pulse; Dr. Lehmann was called by Mr. Wells, and he found her in this condition when he arrived at their home at approximately 8:00 p. m., on Monday night—that's when Dr. Lehmann got there; while Dr. Lehmann was there he also observed that the three-year-old son Bruce, who
had snitched a piece of his mother's sandwich,
page 116 } was vomiting; Mrs. Wells did not improve over-
night and she was admitted to the MCV hospital on Tuesday, September 21st at about 1:00 p. m.; she had continuous abdominal cramps, nausea, diarrhea, vomiting and severe head pains; she was released from the hospital on October 1, 1956; on the night of the day she went to the hospital her husband's stepfather ate some of the—

The Court: I believe you better skip just that fellow.

Mr. Rosner: I thought that part of the evidence had been introduced into the evidence by Mr. Robertson, and that is why I included it in there.

Mr. Emroch: When was he sick, during what period of time? Tuesday night and Wednesday, in the living room of the Wells home.

The Court: Include it if you want to.

*Miles E. Hench.*

By Mr. Rosner:

Q. —on the night of the day that she went to the hospital her husband's stepfather made a sandwich out of the shoulder, and he, too, had cramps, diarrhea and was sick—

A. Excuse me, was that illness immediately—

Mr. Emroch: Judge, I don't know if that came out in the—

The Court: Go ahead. You are the one that wants to do it. Now, I warned you about it.

I am afraid he cannot answer that question.

page 117 } The Witness: I see.

The Court: Counsel cannot answer questions.

By Mr. Rosner:

Q. —in all instances the shoulder tasted good, smelled good and looked good; it was placed in the refrigerator and kept there until Saturday, September 29th, when what was left of it was taken back to Roberson's Super Market, at which time it was cut in two by an electric meat saw being held by Mr. Roberson in both of his hands; Mr. Roberson smelled the ham, saw nothing wrong with it and could smell nothing wrong with it; Mr. Roberson immediately put it into a deep freeze which was zero or below, where it remained until it was delivered to the State Health Department laboratory; the State Health Department Laboratory, from the specimen that had been sent to them, isolated the following organisms from the shoulder: proteus bacillus subtilis and hemolytic staphylococcus aureus.

Now, Doctor, assuming those facts, do you have an opinion with a reasonable degree of medical certainty as to what caused the illness and symptoms suffered by Mrs. Wells?

Mr. Robertson: I object to that question, Your Honor, upon the ground that it is an inaccurate and incomplete assumption of the material facts in this case that are now in evidence from the plaintiff's viewpoint. The ones that I can remember offhand, he did not tell, I think, about the sausage

in there and the sausage that she ate or that the

page 118 } tossed salad—I believe they did say the tossed salad.

The Court: Didn't mention the ingredients.

Mr. Robertson: Didn't mention about eating the chili, didn't mention the fact that they brought it back to Roberson's Super Market at room temperature, didn't mention that at a number of different stages of this cooking process

and eating process that a fork was stuck into the center of the meat up to the hilt, didn't mention about the mayonnaise, didn't mention the fact that when she first got sick she was in such desperate condition that she was so weakened that she had to be supported down the steps by her husband, which I think would go to the credibility of some of these facts. He didn't mention about the rabbit in the refrigerator with the ham, he didn't mention the fact that the way it was cut by the meat cutter. But those are the objecions that I remember that I recalled as they went along.

By Mr. Rosner:

Q. I will ask now to put in the assumption of the ingredients of the tossed salad that was eaten, I believe, at the meal —whatever meal it was—first meal— ,

Mr. Emroch: Sunday afternoon.

The Court: I believe she did testify what the ingredients of the tossed salad were, and counsel can agree about it.

Mr. Robertson: I think there ought to be an-
page 119 } other element in there, that she continued to di-
arrhea and vomit for a week.

The Court: Go ahead, ask the question with that in it, please.

By Mr. Rosner:

Q. I will rephrase the question by including the following, Doctor: On the meal that was eaten on Sunday September 23rd during which Mrs. Wells ate the shoulder and the rest of the people ate rabbit, the tossed salad I mentioned consisted of the following ingredients: I think I already mentioned Mrs. Filbert's mayonnaise; along with that is lettuce and tomato, celery, green pepper, radishes, tablespoon of vinegar, salt and pepper—

Mr. Robertson: You left out the cucumber, too.

Mr. Emroch: Tomato and cucumber and onion.

Mr. Robertson: And what kind of dressing?

Mr. Rosner: Mrs. Filbert's mayonnaise.

The Court: Now, I think that that is a fair statement of what the plaintiff's direct evidence was. Mr. Robertson, any of these items you mentioned that you think proper you may inject in your cross-examination, so I will overrule your objection at this stage.

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*Miles E. Hench.*

page 121 }

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Q. I repeat, Dr. Hench, assuming those facts, do you have an opinion with a reasonable degree of medical certainty as to what caused the illness and symptoms suffered by Mrs. Wells?

A. Yes, I have.

Q. And what is your opinion, Doctor?

A. The pattern of events and sequence of illness and the findings suggest to me a gastroenteritis, a stomach and intestinal upset due to staphylococcus enterotoxin.

Q. And do you have an opinion as based upon the same facts in my prior question as to where the staphylococcus enterotoxin was and what food article that I listed was it? Do you have an opinion as to that?

A. Yes, I have.

Q. And what is your opinion, sir?

A. From the description given the only common ingredient to the three people described as being ill is the ham.

Q. You are speaking of the Swift Premium
page 122 } smoked shoulder, is that correct?

A. Yes, sir.

Q. And can you at this point state for the enlightenment of the Court and the jury just what this staphylococcus is and this enterotoxin is so we will all know exactly what, in your opinion, caused these symptoms?

A. Yes, sir. One of the organisms derived by the state laboratory from the specimen was a Hemolytic staphylococcus aureus. The genus name staphylococcus indicates that this is a spherical organism which occurs in clusters, and the species designation indicates that it is a particular type of staphylococcus which produces a golden figment. It is described as Hemolytic. This means that it has the ability to produce enzymes which produce red blood cells. Organisms of this type are capable, in addition to the enzymes producing red blood cells, of destroying other toxins. One of the toxins is called the enterotoxin, which simply indicates a substance which is poisonous to the intestinal tract. The enterotoxin is a substance produced by the organism as it grows. The growth of the organism and its natural process produce this toxin. The toxin is produced within the organism, escapes from the organism and, of course, disperses in whatever environment the organism finds itself in.

*Miles E. Hench.*

This organism is a common one to the skin,
page 123 } mucous membranes and nasal facings of man. It
is also found on the skin of some animals. Is
that sufficient, sir?

The Court: It will be up to counsel.

By Mr. Rosner:
Q. Now, assuming the same facts that I originally related to you in my long question, would it be fair to say that the meat that in your opinion carried this staphylococcus germ was contaminated?

Mr. Robertson: One minute. I object.
The Court: What was that word?
Mr. Rosner: Contaminated.
The Court: This phrase has not been used in this lawsuit before. I don't know what you mean by it.

By Mr. Rosner:
Q. Did it have enough of those germs in it to produce the toxin that you stated in your opinion caused the symptoms?

The Court: Let the doctor see the report that was introduced here.
Mr. Robertson: If Your Honor please, I object to that question upon all the grounds I urged against the long question and upon the further ground that I think that I am correct that that report does not show the quantity of these animals, as to the number of those animals.
The Witness: There is no quantity shown.
Mr. Robertson: There is, or is not?
page 124 } The Witness: There is not. This is not a
quantitative record.
Mr. Robertson: So as I understand it, in my ignorance, there have got to be millions of them to do this thing. If there are just a few, don't cut no ice.
Mr. Rosner: Your Honor, I will strike that question without the Court having to rule on it and phrase another question to get the same result.

By Mr. Rosner:
Q. Based upon all of the facts that I stated to you in my original question, in your opinion were there sufficient staph

to produce the toxin which you stated in your opinion caused the symptoms?

Mr. Robertson: I object.

The Court: Let me ask the question. Have you not already answered that question in your previous answer?

Mr. Robertson: May I make my objection? He has already said he didn't know how many were there. So how can he form an opinion?

The Witness: I haven't stated anything quantitatively, sir, and I haven't been given any information on the quantity.

The Court: Did I understand you to express an opinion as to what caused this woman's illness?

The Witness: Yes, sir, the toxins.

The Court: And from what substance?

page 125 } The Witness: From the staphylococcus.

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Let me ask you generally, now, Doctor, do you have an opinion as to whether the staph was in this meat from the time indicated forward. I was going to ask you yes or no on that, because the second question would be to

page 126 } what degree of certainty if your answer is yes. I want to find out what degree degree of certainty there is going back that far. I ask you that.

Mr. Robertson: Before you answer, the defendant excepts to the ruling of the Court for all the reasons heretofore stated. I'd like to just put a blanket in, Your Honor, but each one is just a little bit different, so I have to keep on doing it.

The Witness: Sir, before I deliver an opinion now, may I have a time sequence from the time that the ham was removed from the oven until it was returned to the refrigerator; that would be on September 23rd, at which time Mrs. Wells ate one slice, her first slice.

The Court: All right, will counsel vouch the testimony on the length of time taken from the oven and set on the top of the stove and allowed to cool and the slice taken and what time it was put back in the refrigerator?

Mr. Rosner: Judge, I don't remember an exact time. I do remember from the evidence it was 45 minutes on the stove cooling it off. Then it was eaten and after the meal was put back into the refrigerator.

*Miles E. Hench.*

The Court: You are going to have to assume something for the doctor's purposes here and the purpose of questions.

Mr. Rosner: Assuming that there was talking at the meal, an hour, I think, is a very liberal assumption.

page 127 } The Court: All right. I don't remember exactly what the record stated. If it doesn't state it, why, it's going to be too bad for the plaintiff.

The Witness: May I answer it?

The Court: Yes.

The Witness: Yes, sir, I do have an opinion.

The Court: What degree of certainly is in your mind, Doctor?

The Witness: I have reasonable certainty about it, sir.

The Court: All right, you may answer it.

The Witness: In my opinion the toxin was contained in the ham before the time of cooking.

The Court: Now, the question will be: From the facts given you with regard to the assumption as to the purchase of it and where it had been prior to purchase, do you have any further opinion as to how much time prior to cooking?

Mr. Robertson: My continuing exception, Your Honor.

The Court: Yes.

The Witness: What does that mean?

The Court: How much prior?

The Witness: No, sir, I mean, may I speak, or—

The Court: Yes, sir.

The Witness: I am given data here that the ham was stored at 35 to 40 degrees Fahrenheit for 14—

The Court: Not to exceed 14 days.

page 128 } The Witness: Yes, sir. I simply wrote down, "approximately 14 days' storage 35 to 40 degrees." Then I have a period of time, 24 hours at 35 degrees, at which time it was removed, and over a cooking period it was heated. In experiments the staphylococcus does not produce toxin, as a matter of fact does not grow—the toxin is a product of growth, and the staph does not grow well at 35 to 40 degrees Fahrenheit, which would be approximately five degrees Centigrade, which is the temperature condition of the original experiments. The experiments of Dr. Dack would indicate that at that temperature a period in excess of four weeks would be required to produce toxin, sometime longer than four weeks. In similar experiments, in increased temperature up to in Fahrenheit 98.6 degrees, it took increasingly shorter periods of time to produce the toxin. At room temperature, as an example, it will require approximately three

days to produce enterotoxin sufficient to cause vomiting when tested in a suitable animal. At 98.6 degrees it takes approximately three hours of time to produce sufficient toxin.

All of these experiments were carried out in laboratory media; that is, a nutrient medium conducive to the growth of staphylococcus and satisfactory for the growth of such organisms. Therefore, under less satisfactory conditions it does not seem to me that there is enough time at the proper temperature to produce enterotoxin during this
page 129 } period of time about which I have notes here.

By Mr. Rosner:

Q. Now, you are referring to the period of time beginning with the time immediately prior to the time it entered the store, is that correct?

A. Yes, sir, I include the period of storage.

Q. Two weeks before it was bought?

A. And I include the storage of 14 days at 35 to 40 degrees in that opinion.

The Court: Now, let me get it straight. Do I understand that your opinion is that the organism that ultimately began growing to produce the toxin was in the meat more than 14 days prior to the time the Wells purchased it?

The Witness: Well, sir, I'd like to correct that just a bit. I see no time sequence in here sufficient to allow a staph to produce enterotoxin in quantities or that would make anybody ill during this time that the question covered. I therefore, on the negative basis, assume that that toxin must have been in there before this time.

The Court: That's what I understand. I just wanted to be clear.

The Witness: Not the organism, the toxin itself.

The Court: The toxin itself?

The Witness: Yes, sir.

A Juror: What would be the effect of cooking
page 130 } on that, the high temperature of cooking? Would that have any effect one way or the other on the action of that bacillus?

The Witness: Yes, sir, it would destroy the organism itself, but here we have the peculiar instance in which this product of the organism will stand up but the organism itself will not. It takes about one and a half to three minutes to kill the organism itself at boiling temperatures, ordinary boiling temperatures. The toxin has been shown to be effect-

ive after processing them in the instrument known as the autoclave at 121 degrees Centigrade, which would be 250 degrees Fahrenheit, for 20 minutes. Now, that's considerable temperature.

A Juror: Then the toxin alone only could have been left in the meat?

The Witness: Yes—I have no data as to the internal temperature of this meat. Yes, sir, there are circumstances under which the organism could be destroyed and the toxin left intact, yes, sir.

By Mr. Rosner:

Q. Doctor, assuming that the internal temperature of the meat was 170 degrees—assuming that the internal temperature of the meat had been raised to 170 degrees, would you—

The Court: For what length of time?

Mr. Emroch: There are no lengths of time on the instructions on the wrapper, Your Honor.

The Court: All right, go ahead.

page 131 } By Mr. Rosner:

Q. Assuming that the temperature at the center of the meat had been raised to 170 degrees as stuck into the shoulder, would that temperature kill all of the staph present in the meat if any were present?

Mr. Robertson: Wait a minute. We object to that, Your Honor, because there is no evidence in this case to support that. This lady said very categorically that is exactly what she didn't do. She made no effort to follow these directions. Therefore that is not in this case, and there is no evidence in the case as to what the temperature of the meat was in the center of the product.

The Court: If she followed the directions purposely or accidentally, it's evidence. And this is a good way to say whether she followed it accidentally.

Mr. Robertson: Objects to the ruling of the Court for the reasons stated.

By Mr. Rosner:

Q. Answer the question, Doctor.

A. Excuse me just one moment. I am trying to convert the temperature to a more familiar temperature to me. 170 degrees Fahrenheit would be 76 degrees Centigrade, which is

24 degrees below the boiling point of water. It would take 30 minutes to an hour to kill staphylococcus at that temperature.

page 132 } Q. And so if a smoked shoulder were heated until the center reached a temperature of 170 degrees Fahrenheit and then taken out of the oven, in your opinion would say staph in the center of that meat be totally destroyed?

Mr. Robertson: I object for the same reasons, Your Honor.
The Court: Go ahead.
Mr. Robertson: Exception.
The Witness: One could not guarantee that staphylococci were destroyed by that heating, no, sir.

By Mr. Rosner:
Q. Can meat look good, taste good and smell good and still be poisonous?
A. Yes, sir, it certainly can. This is one of the characteristics of staphylococcus-contaminated foods of this sort and other sorts.
Q. Doctor, what is Proteus?
A. Proteus is a species designation of a group of organisms, of a genus of an organism, if you will excuse me, not a species, that have the characteristic of staining properties of Gram-negative organisms. They are capable of living free in nature. We frequently encounter them in medical specimens from areas of the body that are not expected to be sterile.

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page 133 }

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The Witness: Proteus is the genus designation for a genus of bacteria.
The Court: Bacteria?
The Witness: Yes, sir. They are bacilli. They are rod-shaped organisms that have metabolic characteristics that distinguish them from other organisms. They are recognized as a genus of organisms. They are capable of
page 134 } free living in nature. They have no especial medical significance, that is to say, in that they

have a specific disease that they cause.

Mr. Robertson: You mean I can have them all over my body and they won't hurt me?

The Witness: Probably have, sir, and so have I, sir. This has nothing to do with you, but one has them on his body, as well as the staphylococci, see.

Mr. Robertson: And we are still going along normal?

The Witness: Oh, yes, sir, entirely normal. Very abnormal if you didn't have them.

A Juror: This is the genus that you are talking about, not the germ in question?

The Witness: This is the genus Proteus, and there is no species designation in this (indicating Plaintiff's Exhibit No. 7), which simply means that they made the generic definition based on the bio-chemical reaction, probably because of aureus production, a particular enzyme that characterizes this organism.

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page 135 }

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The Court: Let me interrupt and ask a question of counsel for the plaintiff: if they think there is evidence to support the negligence count in the motion for judgment.

Mr. Emroch: No, sir, there isn't any evidence to support Count 2, which is the negligence count of the motion for judgment.

The Court: You concede we will have to strike the evidence as to that count?

Mr. Emroch: Or counsel could withdraw that count, with permission.

The Court: Yes. I will just strike it; that's the easiest way.

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page 138 }

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With respect to Count 3, which is based on the defendant's alleged violation of Pure Food Laws of Virginia, the Court

doth sustain the defendant's motion for the reason that the wrapper on the ham involved here contains the approval of the State Inspector and under such circumstances it is doubtful whether even the State itself, in a criminal proceeding, could prosecute under the section, much less a private individual for whom the benefit of this section might be alleged to have been passed; and second, that it is doubtful whether the section is applicable in a case by a consumer against a manufacturer where there has been an intermediate sale.

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page 139 }

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Mr. Emroch: Counsel for the plaintiff objects and excepts to the ruling of the Court in striking the evidence as to Count 3 of plaintiff's second amended motion for judgment for the reasons that this plaintiff does have a right of action against the defendant in this case based on the provision of the pure food statutes as alleged in said Count 3, and for the further reason that this plaintiff has a cause of action against the defendant in this case even though the State of Virginia may have authorized the defendant to put a sticker on the outside wrapper of this particular shoulder, because, as of this time, there is no evidence that any examination was made of this particular shoulder for the purpose of determin-
page 140 } ing whether it contained staphylococcus aureus germs and for the further reason that a State sticker on this particular shoulder would not, in any event, eliminate the right and cause of action which the plaintiff has against the manufacturer of the shoulder, namely Swift and Company, the defendant in this case. And, as the Plaintiff's Exhibit No. 1 shows, the state stamp or approval is printed along with the cellophane wrapper in which the shoulder was contained and does not appear to be a separate state approval certificate.

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page 144 } SIDNEY A. STROUD,

was called as a witness on behalf of the defendant and, being first duly sworn, was examined and testified as follows:

*Sidney A. Stroud.*

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page 146 }

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Q. And what is your present title of position with the company?

A. General Foreman over cured pork.

Q. Mr. Stroud, we have read the deposition here of the Government Inspector, the Federal Government Inspector there at South St. Joseph, outlined in the Swift processes, describing what is done with a carcass until it is divided into final parts and delivered, as I understand it, to the Pickling Department. Is that your department?

A. That's right.

Q. Well, now, in to what cuts is the carcass divided when it reaches your department?

Mr. Emroch: If Your Honor please, the same
page 147 } objection to this testimony unless there is some connection made with the testimony in the evidence this witness is going to give with this particular shoulder involved in this case.

The Court: I understand that counsel for the defendant is vouching that connection will be admitted.

Mr. Robertson: I am going to tell the chronological story of this whole ham from the time it leaves Swift.

The Court: All right.

By Mr. Robertson:

Q. Now, into what cuts is a carcass divided when it comes to your department?

A. The primal cuts that we refer to is the ham, picnics and the bellies.

Q. Now, when those cuts reach your department, what is the first thing that is done with it?

A. The picnics and the hams are injected with a solution which we refer to as pickle, which has a mixture of curing ingredients, and we put it in this ham, a certain percent of it per pound of the meat and then from there, after this pickle has been injected in the meat, we transfer it to a vat and cover it with another pickle of like nature.

Q. How long a time passes from the time the cut reaches

*Sidney A. Stroud.*

your department until it goes into the first pickling or the first pickling solution it is put into?

A. Well, it will be a matter of the time the cut is page 148} made. It will be within an hour or two.

Q. Is that first curing solution injected into the meat before it goes into any vat?

A. Yes, sir, that is sterile pickle that we inject into the meat first before it goes into the vat.

Q. And how is that done?

A. The pickle is—the solution that we make for curing materials are all—the product is boiled and is brought up to sterilization point to kill all bacteria and then it is preheated before it goes into the meat.

Q. How do you handle the meat when you are going to inject this curing solution into it?

A. The pickle is brought down to the place where the operation is done through a pipe and you have a needle which you inject into the vascular system and then it is injected into the ham through the vascular system.

Q. Where is the ham placed while that injection is being done?

A. It is laying on a stainless steel scale platform.

Q. And how long does the injection of this curing solution ordinarily take?

A. You mean to put it in there?

Q. Yes, sir.

A. Oh, just a matter of seconds.

Q. And then after that is done, what is done page 149 } with the meat?

A. It is then transferred to the vats where it is covered with another pickle.

Q. And how long does it stay in the vat?

A. Ordinarily six to fourteen days.

Q. And the purpose of that is what?

A. That's just to distribute the cure and to finish the curing process.

Q. And, then, when it has been in there—you say that's how many days?

A. Six to fourteen.

Q. Six to fourteen?

A. Yes, sir.

Q. Why is there that much variation in the time?

A. Well, you can have a minimum age that the product would be cured and, then, you have a maximum age that you

can leave it in if you didn't have something else to do with it.

Q. Then, when it is taken out of the pickling vat what is done with it?

A. Then, you can either—what we generally do, we either send the stuff to our own local smoke house, or else we will ship it out to some branch house or sales units or maybe some other plant.

Q. Well, now, suppose you have what has been referred to in this case as Swift and Company picnic
page 150 } shoulder ham that you were going to ship to Richmond, the Swift plant in Richmond, how would that be handled from the time you took it out of the pickling vat until it left the South St. Joseph plant?

A. It would be removed from the vats and then loaded directly into a refrigerated car.

Q. What is the method of loading?

A. Generally load the product into a metal truck, either a stainless steel metal truck or, maybe, a galvanized truck and it is trucked to the dock location and, then, handled into the car, placed in the car.

Q. Is there any regulation of the temperature in the plant where the meat is being handled from the time it reaches your department until it goes out of your department?

A. The temperature all along the line has to be controlled and regulated. In the cooler, before we get them, we have a regulated temperature there to get the meat down to thirty-six degree cutting temperature and, then, when it gets into the cellars we have a controlled temperature of thirty-six to thirty-eight which we maintain at all times. And the reason we maintain that, that is the correct temperature that we can get our best curing conditions.

Q. Now, when you put it into these stainless steel metal conveyers and into the car, what kind of a car is it in which it would be shipped from South St. Joseph to Richmond?

A. It would be a refrigerated rail car.

page 151 } Q. Is that car federally inspected?

A. Yes, sir.

Q. In what way and for what purpose?

A. The car, before we can load it, has to be inspected by the Government Inspector to see if it is clean and in proper condition to load.

Q. I believe that in this case the Swift picnic shoulder ham was not skinned. It was skinned there after it was received

*Sidney A. Stroud.*

by the consumer. Would a picnic ham of that kind, not skinned, be stamped with a Federal Government approval?

A. Not skinned?

Q. Yes, sir.

A. We don't ship picnic hams with the skin removed. However, we do ship a product that has got the skin removed and then it is shipped under government seal then.

Q. I know, but I am talking about an unskinned—a picnic ham that had not been skinned. Would the Government Inspector stamp each one of those hams or not?

A. Yes, sir. That carries the mark of inspection and passed on each one of them.

Q. Now, then, is that picnic ham which has not been skinned permitted to go out of the South St. Joseph plant without that government inspection of approval?

A. I beg pardon.

Q. I mean, does each one of the picnic ham page 152 } shoulders that has not been skinned have to have the Federal Government Inspector approval on it before it can leave the plant?

A. Yes, sir.

Q. Who sees that that is done?

A. That is one of the duties of the inspector over that department, the Government Inspector.

Q. Is that also one of your duties?

A. That's right.

Q. Now, then, when it gets into the refrigerated car, what is the temperature of the car?

A. Thirty-five degrees.

Mr. Emroch: Unless this witness checked the temperature, he cannot answer that question.

Mr. Robertson: Yes, sir, he can. He is talking about a procedure that is normal.

The Court: As I understand it, he is going to later tie this evidence in with this ham.

Mr. Emroch: In this particular car which this ham was in?

Mr. Robertson: I am going to put it in. If you don't like it, strike it all out. I know how to connect a piece of evidence. You just don't want it in the chronological order. You don't want the jury to have the whole story.

The Court: All right, go ahead, Mr. Robertson.

*Sidney A. Stroud.*

By Mr. Robertson:

page 153 } Q. Then, what is the range of the temperature of the car in which the picnic ham is placed for shipment from South St. Joseph to Richmond?

A. Well, your product going in is coming out of a temperature of thirty-six to thirty-eight, so your meat temperature will be practically the same, and in the process of loading, why, your cold meat will even up the temperature of your car.

The Court: The question is—what is the temperature of the car?

The Witness: Started out at thirty-five.

By Mr. Robertson:

Q. And how high will it get after you put the meat in it, if you know?

A. Sir?

Q. How high would it get after you put the meat in it, if you know?

A. It will run up to around forty.

Q. Now, after the picnic shoulder hams are placed in the car, refrigerated car for shipment to Richmond, what is the process of shutting the car up?

A. The doors are locked and are sealed with a seal that belongs to the Swift and Company.

Q. And is that car subject to be opened, then, until it reaches its destination?

A. No, sir.

page 154 } Q. Have you examined the records of your department to see the number of pounds of picnic shoulder hams which were produced from hogs killed at the South St. Joseph, Missouri, plant on August the 6th, 1956?

A. Yes, sir.

Q. Can you tell what those numbers are and what were done with them?

A. I made a memorandum from our stock records.

Q. You can refer to that to refresh your memory.

Mr. Emroch: Is this witness in charge of those stock records and did he make those records?

Mr. Robertson: Made under his supervision.

The Court: Explain what the records are and who keeps them and how you got the memorandum in your possession.

The Witness: The records are kept by a competent stock

clerk that has been on this job for around thirty years, and it is his duty to keep these records of every vat of meat, approximately what becomes of it and the disposition.

By Mr. Robertson:

Q. Is he in your department?

A. Yes, sir.

Q. Is he subject to your orders and supervision?

A. Yes, sir.

Q. And are you finally responsible for those records as the head of that department?

page 155 } A. Yes, sir.

Q. All right, sir, you may go ahead and refer to your memorandum and records.

A. Our stock records show we shipped to the Richmond Sales Unit in SRLKP 5970—

Q. What does SRLKP mean?

A. That's the Swift refrigerator car.

Q. Yes, sir.

A. —a thousand pounds of picnics. This thousand pounds of picnics was produced from hogs killed August the 6th, 1956, cut, put to cure by pickle injection on August the 7th, 1956. Then it was left in the curing vats until August the 20th, 1956. They were removed from the curing vats and placed into a temperature of twenty-six to twenty-eight degrees. They were then removed on the twenty-third from this 26 to 28-degree temperature room and loaded into a refrigerated car 5970—

Mr. Rosner: If Your Honor please, if this witness is testifying from records, I think the records are the best evidence.

The Court: Go ahead.

The Witness: —was loaded into a refrigerated car to ship to Richmond, Virginia. Now, the balance of the lot of 583 pounds of picnics was from hogs cut August the 14th, 1956, and put into the cure and left in cure until 8/23

page 156 } at which time they were pulled from the pickle and loaded directly into a refrigerated car No. 5970 and shipped to Richmond.

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page 157 }

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*Sidney A. Stroud.*

Q. My question to you, Mr. Stroud, was what did you testify was the temperature of the hams or the shoulders, these picnics that you are talking about, before they were placed in the refrigerated car?

A. Thirty-six to thirty-eight.

Q. They were that temperature?

A. Yes, sir.

Q. Did you stick a thermometer in the hams or on the ham to test that temperature?

A. No, sir.

Q. So, you can't testify of your own knowledge what the temperature of those particular hams were before they were placed in the cars?

A. Actually, I did not make a temperature record, no, sir.

Q. No, sir. All right, so you can't testify to that, can you, because you did not make a temperature record?

A. No, sir.

Q. You didn't make any temperature records of the refrigerator cars either, did you?

A. No, sir.

Q. You didn't go into the car and hold the ther-
page 158 } mometer in the car and make a test of it?

A. Personally, no, sir.

Q. So, you can't testify as to the temperature of those cars?

A. From our records—

Q. I am not talking about from your records. I am talking about did you personally make the test.

Mr. Robertson: I ask the witness be allowed to complete his answer without interruption from Mr. Emroch.

The Court: No, he is making explanation.

By Mr. Emroch:

Q. Did you make a test?

A. No, sir.

The Court: Now, he can make any explanation he wants.

The Witness: Our regulations, after the car has been iced, it has to come to us with a temperature of thirty-five before loading.

By Mr. Emroch:

Q. That's your regulation?

*Sidney A. Stroud.*

A. Yes, sir.

Q. But you don't know what the particular temperature of this car was because you didn't make the test yourself, personally?

A. I did not.

page 159 } Q. And you don't know whether this particular car, insofar as your personal knowledge is concerned, had a seal on it when it left St. Joseph, Missouri—personal knowledge?

A. Personal, no.

Q. You did not see to it yourself?

A. No, sir.

Q. Now, how long is this pipe that this pickle juice comes through from its original source, before it reaches the picnics?

A. Oh, it is, I would say, fifty feet.

Q. Where is the pickle stored, where it originates from, now?

A. It's on the floor above and it feeds down this line by gravity. That's where we get our pressure.

Q. And it's up there in large vats or containers up on the floor above?

A. Yes, sir.

Q. And how many people work in that room?

A. Four.

Q. And how many people work in the room where the pickling process takes place?

A. There will be twenty to twenty-five.

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page 160 }

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Q. They didn't go into that process? Now, these trucks that you spoke about for conveying the picnics to the railroad cars, are they open or closed trucks?

A. They are open-top trucks.

Q. And the meat is placed in those open-top trucks with just the skin on them?

A. That's right.

Q. And nothing to cover them on top?

A. Right.

*Sidney A. Stroud.*

Q. And what is the distance from the St. Joseph plant in miles to the railroad station?

The Court: Well, let's ask him from the plant to the refrigerator car.

By Mr. Emroch:

Q. All right, where this refrigerated car was?

A. From the place where it goes into the car, I mean, from the curing location to the car is approximately a hundred and fifty feet.

Q. You have a railroad siding?

A. Yes, sir.

Q. Along side your plant?

A. Yes, sir.

page 161 } Q. Is that hundred and fifty feet in the open?

A. No, sir, not wholly. Probably fifty feet of it would be from the curing building across the dock into the refrigerated car.

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page 163 }

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Q. Mr. Stroud, I believe your testimony was that throughout the time that these picnic hams are being processed in your department they are always under the supervision and control of the Federal inspector?

A. That's right.

Q. Does he inspect the refrigerated car into which they are placed before they are put in there?

A. Yes, sir.

Q. Is the refrigeration of it subject to rejection by him if it is not O. K.?

A. Not the refrigeration, but he does reject it for cleanliness.

Q. If there is anything wrong with the car or the refrigeration of it, is a record made of it in your department?

A. The car has to be O. K.'ed out from the

page 164 } car shops and the refrigerating department before ever it will be set at our dock for loading.

Q. If it was at your dock and was not cool enough, would it be rejected?

*Sidney A. Stroud.*

A. Yes, sir.

Q. Would any record be made of that?

A. It would be sent back to the ice dock to be further iced or else held over until the temperature was equalized in the car.

Q. Is there any record in your department to show there was anything wrong with the refrigeration of this car?

A. No. sir.

Q. All of the employees in your department are subject to supervision for cleanliness and sanitation by the Federal inspection at all times when they are at work in your department?

A. That's right.

Q. You referred to a cellar. This is a matter of information. Is the cellar like it is down below the ground in my home, or would it be on the ground level?

A. No, it could be on any floor level. The term of cellar is used because of the maintained equal temperature of around—of thirty-six to thirty-eight.

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page 165 }

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Q. Just one minute. You weren't out on the loading platform when this particular car referred to in that bill of lading which has been introduced in evidence was inspected, were you?

A. Beg pardon?

Q. You were not there when this was inspected, if it was inspected?

A. No, sir.

Q. So, you cannot speak of your own personal knowledge about any inspection made of that particular car?

A. No, sir.

Mr. Emroch: That's all.

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page 166 }

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R. F. THOME

was called as a witness on behalf of the Defendant and, being first duly sworn, was examined and testified as follows:

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page 167 }

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Q. And what is your present position with the company?
A. Superintendent.
Q. Of the Richmond plant?
A. That's right.
Q. And as Superintendent of the Richmond plant do you have general supervision and direction of the plant?
A. Of all operations and processing.
Q. Mr. Thome, I show you a form here which is entitled, "Sweet Pickling Smoke Oven and Ham Cooking Record," and ask you if that shows the receipt of a freight car from South St. Joseph, Missouri, at the Richmond plant.
A. That's correct.

Mr. Robertson: Offer that in evidence and ask that it be marked Defendant's Exhibit D.

(The document above referred to was received in evidence as Defendant's Exhibit D.)

By Mr. Robertson:
page 168 } Q. What car was it?
A. SRLX 5970.
Q. Is that the same car which was shown on a bill of lading that was introduced as Defendant's Exhibit C?
A. That is correct.
Q. And does this receipt show when that car was received in Richmond?
A. Yes, sir, it does.
Q. What date was it?
A. August the 28th, 1956.
Q. Does it show when it left South St. Joseph, Missouri?
A. Yes, sir.
Q. When did it leave there?
A. August the twenty—

The Court: What does the record show?

*R. F. Thome.*

By Mr. Robertson:

Q. Yes, what does the record show as to when it left there?

A. August the 23rd, 1956.

Q. Now, I am going to ask you to step over here where the jury can see what I point out here. What do those figures down there at the bottom of the left side of that sheet of paper indicate?

A. First is a car number, next is a seal number that is affixed to the door at the plant. The next shows
page 169 } it comes from South St. Joseph; date shipped, August 23rd, '56; date received, August the 28th, '56; unloaded August the 28th, '56, and empty ordered out August the 28th, '56.

Q. Now, take that column up there that's marked "Product" at the top, and what are those notations on there? What is the explanation of that?

A. The first one is "Premium hams."

Q. I mean, what is this "42"?

A. That is a price that the foreman puts on there as a later record.

Q. All right, go ahead.

A. And the next item is "Premium picnics."

Q. And what does that figure there indicate, "25"?

A. That was the invoiced price.

Q. Now, I am going to ask you just to proceed across that page toward the right and just indicate what each column shows according to the records.

A. The first column shows the averages.

Q. State the column.

A. Average size, and—you want to go straight down?

Q. Yes.

A. Hams were 19 to 21. The picnics were 4 to 5. The next column is "Pieces." That showed 40 pieces, and this next item showed 300 pieces. The next one was "Gross weight," which was the weight of the product put into
page 170 } metal trucks. That was 1290 pounds. And the next column is 10—

Q. Wait a minute. Where do you get this figure down here?

A. That is tare.

Q. I am talking about here (indicating). Come on down here; that figure, the top of which is entitled—

A. "Gross weights?"

Q. Yes, I want to know—come on through there.

*R. F. Thome.*

A. The tare, 462 deducted, making it 828.

Q. What do you mean by "tare?"

A. The tare is the weight of the equipment in which the product was weighed.

Q. All right.

A. The next one is 2,048 less the tare of 463, making 1585.

Q. All right, sir, come to the next. They say, "Net weight."

A. Net weight. Well, that's the same as this, 828 on hams and 1585 on the picnics.

Q. Then come down to the printed part there in the center of the sheet and the initial at the bottom. What is that, according to the record?

A. That is amount of ice, and car on arrival was 6/8, meaning the bunkers were six-eights full.

The Court: Meaning what?

The Witness: The ice bunkers at the end of page 171 } the car were six-eighths full of ice.

The Court: Six-eighths full?

The Witness: That's the way they term it. Temperature of the car on arrival, 44 degrees, and the receiving clerk's initials and my own initials.

By Mr. Robertson:

Q. What do your initials indicate?

A. Indicates that I supervised the unloading and that I O.K.'ed the proper procedure of the product.

Q. What do the figures on the extreme right of the page indicate?

A. That indicates pieces, 300, and weight, 1583, which was the amount shown on the invoice.

Q. And how many picnic hams—shoulders were in that car?

A. Three hundred.

Q. And what was the balance of the stuff in the car?

A. On this particular sheet was sweet pickle hams, and the balance of the car was various packinghouse products.

Q. Mr. Thome, are the processes and procedures at the Richmond plant of Swift and Company subject to the Virginia Pure Food Laws and inspection by the Virginia pure food authorities?

A. Health Department.

Q. And the Department of Health?

page 172 } A. That's right.

Q. Now, when that car was received at the Richmond plant, who would break the seal on the car?

*R. F. Thome.*

A. The receiving clerk.

Q. All under your supervision?

A. Yes, sir.

Q. And then what would be the first thing done with the meat in the car after you broke the seal and opened the car?

A. After breaking the seal a thermometer would be placed in the car and the door closed.

Q. Would that be to take the temperature of the car?

A. That's right.

Q. Would a record be made of that?

A. Yes, sir, as shown.

Q. All right, then, after you took the temperature of the car when you opened it, what was the next thing that was done to the stuff that was in that car?

A. We would start an orderly method of unloading the car.

Q. You spoke of trucks here. Do you mean automobile trucks, or do you mean hand trucks that can be wheeled by man?

A. They are stainless steel vats, or you might say vats on wheels, which are pushed to the car, and the meat is put in these stainless steel vats and then pushed across a scales.

Q. Well, about how big are those—you speak
page 173 } of a vat. A vat, to me, indicates something with
a liquid in it. Is there any liquid in those vats?

A. No. It's a container.

Q. Can one man handle them?

A. One man can push them, yes, sir.

Q. Does one man normally do that?

A. Well, one man or two who are working on it.

Q. All right, then, when he loads some of the product into the vat in the car, then where does he take it in this conveyor?

A. I didn't quite get that.

Q. Suppose I am a colored man there with one of these containers, and I fill it up with Swift picnic hams and I get behind it and I am going to take it to where it belongs. Where do I take it?

A. Take it through the door to the scale, which is adjacent to the door, probably 15 feet.

Q. All right, then, I am the Colored boy. Do I weigh it, or is there somebody else there to weigh it?

A. No, the receiving clerk or myself.

Q. All right, then, after it's been weighed, what do they do with it?

A. Straight to the elevator door, which is close again, and put on the elevator.

Q. Still in the container?

page 174 } A. That's right.

Q. Where does the elevator take you?

A. Goes to the basement.

Q. And into what sort of a room?

A. Into a cooler room.

Q. And what is the temperature of that room? Normally?

A. Normally, 32 to 36.

Q. Now, how long does it normally stay in the cooler room in your plant?

A. Why, one to three days, probably, depending on how much we have gotten in.

Q. You mean as to whether you need it for your business or not?

A. No, sir, in cases like this it would be one to three days because of the quantity.

Q. Stays in the cooler room. All right, now, where does it go from the cooler room?

A. Into a wash room—as termed a wash room.

Q. Is that adjoining the cooler room?

A. That is adjoining the cooler, yes.

Q. What do they do in the wash room?

A. There they are taken from the vats and washed and hung in a stockinette on a trolley.

Q. Hung in a stocking—what?

A. Like cheesecloth.

page 175 } Q. Hung in a bag?

A. Bag, yes, shape of a bag.

Q. And where is that put?

A. That is hung on a trolley—it's termed "trolley." It's three bars or forms which hang on a trolley, the trolley riding on a track, and these are hung on that equipment.

The Court: Is it a conveyor?

The Witness: Yes, a type of a conveyor.

By Mr. Robertson:

Q. All right, now, you have taken it out of the car and weighed it, put it in the cooler room and left it there for, as you say, several days. Then what do we do with it? When you take it out of the cooler room, what do you do with it?

*R. F. Thome.*

The Court: You have got it on the conveyor, now?

By Mr. Robertson:

Q. All right, you have got it on the conveyor in these things —in the bag?

A. Yes, sir.

Q. All right, you have got it in the bag. Where do we take it?

A. Then transport it along that track to various smoke houses.

Q. Is a smoke house a thing out in the back yard like I used to have at home, or is it a compartment of your plant?

A. It's definitely part of our plant.

page 176 } Q. All right, when it gets in the smoke house, what do you do with it?

A. Well, we start the heat and the smoke to process it.

Q. Do you keep a record of the temperature in the smoke house?

A. Yes, sir.

Q. And how long does it stay in there?

A. This particular type of item will be from 20 to 24 hours.

Q. And then what is the normal temperature in the smoke house?

A. That starts with a temperature of around 120 and is gradually raised, hour by hour, until it gets up to around 154 to 160.

Q. And it's subject to that heat for how long? How long does it stay in the smoke?

A. Twenty to twenty-four hours.

Q. All right. Then when you finish smoking it, what do you do with it?

A. When it's finished smoking we remove it from the smoke house and let the heat come out of it.

Q. And where is it put while that heat is coming out?

A. In what we term a hanging room, hanging and wrapping room.

Q. Is it still on that conveyor all the time?

A. Still on the conveyor, yes, hanging by the stockinette.

page 177 } Q. And how long does it stay in the cooling room after it comes out of the smoking room before you begin to work on it some more?

A. Well, around five hours, or if it happens to be a weekend, then it would be put into a cooler.

Q. What would be the temperature of the room where it hangs to cool off after it comes out of the smoke house?

*R. F. Thome.*

A. That would only be what is termed a normal room temperature.

Q. After it has stayed there, I think you said four or five hours, what do you do with it then?

A. Wrapped.

Q. What is the process? I am a Colored boy, and you tell me there is a ham hanging up there now. I am an employee of that plant. There is a ham hanging there. You say, "Take it on off and run it on through." What do I do with it?

A. Why, an employee cuts the stockinette, lays it on the table, and usually a girl will put it into a wrapper and tie up the wrapper and go across a scale and seal it and date—put the weight on it, and then it's put into a truck.

Q. Now, is the state sanitary inspector from the State Health Department in and out of the plant while that is being done?

A. Oh, yes.

page 178 } Q. Does that picnic ham bear the state inspector's approval before it leaves the plant?

A. Yes, sir.

Q. When does he inspect it, and when does he put that thing on there, or how is it put on there?

A. He first inspects it as it comes out of the smoke house to check the heat of it, the temperature on the inside of the product.

Q. Is the state inspector present when the seal is broken and the car opened, or a representative of the State Health Department there?

A. In the car?

Q. Yes.

A. No.

Q. When is he?

A. He is present, around, but not necessarily standing at the door. It's under inspection.

Q. All right, but he is around the scene and may or may not be present then?

A. Always.

Q. All right, now, I want to know the circumstances under which the seal that has been inspected and approved by the State Health Department of Virginia. When is that put on there, on the wrapper?

A. That is imprinted on the wrapper at the time they are wrapped.

page 179 } Q. And who from the Health Department says it's all right to wrap it in there with that "passed inspection" on it?

*R. F. Thome.*

A. The inspector. He is inspecting them before we are permitted to wrap them, before we are permitted to bring them from the smoke house.

Q. Now, after you have put it in the hanging room to cool off and then have inspected it again and wrapped it up, then does it go back to a cooling room to await for final disposition?

A. It's finished processing to the extent it's wrapped. It is then put into a cooler.

Q. And it stays there until it's ready to go out?

A. That's right.

Q. To be sold?

A. That's right.

Q. Now, you said you kept some records of these various temperatures. I think you said you took a reading of the temperature of the car when the car is opened, is that correct?

A. That's correct.

Q. And then do you keep a subsequent record of different temperatures, when they were taken, and what they were?

A. There is a record kept through the entire processing.

Q. Mr. Thome, the evidence in this case, I believe, up to now is that one or more of the shoulder hams which was in the lot that was received at the Richmond plant page 180 } about which you have testified was sold to the Roberson Super Market on, I believe, September the 5th. Are deliveries from the Richmond plant made in refrigerated trucks?

Mr. Emroch: If Your Honor please, we ask that the first part of that statement by Mr. Robertson be excluded, because that has not been established yet.

Mr. Robertson: All right, strike it out.

The Court: Yes.

By Mr. Robertson:

Q. Are deliveries from your Richmond plant to Roberson's Super Market or other purchases of picnic hams made in refrigerated trucks?

A. Yes.

Q. Mr. Thome, I hand you a book marked, "Temperature Book," and ask you to turn to a page which has a clip on it, marked, "Daily recording," and ask you if that is a daily recording of the shipment that was received at the Richmond Swift plant according to this Swift receipt report which has been introduced in evidence as Defendant's Exhibit D.

*R. F. Thome.*

A. That's the daily reading of the temperatures of the cooler—various coolers in our plant.

Q. From the date including the date of this Exhibit D forward?

A. That's right, everything.

Q. Now, I am going to ask you to stand over
page 181 } here where the jury can see you, like you did
before.

The Court: Mr. Robertson, what does the Exhibit D show is the date of the receipt? What does it show the date of the receipt of this car was?

The Witness: August the 28th.

The Court: August 28th? All right.

By Mr. Robertson:

Q. Now, Mr. Thome, I turn to the page of the temperature book which has a clip on it. Here is a daily recording, and I ask you where on this page the recordings are shown, beginning on August the 28th.

A. The dates are straight across here, and August the 28th is Tuesday.

Q. Now, I am going to ask you to start over at the extreme left column of the page and come through it with me and explain it. I noticed there in the extreme left column to the left of the figure 8-27, there is no notation.

A. That's right.

Q. Now, I notice there the date 8-27. What does that indicate?

A. August the 27th.

Q. 8-28?

A. That's August the 28th, August the 29th, August 30th, August 31st. That's a complete week.

Q. Then come down below the next open space. That's 9?

A. September 1st, September 3rd, September
page 182 } 4th, September the 5th.

Q. All right, now, going back up here to the column which in the second column has the 28th. What do those initials way over there on the extreme right indicate?

A. That's "S P" for "sweet pickle." That means the engineer's notation "sweet pickle room."

Q. All right, now, come on across and indicate what those columns show.

A. On the first day it's 28 degrees in the A. M. and 28 in the P. M.

*R. F. Thome.*

Q. I notice up here at the top—
A. —A. M. and P. M.
Q. So does that mean those recordings were taken twice a day?
A. That's right.
Q. All right, what were they?
A. Twenty-eight degrees and 28 degrees.
Q. On what day?
A. That's the 27th of August.
Q. All right, now, come to the 28th.
A. Thirty degrees and 29 degrees. Next 30 degrees and 29 degrees, 29 degrees.
Q. Give the date each time.
A. August the 30th, 29 degrees and 30 degrees.
page 183 } August the 31st, 32 degrees and 30 degrees.
Q. All right, now, why is there no initial or anything up there opposite that column there that has nothing in it?
A. Because that only shows the dates.
Q. All right. Now come down to this next column here. What does this next column show? Is that a different product, or what is it?
A. Each line is a different cooler in our building.
Q. You mean a different cooler room?
A. That's right.
Q. All right, now, you said up here the one you just read was a sweet pickle cooler room, correct?
A. That was his reference, yes.
Q. All right, now, what is the next sweet pickle cooler room?
A. This next one is "S M."
Q. I don't want anything but the sweet pickle shoulder hams. Which is it?
A. That would be in this second one, "S M."
Q. "S M" indicating what?
A. That's what we term the cooler, call it.
Q. I mean, what does "S M" stand for?
A. Salt meat.
Q. All right, now, come along and give those readings for this different cooler room. Give the date and the temperature reading.
page 184 } A. August 27, 37 and 39; August the 28th, 38 and 42; August the 29th, 37 and 40; August the 30th, 38 and 40; and August the 31st, 39 and 41.
Q. All right, now, where are the next cooler rooms that had

any of *this* smoked hams in it of this lot that we are talking about?

A. Couldn't be put in one cooler.

Q. Well, which is that? That's what I am asking.

A. That is the one that I—

Q. Is it involved in any more of those cooler rooms down there (indicating in book)? What is this one?

A. That is the second floor cooler chamber.

Q. The one that you mentioned? The picnic smoked hams are the ones involved, came in at the time of that receipt record?

A. At that shipment, yes.

Q. I want to follow through the temperatures on that lot of stuff all the way through, if you have got it. What we just read off is from the day it came in until it went into process in the smoke.

Q. All right, it went into process when?

A. On the 30th.

Q. And I understand that is shown in another book—in a little—this book here?

A. That's correct.

page 185 } Q. All right, I don't want to talk about that till we finish this one. Now, what I am trying to do is to get you to read the temperature readings on that lot of picnic hams that came in here on the 28th up until—including the 5th of September, anywhere along in here that it is shown.

A. All right.

Q. Well, here.

A. Do you want me to repeat?

Q. No, I don't want you to repeat. You read one column and you read another column. Now, is there any additional column you should read?

A. After processing, yes, sir, it is put into this cooler here.

Q. All right, give what—you mean, what cooler room?

A. That's second floor coil chamber.

Q. What is the initial?

A. "2 C."

Q. What does that mean?

A. Second floor coil chamber.

Q. All right, that's what I am trying to get at. All right, now, come on across on second coil chamber and give the date each time and the temperature reading for the morning and for the evening across that coil.

A. Twenty-seventh, 37 and 40. August the 28th, 37 and

*R. F. Thome.*

39. August the 29th, 38 and 40. August the 30th,
page 186 } 39 and 40. August the 31st, 39 and 42.

Q. Now, are there any more of them involved in any of those other cooler rooms there?

A. No.

Q. Now we come down—I notice here that for 9-3, which would be September the 3rd, it's marked "Holiday" and a blank for some reason. I assume that was Labor Day.

A. Labor Day.

Q. All right, so there were no readings on Labor Day, but they went in there and read them the morning and evening after Labor Day?

A. Yes.

Q. Where is the one for the cooler room that this picnic ham that we are talking about—

Mr. Emroch: Now, if Your Honor please, that is not proper, because it hasn't been established that this particular ham was in any cooler yet.

The Court: We will wait and see.

Mr. Emroch: He is talking about the shipment.

Mr. Robertson: I said the whole shipment went in here, and if the whole shipment went in there, the ham in question would certainly be in there.

Mr. Emroch: It hasn't been established yet, and it doesn't make sense.

Mr. Robertson: I think it has been.

page 187 } The Court: The objection makes sense, but it's overruled.

By Mr. Robertson:

Q. Now we have come here, and take this after Labor Day and show the cooler room, or whatever room we have in there where the temperatures are taken. Give me the indication of it.

A. Second floor coil chamber.

Q. Initials?

A. 2-C.

Q. All right, now, come on across.

A. On September the 4th, 37 and 39.

Q. Before you get there, does that mean that when the man went in there that morning after the holiday, took the readings, they were those temperatures?

A. That's right.

Q. All right, go ahead.

A. Here, September 4th, 37 and 39; September 5th, 37 and 40.

Q. All right, that's as far as I want to go. That takes you through September the 5th?

A. That's right.

Q. Right. All right, come back and have a seat.

Mr. Robertson: Now, if Your Honor please, I offer in evidence this one page of this book about which the witness has testified and ask that I be allowed hereafter
page 188 } to substitute a photostat for it.

The Court: So admitted.

(The document above referred to was received in evidence as Defendant's Exhibit E.)

By Mr. Robertson:

Q. Now, Mr. Thome, I hand you another book marked on the outside in pencil, "Swift & Company," and I turn to a page which is separated by a clip, and up at the top it seems to be dated 8-30-56, oven—what?

A. OvenNo.3.

Q. Floor?

A. Two. Second floor, two.

Q. And then I can't read this in here. What does that say?

A. "Premium"—that's the product—"Premium smoked picnic."

Q. What is this over in this column?

A. That's the number of trolleys.

Q. Everything you read, read me clear across what it says.

A. "Premium smoked picnics, 4 to 6, 9 trolleys."

Q. What does, "4 to 6" mean?

A. That means the average weight of the product.

Q. Does it mean 4 to 6 pounds, or does it mean 4 pounds 6 ounces?

page 189 } A. Four to 6—carries them in a two-pound average, 4 to 6, from 6 to 8, and 8 to 10.

Q. The weight, then, would average from 4 to 6 pounds?

A. That's right.

Q. And it says here, "No. of trolleys, 9?"

A. That means that they went onto 9 trolleys, 9 of the conveyors.

Q. Nine separate conveyors, or one conveyor numbered "9?"

A. Nine separate conveyors.

*R. F. Thome.*

Q. On an average, how many of these hams would each conveyor hold when they hang down on there the way you have described?

A. Well, they change some. There usually is around 36.

Q. All right, sir. Now, I notice the column here of temperatures and recordings down there and ask you what those temperatures are—temperatures of what?

A. That's the temperatures of the smoke houses in which the picnic shoulders were smoked.

Q. Does it show the date?

A. Shows the date, August the 30th.

Q. And does it show how long they were left in there?

A. Yes, sir, it shows every hour that they were in there.

Q. All right, now, were those temperatures taken every hour while those picnic hams were in there?

page 190 } A. That's right.

Q. I am going to ask you to step over here and show the jury about that. The date is what?

A. August the 30th.

Q. What year?

A. 1956. Oven No. 3 and floor, second.

Q. What does this mean?

A. Premium smoked picnics, 4 to 6, 9 trolleys.

Q. Now temperatures, and I come over here to the A. M. and come on down there and ask you, those temperatures are for what date?

A. For August 30th, starting at 3:00 P. M.

Q. How do you know it starts at the P. M. instead of up there at the top?

A. Because that's when the man put it in and put the time down.

Q. I say, what shows there?

A. Printed "P. M." 3:00 P. M. and 124.

Q. What shows that the picnic hams went into that particular place in the P. M. instead of in the A. M.?

A. Well, because it's marked "Start," and it's continuous. If it started in the A. M., it would be a break there.

Q. So that this part that is up here at the top is a continuation from the preceding page?

page 191 } A. From down here (indicating). Went in, started at 3:00 P. M. and goes through and then starts in the A. M.

Q. Oh, I beg your pardon. It was my mistake. I was starting at the wrong place. Now, what does this thing here mean?

*R. F. Thome.*

A. That means when they are ready—
Q. The number 138.
A. 138 and 140.
Q. What do those figures mean?
A. Internal temperatures.
Q. You mean inside of the ham?
A. That's right.
Q. How do you get that?
A. By a needle thermometer that penetrates the product.
Q. How long are they?
A. Sir to eight inches.
Q. All right, now let's come here to where it starts. You took the temperatures first at what time?
A. Three P. M.
Q. And what did it show?
A. That it was 124 degrees.
Q. What is that word written there?
A. "Start."
Q. So that is when it started, after it got in there?
A. That's right.

Q. After three o'clock, P. M., and each one of
page 192 } those figures means an hour, down to midnight?
A. That's right.

Q. All right, three o'clock it was what?
A. 124.
Q. Four o'clock?
A. 128.
Q. Five o'clock?
A. 130.
Q. Six o'clock?
A. 132.
Q. Seven o'clock?
A. 134.
Q. Eight o'clock?
A. 136.
Q. Nine o'clock?
A. 138.
Q. Ten o'clock?
A. 140.
Q. Eleven o'clock?
A. 142.
Q. Twelve o'clock?
A. 144.
Q. One o'clock, A. M.?
A. 146.

*R. F. Thome.*

Q. Two o'clock?
page 193 } A. 148.
Q. Three o'clock, A. M.?
A. 150.
Q. Four o'clock, A. M.?
A. 150.
Q. Five o'clock, A. M.?
A. 152.
Q. Six o'clock, A. M.?
A. 154.
Q. Seven o'clock, A. M.?
A. 156.
Q. Eight o'clock, A. M.?
A. 154.
Q. Nine o'clock, A. M.?
A. 154.
Q. Ten o'clock, A. M.?
A. 154.
Q. Eleven o'clock, A. M.?
A. 152, looks like. It's a bad figure.
Q. Twelve o'clock, Noon?
A. 154.
Q. Then come back over here to this 138?
A. 138 and 140.
Q. 138 indicates what?
A. That in testing the hams with the inspector
page 194 } that they went between 138 and 140 degrees.
Q. In other words, that that was an average?
A. No, that was the low and the high.
Q. And was the inspector there when those tests were made?
A. That's—absolutely. Can't take them out without.
Q. Can't take them out without the test being approved by the Virginia State Health Department?
A. That's right.
Q. And they were taken out of the smoke at that time?
A. That means the temperature when they were taken out.
Q. Well, the temperature—it shows 12 o'clock, Noon, and it's marked out. Does that mean they were taken out at 12 o'clock, Noon?
A. That's right.
Q. All right, what is that initial down there?
A. That's time the smudge—that's the actual smoke—went on and the time that it came off. They don't keep smoke the full time.

*R. F. Thome.*

Q. And that is one of the records of your office, made and kept subject to your supervision?
A. That's right.

Mr. Robertson: I offer that book sheet in evidence and ask that it be marked Defendant's Exhibit F and ask that we be permitted to substitute a photostat for it.

page 195 } (The document above referred to was received in evidence as Defendant's Exhibit F.)

The Court: Now, Mr. Robertson, that took us up through noon of what day?
Mr. Robertson: Took us through the entire day of September 5th. I am going to show that this ham was sold—
The Witness: It went in August the 30th at 3:00 P. M. and came out August the 31st in the A. M., at—
The Court: At noon?
The Witness: At noon.
The Court: August the 31st. All right.

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page 198 }

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Q. Now, I noticed in your temperature book you didn't have any temperature for September 1, 2 or 3, or you didn't read any off for those three days. Now, the 3rd was on Monday, which was Labor Day, a holiday. There were no readings taken on that day?
A. That's right.
Q. What about Sunday, September 2nd?
A. I don't know.

Mr. Robertson: You can look at the book.
The Witness: (Looking at Exhibit E) They do not show one for the 1st and 2nd.

page 199 } By Mr. Emroch:
Q. Do not show any for Saturday, the first or Sunday the second or Monday the third?
A. No, sir.

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*R. F. Thome.*

Q. Now, you spoke of smudge or smoke coming on these picnics, Mr. Thome. Where does that smudge or smoke originate?

A. In a piece of equipment which burns sawdust to blow smoke through the houses.

Q. And where is that sawdust located?

A. In the equipment on the outside of the smoke houses in the basement.

page 200 } Q. The sawdust is located in the equipment which is on the outside in another building, in the basement of another building on the outside of the smoke house?

A. No, the smoke houses are made of brick, and the smoke houses are behind a brick wall, and this unit is in the outside or in the basement where this piece of equipment by pipes blows the smoke into the smoke house.

Q. In other words, you burn the sawdust in the basement of this outside building, and then that smoke from the burning sawdust comes through these pipes?

A. That's right.

Q. And is blown onto the picnic?

A. Blown into the smoke houses.

Q. Blown into the smoke houses by a fan?

A. That's right.

Q. And where is the fan located?

A. Inside the equipment.

Q. Not in the smoke houses?

A. No.

Q. In other words, the fans push the smoke up through the pipes into the smoke houses?

A. That's correct.

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page 203 }

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Q. As far as you know, all of these cellophane wrappers on these picnics were intact after they were wrapped?

A. Positively, or they wouldn't go in stock unless they were.

Q. Positively intact?

A. You say "intact." You mean that they are tied completely?

Q. Tied completely and no openings, that is what I mean.
A. That is correct.
Q. Otherwise they would not go in shipment—wouldn't go in delivery?
A. No, sir.

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page 205 }

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J. R. COLLINS,
was called as a witness on behalf of the Defendant and, being first duly sworn, was examined and testified as follows:

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page 206 }

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Q. Mr. Collins, I hand you what appears to be a Swift and Company invoice dated 9-5-56, to which is attached what appears to be a Swift and Company receipt dated 9-5-56, and ask you if that invoice represents a sale you made to A. L. Roberson.
A. Yes, sir, it does.
Q. On what date?
A. I made contact on Tuesday, which was the 4th. We date our billing the day of delivery.
Q. What was the date of delivery?
A. September the 5th.
Q. What year?
A. 'Fifty-six.
Q. And what was it that you sold?
A. Well,the billing was 12 pounds of bacon, 6 pounds of butter and 4 smoked picnics. The bacon was short, the butter and picnics were delivered.

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page 209 }

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*Dr. M. E. Hibbard.*

Q. Now, have a seat, please. That sale is dated September 5th, 1956 Is that the last sale of picnic ham shoulders that you made to Roberson prior to September 23rd, 1956?

A Checking back on his tickets, that's correct.

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DR. M. E. HIBBARD,

was called as a witness on behalf of the Defendant and, being first duly sworn, was examined and testified as follows:

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page 212 }

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Q. Doctor, there has been introduced in evidence in this case as Plaintiff's Exhibit 7 a report from the Virginia State Department of Health, Bureau of Laboratories, dated October 25th, 1956, Laboratory No. 27318; name is Jean Wells. I hand you that report and ask you if you know the circumstances under which the work represented in that report was done and what the report showed?

A. Yes, sir, I do.

page 213 } Q. Do you remember how any request for that report came into the Department?

A. I am a bit foggy as to exactly how the whole thing came about, but to the best of my recollection, my first lieutenant in charge of meat inspection, let us say, Dr. Stafford, came to me and wanted to know—apparently he had been approached by either Mr. or Mrs. Wells, I don't know which, and he wanted to know if our laboratory would examine a piece of shoulder—smoked shoulder, it was—for the presence of pathogenic bacteria, because Mrs. Wells had been made sick, or had been diagnosed as having had food poisoning, and she thought that it involved this particular piece of meat.

And so I told him to go ahead and have the shoulder sent in to our laboratories. Subsequently it was, and I believe the proprietor or the proprietor's wife of the super market that sold this ham or this shoulder to them, I believe that they brought the meat in to the laboratory, and then, of course, our people took it from there and went ahead and

did the routine bacteriological examination which, of course, resulted in this particular report.

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page 215 }

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Q. Now, what is "Proteus"? And if I pronounce them wrong, will you correct me, because I never have studied bacterias.

A. Well, all three of these organisms, of course, are found in the everyday environment. Proteus is one of those organisms that may be isolated from various bowel discharges and the saliva surfaces of the body, whatever you might have in front of you. It's just one of these common environmental organisms you find everywhere around you.

Q. That is something that just floats around?

A. You are very likely to find it anyplace.

Q. If I blow my nose, is that—

A. That is.

Q. If I hawk and spit, has that got it?

A. Might very well.

Q. Does that necessarily cause sickness?

A. No, as far as I am—

Q. Does it normally cause sickness?

A. As far as I am aware it does not produce disease.

Q. At all?

A. No.

Q. Under any circumstance?

A. Not as far as I know.

Q. Then the next one that they mention here is Bacillus subtilis. What kind of a thing is that?

page 216 } A. Again, it's just one of these general organisms that you find in the everyday environment that is everyplace and everywhere.

Q. Does that cause illness?

A. Not to my knowledge.

Q. Ever, under no circumstances?

A. Not to my knowledge.

Q. Now, the next one sounds a little more formidable: Hemolytic staphylococcus aureus. What is that?

A. Well, again, this is—of course, "Hemolytic" means nothing more than it has an ability to produce an agent

*Dr. M. E. Hibbard.*

which destroys red blood cells, or it is said to be Hemolytic, and it is a variety, let's say, of a large family of organisms known as staphylococci, which are, again, very usual in nature. You find them every place; you can have them on your hands right now. "Aureus" breaks it down further and refers to the color of the particular organisms as grown and cultured. The organism itself does not produce disease to my knowledge, in the sense of a general bodily disease. It certainly may cause inflamation of sores and is found very frequently in sores, sore throats and boils, etc.

Q. Doctor, take those three things that this test report shows, "Proteus, Bacillus subtilis and Hemolytic staphylococcus aureus," and would you expect any of those bacteria to survive a normal cooking temperature?

page 217 } A. No, sir.

Q. Why?

A. Because they are subject to being destroyed by heat, of course. For instance, ordinary pasteurization of milk of 142 degrees for 30 minutes will destroy all these organisms. It's a matter of time and temperature.

Q. Would any one of those bacteria cause food poisoning if eaten?

A. One of them is very often suspected as being one of the culprits in staphylococcic food poisons. It, itself, however, does not produce disease, but the toxin it gives off as it grows is what produces disease.

Q. But you say you would have expected that to be destroyed in the normal cooking process?

Mr. Emroch: He didn't say that.

The Court: He didn't say quite that. Let him clear it up.

By Mr. Robertson:

Q. What did you say, Doctor?

A. Providing the organism was subjected to temperatures which would thoroughly cook, for instance, a piece of shoulder, they would be destroyed.

Q. Did any statement from Mrs. Wells come to you that this ham shoulder involved in this case had been thoroughly cooked?

A. Yes.

page 218 } Q. In what form did it come to you?

A. She wrote me a letter, and also, once after I received this report back—in fact, I wrote her an inter-

pretation of the thing, and we were, of course, very interested in finding out the source of her trouble, etc., and I included in this letter some questions, and I believe that was among those questions, too, which I again asked her, if she thoroughly cooked this particular piece of meat, and again—I am a bit hazy on this, but I am quite sure I recall definitely—I did establish, at least to my satisfaction, that she told me that she had thoroughly cooked this piece of meat. That was, of course, to rule out the possibility that these organisms could have been present during the process of cooking and the like, see.

Q. Does it require large numbers of staphylococci to be present before any poison is formed?

A. One could produce toxin, certainly. However, it would take a rather large number of them producing toxin to make someone sick from the whole thing.

Q. Do you know whether or not large numbers were found in the specimen that was examined upon which this report is based?

A. Large numbers were not found.

Q. I think you have already answered this: Do all staphylococci cause food poison?

page 219 } A. No, sir.

Q. Why not?

A. Because they do not produce a toxin which when digested, produces the symptoms that are ordinarily spoken of as food poisoning.

Q. In this specimen that is reported upon here, did you determine whether or not in your opinion the staphylococci that were found in that specimen could produce food poisoning?

A. Let me answer this way: that the only proof of the pudding in a situation like this as to whether a toxin is present that would make someone sick would be for someone to volunteer and consume some of the same material and would then become sick, you would suppose that some of the toxin was present. However, in the absence of a certain number of volunteers, we ordinarily don't go that far, so we can usually assume when a given organism with certain characteristics is present that there is a very good chance that the toxin may be present.

Now, in the case of this particular organism that we have there, this Hemolytic staphylococcus aureus, it quite frequently is involved in producing toxins. However, whether the toxin was there or not we don't know.

*Dr. M. E. Hibbard.*

Q. See if I understand you correctly, that the staphylococci themselves are not what does the damage, that they give off a poison which is in sufficient quantity, what page 220 } they give off produces the trouble, is that right?

A. That is correct.

Q. And if you kill the staph, then they don't make any new poisons?

A. That's correct.

Q. And when they become killed, whether or not the poison already created would cause illness is determined on how much there was of the poison?

A. I didn't follow you entirely. You better repeat.

Q. Well, suppose that you thoroughly cooked the ham shoulder and you kill all of the staphylococci. You got all of them killed now, and that stops the production of any new poison.

A. That's right.

Q. Would any preexisting poison caused by that cause the illness, or would that have been destroyed?

A. The staphylococcus toxins are generally rather stable, and they probably would not be destroyed, although they might be attenuated considerably.

Q. In your opinion, could you tell whether or not there were enough of those staphylococci in this ham shoulder before the cooking to have produced a poison?

A. Well, along that line, now, on direct smears—of course, direct smear, again, is a technique whereby you would put the bacteria on a slide and stain it so you could page 221 } see it by the microscope and, of course, both dead and living bacteria would equally take the stain, you would not be able to tell whether they were dead or alive. But on direct smear they were unable to see any direct staphylococci at all. Of course, in the culture which this is a report of, they would be cultivated there much the same as you would raise radishes.

Mr. Rosner: He has testified that he has been told this, and that is obviously hearsay.

The Court: Is that true, that someone else did this work?

The Witness: That's right.

The Court: Well, now, it was done under your supervision in a way that you know about it, or is it what the assistants told you?

The Witness: Oh, no, this was done at our request, of course, and then a report was submitted to us.

*Dr. M. E. Hibbard.*

The Court: Who did it?

The Witness: Two of the technicians in the laboratory.

The Court: Are they still in the lab?

The Witness: Yes, sir.

Mr. Robertson: I think I can get at it another way, Your Honor. I have got another question.

The Court: They are the ones that actually handled the smear test, and I think we ought to have their accurate observation here.

page 222 } Mr. Robertson: We had the head of the department here under stipulation.

The Court: Anybody qualified can discuss the report, but you are asking him something else now.

By Mr. Robertson:

Q. Now, Doctor, I will ask you this. Is it or is it not true that in order for poison to be in this ham shoulder, it would have been necessary that large numbers of staphylococci capable of forming the poison be in the ham shoulder?

A. That's correct.

Q. And if large numbers had been in that ham shoulder, would you expect to observe the dead forms of the staphylococci microscopically?

A. Yes.

Q. Does the report indicate that the product was examined by microscope?

A. The report does not, no.

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page 225 }

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Q. If a person eats a piece of meat and gets sick within two hours after eating it and staphylococcus aureus are isolated, you would think that there was some relationship wouldn't you, and implication—

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page 226 }

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*Dr. M. E. Hibbard.*

The Witness: You are speaking just of any staphylococcus aureus, or are you speaking of Hemolytic.

By Mr. Emroch:

Q. Hemolytic staphylococcus aureus?

A. Now, let me recall it again. You asked me if I knew someone who ate some meat and became ill with symptoms of gastroenteritis one, two to four hours, something—

Q. Two hours.

A. —and we examined and we found them, would we suspect that the two are related?

Q. Yes.

A. We would.

Q. And if it happened to four people, your suspicion would be quadrupled, wouldn't it?

A. Right, would be more suspicious.

Q. And if people in the same family who did not eat it didn't get sick, your suspicion would be even
page 227 } multiplied more, would it not?

A. It would tend to bear out the situation, I would think, yes.

* * * * *

Q. Doctor, I failed to ask you these questions. Do you have anything to do with the state inspection of the Swift and Company plant here in Richmond that puts out meat products in the Richmond area?

A. Let me say this, that I have general supervision of the state meat inspection service and, of course, we
page 228 } do have an inspector in the Swift and Company's plant here in Richmond.

Q. And is that under your general supervision?

A. General supervision, yes.

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page 231 }

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Q. Doctor, suppose a refrigerated car from the Swift plant in South St. Joseph, Missouri, arrives in Richmond under a Swift seal, the car being closed, and is delivered at the siding of the Swift plant in Richmond, what are the

normal procedures for unloading that car and handling the product from the time they open the car until it is put on the Richmond market? Now, if you want me to break that up and go bit by bit, I can do it, but what I'd like to do is just take it up in chronological sequence and tell the normal story of what would happen to whatever is in that car. I will make it specific: picnic shoulder ham.

A. Of course, it makes little difference what the product was, really, whether it be ham or picnic ham or what it be. The specification of the way it should be handled, of course, is laid down in the regulations of the government service.

Now, then, generally I will review what the regulations do for the thing. The inspector is to be required to, of course, see to it that all this carload of meat, whatever page 232 } it is, that comes in here from Swift and Company or wherever it is, comes from an approved source. An approved source in the sense that I am speaking means that it's been inspected by either another state health department inspected plant where the meat was originally killed or by a federally inspected plant, and if he could see on the wholesale cuts of the meat, in this case it would be a shoulder, the seal or the stamp of either the state health department or of the Federal Government, then he would assume that, of course, the stamp being valid, that the meat does come from an approved source. He then would allow the plant to take it in and begin to process it. And, of course, then this inspector in this case, as being a processing house with no killing, he, of course, would follow the product through and check temperatures, see to it that the handling methods, the sanitation, the equipment, etc., is in accordance with the regulations until the product has gone completely through its processing. It comes out the other end all done up in its package with the state stamp on it, which, of course, is evidence that the product does conform to all of these regulations. Maybe I am being too general now.

Q. If you are not, Mr. Emroch will make you more specific.

Mr. Emroch: I will try.

By Mr. Robertson:

Q. Now, Doctor, I show you a portion of the page 233 } cellophane wrapper which was around the shoulder ham involved in this case and call your attention to this stamp on there and ask you what that says.

*Dr. M. E. Hibbard.*

A. Of course, this stamp says, "Inspected and passed by the Virginia State Department of Health Establishment"—whatever the number is, on this one "25,"—which indicates that the product contained within this wrapper has gone through an inspected plant and at the time that it was wrapped and passed on, it did *meat* all the specifications, etc., of the State Health Department Inspection Service.

Q. I understand it that that inspection stamp is put on that wrapper before the wrapper is put around the ham. What precautions are there to see that the particular ham around which that particular wrapper goes has met the Virginia requirements?

A. Well, of course, in the first place, before—you can understand, I think, that they can't print these things up just as the ham comes off of the line, so we have to allow them to build stock. When they get ready to have some of these things printed up—maybe I am not answering you the way you want me to, but—

Q. All I want is the facts.

A. The thing is submitted, they make proof on these things, see. We know now that this plant is under our inspection, has met all the standards, and for us to start page 234 } the inspection the operator of the plant says, "Here is the wrapper, etc., that we want to put on." They want approval for everything that is on the wrapper. For instance, all the ingredients or whatever it happens to be on the label has to be approved of, too, so they can't tell us there is sawdust in there when there is really dried milk, something like that, see. The stamp has the size and the shape of the stamp, and the number, etc., has to be all approved before they are allowed to be printed up. Then we know how many of them they print up and, of course, at all times that this plant is in operation it has to be under the full supervision of one of our inspectors, and I suppose it's conceivable that someone might come and run off with one of those and stick around it illegally, but hardly anything is a hundred per cent, but generally it is reasonably true that anything that has that around it has undergone all of the regulations that we have passed.

The Court: Is an inspector present when that wrapper is—does he say, "That piece of meat is O. K., put a wrapper on it"?

The Witness: No. It would be absolutely impossible

to have a man standing right there on every one of these operations. The plant is under his supervision.

By Mr. Robertson:

Q. See if I summarize it correctsy or incorrectly: But the plant processes being under constant inspec-
page 235 } tion by the state representative, if he finds everything to be in order, he permits these stamped wrappers to be put on the product, unless he finds something wrong with the normal procedure?

A. Correct.

Q. Is that right?

A. The idea is that this is a routine affair. It is being done daily and hourly and all the time the same way, it doesn't change, and we have an inspector there who is there a sufficient amount of time to assure himself that there are no deviations. If there is any deviation or something does happen, immediately the plant will be stopped, shut down, see, until the thing is corrected.

Mr. Robertson: I have no other questions.

## RE-CROSS EXAMINATION.

By Mr. Emroch:

Q. Dr. Hibbard, are you familiar with the symptoms of gastroenteritis caused by the staphlylococcus aureus—Hemolytic staphylococcus aureus?

A. Why, I am familiar with gastroenteritis, and it makes very little difference what causes it, I suppose, it would be more or less the same thing.

Q. You are familiar with the symptoms?

A. Yes.

Q. Those symptoms are what?

A. Clinical symptoms, I suppose you are speak-
page 236 } ing of?

Q. Yes.

A. Well, it would be vomiting, nausea, diarrhea, dehydration.

Q. And occurs within two to four hours after ingesting the meat or some of the food?

A. Somewhere in that general time limit. Depends upon the dose of toxin.

Q. A certain amount of prostration accompanies the diarrhea?

*Dr. M. E. Hibbard.*

A. True.
Q. That is true?
A. True.
Q. "Prostration" meaning that the individual is helpless to a great extent?
A. Correct.

The Court: How long, Doctor—let me ask this question first. Where does this germ come from?
The Witness: The germ?
The Court: Or from what sources might it get into a piece of meat?
The Witness: Most frequently the source of the germ and the food product that has become poisonous from this particular type of organism probably would come maybe from someone—someone might have one in his throat, and he is working on the thing or preparing it, or he is
page 237 } handling some utensil that they might stick into it, and he might cough or get it on the palms of his hands and subsequently handle a utensil, a knife, for instance, stick a knife in the ham and carry that into the ham with a knife, and it would be in the place where it likes to grow and begin to grow. It might come from a sore finger or a boil, something like that.
The Court: Is it an organism that originally the human body carries around?
The Witness: (Nodding affirmatively.) It's all over, it's here, it's on my hands, it's on everyone's in everyday environment, see.
The Court: I mean, is it originally associated with a human being?
The Witness: Not necessarily.
The Court: Not necessarily? Well, now, does it live in open atmosphere?
The Witness: That's right.
The Court: Floats around in the air?
The Witness: All over. It's one of these organisms that not all strains of it produce the toxin. I think someone said 20 per cent will produce toxin. Why they become toxin-formers and others don't we don't know.
The Court: The one involved in this lab report creates toxin?
The Witness: It may very well. It's a very
page 238 } suspicious one.
The Court: Well, now, would it be orginally

*Dr. M. E. Hibbard.*

in the live carcass in the tissues, or would it have gotten in there during the handling of the meat?

The Witness: Considering the animal from which a piece of meat comes is healthy, the inner tissues should be septic; in other words, shouldn't have any organisms in there at all.

The Court: Now, sometime between that time and the time that you—if that piece of meat gets these germs into it, under what conditions will they begin to multiply and give off this toxin? What temperature?

The Witness: Why, good, warm room temperatures. They like about that temperature. Warm air room temperatures. Anything below, I suppose, 120 degrees, 110 degrees, right in through there, they begin to like the situation very well.

The Court: And below that is not?

The Witness: Below 40 degrees. If you want to hold the thing, keep them below 40 degrees.

The Court: Below 40 degrees keeps them from multiplying and giving off the toxin?

The Witness: (Nodding affirmatively.) All the food handling should be above 150 and below 40.

The Court: If at some those germs become present in a piece of meat and began to multiply and created
page 239 } a toxin and thereafter the meat was thoroughly cooked so as to kill the germs, thereafter what happens to the toxin that was originally created?

The Witness: The toxins may be there, yes. If you cook it long enough at high enough temperature, you might destroy the toxin after a prolonged period of time, but ordinary cooking, generally speaking, would not destroy staphylococcus toxin. However, you should be able to demonstrate the dead organisms on a smear.

The Court: The toxin hasn't a smell?

The Witness: No, this is tasteless, odorless.

The Court: The toxin, too?

The Witness: Yes.

The Court: Now, after a piece of meat has been cooked, do these germs live in a live thing, or could they get into a piece of meat that has been cooked, something that has been eaten and has been satisfactory?

The Witness: Quite right. Quite frequently you find in food poisoning cases involving ham—I am speaking of other situations than this one that is being tried here—that most generally the thing gets in there after the product has been cooked. In other words, someone is handling meat—I re-

*Dr. M. E. Hibbard.*

member a church supper about 200 people were made ill from eating baked ham. The ham had been baked and kept in a steam table which maintained it at just a
page 240 } nice, warm temperature, about what it likes to grow, and a couple or three of the women subsequently were found to have had sores on their hands, and it was held there for about four hours before they served supper, and, boy, we just had the hospital full.

The Court: I see.

The Witness: They got in there because the women had been handling it after it had been cooked.

The Court: How long would it take after the germ or quantity of germs were injected into a piece of meat for them to give off toxin of sufficient quantity that would cause a person to become sick?

The Witness: Very rapid in some cases, depending on how large a number of organisms got into the thing and how good a medium it was for its growth, and this case that I had, it was 200 people and in less than four hours there was sufficient amount in there.

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page 245 }

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Q. All right, now, sticking a needle or a thermometer into a piece of meat would be the same thing as sticking a knife from which these staphylococcus could be injected into the meat?

A. Right.

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page 246 }

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Q. —did you ask her whether or not she had thoroughly cooked this shoulder ham?

A. Yes.

Q. And what did she say she had?

A. I remember that she told me she had thoroughly cooked it.

Q. And if she cooked it the way she said she cooked it, could she have been poisoned by anything that was in that ham before she cooked it?

A. Do I understand you correctly now: if she cooked it the way she said she cooked it—in other words, she told me she thoroughly cooked it.

Q. Yes.

A. Therefore, any organisms that were in there at the time she thoroughly cooked it would have been killed. Therefore, the organisms that we recovered would have been destroyed had they been there at that time, if she thoroughly cooked it.

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page 248 }

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ESTHER FIGLEY,

was called as a witness on behalf of the Defendant and, being first duly sworn, was examined and testified as follows:

page 249 }

* * * * *

Q. Miss Figley, were you employed in the laboratories of the State of Virginia in October of 1956?

page 250 } A. I can't hear what you say.

Q. I beg your pardon. Were you employed where you are now employed in October of 1956?

A. You mean for the Public Health?

Q. Yes.

A. No, September first, 19—let's see. No, I have been with them two years this past September.

Q. So that in October of 1956, of last year, you were with them?

A. Yes.

Q. I hand you a copy of a report which has been introduced here as Plaintiff's Exhibit 7, a report in the name of Mrs. Jean Wells, and will ask you if you are familiar with that report on a sample of ham.

A. Yes.

Q. Did you personally do any work on this ham sample?

*Esther Figley.*

A. I observed it for being set up for bacteriological examinations, and then after it was set up I completed the report.

Q. You did work on it yourself?

A. That's right.

Q. Did you make a culture of this—of a portion of this ham?

A. The other lady did, yes, and I watched her do it.

Q. Are you familiar with the results from your observation of her making the test?

page 251 } A. Am I familiar with the—

Q. With what was found in the culture?

A. Well, I do so many that—yes, I recognize that report.

Q. That report shows that Hemolytic staphylococcus aureus was present in the product. Your examination of the culture would or would not show that fact?

A. Let me see this report just a minute. Your question isn't very clear. What I want to know—repeat that again.

Q. I agree with you. Let me put it this way: The culture made from this ham, did it reveal this staphylococcus?

A. The results are here: "Organisms isolated," as worded means that they must have been found on the culture.

Q. Now, when you make a culture of this nature does that tell you anything about the number of the bacteria that are located or found in the product?

A. No, it just shows that they are present. That's all we are looking for is the presence of the organisms there.

Q. Now, was a further test made by examining under the microscope?

A. There was a direct examination that we do and observe by standard methods that are put out by Public Health Service for all routine work, regardless whether it's ham or any other type of food sample. We have a certain procedure that we follow, and we do direct microscopic examinations on all specimens, and I am sure this was done on this, too, although it isn't stated here, but that is our routine procedure that we adopt for examination of specimens, regardless of what it is.

page 252 }

Q. Did you participate in that work?

A. What is that?

Q. Did you look at this under the microscope?

A. Yes.

*Lorraine R. Berger.*

Q. Did you find under the microscope in a sample of the ham any of this staphylococcus bacteria?
A. If it wasn't written here, it must not have been found.

Mr. Emroch: We object to that answer unless this witness can remember exactly what she did.
Mr. Robertson: That goes to the weight, not to the admissibility.
Mr. Emroch: All right.

By Mr. Frazier:
Q. I repeat the question: In making the examination or sample of this product under the microscope, did you see any staphylococcus bacteria?
A. No microorganisms seen.

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page 253 }

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LORRAINE R. BERGER,
was called as a witness on behalf of the Defendant and, being first duly sworn, was examined and testified as follows:

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Q. Are you in the employ of Swift & Company?
A. Yes, I am.
Q. In what capacity?
A. I am a home economist in the research laboratories.
Q. And how long have you been with Swift
page 254 } and Company?
A. I have been with Swift a little over 9 years.

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page 257 }

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Q. Miss Berger, at the request of Swift and Company, in order that you may testify in this case, have you com-

paratively recently made cooking tests of Swift's Premium picnic shoulder ham?

A. Yes, sir, I have.

Q. How many tests did you make?

A. I made one test at this December date.

Q. And what was the date that you made that test?

A. I believe it was on a Friday; I believe it was December 13th.

Q. And did you prepare a chart showing the progress of that test?

A. Yes, sir, I did.

Q. Have you that chart with you?

A. Yes, I do.

Q. Will you produce it, please?

Mr. Emroch: May I ask at this time, does she have the ham or the shoulder with her that she cooked?

The Court: Yes, you can ask her that.

The Witness: No, sir, I do not.

Mr. Robertson: I can tell you she hasn't.

By Mr. Robertson:

page 258 } Q. Miss Berger, is this document that you have produced a summation of the cooking test you made?

A. Yes, sir, it is.

Q. I am going to ask you to explain it in detail in a moment, but there are a few preliminary questions. What was it that you tested?

A. The meat product that I tested was a Swift Premium smoked picnic. It weighed 4 pounds 9 ounces.

Q. When did you test it?

Mr. Emroch: If Your Honor please, this is a 4-pound, 5-ounce.

The Court: Immaterial, four ounces difference.

By Mr. Robertson:

Q. When did you test it?

A. On Friday, December 1t3h. That's the date I have. Yes.

Q. And just briefly, before we get right down to the chart, what generally was the nature of the cooking test that you made?

A. You mean, what procedure I followed?

*Lorraine R. Berger.*

Q. Yes.

A. I removed the smoked Premium picnic from the refrigerator and with a thermometer I checked the internal temperature of the picnic. It was 35 degrees Fahrenheit. Then I washed the picnic in water from the tap and put it in a heavy, cast aluminum kettle to soak for 15 page 259 } minutes. At the end of this time I took it out of the water and drained the water off, put the picnic in a 6-quart Presto pressure cooker. Then I added 3 cups of water to this cooker and put into the ham what we call thermocouples, which are very sensitive wires like thermometers, but they are far more sensitive than a thermometer, and they are connected with the machine that made this recording.

Then I put the lid on this Presto cooker and turned up the heat on the gas range until the pressure was up to 15 pounds. Then this picnic was cooked for 35 minutes at 15 pounds pressure. At the end of that time I pulled it off the heat and let it drop down to normal pressure so that I could open the lid. This took about 12 minutes additional. Then I transferred the picnic to the same kettle in which it had been soaked and poured the liquid from the pressure cooker into this kettle, put the roaster and the picnic into an oven, a gas oven which had been preheated to 375 degrees Fahrenheit.

It remained in this oven for 30 minutes. Then I removed the roaster and the picnic from the oven and set it on top of the range at room temperature. It remained here for a period of an hour.

Q. Then what did you do after that?

A. That was the duration of the cooking test.

Q. And what was the purpose of the test?

A. The purpose of the test was to determine page 260 } what temperatures were reached throughout the cooking—the final temperature reached at the end of the cooking process and also the time at which the picnic was at different temperatures.

Q. Did that apply to the inside of the picnic, in the middle of it, or just at the outside of it?

A. That applied to several different spots in the picnic. Two of these thermocouples that I mentioned, these very sensitive thermometer-like things, were in the center of the largest muscle of the meat, and that is the part that we have found from experience gets done last; that is, it is always at the lowest temperature. Two of the thermocouples

were in outside portions of the meat—that is, not outside, but nearer the surface. One of the thermocouples, when we had the picnic in the pressure cooker, we had one thermocouple just stuck into the fat under the skin, and then we later used the same one to record oven temperature, because the fat was already up very high when we put the meat into the oven. So we have a record throughout the time of the temperature of the meat at different spots and the room temperature and of the oven temperature on this chart.

Q. Now, does that chart record the various steps and phases of the cooking test you have made so that you can explain it on the chart?

A. Yes, sir.

Q. I am going to ask you to step over there page 261 } where the jury can see it and explain it.

A. Shall I hold it up like this, then?

Q. I want the jury to be able to see it.

A. First of all, I will explain this dark line that goes up all the way through at the side. This machine that I mentioned has 16 wires coming out of it. Well, we couldn't possibly put all of those wires into the meat, because it's just too many; we don't need that many for a small piece of meat. So the ones that we aren't using, the wires that we aren't using we put into a slush of ice which we know is at 32 degrees Fahrenheit. This is a way to check the accuracy of the machine.

It records all the way—you see, right here, this way across the chart is temperature, 0, 50, 100, 150, on up to 600 degrees Fahrenheit from zero. Down this way, or up, I should say, we record time. Each of these three blocks will make a unit of five minutes. This chart is on two cylinders, and the cylinders revolve automatically when the machine is in operation, so whenever three of these blocks go by, five minutes has passed. There is a little printing wheel on this machine that prints the numbers that correspond with these various wires, and that is how we get our record.

Now, these are recording 32 degrees. The ones that we used in the meat, Nos. 1 and 7, were in the center muscle of the meat. They started out here—it's difficult page 262 } to read, because it's printing around 35 degrees, and that's so close to the 32 you can see it running right into this line. As it cooks it begins to go up a little higher.

Now, numbers 10 and 4 were more in the outside of the

meat. As they record they get warmer. This portion of the meat gets warm a little faster, so it's up higher.

Now, at 1:13 p. m., we started recording. It was a few minutes later, it was at 1:20 that the pressure was at 15 pounds, so at this point we started recording the actual cooking. From here to here is a period of 35 minutes, as indicated by these blocks. At that time, then, I wrote down here, it is 1:20 here, it is 1:55. Thirty-five minutes has elapsed. This is the time in the pressure cooker.

Then 24 blocks of time is about the 12 minutes that it took for the pressure to drop down to normal. Now, in this block of time there is a break, because here we take the meat out of the pressure cooker and put it into the pan that goes into the oven.

Also at this point, I am sorry, I forgot to say before at this point when I took it out of the pressure cooker I cut off the skin, and I made a glaze of brown sugar and cloves on the picnic and put it into the pan.

Then here we start our oven cooking period at 2:18 to 2:48, a 30-minute period in the oven. Now we see the temperature continuing to go up in the same pattern
page 263 } that it followed before. No. 1 and No. 7 were lower in temperature than No. 4 and No. 10.
Now, over here in the oven we have this No. 13 recording oven temperature, and there is a little fluctuation, because the heat cycles on and off. It's hitting between 350 and 400, 375 oven temperature.

Now, at 2:48 the 30-minute oven period is ended. I removed the roaster and the picnic and put it on top of the range. This is the hou*g* (indicating on chart) from here to here is the hour-long period on top of the range where the picnic was allowed to set.

The Court: Now, what are all of these things that run over this way that you haven't talked about?

The Witness: You mean these numbers?

The Court: Starting down here.

The Witness: Well, this is just an indication all along that is printed on the chart. This is just part of the chart printing of the temperature from zero to 600 to make it easier to read. At any point you can say this one was 50, 60, 70, 80, whatever the degrees.

By Mr. Robertson:

Q. What is this that is written in pen and ink?

*Lorraine R. Berger.*

A. Those are my comments of what I did at a specific time. Here I say, "Begin 30-minute oven cooking period." Here I say, "End 30-minute oven cooking period." "Begin 60 minutes standing period."

page 264 } Q. What is this down here?

A. Well, I will start at the bottom, maybe that will be simpler. Here I say, "All 16 thermocouples in ice slush." They are all there before we started. Then, "Start heat under pressure cooker." Then, "15 pounds pressure reached. Begin 35-minute cooking period," and up here, "End 35-minute cooking period at 15 pounds pressure." And here, "Pressure dropped sufficiently to remove lid of cooker." Then, "Begin 30-minute oven cooking period. During 11-minute interval picnic skin was removed and picnic was glazed. Thermocouple 13 records oven temperature." "End 30-minutes oven cooking period. Begin 60-minute standing period. Last thermometer reaches 143 degrees Fahrenheit," and here I have just written, "10—red" and "4—blue" to make the reading easier. The thermocouples print in different colors. "End 60-minute standing period."

Q. Will you read the legend there so if we want to ask any questions about it—

A. All right.

Q. You might take your seat and read that, please.

A. "December 13th, 1957. Jean C. Wells *versus* Swift and Company. A Swift Premium smoked picnic weighing 4 pounds 9 ounces was cooked, skin side up, on a rack in a 6-quart Presto pressure cooker for 35 minutes at 15 pounds pressure. The skin was then removed, and the picnic was glazed with brown sugar and cloves. The picnic

page 265 } and the liquid from the pressure cooker were placed in an oval cast aluminum roaster. The roaster and contents were placed in a preheated oven preheated to 375 degrees Fahrenheit. After 30 minutes the picnic was removed from the oven to the top of the stove, where it was allowed to stand one hour. Thermocouples attached to a recording potentiometer were recorded at certain locations at different depths throughout the picnic." Then it lists where they were inserted. "Thermocouple 1 inserted to a depth of one and three-quarters inches in the center portion of the larger muscle toward the shank end. Thermocouple 7, same as No. 1, except 1 1/2 inches over toward the butt end. Thermocouple No. 4 inserted to a depth of 1 1/4 inches at the side of the large muscle. Thermocouple

*Lorraine R. Berger.*

No. 10 inserted to a depth of 1 1/2 inches into the center of the smaller muscle on the other side of the bone. Thermocouple 13, Presto cooker"—that is, I am just indicating how I used it in two different ways. When the meat was in the Presto cooker, Thermocouple 13 was inserted in the fat directly under the skin. "In the oven this thermocouple was inserted in the oven to record oven temperature," and then my signature, Lorraine R. Berger.

Q. And that was made on what date?

A. December 13th.

Q. 1956?

A. 1957.

Mr. Robertson: I mean 1957. I offer that page 266 } chart in evidence, Your Honor, and ask that it be marked Defendant's Exhibit H.

Mr. Emroch: We object, if Your Honor please, to the introduction of the chart.

The Court: Objection is overruled.

Mr. Emroch: Exception noted.

The Court: Let me say in allowing the exhibit into introduction in evidence as well as the testimony, if counsel desire to make any cross examination to show wherein this is any different from the evidence Mrs. Wells has given on the stand in this case, they may do so, and I will later rule whether the evidence of this witness may stay in evidence. Whether the discrepancies are proven by any subsequent evidence is immaterial.

By Mr. Robertson:

Q. Miss Berger, was the purpose of the test to which you have referred to determine the temperatures of the shoulder ham at different times under different circumstances as indicated on the chart?

A. Yes, sir.

Q. Now, on a different occasion did you make a cooking test in conformity with the cooking directions on this cellophane wrapper which has been introduced here as Defendant's Exhibit No. 1?

A. That is right, I did such a test. And I think, page 267 } as I remember the times—I haven't seen this label, of course. Six pounds—what is that, two and a half to three hours? Yes. Yes, I did.

Q. When did you make that test?

*Lorraine R. Berger.*

A. I don't remember the exact date. It was several months ago.

Q. And do you know the results of that test?

A. I'd have to refresh my memory with the chart. I don't have the chart with me.

Q. You do not have the chart with you? Can you, from memory, make any comments on that test?

Mr. Frazier: See if this is it.

By Mr. Robertson:

Q. Miss Berger, I hand you a chart and ask you if that is a chart you prepared as the result of the cooking test you made in conformity with the directions contained on the wrapper which has been introduced in evidence as Plaintiff's Exhibit 1.

A. Yes, sir, this is my—I see the date is April 15, 1957, and it has my signature.

Q. What was the date of the test?

A. April 15th, 1957.

Q. And what did you test?

A. Swift Premium pork shoulder picnic, cook before eating, weighting 4 pounds 5 ounces. It was placed
page 268 } skin side up on a rack in a shallow pan. Electric oven was preheated 30 minutes. Thermocouples were inserted in the picnic, and the picnic was placed in a 325-degree-Fahrenheit oven for three hours. This is similar to the directions that we have on the package.

Q. And is the interpretation of that chart the same as the interpretation of the other chart you introduced?

A. Yes, it is. The same heavy black line with the unused thermocouples in an ice bath. Then the other lines going up gradually are the thermocouples inserted at different positions in the meat. Then this zig-zag line here is the oven temperature of the oven that we used for the test, and it fluctuates, cycles between 300 and 350 degrees Fahrenheit, so that the median temperature is 325. It is the same type of test.

Q. Then if you can understand the other chart, then can you take this one—if I can understand the other one, can I understand this one?

A. Yes, sir.

Mr. Robertson: I offer this in evidence.

Mr. Emroch: We object, if Your Honor please.

*Lorraine R. Berger.*

Mr. Robertson: And marked Defendant's Exhibit I.

Mr. Emroch: I understood the witness to read that it was cooked in an electric oven. Is that right?

The Witness: Yes, sir.

page 269 } Mr. Emroch: This one was cooked in an electric oven and the other one was cooked in a gas oven?

The Witness: Yes, sir.

Mr. Emroch: And preheated for different lengths of time, and the evidence as far as Mrs. Wells' testimony was it was cooked in a gas oven.

The Court: This is an exhibit that corresponds to what would happen if the directions on the package were followed, and so I don't see where it makes any difference what kind of an oven it were cooked in, do you?

Mr. Emroch: I think so, because Mrs. Wells has testified she followed the directions on the wrapper up until two years ago in a gas oven.

Mr. Robertson: I think that goes to the weight the jury chooses to give to it, Your Honor.

The Court: Let me ask this witness: If this had been cooked in a gas oven, from your experience in making these tests, would this chart be substantially different?

The Witness: No, sir, not if the oven temperatures that you are comparing are the same. If you have a gas oven and an electric oven, both of them at the same internal temperature, the results should be the same. The type of heat shouldn't make any difference.

The Court: The gas or electricity doesn't come in contact with the product being cooked, does it?

page 270 } The Witness: No, sir.

The Court: Is it the heat generated by that utility that does the work?

The Witness: Yes, sir.

The Court: Objection overruled.

Mr. Emroch: Exception noted.

The Court: It may be marked as Defendant's Exhibit I.

(The document above referred to was received in evidence as Defendant's Exhibit I.)

By Mr. Robertson:

Q. Will you look at the chart of the first test you have reported there and see what the internal temperature of the meat was as recorded there?

*Lorraine R. Berger.*

A. You mean this chart (indicating Defendant's Exhibit H)?

Q. When you concluded the test, what was the internal temperature of the meat?

A. At the conclusion of the test—the lowest—you want the lowest internal temperature?

The Court: You better ask her at some specific time, Mr. Robertson, because I don't know what you mean.

By Mr. Robertson:

Q. When did you take the last temperature reading of the interior part of the meat?

page 271 } A. At the end of the hour standing period the temperature then was 142 degrees Fahrenheit, at the conclusion of the test.

The Court: This is after it has cooled off at room temperature?

The Witness: Yes, sir, after it has been standing on top of the range.

By Mr. Robertson:

Q. Do you show the temperature when you took it out of the oven?

A. Yes, sir, I can give you the temperature any time.

Q. All right, what was the temperature when you took it out of the oven, the internal temperature?

The Court: These four—what do you call them?

The Witness: Thermocouples. They are just wires.

At the end of the 30-minute oven cooking period, the lowest internal temperature was 128 degres Fahrenheit. Then during the standing period it continues to rise.

By Mr. Robertson:

Q. And what was the highest?

A. The highest temperature was reached during the standing period; that was 143 degrees Fahrenheit, and it remained so for a period of about 34 minutes.

The Court: What was that range of temperature, now, the lowest to the highest?

page 272 } The Witness: Well, the ham began when it—

The Court: No, I don't mean that. The lowest thermocouple.

*Lorraine R. Berger.*

By Mr. Robertson:

Q. When you took it out.

A. When I took it out of the oven the lowest temperature was 128 degrees Fahrenheit. Then as it stood the temperature continued to rise and reached 143 degrees Fahrenheit and remained at this temperature for 34 minutes and began to drop.

Q. Which thermocouple was that? Where was that?

A. No. 1 and No. 7 are the ones on this chart.

The Court: I am talking about at what part of the meat.

The Witness: In the center of the largest muscle in the meat. There is one large muscle on one side of the bone and a smaller one on the other side. This was in the largest muscle.

By Mr. Robertson:

Q. How far down in the meat would that be?

A. It should be in the center. I took a metal skewer and stuck it through the meat from top to bottom and then measured the skewer. I am trying to remember what it was. Three and a half inches or thereabouts. Then I took the measurement of half of that skewer and put the wire in to that depth so that it would be right in the center of the meat.

page 273 } Q. Now, take that other test that you made according to the instructions on the wrapper and show what those heats were when you took it out of the oven.

A. See, as I remember, this was—yes, "removed from oven, end of cooking period," the lowest temperature was 161 or -2 degrees Fahrenheit.

Q. And were those things put in the meat the same way there that they were in the way you have described to His Honor?

A. Yes, sir. I will check the bottom. Yes, they were. In this instance I had thermocouples 1 and 5, instead of 1 and 7, in the center, but that doesn't matter, as long as they are numbered.

Mr. Robertson: Witness with you.

*Dr. J. H. Silliker.*

CROSS EXAMINATION.

By Mr. Emroch:

Q. Miss Berger, you didn't bring either one of these hams with you that you cooked?

A. No, sir. The one in April, of course, I presume is long since disposed of. I didn't bring the one with me that I cooked in December.

Q. Well, who disposed of the one that you cooked in April?

A. It is our custom to give the products which we have cooked and which we have left over from tests to the cafeteria so that it can be used, rather than just throwing

page 274 } it away.

Q. Do you know whether it was given to the cafeteria?

A. I don't recall whether the one last April was. The one this December, when I left I asked them to please do this. I assume they have. I don't know.

Q. Gave it to the cafeteria?

A. Yes.

Q. And that's your Swift Company cafeteria?

A. Yes, sir.

Q. For distribution to the persons who come to the cafeteria?

A. Yes, sir.

Q. And they eat it?

A. Yes, sir.

Q. And as far as you know, it has been eaten?

A. I don't know.

Q. But it was given by you to the cafeteria for that purpose?

A. Yes, sir.

Mr. Emroch: No further questions.

* * * * *

DR. J. H. SILLIKER,

was called as a witness on behalf of the Defendant and, being first duly sworn, was examined and testified as follows:

page 275 }

* * * * *

*Dr. J. H. Silliker.*

Q. Are you in the full-time employ of Swift and Company?
A. Yes, sir.
Q. Where are you located?
A. Chicago, Illinois.

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page 278 }

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Q. Are you familiar with the role of bacteria in food processing?
A. Yes, sir, that's my job.
Q. If a live hog—I am speaking of an animal—infested with sufficient staphylococci to result in presence of toxin, would a carcass, after slaughter, show presence of the bacteria?
A. If the live hog had enough staphylococci present in it to have toxin present in it, it wouldn't be a live *hot* anymore, it would die. However, if the animal had a staphylococcus infection with large numbers of staphylococci in the body, the *meet* inspection veterinarians would detect this at the time of post-mortem inspection.
Q. Have you heard the entire evidence and testimony in this case? Have you been in the courtroom the entire time?
A. Yes, sir.
Q. Well, if the staphylococci were in the hog in the way you have described, would that be obvious to a U. S. Food Inspector if he did his job properly?
A. You mean if the staphylococci were present
page 279 } in the hog in sufficient numbers to have toxin present in the hog?
Q. Yes, sir.
A. Yes, sir, it would take the form of an inflamation in some part of the body which would cause the inspector to reject the animal. I will say that there has never been a case on record of toxin in a living animal.
Q. Does staphylococcus bacterial when ingested by human beings cause food poisoning?
A. No, sir, the staphylococcus organisms do not produce food poisoning if they, themselves, are ingested.

*Dr. J. H. Silliker.*

Q. What, if anything, then, associated with staphylococcus bacteria, could cause food poisoning?

A. There are a certain limited number of strains or individual types of these staphylococci which are capable, when they grow rapidly in large numbers, of producing a toxin, and this toxin, when it is ingested, causes a disease known as food poisoning with certain characteristic symptoms.

Q. Well, now, you say you have heard the evidence here and being connected with Swift and Company in the way you stated, how is the product handled by Swift and Company to eliminate the possibility of toxin or poison formation if it is so handled?

A. Well, the landling of the product, you mean, from the time the animal is slaughtered?

Q. Yes, sir.

page 280 } A. When the animal is slaughtered, of course, all the operations are under Government inspection and the animal is bled after it has been killed, and after the animal is bled, the internal organs of the animal are removed. The tissues of the animal are washed, and we now have a carcass of the animal with the internal organs removed from the cooler and this chilled carcass is now—the entire carcass is at a temperature below which the staphylococci grow, and the carcass is then cut up into the primal chunks of meat.

Now, this is important, because at this time any areas of the carcass that would have any contamination on them at all reach a temperature below which the organisms will not grow, the staphylococci or other food poisoning organisms. The inside tissues of the animal are sterile at this time, or essentially sterile. Then after this chill period, the next day, usually, but it may be two days, the chilled carcass is removed from the cooler and this chilled carcass is now—the entire carcass is at a temperature below which the staphylococci grow, and the carcass is then cut up into the primal chunks of meat.

This operation is carried out very rapidly, and the primal chunks of meat may then be sold as fresh pork, or they may be frozen, an operation which is done immediately, or they may be pumped with pickling solutions to

page 281 } make a cured-meat product.

Now, it has been shown that during this curing period of some 6 to 14 days during which the product is below 36 degrees, is in the range of 36 to 38 degrees Fahrenheit, that staphylococci, even if they are on the product, will not

grow. There is published information to this effect that they do not grow during this curing period.

Now, following the curing period the cured meat may be shipped to another unit, such as in this case, or it may be put into a smoke house and smoked at the unit where it was cured. If it is shipped to another unit, it is shipped under refrigeration; it is shipped under conditions where any contaminants that might be on there in small numbers do not multiply because of refrigeration. Then it goes into a smoke house, and under controlled conditions the temperature of that product is raised from the 36-to-38 degrees up to, in this type of ham, 137 degrees Fahrenheit minimum, following which the ham is allowed to cool and then is put into a cooler until it is disposed of as a wrapped ham.

Now, in this smoke house this ham passes through an incubation zone for the growth of staphylococci. In other words, it passes through that zone somewhere between 50 and 115 degrees Fahrenheit where, if other things were proper, there would be a short time where they might grow, but there

page 282 } have been studies made which have shown that even if the pickle with which the ham is pumped is contaminated with staphylococci intentionally, that during neither the curing period nor the smoking period is one able to demonstrate any growth of these staphylococci. And ham, even though it had been innoculated with staphylococci, comes out of the smoke house free of these organisms, and then, of course, it is chilled down to a temperature which again will not allow any growth of the staph.

Q. Doctor, at what temperature are staphylococci killed in ham?

A. A ham which is put into the smoke house and reaches an internal temperature of 137 degrees Fahrenheit will contain no staphylococci.

Q. Now, you have heard the testimony in this case that the ham involved in this case reached an internal temperature of 138 to 140 degrees during smoking. Would this temperature kill any staphylococci in the ham shoulder?

A. Yes, it would, and there is published information to back up that statement.

Q. You have heard Miss Berger's testimony that a shoulder weighing 4 pounds 5 ounces was cooked by her in her laboratory according to the instructions on the label and another time according to the method described by Mrs. Wells—

Mr. Rosner: Not so, Your Honor.

*Dr. J. H. Silliker.*

Mr. Robertson: No, that's wrong. I forgot that.

page 283 } By Mr Robertson:

Q. And then at another time in a different way than the first test, the one not related to the instructions on the wrapper. In the first test where she introduced the first chart, an internal temperature of—I have forgotten, would you look on the chart there and see what was—can you look there on that chart?

A. Yes, it reached 143 degrees for 38 minutes.

Q. Would that kill the staphylococci if there were any there?

A. That would kill the staphylococci if there were any in there. As it happens, the milk code and ordinance recommended by the United States Public Health Service calls for pasteurization of milk, for instance, for a period of 30 minutes at 143 degrees. This pasteurization is geared or set up to kill the tubercular bacillus, which is an extremely heat-resistant organism as compared to the staphylococci, so a period of 38 minutes at 143 degrees is beyond pasteurization temperature and time, and any staphylococci that would have been present—might have been present in there—would have been eliminated by this cooking schedule, and it would be dead in the ham at the end of the cooking period.

Q. Would that same generalization apply to the other cooking test that she made in conformity with the instructions on the wrapper?

page 284 } A. In the other test the product reached 162 degrees at the time it was brought out of the oven. In the milk code and ordinance to which I referred, there is an alternative to 143 degrees for 30 minutes. If you wish, you can heat the product to 160 degrees for 15 seconds, and most certainly the organisms would have been killed in this product also.

Q. Doctor, based upon the evidence in this case as you have heard it, in your opinion was the shoulder ham which was involved in this case—did it have either staphylococci or the toxin resulting from it in it in a manner that caused the illness of which this lady has complained?

A. In my opinion it did not, because if it had had toxin in there, there would have been hundreds of millions of viable—that is, living—staphylococci present, or it would have had hundreds of millions of dead staphylococci observable under the microscope. Since it had neither, I can only

conclude that it could not have contained toxin at the time it was consumed.

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page 286 }

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Q. Around 3 or 4 weeks went by under temperatures of somewhere around 35, 40 degrees, insofar as the evidence went. Now, you also heard that there were three days in which this shoulder was in the Richmond plant where there are no temperature records, is that correct?

A. That's correct.

Q. And there are no temperature records as to the five days during which this shoulder was in transit and unwrapped, is that correct?

page 287 } A. That's correct.

* * * * *

Q. Is five days a sufficient incubation period for staphylococcus in a shoulder?

A. At what temperature, sir?

Q. At favorable temperature.

A. What do you call favorable temperature?

Q. Room temperature.

A. Yes, at room temperature.

page 288 } Q. At August temperature?

A. If the product had been at room temperature?

Q. Right. And this was during August and September.

A. That's right.

Q. And there is no evidence in this case as to what the inside temperature of that car which was refrigerated by ice, which melts, is there?

A. No, if the ice didn't melt, you'd have no refrigeration, of course. We are glad it does.

Q. Now, in answer to my question, was five days a sufficient period for staphylococcus to incubate and produce symptom-producing toxin? Is that a sufficient period at August and September temperature?

A. You are assuming now that it was at the temperature

outside of the car, or are you assuming temperature inside the car?

Q. Assuming—

Mr. Robertson: Wait a minute, let the witness finish.

The Witness: I can't answer your question unless you tell me what the temperature is you are talking about.

By Mr. Rosner:

Q. If the temperature got above 50 degrees in the car, would the staph not start multiplying and producing toxin?

A. For how long?

page 289 } Q. If the temperature was above 50 degrees for 5 days?

A. They most certainly could multiply and produce toxin if they were present.

Q. And for four days?

A. For four days or for three days.

Q. And for three days? And the higher the temperature goes, the shorter the incubation period becomes, is that correct?

A. The higher the temperature, the shorter the incubation period? I don't understand what you mean.

Q. The higher the temperature, the less time it would take for the toxin to be produced in sufficient quantities to affect a person?

A. That's true.

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page 292 }

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Q. Yes, sir. Now, is there any odor or taste or change in appearance in a piece of meat, or let's refer specifically to a smoked shoulder that has become poisonous due to staph toxin?

A. There is none.

Q. You can't taste it, you can't smell it, and you can't see it?

A. That's right. You can see the organisms in it.

Q. Well, you all don't go around—

The Court: You are talking about with the naked eye?

*Dr. J. H. Silliker.*

By Mr. Rosner:

Q. Naked eye.

A. No, to the naked eye.

Q. This cellophane wrapper that is put on the shoulder, that would prevent germs from going into it, wouldn't it, staph germs?

A. The staph organisms will not go through that cellophane. If there are breaks through the seal or something like that, then they are not going through the cellophane.

Q. But an intact wrapper?

page 293 } A. That's right.

Q. No staph germ could get to that meat?

A. No.

Q. Only when the wrapper is off?

A. That's correct.

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page 294 }

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Q. Do you think that three or four hours is a sufficient time for toxin to be produced in a ham?

A. You mean a three or four-hour incubation period?

Q. Yes, say at a temperature ranging from about 60 degrees to about 100 or 105 degrees, favorable temperature.

A. Well, three or four hours at 60 degrees probably wouldn't do it, but if you get up to a little higher temperature with a high enough inoculum with enough staph on the product at that moment, depending on the product, again, it could form toxin.

Q. It could? That's all.

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page 296 }

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Q. Doctor, could you sum up your testimony, would it be a fair summation of your testimony to say that every symptom of staph poisoning was present with the exception of what you are saying about the dead germs?

A. I would say that with respect to the illness which I

heard described in the testimony that Mrs. Wells' symptoms could have been staph food poisoning, could have been an infection of some sort not involving staphylococci, because there are other types of food poisoning besides staphylococcus food poisoning. I would say that there are certain peculiar aspects about it, in that the duration of her illness was rather long; the duration of her symptoms, being over a week, were much longer than one usually finds in staph food poisoning. A patient may feel ill for that long, but usually doesn't show diarrhea and nausea and vomiting for that length of time. I would say that it is rather odd that the first time she ate the food that she felt as well as she did the next day, well enough to eat a good breakfast and a good lunch the next day. However, this doesn't rule out the possibility it was food poisoning. I don't say page 297 } she wasn't suffering from food poisoning, I don't know. She could have been suffering from something else.

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page 298 }

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DR. M. E. HIBBARD,

was recalled as a witness on behalf of the Defendant and, being previously duly sworn, was examined and testified further as follows:

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page 306 }

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Q. And you were also mistaken earlier this afternoon about your testimony about the examination being made in the Health Department of the state about putting this stain on a glass?

A. I don't follow you.

Q. And finding staphylococci on the stained glass?

A. As I recall my testimony, I was going to say that they made smears and didn't find any staph. I don't know.

*Julius James McCraney.*

page 308 }

* * * * *

Q. Were you the manager of the Richmond plant of Swift and Company in August and September and October in 1956?

A. Yes, sir.

Q. During that time did Swift and Company do any advertising through the Richmond plant at all, anywhere, of Swift and Company Premium picnic shoulder or ham?

A. No, sir. No, sir.

Q. None whatsoever?

A. No, sir.

Q. The testimony in this case is that the Richmond Swift and Company plant sold a lot of Premium picnic shoulder hams to Roberson's Super Market on September 5th, 1956, which I believe was the following Monday, Labor Day, of that week. Do you know whether or not any shoulder—when the last shoulder hams had been sold to Roberson's Super Market prior to that date?

A. No, sir, I don't know the last day.

Q. Do you know how long those shoulder hams that were sold on September the 5th, 1956, had been in the Richmond plant?

A. We had a shipment to come in August the 28th, and they were processed and delivered the following week to Mr. Roberson.

page 309 } Q. Did they have any others at the plant that that shipment came in on August the 28th?

A. No, sir. That was prior to the holiday week-end, as you mentioned, and picnics at that time of the year are seasonable, and we had sold out, and we needed to process that particular lot that came in in order to make delivery on it.

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The testimony on this insert, page 121-A, follows the introduction of the witness, Julius James McCraney, near the bottom of page 121 of the printed record.

*Julius James McCraney.*

Q. I thought you said this afternoon that they did find some, in answer to the Court's question.
A. I am sorry if I misspoke it.

The Court: Clear it up at this time.
The Witness: They didn't find on a smear any staph at all.

By Mr. Emroch:
Q. So if you said they did find some earlier, you were mistaken?
A. Right; if I said that, I misspoke. The organisms we found, of course, we grew them on culture, grew them in culture medium, something like if you have got a few seeds here from radishes, you sow them in good, rich soil.

A Juror: You mean, you put staphylococci in there that had not been in there before?

page 307 } The Witness: No, no, we took a sample of the ham, or the laboratory did, see, that was brought to us, and we took that ham and we mashed it all up in a sterile mortar, see, and you mix that in with a nutrient medium that will grow the bacteria. So that maybe you only had one there; it would be rather difficult to locate that one all by himself, it's like a needle in a haystack. We took that one in a medium that will make him multiply, so pretty soon he's got lots of brothers and sisters, so we can see them, and we knew it all came from that one which came from the ham.
Mr. Emroch: That's all.

* * * * *

JULIUS JAMES McCRANEY,
was called as a witness on behalf of the Defendant and, being first duly sworn, was examined and testified as follows:

* * * * *

page 310 }

* * * * *

Q. Now, there have been introduced in evidence copies of Life Magazine for April 9, 1956 and June 4, 1956, and I

will ask you, sir, whether that isn't an ad of Swift and Company that I am holding now, Plaintiff's Exhibit No. 6?

A. That is, but I don't see any picnics on it.

Q. I didn't ask you that, sir. It is an ad of Swift and Company?

A. It is an ad, yes.

Q. And of Swift and Company?

A. It is an ad of Swift and Company.

Q. All right, I will ask you to tell me whether Plaintiff's Exhibit No. 5, which I am holding in my hand, is an ad of Swift and Company.

A. Not of picnics.

Q. I didn't ask you that, sir.

A. Well, it's an ad of Swift, yes.

Q. You watch television, sir?

A. Yes, sir.

Mr. Robertson: If Your Honor please, I want it understood that this entire line of cross examination is subject to the same exception that I made before. I don't
page 311 } want to keep on objecting.

The Court: That is understood.

Mr. Emroch: Well, I'd like to be heard on that.

The Court: I have already overruled it. The Court's ruling is the same.

Mr. Emroch: Mr. Robertson has opened it up to a certain extent.

By Mr. Emroch:

Q. Are you familiar with the Tennessee Ernie Ford program?

A. Yes, sir.

Q. Swift and Company advertised its products over that television program in 1956, did it not?

A. Um-hum.

Q. The answer is yes?

A. Yes.

Q. You are familiar with the Disneyland program?

A. No, I am not.

Q. Never watch that?

A. No.

Q. Are you familiar with the ads that I just showed you in Life Magazine which refers to the fact that these particular products or one or two of them, particularly the hot dogs or the franks are sold exclusively in Disneyland? Did

you catch that as you opened up Life Magazine?

page 312 } A. No, I did not.

Q. Are you familiar with the arrangement which your company has with Disneyland?

A. No, sir.

Q. Did you ever watch the Horace Hite program over television?

A. Yes.

Q. Did Swift and Company advertise over Horace Hite's program?

A. That's right.

Q. Prior to September 1956?

A. That's right.

Q. What other television programs and radio programs does Swift and Company advertise—or used for advertising prior to September 1956?

A. Well, they used Don McNeill on radio, not TV.

Q. That is the Breakfast Club, isn't it?

A. That's right.

Q. And that comes on from 9:00 a. m., to 10:00 a. m., in the mornings over network ABC?

A. That's right.

Q. All right, sir, what others?

A. I don't know of any others.

Q. What other magazines besides Life Magazine have Swift and Company used, or did they use for

page 313 } advertising prior to September 1956?

A. Well, they have used the Ladies Home Journal, Women's Home Companion. That's about all I can recall.

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page 317 }

• • • • •

JAMES W. CRADDOCK,

was called as a witness on behalf of the Defendant and, being first duly sworn, was examined and testified as follows:

• • • • •

page 318 }

• • • • •

*James W. Craddock.*

Q. Are you connected with Swift and Company in any capacity?

A. Yes, sir; I am a member of the Advertising Department.

Q. How long have you been with Swift and Company?

A. About 12 years.

* * * * *

page 320 }

* * * * *

Q. One of the best media of advertising today
page 321 } is television, isn't it?

A. Well, there are good—television has a lot of impact, yes.

Q. Television has terriffic impact, because it goes right into the living room of the home, doesn't it?

A. Yes, sir, but newspapers are read in the living room of the home, too.

Q. And magazines?

A. Yes, sir.

Q. National magazines, such as Life Magazine, Look, Women's Home Companion?

A. Yes, sir.

Q. They have a terriffic impact, also, particularly on women?

A. Yes, sir.

Q. And the reason you put these advertisements in the magazine and over the radio and over television is to sell your products, isn't that correct?

A. Yes, sir.

Q. And the reason you advertise some of the products is because you'd like for those to be the products that bring the customer into the store, but you also would like for them to buy all Swift products, would you not?

A. I'd say so, yes, sir.

Q. You are not saying that you don't want the
page 322 } public to buy shoulder picnics by the fact you don't advertise?

A. No, sir; we hope that if we advertise Premium frankforts, for example, that they will buy a lot of other Swift products, too.

Q. Sure, buy the bacon and buy the sausage?

*James W. Craddock.*

page 319 }

* * * * *

Q. In your position with Swift and Company, what do you have to do with advertising by the company on the national level?

A. Well, I am what they call a group head in the department, and various products are under my jurisdiction, including smoked meat items and dairy and poultry products and beef, ham, and veal.

Q. Is it within your personal knowledge whether or not Swift and Company has done any advertising whatsoever of its Premium picnic shoulder hams, say, during the period of five years including and preceding the year 1956?

A. The last smoked picnic advertising, sir, was the summer of '53, four and a half years ago, almost five.

Q. Why did they quit advertising?

A. Well, the budget didn't warrant it. The various product departments come to us and ask us to advertise and give us the amount of money to do it, and the picnic people just—

Q. —got left out?

A. —haven't had the money to do it.

Q. How old a company is Swift and Company?

A. Swift is 102 years old.

Q. What would you say its gross volume of business has averaged for the last two or three years, including

page 320 } 1956?

A. The dollar sales volume has been approximately two and a half billion dollars. Now, tonnage I am not familiar with, pounds.

Q. How does that rank in size with other companies in the United States which process the same products?

A. Well, Swift is the largest meat-packing company in the country.

The testimony on this insert, page 124-A, was omitted from page 124 of the printed record. It should apear between the two rows of asterisks near the top of page 124.

*James W. Craddock.*

A. Yes, sir.
Q. Well, how many meat products does Swift make?
A. Oh, gosh, if you get down to the cuts—

The Court: Just estimate them.

By Mr. Emroch:
Q. Estimate 200?
A. I would say a couple of hundred.
Q. Couple of hundred. And you also do mail advertising?
A. By mail?
Q. Direct mail to the homes?
A. Direct mail to the homes?
Q. Yes.
A. Yes, sir, we do, meats for babies, I know, has a direct mail campaign to doctors, for example, and to new mothers.
Q. But do you find that the cost of television advertising is more productive of sales?
A. That is a hard one to answer. I mean, some ads are productive, some are not. You know, what makes a good ad.
Q. And in your advertisements you represent that the Swift products are wholesome and fit for human
page 323 } consumption, do you know?
A. We put our best foot forward, yes, sir.
Q. Are you familiar with the Disneyland program?
A. Yes, sir, somewhat.
Q. When did Swift and Company start advertising over Disneyland?
A. I couldn't tell you; '56, I would say, but that's just a guess.
Q. And that's a program that comes on on Wednesday nights at 7:30 p. m.?
A. Yes, sir.
Q. Would that be the same time in Chicago that it is in Richmond?
A. Chicago would be 6:30.
Q. Chicago at 6:30 and Richmond 7:30, p. m., over ABC national television network?
A. Yes, sir.
Q. And are you familiar with the fact that some of Swift's products are sold exclusively in Disneyland in California?
A. Vaguely. That isn't my sphere, but I do know we have a restaurant there, I believe, that sells Swift products.
Q. And Swift is a well known national and international brand, isn't it?

*Dr. Miles E. Hench.*

A. Yes, sir, we sell—we have a branch in Lon-
page 324 } don, branch in South America, branch in Canada.
Q. It's a well known national brand?
A. Yes, sir.
Q. And you advertise under the name of Swift?
A. Yes, sir.

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page 333 }

* * * * *

DR. MILES E. HENCH,
was recalled as a witness on behalf of the Plaintiff and, being previously duly sworn, was examined and testified further as follows:

* * * * *

page 338 }

* * * * *

Q. Now, Dr. Hench, assuming that a smear was made in this case by the State Health Department and no Hemolytic staphylococcuc germs seen as a result of that microscopic examination of that smear, would that in any way change your opinion given on Wednesday that the Hemolytic staphylococcus aureau germs were in the meat before it left the possession of Swift and Company?

Mr. Robertson: If Your Honor please, that is not what the doctor testified to. He testified that on the facts as stated in that hypothetical question before our side of the story came into the thing that they could have been present when it left Swift and Company under the facts as they were then as assumed in the hypothetical question, over our objection. I submit that this question is an improper question.

The Court: I am not sure that is the exact phraseology the doctor used, and I think you ought to strike out from your
question the last phase of it and ask him if it
page 339 } would change his opinion.
Mr. Emroch: All right, I will amend the ques-

tion by striking out the last part of the question and say, "Does that change your opinion given in this case on Wednesday?"

Mr. Robertson: Wait a minute, if Your Honor please. I think before they ask the witness that, in fairness to himself, he ought to know what the subsequent testimony is in this case.

The Court: That's up to you to ask him.

By Mr. Emroch:

Q. Will you now please answer the question, if you remember it?

A. The question concerns the fact that few or no organisms were seen on a smear?

Mr. Robertson: No, not a few; no.

By Mr. Emroch:

Q. No organisms.

A. No organisms were seen on specimen taken from the source?

Q. That's correct.

A. And does that change my opinion?

Q. That's correct.

A. No, sir, it does not.

Q. Why not?

A. Well, a smear, a slide is made by taking a small portion of the material, spreading it in a thin film over page 340 } the surface of a slide. A positive finding of some organisms there is certainly conclusive evidence; not finding them simply indicates that that portion from which you took this particular material that you put on the slide contains no organism. It does not tell you anything about any other portion of that specimen.

* * * * *

Q. It's been testified here in evidence that the Swift Premium shoulder came out of some room in the Richmond plant at a temperature from 30- to 35-degrees and entered a smoke house at 3:00 p. m. on August the 30th, 1956—would you like to have a piece of paper?

A. If you please, if this is going to be—

Q. I will start off again.—that it came out of some room in the Richmond plant at a temperature of 30- to 35-degrees—

*Dr. Miles E. Hench.*

and entered the smoke house on August the 30th, 1956, about 3:00 p. m., or at 3:00 p. m. with a starting temperature in the smoke house of 124 degrees and remained in the smoke house until the following day at noon with a terminal temperature in that room of 154 degrees, having reached, however, during that time at 7:00 a. m. that morning a
page 341 } maximum temperature of 156 degrees and when the shoulder left the smoke house it had an internal temperature of 138 to 140 degrees and was taken from the smoke house and placed in a room with room temperature where it remained for five hours, unwrapped, and then put in the cooler room where it was wrapped in cellophane wrapper.

Now, Dr. Hench, based on that evidence, will you tell the Court and jury, please, sir, whether during that particular period from 3:00 p. m. on August 30th until 5:00 p. m. on August 31st, during which time it was in a smoke house and in the room with room temperature, there was any period, in your opinion,that Hemolytic staphylococcus aureus germs, if they were present before they went in the smoke house, could have grown and could have given off enterotoxin?

Mr. Robertson: I think I know his answer.

Mr. Emroch: I'm glad that you do, but I'd rather he give it.

Mr. Robertson: I bet you I do.

The Witness: Yes, sir, it could have.

By Mr. Emroch:

Q. Now, will you tell the Court and jury, please, sir, how you arrive at that decision and opinion?

A. The staphylococci grow and produce toxin during that growth period in small quantities from 50 degrees Fahrenheit to somewhere around 115 degrees Fahrenheit. They produce it reasonably well between the tempera-
page 342 } tures of 70 degrees and 107 degrees Fahrenheit and these figures are translated from Centigrade to Fahrenheit. This ham started out, or this meat started out at 30 degrees, and it reached 140 degrees. In the period of time that is given to me for it to go from the cold to the warmer temperature, if there was an uniform heating pattern, as would be indicated, then this means that this 110 degree rise in temperature to the ham's maximum temperature took place at a rate of five degrees per hour.

*Dr. Miles E. Hench.*

We have, between the excellent toxin-producing temperatures of 70 and 107, rather then the outside ones, a spread of 37 degrees. At five degrees per hour, then, this ham would have remained within that suitable safe growing range for a period of 5 divided by 37, or approximately seven hours. At body temperature, which is 98.6 Fahrenheit, it has been demonstrated that these organisms can produce sufficient toxin to give symptoms when fed to allow a human being, in three hours. This is, then, enough time to produce toxin which would produce symptoms.

Further, the maximum temperature reached here is 140 degrees. There is no information available as to how long it stayed at 140 degrees. One hundred forty degrees is equivalent to 60 degrees Centigrade. At 60 degrees Centigrade it takes something more than 30 minutes to sterilize a preparation of staphylococci to kill them off. Then, if the maximum temperature reached by the ham was not held for a long enough time, this cooling process back down to page 343 } room temperature for five hours would give an additional opportunity for any remaining staphylococci to continue their growth and, as they grow, to produce the toxin. So then you would have two opportunities, on the way up and on the way down in temperature.

Q. Now, if it then was wrapped with cellophane and reduced to a temperature of anywhere from 30 to 35 degrees, what would happen to the Hemolytic staphylococcus aureus germs in there, if any were in there, and what would happen to the enterotoxin that was given off by the germs during that heating and deheating period?

A. Nothing would happen to the toxin at all, and surviving organisms in the preparation would be preserved. They could be preserved that way for months.

Q. If a piece of meat, such as we have in this case, is cooked in a pressure cooker and reaches a maximum internal temperature of 147 degrees, what, if anything, would happen to the enterotoxin that may have been contained in the meat. Excuse me, Doctor, I think I want to change that from 147. I think the evidence is 143 degrees Fahrenheit, if that makes any difference.

A. I just figured it out for 147. I will figure it out for 143, too.

The Court: I understand that, here we want to know what would happen to the toxin, if any.

*Dr. Miles E. Hench.*

page 344 } By Mr. Emroch:

Q. What would happen to the toxin if any was in the meat?

A. No, sir, 143 degrees—

Mr. Robertson: I think I'll object to that on the ground that it is undisputed here that the toxin would remain here.

The Court: That's what I understand all the evidence to be.

* * * * *

A Copy—Teste:

H. G. TURNER, Clerk.

# INDEX TO RECORD


| | Page |
|---|---|
| Writ of Error and *Supersedeas* Awarded | 1 |
| Record | 2 |
| Second Amended Motion for Judgment | 2 |
| Instructions | 4 |
| Judgment—July 25, 1958 | 5 |
| Opinion | 6 |
| Notice of Appeal and Assignments of Error | 14 |
| Assignment of Cross-Error by Plaintiff | 15 |
| Witnesses: | |
| Frank H. Wells | 16 |
| Dr. Richard Lehmann | 23 |
| Jean C. Wells | 24 |
| L. T. Roberson | 39 |
| Miles E. Hench | 43, 126 |
| Sidney A. Stroud | 56 |
| R. F. Thome | 67 |
| J. R. Collins | 85 |
| Dr. M. E. Hibbard | 86, 120 |
| Esther Figley | 99 |
| Lorraine R. Berger | 101 |
| Dr. J. H. Silliker | 112 |
| Julius James McCraney | 121 |
| James W. Craddock | 123 |
| Proceedings | 55 |

## RULE 5:12—BRIEFS

**§1. Form and Contents of Appellant's Brief.** The opening brief of appellant shall contain:

(a) A subject index and table of citations with cases alphabetically arranged. The citation of Virginia cases shall be to the official Virginia Reports and, in addition, may refer to other reports containing such cases.

(b) A brief statement of the material proceedings in the lower court, the errors assigned and the questions involved in the appeal.

(c) A clear and concise statement of the facts, with references to the pages of the printed record when there is any possibility that the other side may question the statement. When the facts are in dispute the brief shall so state.

(d) With respect to each assignment of error relied on, the principles of law, the argument and the authorities shall be stated in one place and not scattered through the brief.

(e) The signature of at least one attorney practicing in this Court, and his address.

**§2. Form and Contents of Appellee's Brief.** The brief for the appellee shall contain:

(a) A subject index and table of citations with cases alphabetically arranged. Citations of Virginia cases must refer to the Virginia Reports and, in addition, may refer to other reports containing such cases.

(b) A statement of the case and of the points involved, if the appellee disagrees with the statement of appellant.

(c) A statement of the facts which are necessary to correct or amplify the statement in appellant's brief in so far as it is deemed erroneous or inadequate, with appropriate references to the pages of the record.

(d) Argument in support of the position of appellee.

The brief shall be signed by at least one attorney practicing in this Court, giving his address.

**§3. Reply Brief.** The reply brief (if any) of the appellant shall contain all the authorities relied on by him not referred to in his opening brief. In other respects it shall conform to the requirements for appellee's brief.

**§4. Time of Filing.** As soon as the estimated cost of printing the record is paid by the appellant, the clerk shall forthwith proceed to have printed a sufficient number of copies of record or the designated parts. Upon receipt of the printed copies or of the substituted copies allowed in lieu of printed copies under Rule 5:2, the clerk shall forthwith mark the filing date on each copy and transmit three copies of the printed record to each counsel of record, or notify each counsel of record of the filing date of the substituted copies.

(a) If the petition for appeal is adopted as the opening brief, the brief of the appellee shall be filed in the clerk's office within thirty-five days after the date the printed copies of the record, or the substituted copies allowed under Rule 5:2, are filed in the clerk's office. If the petition for appeal is not so adopted, the opening brief of the appellant shall be filed in the clerk's office within thirty-five days after the date printed copies of the record, or the substituted copies allowed under Rule 5:2, are filed in the clerk's office, and the brief of the appellee shall be filed in the clerk's office within thirty-five days after the opening brief of the appellant is filed in the clerk's office.

(b) Within fourteen days after the brief of the appellee is filed in the clerk's office, the appellant may file a reply brief in the clerk's office. The case will be called at a session of the Court commencing after the expiration of the fourteen days unless counsel agree that it be called at a session of the Court commencing at an earlier time; provided, however, that a criminal case may be called at the next session if the Commonwealth's brief is filed at least fourteen days prior to the calling of the case, in which event the reply brief for the appellant shall be filed not later than the day before the case is called. This paragraph does not extend the time allowed by paragraph (a) above for the filing of the appellant's brief.

(c) With the consent of the Chief Justice or the Court, counsel for opposing parties may file with the clerk a written stipulation changing the time for filing briefs in any case; provided, however, that all briefs must be filed not later than the day before such case is to be heard.

**§5. Number of Copies.** Twenty-five copies of each brief shall be filed with the clerk of the Court, and at least three copies mailed or delivered to opposing counsel on or before the day on which the brief is filed.

**§6. Size and Type.** Briefs shall be nine inches in length and six inches in width, so as to conform in dimensions to the printed record, and shall be printed in type not less in size, as to height and width, than the type in which the record is printed. The record number of the case and the names and addresses of counsel submitting the brief shall be printed on the front cover.

**§7. Effect of Noncompliance.** If neither party has filed a brief in compliance with the requirements of this rule, the Court will not hear oral argument. If one party has but the other has not filed such a brief, the party in default will not be heard orally.

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