

No 22

New Jersey Court of Errors and Appeals

W. A. MANDA, Incorporated, <i>Appellant,</i>	}	On Appeal.	10
<i>vs.</i>			
DELAWARE, LACKAWANNA & WEST- ERN RAILROAD COMPANY, Les- see of the Morris & Essex Railroad Company, <i>Respondent.</i>			

APPELLANT'S BRIEF.

This appeal grows out of proceedings in con-
 demnation instituted by the respondent against
 the appellant to acquire lands of the appellant
 located in the Village of South Orange, Essex
 County, New Jersey. 20

The petition for the appointment of commis-
 sioners in condemnation was filed July 20, 1914,
 and on that date the order to show cause was
 made.

The proceedings were prosecuted in the usual
 manner before the Commissioners and their
 award was made October 2, 1914. 30

From the award of the Commissioners the land-
 owner appealed to the Essex County Circuit
 Court. (p. 2.)

The cause was tried in the Essex Circuit No-
 vember 20th, 23rd, 24th and 25th, 1914, and re-
 sulted in a verdict for the landowner of \$17,000.

The award of the Commissioners was \$25,000.
 and judgment was therefore entered in favor of
 the respondent for the sum of \$8000. (p. 7.) 40

The questions involved in this appeal relate to the legality of the rulings of the trial court in the admission and rejection of evidence; to the legality of the charge of the court as delivered, and the refusal of the court to charge as requested.

Under the peculiar circumstances of this case the question is also raised whether the action of the trial court in refusing to set the verdict aside and grant a new trial, amounts in effect to oppression of the appellant.

The appellant owns a nursery property located at South Orange, New Jersey, comprising an area of about 20 acres. Practically all of this property is planted with nursery stock of large value. On it are erected greenhouses, packing sheds, etc. The railroad tracks of the respondent extend along the entire easterly side of the main portion of this nursery property, a distance of more than 1000 feet.

The condemnation proceedings were instituted to acquire additional lands to be used by respondent in connection with the elevation of its railroad tracks through South Orange.

The lands taken were a part of appellant's nursery property and consisted of a strip of land 62½ feet in width on Third Street and extending along the entire easterly side of the nursery a distance of 1006¼ feet and tapering to a width of 20 feet at the rear, or southerly end of the property.

The plan of construction introduced in evidence showed that on the land taken and on the adjoining right of way of the railroad company an embankment was to be raised varying in height from 16½ feet at Third Street to about 9 feet at the rear or southerly end of the strip taken. (p. 48, l. 19).

Nearly all of the land taken was covered to an average depth of 2½ feet with a very highly developed and fertilized compost top soil used for propogating purposes, and for growing and devel-

oping plants and shrubbery for sale. This top soil was also to some extent sold for use in planting and propagating nursery stock. (p. 34, l. 1; p. 74, l. 15 &c.)

The land taken was planted with nursery stock of large value, as was also all the land adjacent to the strip taken.

The big palm house of appellant is located about 35 feet from the line of the property taken and another large greenhouse is located about 90 feet from that line (p. 73, l. 10). 10

The grounds of appeal relied upon are as follows:

The following questions were overruled:

- (1) Q. (To the witness Louis H. Pierson) From your experience in connection with building work that you have done, are you able to give us the value of those buildings on this property? (p. 26, l. 27).
- (2) Q. (To the witness Albert A. Manda) Now, will you tell us, if you are able to, what percentage of decrease in the valuation of this shaded land will probably arise because of this embankment concerning which you have testified, and the proposed use of this property for railroad purposes? (p. 58, l. 15). 20
- (3) Q. (To the witness Albert A. Manda) Now, will you state what in your judgment will be the necessary annual expense to be incurred by reason of these conditions? (p. 62, l. 10). 30
- (4) Q. (To the witness Albert A. Manda) Mr. Manda, you were testifying to what you conceive to be the value of this strip of land, taken as land without the top soil on it, and you stated that you compared it with the Pierson property after allowing for the value of the buildings; at that time that was not in evidence as to the 40

value of this brick building. Now will you state what allowance you made for the value of the buildings on the Pierson property? (p. 143, l. 20).

R. P. Co. The following questions were admitted against respondent's objection:

- 10 (5) Q. (To the witness Charles I. Bech) Tell us what was paid for those seven acres? (p. 155, l. 27; 157, l. 1).
- (6) Q. (To the witness Julius V. Burgerman) How do the prices in the catalogs which you have examined for this class of stock compare with the prices which you have marked on this inventory? (p. 167, l. 25).
- 20 (7) Q. (To the witness James W. Wagner) Do you know, Mr. Wagner, whether or not the passage of locomotives along this track, passing your greenhouse, has had any effect on your plants in your greenhouse? (p. 170, l. 22).
- (8) The Court charged the jury as follows:

30 "As to the value of the land in question. Mr. Manda gives his opinion of its value. He is the owner of the land, and has a right to value it, and has valued it, and gives his judgment of the value of the land taken as mere land, 62½ feet on Third Street. He says by reason of the top soil which has been placed upon that land it has been made up, built up, year by year, and there is an added value of thirty cents a square foot for 36,550 square feet, or \$10,905, so that, according to his judgment, this land in its present condition is worth \$27,905. Mr. Farquhar, the gentleman from Boston, you will remember, gives no opinion as to the value of the land itself, but he gives his opinion of the value of the top soil, which

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he says is twenty-five cents a square foot, And Mr. Karlstorm, who is employed by Mr. Manda, also gives it as his opinion that this top soil adds thirty cents a square foot to the value of the land. These figures are not to be applied to this top soil as a mercantile proposition, as something that is to be taken from the land and marketed. These figures are to be considered by you in determining the value of the land as a whole. As is expressed in the railroad company's seventh request to charge, and which I conceive to be good law in this case, the rule is accurately stated thus: 'In this case it appears that on the land condemned were a number of large fixed trees, not nursery stock'—those I have not mentioned yet, but Mr. Manda, you will remember, testifies there were some trees there which were not nursery trees, and which could not be removed, and this request which I am about to charge you applies to the trees, the fixed trees that were not nursery trees, as well as to this top soil—'In this case it appears that on the land condemned were a number of large fixed trees, not nursery stock, and a layer of top soil. These trees and the top soil are a part of the land, and cannot be valued separately and apart from the land, but may be taken into consideration to determine to what extent, if any, the value of the land is enhanced for a fair sale in the market.' That is a correct statement of the law, and I charge you that. On the other hand, of course, you will consider all the other testimony on the part of the Manda Corporation as to value. I shall mention only that of Mr. Manda, and Mr.

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Farquhar and Mr. Karlstrom. All the others you are to remember and take into consideration." (p. 179, l. 39).

- (9) The Court also charged the Fifth request of the Appellee as follows:

"The land must be valued as land, and not for the elements which compose the land." (p. 190, l. 11).

- 10 (10) The Court also charged the Ninth request of the Appellee as follows:

"In estimating the value of the nursery stock, you must consider its condition in the ground at the time of condemnation, what attention, care and expense is involved in converting it from that condition to a commodity ready for delivery to a customer or into a separate propagating plant." (p. 190, l. 32).

- 20 (11) The Court also charged the Tenth request of the Appellee as follows:

"Considering the condition of the nursery stock in the ground, you may further consider the probability of its survival, and you may consider what proportion of this stock might be sold or require transplanting. (p. 190, l. 38).

- (12) The Court refused the request of the Appellant to charge the jury as follows:

30 "That the value of the property is to be considered as of the time when the condemnation proceedings are commenced by the filing of the petition in condemnation." (p. 192, l. 18).

- (13) The Court refused the request of the Appellant to charge the jury as follows:

40 "If the owner will be compelled to make an annual outlay by reason of the appropriation of its property and the use to which the part appropriated is put, and such outlay will be continued in the

future, the annual outlay should be capitalized, and such sum awarded as damages, as will, at the legal rate of interest, produce an income sufficient to meet the annual outlay which the owner will probably be required to make." (p. 188, l. 28; p. 193, l. 25).

- (14) The Court also refused the request of the Appellant to charge the jury as follows: 10
 "If by reason of the appropriation of its property and the use to which it is or will be put by the railroad company, the cost of carrying on the owner's business on the remaining properties is increased, the annual amount of such increased cost should be capitalized, and such sum awarded as damages on account of such increased cost as will, at the legal rate of interest, produce an income sufficient to meet such increased annual cost of carrying on the owner's business." (p. 20
 188, l. 28; p. 194, l. 1).
- (15) The Court also refused the request of the Appellant to charge the jury as follows: 30
 "If the jury find that the embankment erected by the railroad company upon the property taken and the use the railroad company are to make of the property taken, will require additional labor and the use of materials and remedies to prevent injury and disease to the plants grown on the owner's property adjacent to the property taken, then the jury should capitalize the annual cost of such labor and materials, and award the owner for damages, on account of such annual cost such sum as will, at the legal rate of interest, produce an income sufficient to meet the annual cost of such labor, materials and remedies." (p. 188, l. 28; p. 40
 194, l. 20).

(16) That the Appellant requested the Court to charge the jury as follows:

10 "If the jury find that substantial damage will probably be done to appellant's adjoining lands, or greenhouses, or to the plants growing thereon or therein, by reason of obstruction to light, or to the free circulation of air, occasioned by erecting an embankment upon the lands acquired of the appellant by the condemnation proceedings, and the use of said lands and embankment for railroad purposes in the manner indicated by the plan of construction put in evidence by the railroad company, they should award to the appellant such sum as in the exercise of reasonable judgment they believe will constitute just compensation therefor."

20 The Court limited the application of said request as follows:

"That is applicable to the removal of the plants, and the building of the road, and grading of the road, and changing of the pipes, I charge you. Beyond that it is not applicable to the proven facts of this case." (p. 188, l. 40).

(17) The trial court declined to set the verdict aside and grant a new trial. (p. 21).

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I.

There was error in the exclusion of testimony offered by the Appellant.

40 1. The property nearest to the lands under condemnation which had been sold in recent years is spoken of in the proceedings as the "Pierson

property," and is now owned by the H. B. Halsey Company. Appellant's property lies on the westerly side of the railroad right of way, and on the southerly side of Third Street. The Pierson property lies on the easterly side of the railroad right of way and on the northerly side of Third Street, thus the two properties are about 75 feet apart. Both have railroad frontage their entire depth. The Third Street crossing of the railroad tracks separates the two properties.

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Mr. Pierson, a witness for the appellant, testified that he had been in the grain and real estate business for 25 years at South Orange and Maplewood; that his father formerly owned the Pierson property and that he was in business with his father at one time on that property; that the Pierson property had been sold to the Halsey Company for \$12,000 (p. 23); that on the Pierson property at the time of the sale there were three buildings, an old wooden building, a wagon shed and a brick building; that he had been engaged in the building business to a certain extent for 25 years, building large barns, houses and storehouses (p. 26, line 5). He was then asked—

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"Q. And from your experience in connection with building work that you have done are you able to give us the value of those buildings on this property?"

Respondent's counsel objected to this question because—"That is making the witness qualify himself by his own opinion". The objection was sustained (p. 26, line 25).

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The objection was not well taken, for the witness was not qualifying himself nor was he asked so to do "by his own opinion". He qualified himself to testify as to the value of the buildings by showing that he was familiar with them; that he had carried on business on the property and that he had been engaged in the real estate and build-

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ing business for 25 years. These facts certainly qualified the witness to testify as to the value of these buildings.

10 2. Appellant contended that its remaining property adjacent to the strip condemned by the railroad company would be damaged for nursery purposes by the embankment which the railroad company was to erect on the property taken, and on its adjoining right of way; by the running of
20 engines and cars over the tracks to be built on the embankment of the newly acquired property and by the storage of cars on said tracks; that the embankment and the cars on the tracks built thereon would shade a very considerable area of adjacent property; that the sunlight would be cut off from the plants growing thereon; that the circulation of air in the vicinity of the embankment would be impeded to an injurious extent; that smoke and gases from the engines would settle along the embankment and on the adjacent property and remain there because of the lack of circulation of air, thus materially damaging plants in that vicinity; that because of these conditions the plants would become diseased; that extra labor would be required to keep the plants in the shaded area free from insects and disease, and that for these reasons the value of a considerable area of land would be materially damaged and decreased for use for nursery purposes.

30 The record shows that measured on the plan of construction proposed by the railroad company the top of the tie on the embankment at Third Street is to be $16\frac{1}{2}$ feet above the level of the ground; that at Fourth Street the elevation will be about 11 feet above the former level; that near the southerly end the elevation is to be 9 feet above the old ground level (pp. 48-49); that the height of a freight car is 14 feet (p. 53, line 25).

40 ALBERT A. MANDA, a witness for the appellant testified that he had been in the horticultural busi-

ness 41 years; that he had been so engaged in Bohemia, in Vienna, in Paris, in London and for 32 years in the United States; that for 5 years he was curator of the Harvard Botanical Gardens, and that in 1894 he started in business on his own account in South Orange, in the present location; that he purchased the property of the appellant fronting on Third Street in 1893, and the remainder of the property about 16 years ago (p. 27, line 1). That he had been engaged in improving existing varieties of plants by hybridization and in producing new varieties of plants for 35 years (p. 27, line 35). That the plants now located along the new line established by the condemnation would have to be shifted to other parts of the ground because they could not stand the exposure to the smoke and gases from the railroad, nor the lack of light and air occasioned by the embankment, and that other plants not so sensitive to these conditions would have to be planted adjacent to the proposed embankment (p. 51, line 8). That he had made investigations and measurements to ascertain how far and to what extent the adjacent property would be shaded by this embankment. The results of these investigations and measurements are shown on pages 51 to 56 inclusive. It appears from the evidence that a total of more than 26,000. sq. feet of property will be shaded and injuriously affected by the embankment and its use for railroad purposes.

The witness further testifies that because of the embankment and also of the cars that may be stored on the tracks there will be lack of circulation of air through the adjacent property; that a body of dead air will be formed; that there will be pockets of dead or stagnant air, gas and smoke settling adjacent to the embankment, and that all these will have an injurious effect upon the plants, stopping or retarding their growth and causing them to become diseased and infected with insect

life, and that these injurious effects arising from lack of light, lack of free circulation of air, and the accumulation of smoke and gases will extend two or three times the width of the shaded area (pp. 56, line 35).

10 The testimony of Mr. Manda relative to the effect upon plant life, of shading it, cutting off the light therefrom and impairing the circulation of air, is corroborated by Dr. George E. Stone, of the Agricultural College at Amherst, Mass., who has made a study of plant diseases, plant pathology and plant physiology for 25 years (p. 81, line 1).

20 This witness shows the effect of the diminution of light upon plant growth (p. 81, line 35); the effect of stagnant air upon plant life (p. 82, line 35); the character of the plants growing on appellant's property next to the property taken in condemnation proceedings (p. 83, line 22); the diseases to plant life arising from lack of light and air (p. 83, line 32; also p. 88, line 35).

To the same effect is the testimony of John K. Farquhar, a horticulturist of 40 years' experience, having nurseries aggregating 250 acres in area in Massachusetts (p. 109, and p. 112, line 40, &c.).

30 Testifying to the shading of adjacent property, the cutting off of light and impeding the circulation of air and the effect thereof of plant life, the witness Manda testified that he had experience in the matter of shading plants during growth and the effect thereof (p. 59, line 30); that from 40 years' practical observation on his own place and on the places of patrons in different parts of this country and in Europe, he could estimate the probable depreciation in value of the adjacent property by reason of cutting off the light and lack of circulation of air. He was then asked—

40 "Now, will you tell us if you are able to, what percentage of decrease in the valuation

of this shaded land will probably arise because of this embankment concerning which you have testified, and the proposed use of this property for railroad purposes". (p. 58, line 15).

The question was objected to on the ground that the evidence was speculative, and that the witness was not qualified to answer. The objection was sustained.

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That damage would result to the adjacent property from the erection of the embankment and from the operation of engines and cars over tracks built thereon is clearly evident from the testimony. The extent of this damage could be judged from experience in that line of business, such as the witness testified he had had. That the extent of damage to the adjacent land could not be mathematically determined does not render the evidence incompetent. The fact that damage would arise was fully established. The witness was asked to state his estimate, based on his experience, of the damage which would probably arise to the adjacent property. The testimony should have been admitted.

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3. Appellant's proofs show that the lack of light and free circulation of air occasioned by the embankment to be raised by the railroad company would cause disease in the nursery plants adjacent to the embankment, and would result in their becoming infected with insect pests.

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Mr. Manda testifies that almost every insect pest and every disease known to plant life are occasioned by lack of light and lack of circulation of air; that to prevent the disease and insect pests the use of insecticides would be necessary; that there would need to be a careful examination of the plants and these remedies would need to be applied as often as found necessary. That if disease or insects got into one part of the nursery

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there was danger of their spreading throughout the nursery; that under the state laws no shipment could be made from the nursery unless the State Entomologist certified that the place was free from disease, and insect pests. He further testified that he could estimate the probable additional expense which the appellant would necessarily incur by reason of cutting off the light and circulation of air by the embankment (p. 60, line 10 38 etc.). He was then asked—

“Q. Now, will you state what in your judgment will be the necessary annual expense to be incurred by reason of these conditions?”

referring to the conditions brought about by the raising of the embankment.

This question was objected to on the ground that it was too remote and speculative and the objection was sustained.

20 That extra and unusual labor would be required and that additional expense would be incurred by the appellant in conducting its business, was clearly indicated by this testimony. The witness, an experienced horticulturist and nurseryman, testifies that he could estimate the probable additional expense to be incurred. Beyond question a man of experience in the nursery business and in the care, development and protection of plant life would have unusual means of knowing what 30 would need to be done, how frequent the remedies would need to be applied and what the probable cost would be. His knowledge would be far beyond that of a person without such experience. The jury could not be presumed to have knowledge of these things and they were entitled to have the estimate of a man of experience in such matters.

The evidence was clearly competent, and its exclusion was manifestly injurious to the appellant.

40 4. Mr. Manda testified to the similarity be-

tween the property under condemnation and the Pierson property, and that in his judgment the land of the appellant, without taking into account the extra value given to it by reason of the top soil, was equal in value, area for area, to the Pierson property (p. 27; p. 28, line 5). The selling price of the Pierson property was already in evidence (p. 23, line 35). The witness based his valuation of the appellant's land on the value of the Pierson property after allowing for the value of the buildings on the latter property (p. 28, line 25). On the original examination of this witness he was not allowed to testify what deduction he had made for the value of the buildings on the Pierson property, because their value was not yet in evidence (p. 28, line 35). Later on the value of the buildings on the Pierson property was put in evidence by Mr. Kane, a witness for the appellant (p. 78, line 30), the value testified to being \$1950.80 at the time the Pierson property was sold. Later in the trial Mr. Manda was recalled and asked how he arrived at the value of the property under condemnation. He stated that he compared it with the Pierson property after deducting for the value of the buildings. He was then asked—

“Q. And what deduction did you make for the value of the buildings?”

On objection by respondent, this question was overruled (p. 144, line 5).

It is evident that appellant's property was properly compared with the Pierson property, which was only about 75 feet distant from it, and was similar to it in almost every particular. In order to get the value of the Pierson land without the improvements, it was necessary to establish the value of the buildings. We submit that it was competent for Mr. Manda to testify what deduction he had made from the selling price of the Pierson property on account of the buildings

thereon, even though no evidence had been in the case with respect to the value of these buildings. After evidence had been put in tending to show the value of these buildings, it was clearly competent for Mr. Manda to show what deduction he had made on account of the buildings in order that the jury might determine the fairness of his deduction and the fairness of his comparison of the value of the land in its natural state in these two plots, minus the buildings on the one, and the compost top soil on the other. The evidence would also affect the credibility and general fairness of the witness.

The overruling of this question was injurious to the appellant.

II.

20 **There was error in the admission of testimony objected to by the appellant.**

1. As evidence tending to show the value of the Manda property, respondent called Charles I. Bech as a witness to testify to the value of property known as the "Playground" for the Village of South Orange, also called "Cameron Field." This witness testified that the Playground property adjoined the railroad track but there was no opening to it from South Orange Avenue until a right of way to it was condemned; that the property contained 7 acres (p. 154, line 25). The witness was then asked—

"Q. Tell us what was paid for those 7 acres?"

(p. 155, line 20).

Following this question and before it was answered, the witness was cross examined as to the nature of the property. It appeared that it ad-

joined a coal yard; that it had no frontage on South Orange Avenue or on any other Street; but the witness testified that while it had no street frontage it had a right of way into it through another man's land "behind Decker's store"; that this right of way was a block long; that one end of the property was swampy and that the other end had a big sand hill which had to be dug away to make it level; that not more than one acre of it was swampy "and that is giving a good leeway" (p. 155, line 30 etc.). After this cross examination objection was made to admitting evidence as to the value of this property on the ground that it was entirely different from the property under condemnation. This objection was overruled and the evidence admitted (p. 157, line 1). 10

The dissimilarity between the two properties was so great, even on the testimony of this witness, that the evidence should not have been admitted. The Manda property fronted on Third Street, an improved public highway. The Playground property had no access from any public street and a right of way to it had to be acquired by condemnation. The Manda property had a private crossing across the railroad track by which access could be had to Fourth Street and Valley Street. On the testimony of Bech one-seventh of the Playground property was low, swampy land, and had to be filled. It had a sand hill on one end which had to be cut down. The Manda property was all level and high, dry land. 20 30

Even on the testimony as it then stood, the selling price of the Playground property could throw no light on the value of the Manda property.

The serious injury done the appellant by the admission of the foregoing testimony is greatly accentuated by the discovery that in most of its essential elements the evidence is absolutely false. It now appears (and it is not disputed by the 40

respondent), that not only was there no access to the Playground property (or Cameron Field) by any public street, but that there was no private right of way to it; that after acquiring the property the municipality purchased a right of way from South Orange Avenue to Cameron Field through premises of Kraus Mor and of Patrick J. Smith; that the municipality paid to Kraus Mor \$3900 for the part of the right of way purchased from him and in addition built a street 10 367 feet in length and guttered and curbed and built a side walk the entire length thereof, and that for the part of the right of way purchased of Patrick J. Smith the municipality paid \$3900 in cash (p. 12, line 20; p. 14, line 20; p. 15, line 20; p. 19, line 35). It further appears that $\frac{3}{4}$ of Cameron Field was low, wet land which required to be drained and filled (p. 15, line 30; p. 19, line 22).

20 Instead of having an area of 7 acres as sworn to by Bech, the actual area was only $4\frac{1}{2}$ acres (p. 16, line 20; p. 20, line 20).

We insist that not only was this evidence inadmissible when produced, but that the witness by his false testimony perpetrated a fraud upon the court and jury. That the judgment is tainted by this fraud and should not be permitted to stand.

30 Mr. Bech's testimony so impressed the court by reason of the official positions which he had held in the municipality that these matters were especially referred to in the charge and thus his false evidence was made doubly impressive with the jury and the fraud was rendered effective (p. 181, line 15).

40 2. The value of the nursery stock growing upon the property condemned was a very important element of the damages sustained by appellant. The appellant's inventory and appraisal of these plants showed a value of \$21,703.98 (p. 183, line 20). This valuation was amply sup-

ported by the testimony of Mr. Manda and by that of Mr. Farquahr, a nurseryman of 40 years' experience now operating nurseries in Massachusetts, having an area of 250 acres, a member of many societies and three times President of the Massachusetts Horticultural Society (p. 109, line 1; p. 184, line 5). Also by Mr. Stewart (p. 183, line 35), and by Mr. Corbitt, a nurseryman of large experience (p. 184, line 10). The witnesses of the respondent testified that these plants were of the value of \$4,297.95 to \$4,656.54 (p. 184, line 30). One of the witnesses who testified to the value of these plants for defendant, was Julius V. Burgeman. In the course of his examination he was asked if he had recently examined the catalogues of houses in this line of business (meaning the nursery business), and he replied that he had. That he had some of those catalogues with him. He was then asked—

“Q. How do the prices in the catalogues which you have examined for this class of stock compare with the prices which you have marked on this inventory?”

This was objected to for the reasons stated by counsel (p. 167, line 25). This objection was overruled and the testimony was admitted.

There was nothing in the case to indicate that the plants described in these catalogues were similar in kind or quality to the plants under consideration, nor was there anything to show the character of the plants priced in these catalogues. A part only of the catalogues were in court. Clearly these catalogue prices throw no light on the value of the stock which the jury was called upon to appraise. In fact, it appeared on the cross examination that the witness fixed prices upon the appellant's stock from the catalogue of the Elizabeth Nursery, although he had never purchased any such plants from that nursery (p. 169, line 12).

The evidence admitted over the objection of the appellant was highly injurious.

3. With the purpose of proving that the plants on the property adjoining the railroad embankment and in appellant's greenhouses would not be injured by the smoke and gas from locomotive engines, the respondent called James W. Wagner, who testified that he was a rose grower at Chatham, New Jersey, and that his greenhouses were about 20 feet from the railroad tracks; that the tracks at that point were laid on an embankment. He was then asked—

“Q. Do you know, Mr. Wagner, whether or not the passage of locomotives along this track passing your greenhouse has had any effect on your plants in your greenhouse?”

The answer of the witness was taken against the objection of the appellant (p. 170, line 10).

20 This evidence has no bearing upon the issues between the parties. The plants on appellant's adjoining property, and in its greenhouses were not roses, and there is no proof that smoke and gases have the same effect on roses as upon the plants of the respondent which will be exposed to smoke and gases.

30 Apparently all of the witness's plants were located in his greenhouse, and there is no evidence of similarity between the construction of the greenhouses of the witnesses and those of the appellant.

This evidence was therefore entirely immaterial.

III.

There was error in the charge of the court.

40 1. On the property condemned were some five

or six large trees which were growing on the property when it was bought for nursery purposes. These trees were not salable as nursery stock, but were of value in connection with the use of the property for nursery purposes (p. 40, line 10 etc.).

There was also on this property a very highly developed, rich compost top soil which had been in course of formation and development for 20 years. This top soil was made by filling in the land in its natural condition with the best loam obtainable and enriching that loam with heavy fertilizing, with stable manure, sheep manure, bone, ashes and vegetable matter, and chemical fertilizers. (Manda, p. 29, line 30 etc.; Karlstrom, p. 141, line 25; p. 142, line 35.)

This top soil covered the land taken to an average depth of about $2\frac{1}{2}$ feet. Mr. Manda found the average depth by digging down and measuring it in about 20 places (p. 30, line 5; p. 32, line 40). Mr. Farquahr tested it in several places and found the average depth of $2\frac{1}{2}$ to 3 feet (p. 112, line 8; p. 117, line 25). Mr. Voorhees of the New Jersey Agricultural College dug with a spade all along the property every 20 or 30 feet as deep as $2\frac{1}{2}$ feet. He also noticed the excavations then being made by the railroad company, and found the top soil to be of a depth of not less than $2\frac{1}{2}$ feet and from that up to three and four feet in some cases (p. 136 line 25).

Mr. Corbitt measured the top soil in six different places and found it from 32 to 42 inches in depth (p. 139, line 10).

This top soil was of unusual quality and value (Farquahr, p. 111, line 15; Corbitt, p. 140, line 18).

Professor Voorhees examined the top soil with respect to its mechanical and physical conditions (p. 136, line 10). He found that it was a very pliable soil containing large quantities of organic matter, thus showing its great utility to retain

moisture and plant food (p. 137, line 10). He found by chemical analysis that this soil contained 15% of organic matter while soils generally contain less than 1%, but occasionally rising as high as 5% (p. 137, line 30).

This top soil was also at times separated from the land and sold as an article of commerce (p. 34, line 10; p. 75, line 10).

10 The Railroad Co. removed this top soil and carried it away (p. 38, line 15).

With respect to these large trees and to this top soil the court charged as requested by the respondent—

20 “In this case it appears that on the land condemned were a number of large fixed trees, not nursery stock, and a layer of top soil. These trees and top soil are a part of the land and cannot be valued separately and apart from the land, but may be taken in consideration to determine to what extent, if any, the value of the land is enhanced for a fair sale in the market.”

(p. 180, line 37).

30 It is apparent from the testimony that this compost top soil was a thing separate and apart from the land in its natural state. It had been built up through a long period of years for special purposes of plant propagation and rapid plant growth and development. It was in the nature of a factory where nursery products were produced. It was just as proper to value this separately from the value of the land in its natural state as it would be to value separately from the land a building used in the production of shoes or any other article of merchandise. Technically speaking, of course, both the manufacturing building and this top soil are a part of the land, but the combined value of the land the improvement in each case makes up the value for which the owner is entitled to compensation.

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If a reservoir or pool had been built on this land and filled with water for the growth and production of water plants, even though built of earth, it would doubtless be conceded that a separate value might be placed thereon. Equally so it was permissible to value this compost top soil separate from the land, and thus determine how much should be added to the value of the land in its natural state in order to compensate the owner for taking its property thus improved by this top soil. 10

It was practically impossible to value the land and top soil as a whole without placing a separate value upon the top soil. The nurserymen, Farquahr, Karlstrom, and Corbitt, knew the value of the top soil, for they had been for years engaged in developing similar top soil and they knew its value for use in nurseries, and for propagating purposes, but they had no knowledge as to the value of the land in that neighborhood in its natural state. The two values had to be determined separately and these combined to enable the jury to estimate the total value of the property taken, just as lands and buildings are usually valued separately, and these values united to determine the total land value. 20

The instruction of the court on this point deprived the jury of the only means of arriving at the true value of the land as improved by this highly developed top soil. 30

True, the court directed the jury that the large trees and the top soil might be taken into consideration in determining "to what extent, if any, the value of the land is enhanced for a fair sale in the market". But how were the jury to "take these into consideration", if they were not permitted to value them separately? The charge on this point was contradictory and confusing.

That it misled the jury to the extent of practically eliminating from their verdict any value for 40

10 this top soil would seem to be evident. The evidence of appellant with respect to the character of the top soil, its depth and value was not at all disputed by the respondent. By computing of the area of the land taken, the depth of the top soil as shown by the evidence and its value per sq. ft. as testified to by appellant's witnesses, that value was shown to be \$10905. (Manda, p. 37, line 10; Farquahr, p. 112, line 20; Corbitt, p. 140, line 8; Karlstrom, p. 142, line 28.) The verdict of the jury was for \$17,000—only \$6,100 for all other elements of damage for which appellant was entitled to recover, and they did not pretend to include in those damages any value for the top soil. They simply valued the land and the nursery stock, and the lowest aggregate amount testified to by respondent's witnesses for these two items was \$7,172.85. They allowed no damages to the adjoining property, nor did they allow anything
20 for removal of plants, the building of a new road and grading it, and the removal of water pipes, etc., which according to the undisputed testimony of appellant would cost \$2,930. (p. 186, line 35 etc.).

An examination of these figures lead most persuasively to the conclusion that the jury failed to take into account the value of the top soil, and that they were led to do so by the charge of the court.

30 Furthermore, the top soil and large trees should have been taken into consideration and valued, not only to the extent they would enhance the value of the land for a fair sale in the market, but also to the extent they were of value to the property for nursery purposes, and for any purpose to which the land was adapted, either to the owner and to any person who might desire to purchase the property.

40 This part of the charge was erroneous and injurious to the appellant.

2. The court also charged the Fifth request of the respondent—

“The land must be valued as land, and not for the elements which compose the land.”

(p. 190, line 10).

It is clear both from general knowledge and from the testimony in this case that it is the elements which compose the land that give it value. Different parcels of land are distinguished from one another by the difference in their component elements. The presence of certain elements render the land mellow, easily cultivated, a retainer of moisture and a storehouse of plant food, while their absence renders the land hard, dry and sterile. Thus just the things that give value to the land were excluded from their consideration.

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3. The court also erroneously charged the Ninth and Tenth requests of the respondent as follows:

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Ninth request—

“In estimating the value of the nursery stock, you must consider its condition in the ground at the time of condemnation, what attention, care and expense is involved in converting it from that condition to a commodity ready for delivery to a customer or into a separate propagating plant.”

Tenth request—

“Considering the condition of the nursery stock in the ground, you may further consider the probability of its survival, and you may consider what proportion of this stock might be sold or require transplanting.”

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(p. 199, line 20).

The uncontradicted testimony in the case is that the value placed by appellant upon the nursery stock was its value as it stood in the ground (p. 39, line 25 etc.). There was an extra charge to

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the customer for digging up the plants, for boxes or crates and for packing (p. 40, line 1).

The jury were told, however, that in valuing the nursery stock they must not only consider its condition in the ground at the time of condemnation, but that in addition thereto, they must consider the care, attention and expense involved in fitting it for delivery to a customer, or in developing it into a separate propagating plant. But after
10 taking these elements into account, the value of the stock would not be as it stood in the ground, but in condition ready for delivery to a customer, or a plant developed into a propagating plant. These two values are entirely different and the values shown by the testimony were the values of the plants as they stood in the ground at the time of condemnation. And these were the values the jury were to determine.

The jury were further erroneously instructed
20 that they were to consider—(a) the probability of the survival of the stock; (b) what proportion of the stock might be sold; (c) what proportion might require transplanting.

With none of these questions was the jury concerned. They were to fix by their verdict the value of the plants as they stood in the ground at the time of condemnation. There was no evidence introduced by either party with respect to the probability of the survival of the plants, what
30 plants might be sold, or what plants might require transplanting. Opinions upon any of these points would have been merely speculative and of no value. Nor would they have been relevant to the issue the jury were trying. The definite thing which the jury were to pass upon was the value of this stock as it stood at the time of condemnation, and that was the value which the owner was entitled to recover, without any deduction on account of speculative possibilities concerning which
40 the jury had no right to guess, and as to which they had no information.

IV.

The Court erred in refusing to charge as requested.

(1) Appellant requested the court to charge as follows:

“That the value of the property is to be considered as of the time when the condemnation proceedings are commenced by the filing of the petition in condemnation.” 10

(p. 192, line-20; p. 195, line 15).

Section 6 of the Statute concerning eminent domain, provides among other things that the Commissioners shall “make a just and equitable appraisal of the value of the same (*i. e.*, the property under condemnation), and an assessment of the amount to be paid by the petitioner for such land or other property and damages aforesaid, *as of the date of the filing of the petition and order thereon.*” 20

Thus, the statute fixes the time as of which the damages are to be assessed, and the instruction requested should have been given.

It is true that this request was not preferred until the close of the charge. But the court had just before charged the eleventh request of the respondent as follows:

“In estimating the value of the nursery stock you must determine the market value in its condition *at the time of taking, i. e.*, in the ground.” 30

(p. 191, line 3).

As “the time of taking” was left indefinite and the jury would not know precisely what time was referred to, the request may properly be said to have arisen out of the charge as given.

The instruction requested was important in 40

view of the fact that some of respondent's witnesses testified to the plants being in poor condition. But these witnesses examined the plants weeks after the condemnation proceedings were commenced and after the award of commissioners.

Condemnation proceedings were commenced July 20, 1914, and the Commissioners made their award October 2, 1914 (p. 2).

- 10 2. It was the contention of the appellant that by reason of the taking of its property, the erecting of an embankment on the part taken, as disclosed in the testimony, and the use to which the property thus taken was to be put, the appellant would be burdened with additional expense in carrying on its business, in keeping its nursery stock free from disease and free from insects and in caring for its property in general.

- 20 The contention of the appellant was amply sustained by the evidence.

The shading of the ground, the interference with light and the circulation of the air, and the effect upon the adjacent property, greenhouses and the plants growing therein and thereon, were testified to by Mr. Manda. (Pages 51-62 inclusive.)

Also by Dr. Stone—Pages 81-108 inclusive.

By Mr. Farquahr—Pages 113-117 inclusive.

- 30 By Mr. Weiss, assistant State Entomologist—Pages 118-131 inclusive.

- 40 From the testimony of these witnesses it is established that the shading of the adjacent lands by the embankment and its proposed use for railway purposes, the interference with the circulation of the air, and the cutting off of the sunlight, will result in retarding the growth of plants in the section affected thereby; that the plants will be inferior in quality; that in all probability they will be infected by disease and attacked by insects. That extra labor will be required to fight

the diseases and the insects which will attack the plants along the property adjacent to the embankment, and in the nearby greenhouses, and that care and labor will be required to prevent the spreading of these conditions throughout the nursery. See testimony of Mr. Manda, Pages 61-62; testimony of Dr. Stone, Pages 81-103; testimony of Mr. Farquahr, Pages 113-114; testimony of Mr. Weiss, Pages 118-130.

It further appeared that these injurious effects will extend two and a half or three times as far as the shaded area. (Manda, p. 57, line 28). 10

The effect upon the greenhouses and their contents is set forth particularly by Mr. Weiss (pp. 125-129, inclusive).

The qualification of these witnesses to speak with authority upon these subjects cannot be questioned.

Mr. Manda has been in the horticultural business for 41 years, in this country and in Europe. He has had experience in the effect of lack of light and proper circulation of air upon plant life, and speaks from the results of 40 years' practical observation (p. 27, line 1; p. 57, line 30; p. 59, line 30). 20

Mr. Farquahr has been a practical nursery man and horticulturist for over 40 years, is a member of various horticultural societies in this country and a Fellow of the Royal Horticultural Society of London, has been three times elected president of the Massachusetts Horticultural Society, and has had experience particularly qualifying him to speak on these subjects (p. 109, line 1; p. 112, line 40 etc.). 30

Dr. Stone has made a special study of plant pathology and plant physiology practically all his life, and has been a member of the faculty of the Amherst Agricultural College for 25 years. He has written extensively upon the subject of the relation of light and air upon plants and their 40

diseases (p. 81, line 1; p. 82, line 35; p. 84, line 8; p. 85, line 10).

Mr. Weiss is assistant State Entomologist, and as such visits and inspects all nurseries in the State, and examines them with respect to the presence of diseases and harmful insects. He has been doing that work for 10 years; he is also instructor in entomology in the N. J. State College, covering the subject of injurious insects and to some extent that of diseases of plants (p. 118, line 35; p. 120, line 30). He has had occasion in connection with his business to study and ascertain the effects of embankments alongside of nursery properties in relation to the stock growing near such embankments (p. 119, line 30).

All these witnesses testified that the diffusion of the smoke and gases from the engines will be greatly impeded by the embankment and the interference with the circulation of the air caused thereby.

The appellant's second, third and fourth requests to charge were based upon the foregoing evidence. These requests are as follows:

2nd Request: If the owner will be compelled to make an annual outlay by reason of the appropriation of its property and the use to which the part appropriated is put, and such outlay will be continued in the future, the annual outlay should be capitalized, and such sum awarded as damages as will at the legal rate of interest, produce an income sufficient to meet the annual outlay which the owner will probably be required to make.

3rd Request: If by reason of the appropriation of its property and the use to which it is or will be put by the railroad company, the cost of carrying on the owner's business on the remaining properties is increased, the annual amount of such increased cost should be capitalized and such sum awarded as damages on account of such increased cost as will at the legal rate of interest, produce

an income sufficient to meet such increased annual cost of carrying on the owner's business.

4th Request: If the jury find that the embankment erected by the railroad company upon the property taken and the use the railroad company are to make of the property taken, will require additional labor and the use of materials and remedies to prevent injury and disease to the plants grown on the owner's property adjacent to the property taken, then the jury should capitalize the annual cost of such labor and materials and award the owner for damages, on account of such annual cost, such sum as will, at the legal rate of interest, produce an income sufficient to meet the annual cost of such labor, materials and remedies. 10

(Page 193, line 25, &c.).

The Court declined to charge these requests, saying— 20

“While they appear to me to be good propositions of law in the abstract, I believe not to be applicable to this case and therefore I shall decline to charge them.”

(Page 188, line 28).

We respectfully submit that the trial court was in error in ruling that the propositions of law embodied in this request were not applicable to the case. 30

The fact that damage would arise to the adjacent property—the land as well as the greenhouses—was established by the evidence above cited of Messrs. Manda, Stone, Farquahr and Weiss. This testimony was practically undisputed. In fact, little or no attempt was made by the respondent to dispute it.

The extent to which this damage will probably extend was shown by the testimony of Mr. Manda (p. 57, line 10), and that of Mr. Weiss (p. 122, line 5 to p. 127, inc.). 40

That extra expense would constantly be incurred by reason of these conditions was established and undisputed (Manda, pp. 60-62, inc.; Weiss, p. 127, line 15 to p. 129, inc.).

Mr. Manda was not permitted to testify to the probable amount of extra expense which would necessarily be incurred in carrying on the business (pp. 60-62, inc.).

10 Mr. Weiss testified that the damage to the greenhouses would be at least 50% (p. 127, line 10 to p. 129, inc.).

On the testimony above cited it was clearly a question for the jury to determine whether extra expense would be incurred in carrying on the business and if so, the amount thereof.

20 If an extra outlay and expense in protecting the nursery stock and in carrying on business on appellant's remaining property would annually recur by reason of the conditions created by taking appellant's lands and the use made of them for railroad purposes, then these annual expenses should be capitalized and damages should have been awarded in an amount sufficient to produce an annual income equal to these annual expenses.

30 In *Central Railroad Company v. Bayonne*, 51 N. J. L. 428, the Supreme Court held that the railroad company was entitled to compensation for *laying and maintaining planking* between the tracks at a new grade crossing required by laying out a street across the railroad tracks.

40 In *Patterson & Newark R. R. Co. v. Newark*, 61 N. J. L. 80, the Circuit of Essex County in a trial of an appeal from the award of commissioners in a condemnation case had refused to permit evidence to be given by the Company of the cost of constructing, *maintaining and operating safety gates* at a crossing made necessary by laying a street across the railroad tracks. The Supreme Court held that this evidence should have been allowed.

In *Morris & Essex R. R. Co. and D., L. & W. R. R. v. City of Orange*, 63 N. J. L. 253, the railroad company claimed damages occasioned by laying a street across the railroad tracks. Among the items of damage claimed, were the cost of maintaining safety gates and the annual cost of a flagman. These items of damage were capitalized and the damages to the amount necessary to produce an income to meet these annual expenses were claimed. This court held that the expenses incident to the erection and maintenance of gates, sign-boards, cattle guards and the like, including the salary of a flagman, could not be included in the damages awarded to the railroad company on the ground that they were expenses incident to a compliance with police regulations. 10

This case overruled *Paterson and Newark R. R. Co. v. Newark*, in so far as it denied the right of the railroad company to recover in damages the costs incurred in erecting and maintaining safety gates and the annual expenses of operating the same. It was no where suggested in the opinion that the method of arriving at the damages by capitalizing the annual expenses was incorrect, nor does it any where appear that that method of arriving at the damages would have been disapproved had the railroad company been entitled to recover with respect to any of these items. 20

In *Elliott on Railroads* (2nd Ed.) Vol. 2, p. 625, the author said: 30

“The destruction of valuable accessories— for example, a frontage on another railroad; the obstruction of ingress to and egress from the premises; * * * inconvenience and increase of expense of using premises not taken * * * have all been held subjects for compensation in damages.”

In *C. B. & Q. R. R. Co. v. City of Naperville*, 47 N. E. Reporter, 734, a street was laid out across 40

the Railroad Company's property and tracks in such a way as to increase the Company's expense of operation and it claimed damages therefor. In deciding the case the Illinois Supreme Court said:

10 "Now, if the opening of the street will increase the cost of transacting the company's business, or if the business of the company will be interrupted and by the interruption damages will be sustained, the railroad com-
 20 pany will not receive just compensation, unless it is paid all damages arising from the interruption of its business or from the increased cost of transacting its business. This would seem too plain a proposition to consume time in its elaboration. Indeed, a similar question arose in *Lake Shore and M. S. Ry. Co. v. City of Chicago*, 151 Ills. 357; 37 N. E. 880, and it was there held where a city seeks to condemn a strip of land across the right of way, and tracks of a railroad company leading to its yard, used for storing, switching and making up trains, and the company files a cross-petition for damages to the land not taken for the street, and the evidence shows that, in the use of such yards, the operation of the company's switch engines will be retarded and hindered, and that it will require an increased expenditure of money daily to perform the same operations in handling and
 30 switching cars, making up trains, etc., now carried on after the opening of the street, it is clearly competent for the company to call witnesses and have them approximate the average daily increased expenditure that will be caused to it as tending to show damages to property not taken."

40 In *Boston & Albany Ry. Co. v. Cambridge*, 159 Mass. 283, it was held that both the common law and the statutes of that state required compensa-

tion to the railroad company for the cost of erecting and *maintaining* the planking and paving of a crossing of its tracks and also the cost of erecting and maintaining cattle guards, fences, gates, etc.

In the same case the court had before it the question of allowing an item of \$14,375. *for the expense of operating the safety gates.* This sum was evidently arrived at by capitalizing the annual cost of operating these gates. The court held that the cost of operating the safety gates was not allowable, but did not disapprove of the amount awarded or the method of arriving at it.

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In *Commissioners v. Railway Company*, 91 Mich. 291, the court held that a railway company was entitled to compensation for the cost of erecting and maintaining safety gates or the cost of a flagman.

In *City of Detroit v. G. H. & M. Ry. Co.*, 122 Mich. 304, S. C., 70 N. W. Reporter, 573, the trial court instructed the jury that

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“if they believe from the testimony that a gateman or flagman was necessary the company should be awarded a sum which, at 6% interest would produce an amount adequate to the payment of such expenses.”

On appeal to the Supreme Court, that court said:

“It is evident that the jury did not award compensation for this item (*i. e.*, for a gateman or a flagmen) and the defendant asks a reversal of the case upon this ground.

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“The undisputed testimony shows that a flagman was necessary at the place, and that a sum equal to the interest upon \$6000. at 6% would be required to pay the expenses thereof. * * *

“We think the verdict and confirmation are erroneous and they are therefore set aside and the case remanded for a new trial.”

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If this court should not adopt the rule that the amount to be awarded for annually recurring expenses should be ascertained by capitalizing the annual expense, then the appellant was entitled to such damages as the jury in the exercise of reasonable judgment, believed would constitute just compensation for the damage done to appellant's adjoining lands or greenhouses, and to the plants growing thereon or therein, by reason of obstruction to light and the free circulation of air in so far as these results were brought about by erecting an embankment on the lands taken and using the same for railroad purposes.

The evidence above cited in connection with the refusal to charge appellant's second, third and fourth requests shows that substantial damage was done to appellant's adjoining property and the question of the amount of damages should have been left to the jury.

In this connection appellant requested the court to charge the jury as follows:

"If the jury finds that substantial damage will probably be done to appellant's adjoining lands, or greenhouses, or to the plants growing thereon or therein, by reason of obstruction to light, or to the free circulation of air, occasioned by erecting an embankment upon the lands acquired of the appellant by the condemnation proceedings and the use of said lands, and embankment for railroad purposes in the manner indicated by the plan of construction put in evidence by the railroad company, they should award to the appellant such sum as in the exercise of reasonable judgment they believe will constitute just compensation therefor."

The court limited the application of the foregoing request as follows:

"That is applicable to the removal of the

plants, and the building of the road, and grading of the road, and changing of the pipes, I charge you. Beyond that it is not applicable to the proven facts in this case.”

This limitation withdrew from the consideration of the jury the question of damages to the adjoining property and the greenhouses and the plants thereon and therein, by the embankment and the use to which it was put, occasioned by shading, by cutting off light and by interfering with the circulation of air.

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That these damages were not sworn to in definite amounts was due to the ruling of the trial court, to which objection was noted, and these objections have already been argued.

That it might have been difficult for the jury to determine definitely the amount of damages of this character which appellant would sustain constitutes no reason for withdrawing it from their consideration.

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When the fact has been established that damage will probably result and there is evidence to show the nature and probable extent of the damages, it is for the jury to fix the amount. It is only when the occurrence of any damages is uncertain and speculative that the consideration thereof should be withdrawn from the jury.

In *Jenkins v. P. R. R.*, 67 N. J. L. 331, this court had before it the question of the assessment of damages in a case where the damages arose out of the acts of the defendant, a part of which were actionable and a part were not actionable. Justice Pitney, speaking for the court said (p. 334):

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“In such cases, since the injured party cannot supply the materials necessary to enable the jury to make an exact computation of the damages in suit, the approved practice is to leave it to the good sense of the jury, as reasonable men, to form, from the evidence,

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the best assessment that can be made under the circumstances as a basis of compensatory damages for the actionable injury."

That is what should have been done in this case.

V.

10 Under the peculiar circumstances of this case, the refusal of the trial court to set aside the verdict and grant a new trial amount in effect to oppression of the appellant.

The last ground of appeal is—

"The trial court declined to set the verdict aside and grant a new trial."

20 It is conceded that under ordinary circumstances this would not be a proper ground of appeal to present to this court. The circumstances of this case, however, are peculiar in connection with the false testimony of the witness Bech.

Beyond question the testimony of this witness with respect to Cameron Field was false—

- (1) With respect to the area of the property.
- (2) With respect to the alleged private right of way into the property.
- 30 (3) With respect to the condition of the property and the amount thereof that required filling.

The witness did not disclose what he undoubtedly knew, that \$7800 had been paid for right of way into this property, and that in addition thereto the municipality had built a street 367 feet in length along the Mor property, and had guttered and curbed it and laid a sidewalk without any
40 assessment to Mr. Mor.

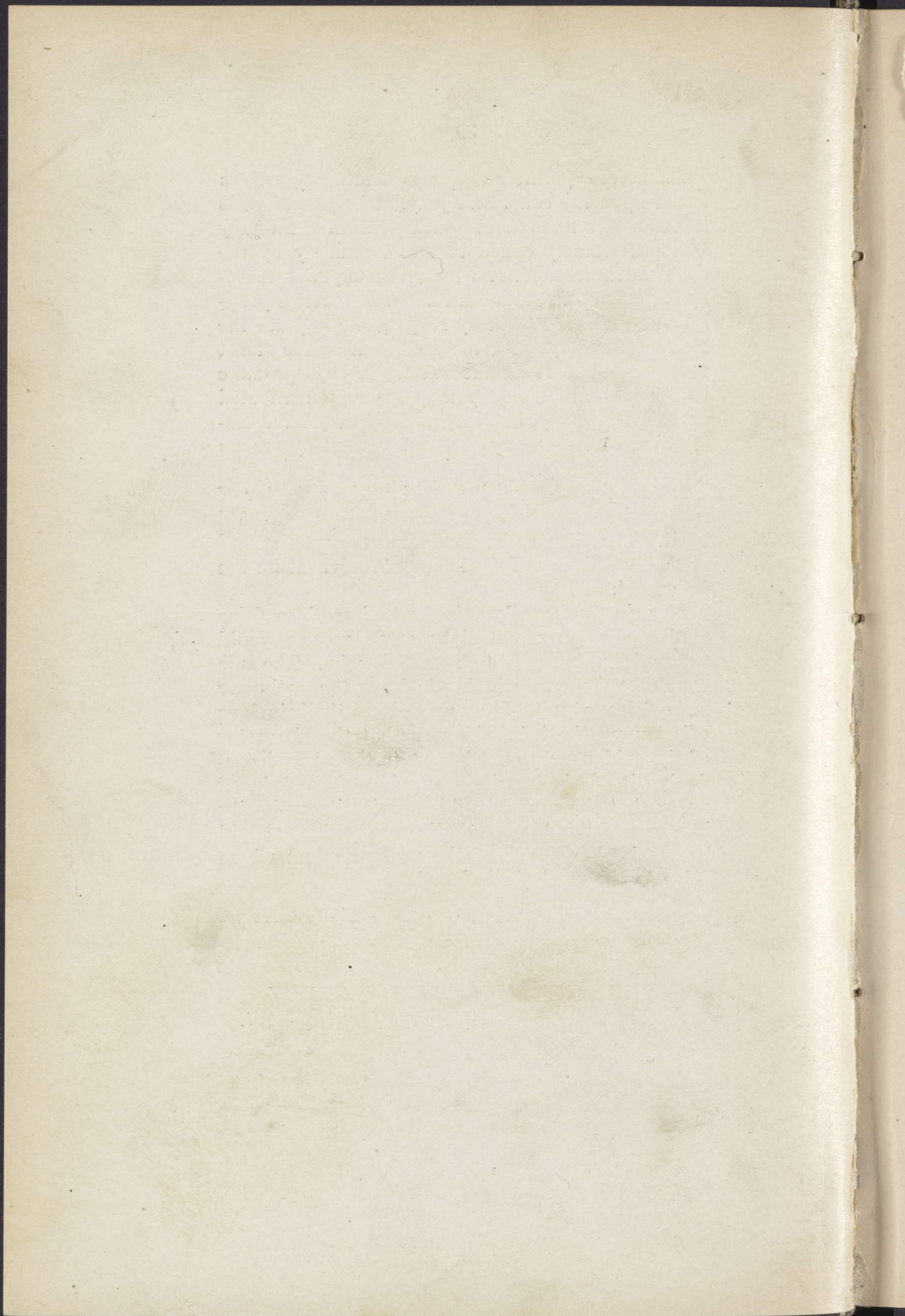
As before pointed out, this testimony was a fraud upon the court and jury. The judgment is infected with this fraud. The attention of the jury was particularly called to this testimony by the court in the charge, and the testimony was thereby emphasized. Cameron Field was acreage property and it was sought by respondent to place the Manda property, with the exception of the street frontage, upon the same basis. It is impossible to tell how far the jury may have been affected by this testimony, or how far they may have discredited the testimony of the appellant by reason of this testimony. 10

It is in the case and it should not be a matter of speculation as to how far the verdict was affected by it. That it may have affected the verdict and probably did, is sufficient reason for vacating the judgment.

If a party were knowingly to introduce false testimony upon a material matter, no one would contend that he ought to benefit thereby. The rule should be the same whether he knew the testimony to be false, or not. It no way alters the injurious effect upon the injured party that the character of the evidence was not known to the party introducing it. It is for the protection of the injured party that the court should exercise its authority in a case of this kind, and all presumptions should be resolved in favor of the party against whom false testimony is introduced. 20 30

We respectfully submit that for the reasons assigned, judgment should be reversed.

VREDENBURGH, WALL & CAREY,
Attorneys for Appellant.



New Jersey Court of Errors and Appeals

W. A. MANDA, Incorporated,
Appellant,

against

THE DELAWARE, LACKAWANNA AND
WESTERN RAILROAD COMPANY,
Lessee of the Morris and Essex
Railroad Company,
Respondent.

On Appeal.

Brief of Respondent.

This appeal is from a judgment of the Essex County Circuit Court, in a condemnation proceeding.

The railroad company elevated its tracks through the Village of South Orange, and at the southerly end of the village, where the elevated tracks run down to the old grade (pp. 48, 49), it required and condemned a strip of additional right of way for the slope of the bank, twenty to sixty feet in width, 1,000 feet long, and containing something less than nine-tenths of an acre. The verdict of the struck jury was \$17,000. The land was a part of the appellant's nursery, and growing upon it were certain plants and shrubbery which the land owner refused to remove, and their value was therefore included in the award, and in the verdict. There were no structures upon the land taken.

(1) For the purpose of showing the value of land taken, the appellant proved the selling price of a feed mill property which had been sold about eight years before the trial of this cause, and the first assignment of error is to the refusal of the trial court to permit the witness, Louis Pierson, state his opinion of the value of the brick mill buildings separately from the value of the land upon which they were built (p. 26). The witness testified that he had been in the grain business and real estate business for about twenty-five years (p. 23), which developed that he had been in the grain business twenty-five years, and in the real estate business six or eight years (Supplement, p. 1). He was a son of the Pierson who operated the mill, and before his father sold the mill, in June, 1906, eight and a half years before this trial, he was connected with him in the conduct of the feed business. The mill was a brick structure, two stories in height, with a large brick chimney (Supp., p. 28), and contained within it were a boiler, engine, grinding and elevator machinery, etc (Supp., p. 4). For the purpose of qualifying him to testify as to the value of the brick mill and these appurtenances, and the other buildings upon the mill property, the witness was asked if he had had any experience in building, and he replied that he had, having built some modern barns, houses and store-houses. He was permitted to testify as to the value of the frame buildings (Supp., p. 3). No other qualifications being shown, and the witness not pretending to be an expert upon brick buildings and machinery, we respectfully submit that there was no error in refusing to receive this man's opinion of the value of the brick mill buildings. *Electric Park Co. v. Psichos*, 83 N. J. L., 265; *Crosby v. East Orange*, 84 N. J. L., 710; *Kutner v. Central R. R.*, 80 N. J. L., 11; *Van Ness v. Tele-*

phone Co., 78 N. J. L., 511; *State v. Maioni*, 78 N. J. L., 341; *Kinney v. Philadelphia Watch Case Co.*, 76 N. J. L., 738; *Riley v. Camden & T. R. R. Co.*, 70 N. J. L., 289; *P. & P. R. R. v. Root*, 53 N. J. L., 253; *Laing v. United R. R. of N. J.*, 54 N. J. L., 576; *Bergen Neck R. R. v. Point Breeze Ferry Co.*, 57 N. J. L., 195; *Wheeler & Wilson v. Buckhout*, 60 N. J. L., 102. That the opinion was properly excluded is shown by the cross-examination, the witness never having built, bought or sold a brick building (Supp., p. 2).

(2, 3) The second and third assignments of error deal with the question of damages to the remaining land, and are more conveniently considered in connection with the 14th, 15th and 16th assignments, which are on the same subject.

(4) Mr. Manda estimated the value of the strip taken by the railroad company at \$17,000 (p. 28) and stated that he valued it on the basis of the sale of the Pierson Mill property, eight years before, and that he estimated the value of the bare land of the mill property by deducting therefrom his estimate of the value of the buildings. He also was unable to qualify on the valuation of the buildings and his examination along this line was therefore postponed (p. 29); in the meantime, the appellant produced some other witness to testify to the value of the buildings on the Pierson mill property and Mr. Manda was later recalled and examined as follows:

Direct examination by Mr. Carey (p. 143):

Q Mr. Manda, you were testifying to what you conceived to be the value of this strip of land, taken as land, without the top soil on it, and you stated that you compared it with the Pierson property after allowing for the value of the building; at that time that was not in

evidence, as to the value of this brick building; now will you state what allowance you made for the value of the buildings on the Pierson property?

Mr. Stallman. I object to that.

The Court. You see it is not his allowance, Mr. Carey.

Mr. Carey. It is in evidence now what the buildings are worth. I am asking him now to analyze his method of arriving at the value of the land after deducting the value of the buildings, in making his comparison with the Pierson property.

(Question read.)

The Court. I will sustain the objection. He has already said as land it was as valuable as the Pierson property.

Q Will you state, Mr. Manda, how you arrived at the value which you placed upon the property which the railroad company is to take, that is, the land as land?

A I was comparing the value of the land proper *in my estimation, deducting for the buildings that were on Mr. Pierson's property,* which adjoins another piece of property I owned there, and which I have known for the last twenty-one years, deducting for the value of the building.

Q And what deduction did you make for the value of the building?

Mr. Stallman. Objected to.

The Court. I will sustain the objection.

As Mr. Manda was not qualified himself to value the buildings and had nothing to do with the sale of the property, and the land and buildings having been sold as a whole and not separately, any answer which the witness might make to the question objected to would be founded on what he heard the other witness say. Not being an expert on land values, the testimony of others could not be con-

sidered by him as an expert, as a part of a hypothetical question, and the question was properly overruled.

(5) The fifth assignment is abandoned.

(6) The next assignment is to the admission of proof of the sale price of the playground known as Cameron Field, on the ground that it was not comparable with the land condemned.

This plot is fully described on pp. 155, 156 of the record, and as the trial judge pointed out, in ruling on the question (p. 157) and in charging the jury (p. 179), the two properties had certain comparable and distinguishing features.

a. They are both on the same side of and adjacent to the railroad, and extend down to the Rahway River;

b. The appellant's property is next to the roundhouse, and the playfield is next to Mor's coal trestle.

c. Neither was accessible from the public highway, except over other lands.

And the Court ruled: "To the extent that it is similar, it may be used as a standard of comparison of value."

The record fails to show that any formal objection was taken to the ruling of the Court, and it would therefore seem to be not reviewable. Kargman v. Carlin, 85 N. J. L., 632-636; Webster v. Freeholders of Hudson County, 86 N. J. L., 256; Lams v. Fish, 86 N. J. L., 321.

However, in permitting this proof, there was no error.

In *Brown v. New Jersey Short Line R. R. Co.*, 76 N. J. L., 795-796, this Court held:

"Whether such lands were sufficiently like the land taken, and such sales were sufficiently near in point of time and vicinage to qualify

opinion evidence as to value, was, under the authorities, also very largely within the range of the discretion of the trial court. These hold that a wide discretion should be given the trial judge in determining whether the conditions are such as readily to admit of reasonable comparison between the lands taken and the lands so sold. *Laing v. United N. J. R. R. and Canal Co.*, 25 Vroom, 576; *Shattuck v. Stoneham Branch R. R. Co.*, 6 Allen, 115."

The lands of the appellant, which were taken in these proceedings, were parts of different tracts and some of the land condemned was over a thousand feet from Third street, the nearest public highway, with the exception of Valley street, which was on the other side of the railroad and from which access was obtained by a farm crossing connected with other lands of the appellant. It was, therefore, proper to show values of property similarly situated. This witness showed that the Cameron field was sold, a short time before, for \$3,500 (p. 157), which would be either \$500 or \$800 per acre, depending on whether or not the witness recollection of the area was correct. The same witness, however, testified that the appellant's rear land, about two-thirds of an acre, was worth, considering the use made of it, a thousand dollars (p. 159), which would be about \$1,500 per acre. Another of the railroad company's witnesses testified that the appellant's rear land was worth \$2,000 an acre and another of the railroad company's witnesses testified that the rear land was worth six and two-thirds cents ($6\frac{2}{3}c.$) a square foot, which would be about \$2,900 an acre (pp. 181, 182). In view of these values placed upon appellant's lands by the railroad company's witnesses, the proof of the sale of Cameron field could not, in any sense be prejudicial to the appellant, and the trial court so held on the application for the rule to show cause.

(7) Both the appellant and respondent had detailed inventories prepared, covering all of the nursery stock on the land taken. The appellant's inventory was made by Mr. Manda and his employes, and the plants were therein valued at the prices at which he usually sold the stock (Supp., pp. 9, 17). One of the respondent's inventories was made by Mr. Peterson of the F. & F. nurseries at Springfield, and the other was made jointly by Mr. Burgeman, formerly purchasing agent for Bronx Park, Mr. Winnewisser, a nurseryman of thirty-five years' experience, and Mr. Hartung, of Hartung Brothers, a nurseryman of Jersey City and Mendham (Supp., pp. 29, 35). By stipulation of counsel, these inventories were admitted in evidence without primary proof of the separate items. Mr. Burgeman, on direct examination, testified as follows:

Q Now, I wish you would tell us just how you made this inventory, checking the inventory made by Mr. Manda.

A Well, we were on the property. Mr. Manda had his inventory that he had submitted, I believe, to the railroad company, which was given to me in the railroad company's office. We counted the plants and valued them according to the values that I have been in the habit of paying, from the catalogue prices that I have been in the habit of buying from, and from different nurserymen. In some cases we found the count just the same as Mr. Manda's.

By Mr. Stallman.

Q Have you recently examined the catalogues of houses in this line of business?

A Yes, sir.

Q Have you those with you?

A I have some with me, yes, sir.

Q How do the prices in the catalogues which you have examined for *this class of*

stock compare with the prices which you have marked on this inventory?

Mr. Carey. I object. You cannot tell from the catalogues what the nature of the stock is. It cannot be defined with any degree of accuracy at all. No person would venture to buy a large quantity of plants from a mere catalogue.

The Court. But it might be a guide. Objection overruled. * * *

A The prices that I have used would compare about the same as those of the catalogue. In some instances we have allowed a little more to Mr. Manda than the catalogues.

The question under examination was the market value of the nursery stock and this was proven by the experts in that line of business (Supp., pp. 34 to 37). There were about 65,000 items in hundreds of varieties.

In *More-Jonas Glass Co. v. West Jersey and Seashore R. R. Co.*, 76 N. J. L., 710, this court said:

“The second assignment of error argued raises the question of the propriety of the ruling of the trial judge in allowing the witness Richard M. More, to make use of certain trade price lists and discount sheets for the purpose of aiding his memory in testifying as to the market value of bottles destroyed by the fire.

It appeared that upwards of eighty different kinds of bottles were destroyed. That they were of varying weights, sizes, shapes and colors and were intended for various uses.

The witness testified that for twenty-five years he had been engaged in the business of selling glassware and that he was familiar with the market value at the time of the fire of the stock of bottles destroyed; that the market value of such bottles is determined each year by means of a trade price list and

discount sheets made out by a committee of the manufacturers of glass bottles; that he could not now testify as to the market value of all the bottles destroyed without the use, as to some of them, of such price lists and discount sheets which were in effect at the time of the fire.

Under the circumstances, there was no error in allowing the witness thus to refresh his memory. Whether or not the price lists and discount sheets were confidential to the trade is of no moment. They were promulgated by the authority of the manufacturers and were universally recognized by the trade, and enabled the witness to definitely and accurately testify as to market value. *Morris v. Columbian Iron Works*, 76 Md., 354."

The inventories were already in evidence by stipulation, and *we did not offer any catalogue*, but merely showed the general fact that the prices placed upon the nursery stock by the experts compared favorably with the catalogue prices which other dealers in the business asked for the same class of goods. The mere statement of the witness that his estimate of the value agreed with trade prices could not be in the least degree prejudicial to the appellant, and at the appellant's request, the Court instructed the jury on this point. Request No. 7 (p. 189).

(8) James W. Wagner is a rose grower at Chatham, N. J. His nursery and greenhouses adjoin the respondent's railroad. The railroad there is on an embankment and locomotives are continually passing the greenhouses (Supp., p. 44). In view of the appellant's claim that the operation of the respondent's locomotives on its elevated track would have an injurious effect on the appellant's nursery, it was perfectly competent and proper for the respondent to show the actual

experience of a nurseryman, under identical conditions.

The question was (p. 170):

“Do you know, Mr. Wagner, whether or not the passage of locomotives along this track, passing your greenhouse, has had any effect on the plants in your greenhouse?”

Mr. Carey. I object to that as immaterial.

The Court. Objection overruled.

There was nothing prejudicial in the question, and as counsel insisted that the matter was immaterial, I do not understand why he now urges that it was.

(9) The ninth ground of appeal is directed to that part of the charge in which the Court instructed the jury with reference to the large fixed trees and the top soil on the land. The trees were not planted by the appellant as nursery stock. They were of natural growth and had been there for many years. The soil was not a chattel nor stock in trade, even though occasionally some of the appellant's customers purchased a little of it (Record, p. 70, and Supp. p. 5).

The Court had already charged the jury:

“The question with which you are concerned in this hearing is only one of compensation; that is, what will be just compensation to W. A. Manda, Incorporated, *for the property taken for the best and most beneficial use to which the property is capable of being put*, and for damages to the remaining property by reason of the taking.”

The Court also charged the jury (page 180):

“He says by reason of the top soil which has been placed upon that land, it has been made up, built up, year by year, and there is an added value of thirty cents a square foot for 35,550 square feet, or \$10,905, so that,

according to his judgment, this land in its present condition is worth \$27,905. Mr. Farquhar, the gentleman from Boston, you will remember, gives no opinion as to the value of the land itself, but he gives his opinion of the top soil, which he says is twenty-five cents a square foot."

"Mr. Karlstrom, who is employed by Mr. Manda, also gives it as his opinion that this top soil adds 30c a square foot to the value of the land. These figures are not to be applied to this top soil as a mercantile proposition as something that is to be taken from the land and marketed. These figures are to be considered by you in determining the value of the land as a whole."

Notwithstanding these specific references to the value of the top soil, the following text from *Lewis on Eminent Domain*, third edition, Sec. 724, is abundantly supported by authority:

"The compensation should be estimated for the land, as land, and not for the materials which compose it * * * so it is proper to consider the value of trees or of peat on the land, or of a spring of water or a well, but these items should not be valued separately, but considered as affecting the value of the land." See also *Id.* §707.

In *Philadelphia T. Co. v. Merchantville*, 74 Eq. 332, the present Chancellor said:

"Land, as I understand it, includes water, and this understanding seems to be supported by abundant authority. The word land when used in a deed, includes not only the naked earth, but everything within it, and the buildings, trees, fixtures, fences, stones, minerals, water and herbage upon it. 18 Am. & Eng. Encycl. L. (2d ed.) 141. The word 'land' is comprehensive in its import, and includes many things besides the earth we tread on, as water, grass, buildings, fences, trees and

the like for all these may be conveyed by the general designation of land. Words and Phrases, Vol. 5 tit. Land, p. 3976 * * * *

When the use of land is transferred by the action of the legislative will, the right of use, for the specified purpose, everything, which in the legal sense is comprehended in the term land, is transferred. *Taylor v. New York and Long Branch Railroad Co.*, 38 N. J. L. (9 Vr.) 28, 30. The complainants acquired the property sought to be condemned (including the water) as land, and as land it can be taken away."

It has also been held that

"In proceedings to appropriate land for railroad purposes, it is error to instruct the jury in such a way that they might understand that in ascertaining the amount of the damages, they were to consider the value of the land as such and also the value of the gravel existing on the premises." *P. F. W. & C. R. R. v. Swinney*, 59 Ind. 100.

"The evidence should be directed to the value of the land in its then condition and while in valuing this, it is proper to consider the house, barn, fruit trees, etc., yet it is error to direct the evidence to their value independent of the land." *L. & N. R. R. v. Asher*, 10 Ky. L. R. 1021.

See also *DeVou v. Cincinnati*, 162 Fed. 633. 10 Ruling Case Law, Title "Eminent Domain" section 112.

In view of the rule as exemplified by the foregoing authorities, the charge was more than favorable to the appellant. The criticism in the last paragraph on p. 24 of appellant's brief overlooks entirely the respondent's fourth request (p. 190).

(10) The tenth ground of appeal also challenges the correctness of the charge based upon the foregoing quotation from Lewis.

(11, 12) The eleventh and twelfth grounds of appeal are directed to the Court's instruction to the jury as to valuing the nursery stock. The appellant, in its inventory, used the prices at which it customarily sold these plants and shrubbery and produced its books to show that the prices used in the inventory were the same as those appearing upon its invoices to its customers. (Supp. p. 17.) It was shown that these prices included the appellant's profits over and above its expenses of production and overhead expenses, including expenses of selling the plants and time and skill used in making selections for customers. (Supp. p. 23.)

The record shows that many of the plants are raised from shoots or eyes. These in time develop into clusters or colonies of stems. These clusters are then separated into separate stems for sale or transplanted for repropagation. This propagation involves considerable expense and labor. The herbaceous plants die down in the fall and if healthy reappear in the spring (Supp. p. 22). Some of the evergreens cannot be propagated. This is a risk of the business (Supp. pp. 21, 45). The entire nursery stock is not all sold annually, but large quantities are carried over from season to season and year to year (Supp. p. 18 top). (The statements at the foot of p. 25 and in the last paragraph on p. 26 of appellant's brief were undoubtedly made from consulting the expurgated record prepared by the appellant. References are therefore made to the supplement as noted). The nursery stock, however, was *all* valued by the appellant *as separated, selected and sold*.

Upon these facts it was not improper to charge the jury:

"9. In estimating the value of the nursery stock, you must consider its condition in the ground at the time of condemnation, what attention, care and expense is involved in converting it from that condition to a commodity ready for delivery to a customer, or into a separate propagating plant."

"10. Considering the condition of the nursery stock in the ground, you may further consider the probability of its survival, and you may consider what proportion of this stock might be sold or require transplanting."
(Supp. p. 21.)

(13) The thirteenth ground of appeal is that the Court refused to charge a requested proposition of law as to the time at which the plants should be valued. I desire to call the Court's attention to the fact that this proposition was not submitted to the trial court before the beginning of the argument, as required by rule 5 of the Circuit Court. *Dunne v. Jersey City Galvanizing Company*, 73 N. J. L. 590.

The situation which brought forth this request was as follows:

One of the respondent's witnesses testified that when he examined the appellant's plants the tops of some of them were withered and dying. The appellant ascribed this condition to the fact that the plants required constant care and attention, and that when the railroad company had filed its petition and notice thereof was given to the land owner, the land owner thereafter was under no obligation to give and did not give any attention or care to these growing plants, and that any deterioration in their condition, between the time of filing the petition and the time when the right of entry accrued, was chargeable entirely to the

petitioner. This is shown by the following charge and colloquy by the Court and counsel.

The Court. "I am also requested to charge you upon the time at which the railroad company may take possession. Under the law of eminent domain in this State the railroad company is entitled to take possession only when they have paid into the Court of Chancery the amount of the award of the commissioners, and notice to that effect has been given to the landowner. I have here a certified copy of the order of the Chancellor of this State from which it appears that this amount of money was paid into the Court of Chancery on the 10th day of October, 1914; so until that time, and until the landowner, the Manda corporation, had been notified of the payment into the Court of Chancery, the railroad company had not the right to enter upon and take this land. I understand these proceedings to have been offered in evidence, is that correct?"

Mr. Stallman. Only with reference to the date. Mr. Carey and I agreed that the date of the payment should be shown.

Mr. Carey. The date at which they are entitled to take possession is when notice is served on the owner.

The Court. That is it, and after payment has been made to the Court of Chancery.

Mr. Carey. We did not receive notice until the 16th or 17th.

Mr. Stallman. Mailed on the 15th, and received, probably, the 16th.

The Court. By agreement of counsel that is the date the railroad company had the right to take possession. You may retire.

Mr. Carey. In this connection may I ask your Honor to call the attention of the jury to what I conceive to be the law on the subject, that the value of the property is to be

considered as of the time when the condemnation proceedings are commenced by the filing of the petition in condemnation?

The Court. Is there any dispute about that in this case? Has there been shown to be any difference on the subject?

Mr. Carey. *The only reason I call attention to that is the fact that after that time there was no duty upon us to take care of the property.*

The Court. I am not willing to charge that. * * *

Mr. Carey. I also wish to note an objection to the denial by the Court of the request to charge that *after the filing of the condemnation proceedings in the Circuit Court, the appellant was not burdened with the duty of caring for the property.*

The Court. No such request was preferred in time to be charged; that was preferred just before the jury retired.

Mr. Carey. That, it seemed to me, arose out of the charge of the Court.

The Court. There has not been in this case any question of any addition of value, as I apprehend it, to the property at any time, which would make that necessary."

I submit there was no error in this ruling. I can find no authority holding that the owner can deliberately permit his property to depreciate, and charge it to the petitioner in condemnation, who would be charged with trespass if it entered upon the property even for the purpose of preservation.

II.

As the remaining grounds of appeal relate to the admission of evidence and the charge of the Court on the subject of the "damages to the remaining land," it will be well to note and bear in mind that these damages, by the appellant's

proofs, or rather contentions, were of a very definite and limited character; also the manner in which this part of the issue was presented to the jury. While Mr. Manda has conducted this nursery beside the railroad for over 20 years, he was not able to show that the railroad operations ever adversely affected the nursery. He claimed, however, that the embankment would damage some plants because (a) it would cause some undesirable shade; (b) it would cut off the wind, which would (c) delay the dispersion of engine gases (Appellant's brief, pp. 10, 11)). The appellant attempted to prove the amount of this damage in several ways:

First, by estimating the probable percentage of decrease in the valuation of the remaining land, although no proof of the value of the whole tract was offered.

Second, by capitalizing at 6% the estimated annual expenditure to combat the damage so feared, as the nursery was then laid out.

Third, by estimating the cost of readjusting the nursery by removing the susceptible plants from the suspected area and transplanting them, and replacing them with non-susceptible plants.

The appellant admits at top of p. 36 of its brief that these measures of compensation are optional and not cumulative.

With these theories in mind, the alleged errors may be examined.

2. The second ground of error is directed to the Court's refusal, upon the respondent's objection, to permit the witness A. A. Manda to answer the question as to the percentage of decrease in the valuation of the remaining lands (p. 58), predicated upon the following assumptions: The track on the elevation nearest the appellant's property being the freight lead track, i. e., a track giving

access to the freight yard from the main track, the witness assumed that there would always be a string of freight cars standing on this track; that the embankment and these freight cars would continually cast a shadow over a large part of its lands (pp. 51,53). That the embankment would shut off all circulation of air and that "dead air" pockets would form alongside the railroad, and that these dead air pockets would contain certain gases escaping from the locomotives (p. 56-57), and that, if these things occurred, some plants would be affected thereby and that if plants near the track were so affected, such affection would extend for a very considerable, but indefinite, distance from the railroad (p. 57).

The question, therefore, calls for a opinion based upon a *combination* of three factors, shade, cutting off wind or air currents, and the deposit of gases.

As to the shade, it may be conceded as a simple fact that a bank ranging from three to fourteen feet high will cast a shadow varying with the season of the year, which diminishes as the sun rises. The bank was not yet constructed, so Mr. Manda set up poles thirty feet high, and from the length of the shadow made by the pole made an estimate of the area which would have been shaded on that November day (p. 52), when the sun hangs south of the equator and the nursery stock is wintering, but no estimate was made as of the spring or early summer, when nursery stock is developing, and the sun is high in our latitude. What the extent, as well as effect, of the shade would be, at the important season of the year, was therefore necessarily left to speculation.

As to the gases from the operation of locomotives, it must be considered as noted above, that Mr. Manda has had his nursery right alongside

this railroad, and between the round-house on the south and the freight yard on the north, for twenty-years (p. 27), during all of which time engines have been passing by and taking cars to and from the yard as occasion required and yet there is not one word of testimony that he ever suffered in the slightest from the operation of the railroad or knew of anybody who did. He is not a chemist or mechanical engineer (p. 72) and showed no knowledge of the composition, temperature, velocity, saturation or effect of the gas from a smoke-stack discharging into the immeasurable atmosphere (Supp. p. 41), and any opinion as to the fact or extent of damage from this cause was pure speculation on his part.

As to the wind or air currents, and the formation of "pockets" containing "dead air", Mr. Manda showed no qualification, in the least degree, to prophecy how or when the wind would blow or to describe its tendency to spread vertically or horizontally, and what the effect would or would not be at and beyond the foot of a slope of an embankment of varying height.

The fact of damage from these features being conjectural, the extent of such damage was more so, and therefore "the probable percentage of decrease in the value of the land," and we submit that the Court properly excluded the opinion on the ground of its conjectural character, and that the witness did not have the knowledge, information or experience necessary to enable him to give an opinion which would have any value as evidence.

The rule, as stated in *Chamberlain's Mod. Evid.* §2293, is as follows:

"Great care will be employed in seeing that the facts at the basis of the opinion of witnesses should be carefully verified. Few observers are at much pains to distinguish be-

tween what they see and what they infer from it. The Court will be careful to see that the distinction is drawn, so far as practicable. No inference upon inference will be permitted. Nor must doubtful inference be allowed to supply the place of proof."

In *Kutner v. Central R. R.*, 80 N. J. L. 11, at 14, the Court said:

"Each of these questions called for the opinion of the respective witnesses to whom they were addressed, upon matters outside the line of their special knowledge; upon matters of mechanics rather than of medical science. The answers to them, if given, would have been without probative force. The opinions of experts, except as to those matters of which they have knowledge not acquired by ordinary persons, have no place in judicial procedure. The questions were properly excluded."

In the appellant's brief it is argued that the trial Court should have accepted Mr. Manda's opinion as to the probable depreciation in the value of the land, because his opinion that some damage would result was corroborated by the opinions of Dr. Stone and Mr. Weiss, but the record shows that both Dr. Stone and Mr. Weiss acknowledged that they could not prophecy as to the winds, and were not familiar with the character of the gases arising with the exhaust steam from the locomotives which they assumed would be injurious. The cross examination of these witnesses (pp. 86, 88 and 131) shows that they had absolutely no basis in knowledge or experience for their statements, but merely assumed, because they were called as experts, that they had the privilege of guessing, a privilege that is not accorded to an expert any more than it is to a layman. Chamberlain *Modern Evidence*, §2380.

Dealing with a similar situation, this Court in *Penna. etc. Co. v. Schwarz*, 75 N. J. L. 801, said:

“The witness was a real estate agent, but that did not qualify him as an expert with respect to the peculiar question of value that arose upon the facts of the present case. *Penna. R. R. Co. v. Root*, 24 Vroom 253. * * * *

Upon cross examination it was brought out that the West Shore tunnel was only eighty or ninety feet below the surface, that it carried two tracks on which a steam railroad operated both freight and passenger trains, and that the tunnel was constructed with open shafts through which the smoke and gas escaped. This latter circumstance, as well as the great disparity in depth between the two tunnels, were claimed by counsel for the condemning party to so differentiate the West Shore tunnel from the one under consideration in substantial respects as to afford no basis for the expert qualification of the witness touching the pending inquiry. Beyond this single instance the witness admitted that he had neither knowledge nor basis of knowledge. * * *

“From this rehearsal of the examination of the witness that preceded his answer to the question calling for his expert opinion, it is clear not only that he gave no testimony that showed the possession by him of any special knowledge that qualified him to speak as an expert upon the particular subject of inquiry.”

To all of the questions, resulting in the conjectures of these witnesses, objections were interposed by the respondent, which were overruled and objections duly noted to such rulings (pp. 85, 86, 88, 92, 96, 101 and 102), and I respectfully submit that there is nothing in the testimony of these experts (*who followed and did not precede Mr. Manda on the stand*), which in any way quali-

fied Mr. Manda to give an opinion of probative force, instead of a statement of vague fears, which were not the result of the experience of anyone so far as the record shows.

In *State v. Maioni*, 78 N. J. L. 339, this Court observed that in some matters, the opinion of an expert

“is of no more value than that of any other intelligent person, and the opinion of a witness has no place in a judicial investigation unless he possesses, with regard to the particular subject of inquiry, a knowledge not acquired by ordinary persons. But even if the witness could fairly be considered as an expert upon the subject inquired of, the question was, nevertheless, objectionable, for the matter with which it dealt was a mere abstraction. Questions calling for the opinions of experts upon matters of science must always be predicated upon, and relate to the facts established by the proofs in the case. *Shoemaker v. Elmer*, 41 Vroom 710. Professional opinions upon mere abstract questions of science tend to lead the minds of the jury away from the real points of inquiry and should always be excluded. 12 Am. & Eng. Encycl. L. (2d Ed.) 424, and notes.”

In *Van Ness v. Telephone Co.*, 78 N. J. L. 511-512, the Court said:

“That a witness had bought and sold land in a township did not qualify him to give an expert opinion as to the extent a particular lot of land in the same township was damaged by the cutting of a shade tree standing along a sidewalk in front of the lot. To qualify one as an expert witness there must be some proof that he has some special knowledge of the subject about which he is called upon to express an opinion. The knowledge may come from experience in, or study of, the matter, but there must be something shown to justify

the conclusion that he has some special knowledge to make his opinion of any value. * * * While considerable latitude is always allowed to the trial court in determining whether or not a witness has qualified as an expert, there must be some evidence to support the conclusion reached, and as there was none in this case, the witness was not competent to give the testimony admitted. *Elvins v. Telephone Co.*, 34 Vroom 243; *Pennsylvania, N. J. and N. Y. R. R. Co. v. Schwarz*, 46 N. J. L. 801."

In *Kinney v. Phila. Watch Case Co.*, 76 N. J. L. 835-838, the Court said:

"The qualification of an expert is to be determined by the trial court as a question of fact, and its conclusion will not be disturbed on error if there be legal evidence to support the finding * * *. Mr. Justice Dixon, in speaking for this court in *Convery v. Conger*, 24 Vroom 468-476, regarding the exercise of such a discretion, quoted with approval from *Bacon v. Williams*, 13 Gray 525, that 'this court would be slow to revise a ruling on such a question, unless the error was very plain and palpable'."

Not only was the witness disqualified by lack of knowledge to answer the question, there was at no time any proof offered of the value to which the supposed percentage was to apply.

(3) The next ground of error relates to the sustaining of our objection to the question, "Now, will you state what in your judgment will be the necessary annual expense to be incurred by reason of these conditions?" (p. 62). It will be noted that this question was preceded by the testimony of the witness that if the plants would be affected, by the shade, dead air and gas, in that case, it would be necessary to employ insecticide and men to apply it, over such parts as might be affected

(p. 61). This calls for cumulative conjecture, along the same lines as the preceding question, and for the reasons stated and upon the authorities mentioned above there was no error in overruling the question. This measure of the damage, however, was eliminated by the readjustment scheme adopted by the appellant.

(14, 15, 16) The fourteenth, fifteenth and sixteenth grounds of appeal are based upon the court's refusal to charge that the jury should capitalize at 6% the amount of any expense which the appellant might hereafter incur in his business in combating diseases caused by the shade of the bank, etc., and to award such capitalized sum in gross, as damages. Not only is the probability and amount of such expense pure speculation, but such an award would be contrary to law. *Lewis on Eminent Domain*, Sec. 727. *P. & C. Ferry Co. v. Inter City Link Railroad Co.*, 76 N. J. L. 50; affirmed in 77 N. J. L. 716.

(17) The appellant finally argues (brief, p. 37) without adverting to its proofs of the expense of reconstruction, that the trial court, in dealing with the appellant's sixth request, withdrew from the jury's consideration the matter of *damages to the remaining property*. But this is obviously not so, and no such notion could have been acquired by the jury. At the inception of his charge the Court said:

"The question with which you are concerned in this hearing is only one of compensation; that is, what will be just compensation to W. A. Manda, Incorporated, for the property taken for the best and most beneficial use to which the property is capable of being put, and for damages to the remaining property by reason of the taking."

At the bottom of p. 184 the Court specially takes up the matter of damage to the remaining land, which the appellant attributed to shade, etc., this part of the charge taking up two printed pages in the record, which is unnecessary to repeat in this brief.

The Court then charged the first and fifth requests of the appellant, as follows:

“1. The ‘just compensation’ which the constitution of this State requires shall be made to the landowner in condemnation cases, requires that the railroad company in this case shall make good to the owner all the pecuniary outlay which it is or will be compelled to make by reason of the appropriation of its property, and by reason of the use to which the railroad company puts or will put the property appropriated. I charge you that.”

“5. In this case the railroad company has defined its plan of constructing its railroad upon the land taken, and *the jury should award damages to the remaining lands of the owner based on the use of the land taken in any lawful mode within the plan presented by the railroad company. I charge you that.*”

Then, at the request of the respondents, the Court further charged:

“13. In considering the matter of *damages to the remaining land*, you are to take into consideration only such damages as are reasonably probable to result from the taking of the land and the use to which it is to be put. Remote and speculative consequences should have no place in your considerations.”

It must be borne in mind, however, that appellant's case was tried and proved on the theory that *to escape the damage feared*, it would be necessary to remove the plants growing within the zone of these influences near the railroad, to some other part of the nursery and put in their places

trees and other stock which would not be so affected, and that this rearrangement would cost \$2,500, and other changes \$430, or a total of \$2,930 to enable him to operate the nursery as advantageously as he was then doing. (Record p. 51, and 62 to 69, inclusive.) This estimated expense was not confined to any expected damages from shade alone, but from all of the assumed causes of damage combined (p. 72). These items of reconstruction were not disputed and *the Court charged the jury to allow them* (p. 186). In the cases of *Buhler Rubber Co. v. Newark*, 61 N. J. L., 32, and *Edgewater R. R. Co. v. Valvoline Oil Co.*, 76 N. J. L., 789, it was held proper to allow the land owner the cost of replacing facilities actually taken, and there is no reason why the land owner, if he so elects, should not accept the cost of making changes to avert damages to the land not taken.

This brings the case squarely within the decision of this Court in *Hinners v. Edgewater, etc. R. R. Co.*, 75 N. J. L. 514, in which Mr. Justice Garrison wrote:

“Plaintiff in error, having insisted upon this scheme as one that reduced its damages, and having occasioned its submission to the jury, cannot now obtain a reversal of the judgment rendered on the trial verdict merely because of some academic or abstract errancy in such submission that was not, *as applied to the concrete scheme in question*, injurious to the plaintiff in error.”

The trial court after having charged the jury to include in their verdict *all damages to the remaining land*, and then having charged them specifically to allow the cost of the particular items of reconstruction which the appellant claimed to be necessary to escape the damages resulting from the

use of the land, followed his main charge by charging the appellant's fifth request as follows:

"5. In this case the railroad company has defined its plan of constructing its railroad upon the land taken, and *the jury should award damages to the remaining lands of the owner based on the use of the land taken in any lawful mode within the plan presented by the railroad company. I charge you that.*"

The sixth request does not clearly indicate whether it is intended to charge in a different form the lump sum capitalized expense theory contained in the second, third and fourth requests, or an elaborated repetition of the fifth request, or that the appellant was entitled to the damages therein mentioned in addition to the sum which it estimated was necessary to avert them, or that the appellant should be allowed something for possible damages of which no proof was made.

There can be no doubt that the appellant is not entitled the assessment of double damage, once on the theory that the nursery would be allowed to remain as it was, subject to the assumed detrimental shade, etc., and secondly by assessing the cost of making the changes necessary to escape such influences. The request was not framed to direct the attention of the jury to any damage from shade, gas and air which might be imagined to result *after* the appellant had spent the \$2,900 it claimed to be necessary to transpose the plants to avert this very damage. In view of the charge as a whole, especially the appellant's 5th and respondent's 13th requests, and with reference to the allowance of the reconstruction expenses, I respectfully submit that the appellant's sixth request as drawn was apt to mislead the jury, and that in any event, the jury could not have been led to disregard the proved damages by the manner in which the Court charged the sixth request.

(18) The closing argument of appellant's brief was submitted to Judge Dungan on its application for a rule to show cause. At the opening of the last term of this court the appellant's counsel consented to the entry of an order striking out this ground of appeal, and the order was entered.

Conclusion.

The trial of this cause consumed three whole days (not including the striking of the jury and viewing the premises), before an exceptional jury. The trial judge, during the charge, submitted to the jury the exact amount in dollars and cents that the appellant claimed for every item (pp. 180, 183, 186), and full summarized all of its contentions. If there was anything abstractly erroneous in the submission of the case, there was no error injuriously affecting the substantial rights of the appellant (Practice Act, 1912, §27), *Wickes Bros. v. Lamp Co.*, 85 N. J. L. 322; *Ridgely v. Walker*, 86 N. J. L. 590; *Murphy v. Marone*, 86 N. J. L. 663-667; and we respectfully submit that the judgment should be affirmed.

Respectfully submitted,

MAXIMILIAN M. STALLMAN,
Of Counsel with Respondent.

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Notice of Appeal.

Essex County Circuit Court

W. A. MANDA, Incorporated,
Appellant,

vs.

DELAWARE, LACKAWANNA AND
WESTERN RAILROAD COMPANY,
Lessee of THE MORRIS AND
ESSEX RAILROAD COMPANY,
Appellee.

10

In Condemnation.

Proceedings on
Appeal from
Award of
Commissioners.

Notice of Appeal.

20

To:

M. M. STALLMAN, Esq.,
Attorney for Appellee.

TAKE NOTICE, that the above-named appellant
appeals to the Court of Errors and Appeals from
the whole of the judgment entered in the above-
entitled action December 3rd, 1914.

Dated August 2, 1915.

30

Yours respectfully,
VREDENBURGH, WALL & CAREY,
Attorneys for Appellant.

Acknowledged Aug. 7, 1915.

M. M. STALLMAN,
Atty, of Appellee.

Filed August 10, 1915.

JOSEPH McDONOUGH,
Clerk. 40

Notice of Appeal

The petition for the appointment of commissioners in condemnation herein was filed July 20, 1914, and the usual order to show cause was made on that day.

The award of the commissioners was made October 2, 1914.

From the award of commissioners the land
10 owner appealed.

20

30

40

Order Framing Issue, &c.

ESSEX COUNTY CIRCUIT COURT.

W. A. MANDA, Incorporated,
Appellant,

vs.

DELAWARE, LACKAWANNA & WEST-
ERN RAILROAD COMPANY, Lessee
of the MORRIS & ESSEX RAIL-
ROAD COMPANY,
Appellee.

On Appeal in
Condemnation
Proceedings.

10

Order Framing
Issue &c.

W. A. MANDA, INCORPORATED, the above named appellant, protesting against the right of said appellee to maintain its proceedings in condemnation on its petition filed herein, and having taken an appeal from the award of Alonzo Church, William F. Patterson and Arthur Seitz, Commissioners heretofore appointed by Honorable William S. Gummere, Chief Justice of the Supreme Court of the State of New Jersey, to examine and appraise the land and property of the appellant sought to be condemned by said appellee, and to assess the damages sustained by said appellant and others interested in said lands by reason of acquiring said lands and property; and it appearing that notice of said appeal and of this application has been duly filed and served,

29

30

IT IS, on this twenty-fourth day of October, nineteen hundred and fourteen, by the Honorable Nelson Y. Dungan, Judge of the Circuit Court of Essex County,

ORDERED AND ADJUDGED that the issue between the said W. A. MANDA, INCORPORATED, Appellant, on one side, and Delaware, Lackawanna & West-

40

Order Framing Issue &c.

ern Railroad Company, lessee of the Morris & Essex Railroad Company, appellee, on the other, for the trial of said appeal, shall be and is:

10 What amount shall said appellee pay to said appellant and the persons interested in said lands and property for the value of said lands and property sought to be acquired by condemnation, and for the damages sustained and to be sustained by said owner and the persons interested in said lands by the acquiring and taking by said appellee said lands and property to be forever occupied and used by the appellee in the manner shown by the plan of construction produced by said appellee before the aforesaid Commissioners, and made a part of said condemnation proceedings, the appellant, however, objecting to said plan of construction with reference to the proposed private crossing for the appellant shown on said plan, which proposed crossing the appellant has refused to accept in lieu of the crossing to which it claims to be entitled, located at the foot of Fourth Street; said lands and property, located in the Village of South Orange, Essex County, New Jersey, being described as follows:

20

30 “Beginning at a point in the west line of Third St., said point being distant eighty-seven (87) feet, northerly, measured at right angles from the center line of the M. & E. R. R. Co.; thence,

“(1) Southeastwardly along said west side of Third St., sixty-two and five tenths (62.5) feet more or less to line of lands of the M. & E. R. R. Co.; thence

40 “(2) Along said line of the M. & E. R. R. Co. south thirty-nine degrees fifteen minutes west (S. 39 deg. 15 min. W.) one thousand six and twenty-six hundredths (1006.26) feet to a corner; thence

Order Framing Issue &c.

“(3) Still along said line north forty-eight degrees fifty minutes (N. 48 deg. 50 min. W.) (20) feet; thence.

“(4) In a northeasterly direction six hundred ninety-five (695) feet to a point, said point being distant sixty-five (65) feet northerly, measured at right angles from the center line of the M. & E. R. R.; thence,

10

“(5) Still in a northeasterly direction two hundred and fifteen (215) feet more or less to a point; thence,

“(6) Still in a northeasterly direction and at right angles to Third St., one hundred feet (100) to the place of Beginning.

CONTAINING eighty-nine hundredths (.89) of an acre more or less.

Said lands and property so taken are taken subject to covenants, agreements and stipulations on the part of the appellee as follows:

20

(1) That the appellee will erect and maintain during the period of construction of its work, a substantial fence along the new boundary line established in these condemnation proceedings.

(2) That the appellee will construct and forever maintain a concrete retaining wall along said new boundary line as shown on said plan of construction, to retain the portion of the embankment there to be constructed.

30

AND IT IS FURTHER ORDERED that a jury be struck in the manner prescribed by law for the trial of the issue in said appeal, and that the sixth day of November next, at ten o'clock in the forenoon, or as soon thereafter as the court can attend to the same, at the Court House, in the City of Newark, be and the same is hereby fixed as the time and place for striking said jury.

AND IT IS FURTHER ORDERED that the twentieth

40

Order Framing Issue &c.

day of November next, at two o'clock in the afternoon, at the Court House, in the City of Newark, be and the same is hereby fixed as the time and place for the trial of said appeal, and that on said date a view of said premises be had.

NELSON Y. DUNGAN,
Circuit Court Judge.

10 Filed October 27, 1914.

JOSEPH McDONOUGH,
Clerk.

20

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Judgment.

ESSEX COUNTY CIRCUIT COURT.

<p style="text-align: center;">W. A. MANDA, Incorporated, <i>Appellant,</i></p> <p style="text-align: center;">vs.</p> <p style="text-align: center;">DELAWARE, LACKAWANNA AND WESTERN RAILROAD COMPANY, Lessee of the MORRIS AND ESSEX RAILROAD COMPANY, <i>Respondent.</i></p>	}	<p>On Appeal from Award of Commissioners in Condemnation Proceedings</p> <p>Judgment.</p>	10
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This appeal was tried before Nelson Y. Dungan, Circuit Judge, with a struck jury, in the presence of counsel of the respective parties, at the Essex Circuit, on November 20th, 23d, 24th and 25th, 1914. 20

The cause having been heard and submitted to the jury they assessed the value of the land and other property taken and the damages sustained and returned a verdict in favor of the owner-appellant in the sum of \$17,000.

The report of the Commissioners, as filed in the office of the Clerk of Essex County, on the 10th day of October, 1914, having awarded to the owner as compensation for said land and damages, the sum of \$25,000 which amount was paid into the Court of Chancery by the petitioner-respondent, as provided by law, and the amount found by the jury being the sum of \$8000 less than the amount awarded by the said commissioners: 30

It is adjudged that the respondent, Delaware, Lackawanna and Western Railroad Company, lessee of the Morris and Essex Railroad Company, recover of the appellant, W. A. Manda, Incord- 40

Judgment

porated, the sum of \$8000 and its costs which are
taxed at the sum of _____, making in
the whole the sum of _____.

Judgment entered, _____, 1914.

NELSON Y. DUNGAN,
Circuit Court Judge.

Filed December 3, 1914.

10 JOSEPH McDONOUGH,
Clerk.

20

30

40

Judgment

ESSEX COUNTY CIRCUIT COURT.

<p style="text-align: center;">W. A. MANDA, INC., <i>Appellant,</i></p> <p style="text-align: center;">vs.</p> <p style="text-align: center;">DELAWARE, LACKAWANNA AND WESTERN RAILROAD COMPANY, Lessee of the MORRIS AND ESSEX. RAILROAD COMPANY, Lessee, <i>Appellee.</i></p>	<p>On Appeal from Award of Commissioners After Verdict Judgment entered Nov. 25th, A. D., 1914</p> <p>Damage \$17,000.00 Costs Total. (See Judgment entered Dec. 15, 1914)</p>	<p>10</p>
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VREDENBURGH, WALL & CAREY,
Attys. of Appellant.

Judgment after Verdict in the above entitled
action on Appeal was rendered on the Twenty-
fifth day of November, A. D. Nineteen hundred
and fourteen, in favor of the said Appellant:
W. A. Manda, Inc., and against the said Appellee:
Delaware, Lackawanna and Western Railroad
Company, Lessee of the Morris and Essex Rail-
road Company, Lessee, for the sum of Seventeen
Thousand Dollars, damage, and the sum of
Dollars and cents,
costs of suit.

Judgment entered and signed Nov. 25th, A. D.
1914.

WM. S. GUMMERE,
Judge.

Judgment

ESSEX COUNTY CIRCUIT COURT.

10	<p style="text-align: center;">W. A. MANDA, Incorporated, <i>Appellant,</i></p> <p style="text-align: center;">vs.</p> <p style="text-align: center;">DELAWARE, LACKAWANNA AND WESTERN RAILROAD COMPANY, Lessee of the MORRIS & ESSEX RAILROAD COMPANY, <i>Respondent.</i></p>	<p>On Appeal from Award of Commissioners After Verdict Judgment entered Dec. 3, A. D., 1914. as of Dec. 15, A. D., 1914. Damage \$8000. Costs 62.31 <hr style="width: 50%; margin-left: 0;"/>Total \$8062.31</p>
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M. M. STALLMAN,
Atty. of Respondent.

20 Judgment after Verdict in the above entitled
action on Appeal was rendered on the Twenty-
fifth day of November, A. D. Nineteen hundred
and fourteen, in favor of the said Appellant
W. A. Manda, Inc., and against the said Appellee
Delaware, Lackawanna & Western Railroad Com-
pany, Lessee of the Morris and Essex Railroad
Company for the sum of Seventeen Thousand Dol-
lars damage, being the sum of Eight Thousand
30 Dollars—\$8000—less than the amount of award of
Commissioners. Therefore, it is adjudged that the
Respondent recover of the Appellant, W. A.
Manda, Incorporated, the sum of Eight Thousand
Dollars, and the sum of Sixty-two Dollars and
Thirty-one cents costs of suit.

Judgment entered and signed December 3, 1915.

WM. S. GUMMERE,
Judge.

Notice of Motion.

ESSEX COUNTY CIRCUIT COURT.

<p style="text-align: center;">W. A. MANDA, INC., <i>Appellant,</i></p> <p style="text-align: center;">vs.</p> <p style="text-align: center;">DELAWARE, LACKAWANNA & WEST- ERN RAILROAD COMPANY, Lessee of MORRIS & ESSEX RAILROAD COMPANY, <i>Respondent.</i></p>	<p>In Condemnation Proceedings.</p> <p>On Appeal.</p> <p>Notice of Motion.</p>	<p>10</p>
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PLEASE TAKE NOTICE that at the Court House in the City of Newark, on the 8th day of January, 1915, at two o'clock in the afternoon, we shall move before the Honorable Nelson Y. Dungan, Circuit Court Judge, for a rule to show cause why the verdict in the above entitled action should not be set aside, and on said motion we shall read from the stenographer's transcript of the proceedings at the trial herein, and we shall also read affidavits of which copies are hereto annexed. 20

Yours respectfully,
VREDENBURGH, WALL & CAREY, 30
Attorneys for Appellant.

Dated December 31st, 1914.

To—

M. M. STALLMAN, Esq.,
Attorney for Respondent.

Service of a copy of above notice is acknowledged this 31st day of December, 1914.

M. M. STALLMAN,
Attorney for Respondent. 40

Affidavit of Kraus Mor

ESSEX COUNTY CIRCUIT COURT.

W. A. MANDA, Incorporated,
Appellant,

vs.

10

THE DELAWARE, LACKAWANNA &
WESTERN RAILROAD COMPANY,
Lessee of the MORRIS & ESSEX
RAILROAD COMPANY,
Respondent.

In Condemnation
Proceedings.

On Appeal.

STATE OF NEW JERSEY, }
County of Essex, } ss.:

20

KRAUS MOR, being duly sworn on his oath, says that he, together with Catherine D. Mor, his wife, are the grantors named in a certain deed, dated the 17th day of December, 1912, to the Village of South Orange; that said deed conveys a strip of land thirty-nine (39) feet in width at right angles to its sides, by about three hundred and sixty-seven (367) feet in length; that said strip of land extends from lands of Patrick J. Smith to premises known as the Cameron Field, in the Village of South Orange; that said strip of land, together with the strip of land of the same width, purchased by the Village of South Orange, from Patrick J. Smith, constitutes the only entrance to said Cameron Field. That deponent has lived adjacent to the premises constituting Cameron Field for many years, and knows said premises thoroughly. That from the time of the conveyance of said premises to Cameron Field, a corporation, in the month of February, nineteen hundred and ten, up to the time of the purchase from Patrick J. Smith

30

40

Affidavit of Kraus Mor

and deponent of the above mentioned strip of land there was no right of way or access to said Cameron Field from South Orange Avenue, or from any other public street.

Deponent further says that he received for the above described strip of land conveyed by him and his wife to the Village of South Orange, the sum of three thousand, nine hundred (\$3,900) dollars in cash, and as a further consideration therefor, the Village of South Orange agreed to and did build a street on said strip of land, guttered and curbed the same and built the sidewalk the entire length thereof, without any assessment upon deponent's abutting property.

KRAUS MOR.

Subscribed and sworn to before me }
this 5th day of December, 1914. }

GEORGE GARRABRANT,
Notary Public
of N. J.

(SEAL)

10
20

30

40

Affidavit of M. A. Fitzsimmons

ESSEX COUNTY CIRCUIT COURT.

W. A. MANDA, Incorporated,
Appellant,

vs.

In Condemnation
Proceedings.

10

THE DELAWARE, LACKAWANNA &
WESTERN RAILROAD COMPANY,
Lessee of MORRIS & ESSEX
RAILROAD COMPANY,
Respondent.

On Appeal.

STATE OF NEW JERSEY, {
County of Essex, } ss.:

20

M. A. FITZSIMMONS, being duly sworn on his
oath, says that he is Clerk of the Village of South
Orange; that said Village paid to Patrick J. Smith
the sum of three thousand, nine hundred dollars
(\$3,900) in cash, for a strip of land about thirty-
nine (39) feet in width, extending from South Or-
ange Avenue to land of Kraus Mor, and said Vil-
lage also paid to Kraus Mor, three thousand, nine
hundred (\$3,900) dollars in cash for a strip of
land about thirty-nine (39) feet in width, extend-
ing from the land of Patrick J. Smith to Cameron
Field; that said two pieces of land were acquired
by the Village for an entrance to Cameron Field,
which entrance is now known as Cameron Field
Place.

30

M. A. FITZSIMMONS.

Subscribed and sworn to before me {
this 4th day of December, 1914. }

40

JOHN D. MUNTHER,
Notary Public
of New Jersey.

(SEAL)

Affidavit of Chas. E. Colley

ESSEX COUNTY CIRCUIT COURT.

W. A. MANDA, Incorporated,
Appellant,

vs.

THE DELAWARE, LACKAWANNA &
WESTERN RAILROAD COMPANY,
Lessee of MORRIS & ESSEX
RAILROAD COMPANY,
Respondent.

In Condemnation
Proceedings. 10
On Appeal.

STATE OF NEW JERSEY, }
County of Essex, } ss.:

CHAS. E. COLLEY, being duly sworn on his oath,
says that he is President of the Playground Com-
missioners, and is familiar with the condition of
Cameron Field at the time it was purchased. That
at said time there was no entrance to Cameron
Field from South Orange Avenue, or any other
public street, and that the land was acquired from
Patrick J. Smith and Kraus Mor for an entrance
to said Cameron Field.

20

Deponent further says that at the time of said
purchase about three-quarters of Cameron Field
was low, wet land, which required to be drained
and filled.

30

CHAS. E. COLLEY.

Sworn to and subscribed this 4th)
day of December, 1914, before me.)

JOHN D. MUNTHEK,
Notary Public
of New Jersey.

40

(SEAL)

Affidavit of Frederick Dunham

ESSEX COUNTY CIRCUIT COURT.

W. A. MANDA, Incorporated,
Appellant,

vs.

10

THE DELAWARE, LACKAWANNA &
WESTERN RAILROAD COMPANY,
Lessee of MORRIS & ESSEX
RAILROAD COMPANY,
Respondent.

In Condemnation
Proceedings.

On Appeal.

STATE OF NEW JERSEY, }
County of Hudson, } ss.:

20 FREDERICK DUNHAM, being duly sworn on his
oath, says that he is an Engineer and Surveyor.
That he has plotted the premises described in a
certain deed of conveyance made by the Meadow
Land Society to Cameron Field, a corporation,
dated February 15, 1910, and recorded in Book
E-47 of Deeds for Essex County, page 157, etc.,
and has computed the area of said premises. That
the total area thereof as described in said deed,
is 4.496 acres.

30

FREDERICK DUNHAM.

Subscribed and sworn to before me }
this Fourth day of December, 1914. }

JOHN T. DAVIDSON,
Notary Public of N. J.
(Notarial Seal)

40

Affidavit of Albert A. Manda

ESSEX COUNTY CIRCUIT COURT.

W. A. MANDA, Incorporated,
Appellant,

vs.

DELAWARE, LACKAWANNA & WEST-
ERN RAILROAD COMPANY, Lessee,
etc.,
Respondent.

On Appeal.

Affidavit.

10

STATE OF NEW JERSEY, }
County of Essex, } ss.:

ALBERT A. MANDA, being duly sworn according to law upon his oath, says that he is the President of W. A. MANDA, INC., and has entire charge of collecting evidence for it; that when the above matter was heard before the Condemnation Commissioners, no testimony whatever was given with respect to the purchase or value of the property known as the "Cameron Field" property, nor was any testimony whatever given with respect to said "Cameron Field." That the testimony given at the trial of the appeal with respect to said property was entirely a surprise to deponent; that at the time of the trial neither he nor any one connected with the appellant had any knowledge concerning the facts testified to in regard to this property, and was unable to meet them at the trial; that immediately after the trial was concluded he began investigation and ascertained that the testimony with respect to "Cameron Field" was false, as shown by the affidavits of Messrs. Mor, Fitzsimmons, Colley and Dunham, submitted herewith.

20

30

40

Affidavit of Albert A. Manda

Deponent further says that neither he nor any one connected with the appellant, knew or supposed that any testimony whatever was to be given at the trial respecting or about said Cameron Field, and that the appellant was entirely unprepared to contradict this testimony.

ALBERT A. MANDA.

10 Subscribed and sworn to before me }
this 18th day of December, 1914. }

JOHN D. MUNTHER,
Notary Public,
New Jersey.

20

30

40

Affidavit of David McCullough

ESSEX COUNTY CIRCUIT COURT.

<p>W. A. MANDA, Incorporated, <i>Appellant,</i></p> <p style="text-align: center;">vs.</p> <p>DELAWARE, LACKAWANNA & WEST- ERN RAILROAD COMPANY, Lessee of MORRIS & ESSEX RAILROAD COMPANY, <i>Respondent.</i></p>	}	<p>On Appeal.</p> <p>Affidavit.</p>	<p>10</p>
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STATE OF NEW JERSEY, }
County of Essex, } ss.:

DAVID McCULLOUGH, being duly sworn on his oath, says: 20

That he did the filling and draining of premises known as "Cameron Field" at South Orange, New Jersey, after the same was purchased for a playground; that prior to doing this work, fully three-quarters of said "Cameron Field" was low and wet and almost impassable for teams and required to be filled and drained; that less than one acre was hard, dry ground; that the low and swampy portion of said land was filled in from one side, and it was a source of constant danger to the horses and mules to attempt to drive over the unfilled portion when coming out with the empty wagons. 30

Deponent further says that there was no right of way to this property from any public street, and that he was compelled to procure a special permit to cross over the lands of the South Orange Field Club to this property, and that during the 40

Affidavit of John H. Redfern

whole of his work on the property, he used this
passageway over the property of said South
Orange Field Club.

DAVID McCULLOUGH.

Subscribed and sworn to before me }
this day of January, 1914. }

10 GEO. GARRABRANT,
 N. P. of N. J.
(SEAL)

STATE OF NEW JERSEY, }
County of Essex, } ss.:

JOHN H. REDFERN, of full age, being duly sworn
on his oath, saith:

20 He is a surveyor in the employ of Ira T. Red-
fern, in South Orange, New Jersey, and that he
figured the area of Cameron Field in South
Orange, New Jersey, and found the contents to
be 4.53 acres taken from the lines and distances
given in the deed.

JOHN H. REDFERN. (L. s.)

30 Sworn and subscribed before me }
 at South Orange, New Jersey, }
 this fifth day of December, 1914. }

 JOHN D. MUNTHER,
 Notary Public,
 New Jersey.
(Seal of Notary)

On Appeal from Award.

ESSEX COUNTY CIRCUIT COURT.

W. A. MANDA, Incorporated,
Appellant,

vs.

DELAWARE, LACKAWANNA AND
WESTERN RAILROAD COMPANY,
Lessee of the MORRIS AND ESSEX
RAILROAD,
Respondent.

In Condemnation
Proceedings.

On Appeal from
Award.

10

The appellant having applied to the court for a rule to show cause why the verdict in the above-entitled case should not be set aside and a new trial granted, and the court having heard William H. Carey, Esquire, for the application and Maximilian M. Stallman, opposed, ordered that the application for said rule be and the same is hereby denied.

20

On motion of

MAXIMILIAN M. STALLMAN,
Attorney of Respondent.

Filed May 13, 1915.

JOSEPH McDONOUGH,
Clerk.

30

40

Testimony.

ESSEX CIRCUIT COURT.

	W. A. MANDA, Incorporated,
	vs.
10	DELAWARE, LACKAWANNA & WEST- ERN RAILROAD COMPANY.

Transcript of shorthand notes of testimony taken in the above stated cause, upon the trial thereof, at the Court House, Newark, N. J., November 20, 1914.

Before Hon. NELSON Y. DUNGAN, Judge, and a Jury.

20 VREDENBURGH, WALL & CAREY for appellant.
M. M. STALLMAN for appellee.

By agreement of counsel, and on the order of the Court, the jury were taken to view the premises in question.

Adjourned to Monday, November 23, 1914, at ten o'clock, A. M.

SECOND DAY.

30 Newark, N. J., November 23, 1914.

Continued pursuant to adjournment.

Appearances as before.

Mr. Carey opened for the appellant.

Mr. Stallman opened for the appellee.

Two maps, one of which is produced by the appellant, and the other by the appellee, are placed upon the board.

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Louis H. Pierson, for Appellant—Direct

LOUIS H. PIERSON, sworn for the appellant.

Direct Examination by Mr. Carey:

Q. Mr. Pierson, where do you reside? A. Maplewood.

Q. That is near South Orange? A. It is.

Q. What business are you in, Mr. Pierson? A. Grain business and real estate.

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Q. How long have you been in that business? A. Twenty-five years.

Q. In what vicinity? A. South Orange and Maplewood.

Q. Do you know the Manda property which is under condemnation in this proceeding? A. I do.

Q. Mr. Pierson, were you at one time in business near this property? A. I was.

Q. Where were you in business? Where was the location? A. Diagonally across the street, or across the railroad track.

20

Q. Take the pointer and point out to the jury the exact location of the property where you were engaged in business. A. (Witness indicates on the blueprint.)

Q. That is the property shown on the map there? A. That is where I was engaged in business with my father.

Q. Who now owns that property? A. The H. B. Halsey Company.

30

Q. Did your father sell that property to the H. B. Halsey Company? A. He did.

Q. What is the character of the Manda property, I mean simply the land, as compared with the character of the property which you sold to the H. B. Halsey Company? A. I should think it was about the same class of ground.

Q. Mr. Pierson, what was the selling price of the property you sold to the H. B. Halsey Company? A. \$12,000.

40

Louis H. Pierson, for Appellant—Direct

Q. I show you a certified copy of a deed from Walter L. Pierson and wife to Henry B. Halsey, will you look at the description of that property and see whether that is the property which is known now as the Halsey property, and which you have just testified about? A. It is.

10 Said deed offered in evidence and marked Ex. P1.

By a Juror:

Q. The witness pointed to a spot there, is that the full plot, or only that spot? A. It is all this plot around the D., L. & W. Railroad, and up to there; it is 86.69 feet on Second street, 229 feet to Third street, and 192 feet on Third street—or, rather, 62 feet on Third street.

20 Q. Had a frontage on two streets? A. Had a frontage on two streets.

Q. What is the railroad frontage? A. 292.81 feet.

Q. 292 feet on Third street? A. 62 feet on Third street.

Q. What did you say the distance was from Second to Third? A. 228 feet.

Q. Did that have any building, or anything, on it when you sold it to Halsey? A. Yes, sir, it did.

30 Mr. Carey: I will read the description of the deed, and Mr. Stallman has a map which corresponds with the description of the deed and I will put that in evidence (reading description).

By Mr. Carey:

40 Q. Now, Mr. Pierson, the description in this deed speaks of a triangular corner which may be owned by James M. C. Morrow, was there a little triangular strip at that point owned by your father at the time of the conveyance?

Louis H. Pierson, for Appellant—Direct

Mr. Stallman: Objected to. That calls for a conclusion. The deed speaks for itself.

The Court: The objection will be overruled.

A. Yes, sir.

Q. Will you point out on the map the location of this little triangular strip. A. It was 2.16 feet on this line here (indicating) and ran down this way 29½ feet, a V-shaped piece. 2.16 feet on that line, and ran down Third street 29½ feet. 10

Mr. Carey: Mr. Stallman has very kindly had drawn from a description in the deed a diagram of this property, and I will offer it in evidence.

Same marked Ex. P2.

By a Juror:

Q. When was this deed made? A. June 30, 1906. 20

Q. Has the exclusion of that exception in the deed ever come up since? A. It has.

Q. Has it been settled definitely? A. After we sold the property the H. B. Halsey Company bought that piece from Mr. Morrow. At the time we bought that piece of Mrs. Gardner, who we thought owned the piece of property at that time, she also thought so, but in some way it has been deeded to Mr. Morrow, and we thought that we had title to it at that time, but there was a dispute as to the title to this piece, and afterwards it was proved that we didn't own it. 30

By Mr. Carey:

Q. Will you look at this Exhibit P2, and notice the little colored triangular strip in one corner there, do you see that? A. Yes, sir.

Q. Is that the triangular strip in question? A. 40

Louis H. Pierson, for Appellant—Direct

That is the triangular strip that we thought we bought of Mrs. Gardner, but Mr. Morrow proved to us that Mrs. Gardner didn't own it.

Q. Now, Mr. Pierson, what buildings were on that property at the time you sold it to Mr. Halsey? A. Three.

10 Q. Describe them. A. There was one old building, a wooden building, that we used to store some odd stuff in, and there was a wagon shed and a brick building.

Q. What, in your judgment, was the value of these buildings at the time the property was sold?

Mr. Stallman: That is objected to on the ground the witness has not shown qualification.

The Court: The objection is sustained.

20 Q. Have you been engaged in the building business? A. To a certain extent.

Q. Describe to what extent and how you have been connected with the building business? A. Building large barns and houses, and store houses.

Q. And for how long a period? A. Twenty-five years.

30 Q. And from your experience in connection with building work that you have done are you able to give us the value of those buildings on this property?

Mr. Stallman: I object to that question. That is making the witness qualify himself by his own opinion.

The Court: The objection is sustained.

An objection to this ruling is noted by appellant as ground of appeal.

Albert A. Manda, for Appellant—Direct

ALBERT A. MANDA, SWORN for the appellant.

Direct Examination by Mr. Carey:

Q. Mr. Manda, you are the president of the Manda corporation? A. Yes, sir.

Q. What is your business, Mr. Manda? A. Horticulture.

Q. How long have you been in that business? 10
A. Forty-one years.

Q. And where? A. First in Bohemia, then in Vienna, then in Paris, then in London, and for the last thirty-two years in this country.

Q. Where in this country have you been engaged in that business? A. First I was—for five years I was curator of the Harvard Botanical Gardens; then I joined James R. Pritchard and started the United States Horticultural Company at Short Hills; spent over five years there, and since January 1, 1894, I started on my own account at South Orange, New Jersey, in the present location. 20

Q. And the business was afterwards incorporated in the name of W. A. Manda, Incorporated? A. Yes, sir.

Q. And that corporation is now the proprietor of the business, is it? A. Yes, sir.

Q. Did you purchase this land, a part of which is being condemned now, Mr. Manda? A. Yes, sir. 30

Q. How long ago did you purchase it? A. One part of it, the part fronting on Third street I purchased in '93, 1893, twenty-one years ago.

Q. And the remainder of it? A. The remainder of it about sixteen years ago.

Q. Now, Mr. Manda, in connection with your professional work have you originated any species of plants by hybridization? A. Yes, sir, that is my profession, to try and improve existing va- 40

Albert A. Manda, for Appellant—Direct

rieties by hybridization and producing new ones.

Q. How long have you carried on that work?

A. About thirty-five years or more.

Q. In your judgment what is the value of this strip of land which is being taken by the railroad company, considered merely as land in its natural state? A. The slip of land taken from the W. A.

10 Manda, Incorporated?

Q. Yes. A. Figuring it on the basis of the next property, that is—

By the Court:

Q. You are asked just now to give your opinion of it; if it is desired that that be analyzed counsel will ask you the question. Just your opinion of the value in dollars and cents. A. Can I refer to a calculation I made?

20 Q. If you cannot recollect. A. I can recollect, but not just exactly the fraction.

Q. Well, generally, give it? A. Generally \$17,000.

By Mr. Carey:

30 Q. And on what do you base that calculation, Mr. Manda? A. I am basing the calculation on the valuation of the Pierson property which is just like ours; the line beginning at Third street, and going to Fourth street, where we have a right of way, and on our map there we have a street, a private street built on our side. I am speaking of the property going down the lots here, is worth as much as the Pierson property, which averages, taking out the value of the buildings, at fifty cents, in my estimation—

40 Mr. Stallman: I desire to object now. The witness is endeavoring to give values based on his own computation, taking the value of the Pierson buildings from the entire prop-

Albert A. Manda, for Appellant—Direct

erty, which, certainly, he is not qualified to do. I think the basis of his calculation being property, and not based on his own knowledge, he should not be permitted to argue on that basis.

The Court: Is not that so, Mr. Carey?

Mr. Carey: I will put another witness on afterward, and ask leave to recall Mr. Manda later, if necessary. 10

Q. I understand you base your estimate of the value of the property on what you conceive to be the value of the Pierson property adjoining, is that right? A. Yes, sir.

Q. And extending the property back by reason of the frontage which you explained about? A. Yes.

Q. Now, Mr. Manda, what did you do with this land after you purchased it by way of preparing it for use as nursery property? A. When I bought the land it was what people commonly call God forsaken property; that is the popular name. That means if anybody had a dog, or cat, or horse, to bury they buried it there; or if anybody wanted a load of sand, or anything else that was on it, they went and helped themselves. And in that condition I had to start and subdrain it first, then fill it in with top soil to various depths from 2 feet up to 7 feet in depth to make it available for our business. 20 30

Q. And how long has this process of fitting this land for nursery business been going on, Mr. Manda? A. The last twenty years.

Q. Now, describe the condition of the top soil of this property to which it has been brought by reason of what you did. A. Well, we filled with the best of loam obtainable; then we enriched that loam by heavy fertilizing with stable manure, 40

Albert A. Manda, for Appellant—Direct

sheep manure, bone ashes, and in fact we carried into the place every day from three to twelve loads of manure on our property.

Q. Have you taken means to ascertain what the average depth of this top soil was on your property? A. Yes, sir.

10 Q. With what result? A. Figured out the average depth to be two feet and a half, thirty inches of the best soil, such as we have made our propagating beds.

Q. In connection with your business, Mr. Manda, do you do landscape work? A. Yes, sir, very extensive.

Q. Gardening? A. Yes, sir.

20 Q. What is the value per square foot of this top soil which stood on the property there at the time the condemnation proceedings were commenced?

Mr. Stallman: I desire to object to that question. As I understand the rule, it is not competent, in endeavoring to prove value of land, to prove the different elements which compose the land, or to divide land into strata, and prove separate values. I know that it is competent to show the condition of the land, but when you are putting value on land, especially in a case of this kind, and endeavoring to find the market value, then the rule laid down by the Court of Errors in cases of this kind should apply, that you cannot take the land and take the values of strata, and divide the land up into its component parts. That is laid down in section 706 of Lewis, and on that account, if I have made myself clear, I desire to object to this.

30

(Argued.)

40 The Court: Unless you can cite some authority, Mr. Stallman, my opinion would be

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that that would not be proper. Of course you can show the value of the land; it is entirely proper to show the condition of the land when bought, and the value of land in that locality, and if it is impossible to show the value of this particular kind of land in that locality, to show the improvement that has been made in the enrichment of the soil, and leave it to the jury to say what in their opinion the property would be enhanced thereby. 10

(Question read.)

Mr. Carey: I will add to that, in addition to the natural value of the land.

The Court: I think that makes a very different question.

Mr. Stallman: My idea of it, as I understand the law which I have examined, is that it is not proper to divide these land values into parts, divided up in order to arrive at the total. I do not think, if we were condemning a farm that had been used, probably, for raising oats, or something of that kind, that it would be proper to show that the farm, the oat field, or whatever it might be, had a value compared with the farms in that neighborhood, and then go and add the value of the manure, add something for the labor of plowing, and various things of that kind on top of that; because those things are to make the land in that condition. 20 30

The Court: You could show the increased value of the land, and it would be proper to get the opinion of a witness properly qualified as to how much more he thought the enriched property was worth per acre, or per foot, than the original farm.

Mr. Stallman: The question was not put in that way. 40

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The Court: With the addition to it I think it made considerable difference in the question.

10 (Question read as follows: "Q. What is the value per square foot of this top soil which stood on the property there at the time the condemnation proceedings were commenced, in addition to the natural value of the land?")

The Court: I am inclined to admit the question.

Mr. Stallman: The Court will note my objection to the admission of the evidence?

The Court: Yes.

An objection to this ruling is noted by the appellee as ground of appeal.

20 Mr. Stallman: I would like to cross-examine at this point to find out the basis upon which he has computed the value.

The Court: You may do that.

By Mr. Stallman:

Q. I understand you to say that the depth of the top soil varies in different places? A. Yes, sir.

30 Q. And is the top soil which is on this property of different ages, that is, some part of it been developed before another part has? A. Well, the bottom part, when I bought the property, of course—

Q. You can answer me just briefly, whether or not some part of this land has been developed to this condition before the other part. A. Well, certainly, yes, sir.

Q. It was not all done at once? A. No, sir; no, sir.

40 Q. How many places did you measure in order to get this average depth? A. Oh, about twenty, and you can see there now if you want to.

Albert A. Manda, for Appellant—Direct

Q. Do you know how much you have added, say within the last year, average all over this particular parcel that the railroad company wants? Can you say how much you have added the last year in depth? A. Well, the biggest part of that space was not disturbed during the last year.

Q. What is that? A. The biggest part of that property was not raised up. That is, we had the property raised to its proper height; the only thing I have put in now, keep on year after year additional fertilizer. But the heavy fertilizer to make these production beds I have made in two and three sections. 10

Q. And I understand it that you raised it to practically its present grade shortly after you bought it? A. No, sir; no, sir; I done it two or three times, as I answered you before.

Q. But I do understand that the present grade of the property, generally speaking, has been the same for over a year past? A. Over a year past, yes, sir. 20

Q. Would you say two years? A. Yes, but some of it was changed about two years ago, and we made another raise up against the railroad to keep the water from coming down.

Q. And before that when had it been raised? A. About four years.

Q. And during all this time the property has been used for cultivating your plants? A. Yes, sir. 30

Q. The work that you did on this particular strip which the railroad company desires to take was not substantially different from the other part of your nursery premises, was it? A. No, not from the biggest part; not all; the biggest part.

Q. But what you did there you did in the other sections of your property as well? A. Yes, sir, right across, as you see the beds. 40

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Q. And in the figure which you were about to testify to as the value per square foot, how did you arrive at that value? What was the method and basis of your computation? A. From the cost and selling.

Q. (By the Court.) What? A. From the cost, your Honor, and the selling. We had sometimes
10 sold property of that sort.

Q. (By Mr. Stallman.) There is a small market for top soil there? A. That is not ordinary top soil, it is enriched top soil, made mellow by vegetable matter and fertilizer, so we can use it for propogating beds.

Q. Have you kept a record from the time you went there of the money you have spent on this development? A. No, sir. I would hate to look at the figures.

Q. You say you have done this on the basis of
20 the cost? A. Yes, sir.

Q. And what you get for it? A. Yes, if we sell that sort of soil.

Q. And the price you get for it when you sell it by the load, or what not, is more than what it cost you? A. Well, about.

Q. You sell it at some small profit? A. Well, it is more to customers that buy plants from us; otherwise we don't sell it.

Q. What you do sell is at a profit? A. Well,
30 some slight profit; sometimes at a loss.

Q. How much of that have you sold within the last year? A. Well, we sell it with almost any planting.

Q. No, you don't understand me. I said how much have you sold within the last year? A. We don't sell much of it; simply to be sure that the plants we send out are planted in proper soil, and would take root and flourish, and satisfy the
40 customers.

Albert A. Manda, for Appellant—Direct

Q. Over what period of years have you examined the cost in order to give this figure that you have in your mind? A. Well, in a general way; it is impossible to keep exact cost.

Q. Did you figure up the cost of the improvement over your property generally, and find out an average per square foot value? A. Yes, sir. 10
of the property that was treated in a similar way.

Q. And over how many acres would that apply? A. Well, that would be equal to about four or four and a half acres.

Q. And did you tell me about how many years figures you went over? A. I tell you I took the average figure, what it can be figured to, because it is impossible to keep it—

Q. This particular strip which the railroad company desires to take is substantially different near Third street than it is down near the round house; 20
I mean the top soil. A. It is pretty much alike except that far end here.

Q. The last few hundred feet, did you say? A. No, that other point there, against the round-house.

Mr. Stallman: If the Court please, I think that the way that the witness has computed what he thinks is the additional value is hardly fair and proper, or legal evidence. He has figured up the cost, he says, over a number of years. During all that time there has been something taken out, and that means putting back. You cannot take anything out of the soil you do not give the soil; and of course the price at which that stuff is sold, after it is severed from the land, selling a little of it, that is no criterion of the additional value. And these things, taken into consideration with the fact that this man is the owner, and, of course, desires to get as 40

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much as he can for his land, it seems to me does not qualify him to give an unbiased and fair answer, and competent answer to the increased value based upon the method in which he has gone after it.

The Court: The objection will be overruled.

10

By Mr. Carey:

Q. (Question read as follows: "What is the value per square foot of this top soil which stood on the property there at the time the condemnation proceedings were commenced, in addition to the natural value of the land?") A. I figure it out to be thirty cents a square foot.

20 Q. Mr. Manda, in connection with your landscape work do you make propogating beds, and prepare soil of the same general character as the soil which you have there on this land? A. Yes, sir.

Q. How long have you been doing that kind of work? A. Well, I might say over thirty years.

Q. And in computing the value of this have you taken into account the cost which is incurred in connection with preparing soil of that kind for propogating beds in the landscape work which you do? A. Yes, sir.

30 Q. Part of this strip is covered by a roadway, is it not? A. Yes, sir.

Q. And of course the top soil is not on that part of the strip? A. No, sir. In my figures I have deducted the area covered by roads.

Q. Now, will you tell us how much of the area is covered with top soil as you have computed it? A. May I refer to my figures?

The Court: Yes.

40 Q. Look at your memoranda. A. The entire

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strip of land taken by the railroad is 38,991 $\frac{1}{2}$ square feet. From that should be deducted 2,641 square feet, which covers the road and a part where the top soil was not on, which leaves a net of 36,350 square feet of top soil.

Q. And you computed the average depth of this 36,350 feet at how much, did you say? A. About 2 $\frac{1}{2}$ feet. The railroad has been digging it up and carting it away. 10

Q. What value do you find this top soil to have had there on increasing the natural value of the land?

Mr. Stallman: I have to make another objection to this repetition of the question.

The Court: A mere matter of calculation, isn't it? Makes \$10,905. doesn't it?

Witness: Yes, your Honor. 11

Q. Mr. Manda, what was on this property, this strip of land, at the time the railroad company began the condemnation proceeding? A. All of these beds were full of— 20

Q. Won't you step to your map and show what you mean by beds? A. All of these beds, each bed about 5 feet wide, with a foot pathway in between, and divided again by cross paths, so as to be able to show customers, and so as to be able to work the beds, weed them, and plant them, and keep them in condition along the roadway here. 30

Q. Show by the pointer how far those beds extended. A. Those beds extended from Third street way down to temporary right of way, where, when the jury were there, crossed over here (indicating). Those beds extend from Third street down to a point where temporary right of way we are using across the tracks; and then the further portion was planted full of plants that have green foliage summer and winter, plants 40

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that are generally termed evergreens, the paths and hedges were lined with specimen evergreens from Third street on. And at different points through these beds there was shrubbery and specimen trees of various kinds that have been cut down by the railroad since they began their operation.

10 Q. Now, what became of the plants and shrubs which were on the ground at the time of the condemnation? A. The railroad lifted out the evergreens and shipped them away, planted them in some places. I recognized some of the—

Q. I don't care where, I want to know simply whether or not the railroad company took them?

A. The railroad company took them, cut down the trees and scooped the rich deep soil, the black soil, with a scoop, put them on cars and carted them
20 away.

Q. Did you make an inventory of the plants that were on this property? A. Yes, sir; I have.

Q. And in that inventory did you fix the price value, of the plants? A. Yes, sir.

Q. And have you the inventory here? A. I have, sir.

Q. Will you state whether or not you took part in counting these plants for the inventory? A. I have. I have in the first place, and have since,
30 after the second lot of men sent by the railroad to recount the plants.

Q. Suppose you begin at the beginning of the counting and tell what you did, and who worked with you, and how you counted, and so forth? A. We took bed after bed, Mr. Karlstrom, two gardeners, and myself part of the time, took the beds in number from one up, and counted the plants, giving the botanical names, the number of the plants, and the numbers from each plant,
40 per unit of each of these beds.

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Q. (By a Jury.) What price did you put on, the regular retail price, or cost price? A. Well, there is no cost price; it is hard to determine, in growing crops, where we grow an enormous variety of plants.

Q. How did you arrive at your cost? A. The price put on was the price which we sell in large quantities.

Q. (By Mr. Carey.) Sell in what kind of quantities? A. In large quantities.

Q. (By a Juror.) Did you include the plants along the road there you spoke of? You see the railroad does not include the road all the way up, and you were speaking of growing plants along the road. Did you include them in your figures? A. Only those the railroad took; simply the plants that were included in the line of the railroad land which they condemned.

Q. (By Mr. Carey.) Are those the plants which you have included here, the plants which the railroad company has disposed of as you have testified to? A. Yes, sir.

Q. In connection with this price which you have put on your plants in the inventory will you state whether or not that is the value of the plants standing in the ground, or the value after they are taken out and shipped away? A. That is the price of the plants as they stand in the ground.

Q. When you take up and ship away for the price which you have mentioned, is anything added to the charge to the customer for any purpose, and if so, for what purpose?

Mr. Stallman. I think this line of examination is leading. Mr. Manda is capable of telling what elements enter into his price.

The Court: The objection will be overruled. Yes, or no, the answer may be.

A. Yes, sir.

Albert A. Manda, for Appellant—Direct

Q. Now, will you state what additional charges are made to the customer? A. For boxes and packing; that is, boxes or crates, whatever was used for putting the plants in, and the labor in digging and taking them up.

Q. Mr. Manda, there were some trees on the property, were there not? A. Yes, sir.

10 Q. What kind of trees were they? I mean trees in distinction from this shrubbery and evergreens? A. There were some oaks; some ash trees; there were some honey locust around by the railroad.

Q. (By a Juror.) That is the one there by the gate? A. Yes, sir. That is not in the schedule.

Q. (By Mr. Carey.) Don't tell us anything about any tree that is not in this schedule. We are asking to be compensated for what is on this
20 schedule; don't go outside of that. A. That is the only tree that is not on schedule.

By a Juror:

Q. Did you plant all those trees? A. Not all.

Q. Some were there when you bought the property? A. Some were there when I bought the property.

Q. Paid for them. Are you charging them in this list on the same basis you paid for them?

30 A. I didn't pay anything for them; I bought the land—

Q. Don't you charge for them here? A. Certainly.

By Another Juror:

Q. Were all of these trees included in those that were on the property when you purchased such as you might term specimen trees? Had they been transplanted, so they were marketable?

40 These oaks and ash you speak of? A. No; the only

Albert A. Manda, for Appellant—Direct

thing that was on the property was the large plants of oaks and elms.

Q. And you had not transplanted those so they were marketable? A. No; those we keep for protection against the smoke and fumes of the railroad, and for partial shade for shade loving plants that we were growing right adjoining to such trees.

10

By Mr. Carey:

Q. Will you state whether or not those trees which you have put in the list have a salable value? A. Every tree on the property has a value.

Q. Don't tell about the trees on the property now. I want to know if these trees you had in this list, and charge against the railroad company, have a salable value? Are they salable? A. They were all salable with the exception of about five or six, and those have values, because any tree on any property has a value.

20

Q. Tell us what value those five or six have. Point out what trees you refer to as five or six trees. A. On page—

Q. (By the Court.) What is the title of it? A. "Trees" on page 17 there is one large scarlet oak, 22 inch stem, that could not be transplanted. That was one of the original trees on the property.

30

Q. (By a Juror.) What is that worth?

The Court: Listed at \$100.

A. A tree like that could not be replaced for twice the amount.

Mr. Stallman: That is objected to.

The Court: That will be stricken out.

Q. (By Mr. Carey.) What was it worth? A. \$100.

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Albert A. Manda, for Appellant—Direct

Mr. Stallman: I object to that. I do not think they can value these trees separately, or permit this witness to give an arbitrary value of trees as they stand there.

10 The Court: The difficulty with this objection is that it is admitted already that this witness will testify to that value by the production in evidence, by consent, of all these sheets that contain these values.

Mr. Stallman: I specifically stated we had some legal objections to some of these items on here.

The Court: Yes, and that will probably be a motion to strike out later; I assume that.

Mr. Stallman: Yes, or a request to charge. I want to save my rights on this point.

20 The Court: Yes.

Q. Several other trees that are not transplantable, or salable by reason of being transplanted.

A. Three other trees. There is an elm, 26 inch stem; one elm 26 inch stem again. and another elm; and another oak 24 inch stem, 2 feet.

Q. Are those the only trees that are not salable because they cannot be transplanted? A. Yes, sir.

30 By a Juror: Will it be right to ask him the actual value of these trees?

The Court: \$20 apiece on this list.

Q. (By the Court.) How about those on page 16; red oak, 24 inch stem, and trees of various other sizes; an oak 15 inch stem; there are a number of trees on that page. A. There is one large oak here, 24 inch stem.

Q. (By Mr. Carey.) What about that? A. That is one of the original trees.

40 Q. I mean what about it with reference to be-

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ing— A. That could not be transplanted—it could be transplanted, all of these could be transplanted at extra large cost. Large trees of similar sizes are transplanted and are replanted at large world's fairs, or something like that, where you want to give the effect as regards landscape to the buildings. But such large trees are not moved, they are not transplanted in nurseries. It is taken from a natural growth, trees selected and lifted with an enormous big chain, put on a sled or stone boat, and dragged to the place where they are wanted to be planted; but they are not what could be termed a nursery tree. 10

Q. The cost of doing that would be what? Large cost or small cost? A. Large cost. A cost like that is generally higher than the tree itself. A \$100 tree would cost from \$100 to \$200 to move it. 20

Q. (By the Court.) I notice on page 16 other oaks as high as 15 inches in diameter, 10 to 15 inches, and hickory 10 inches, have they a market value as trees to transplant? A. Most of the small ones have been transplanted.

By a Juror:

Q. Were they some of the original trees on the property, you spoke of the small trees, 15 inch? A. No. 30

Q. The 15 inch was not an original tree? A. No.

Q. You keep them there for sale? A. Yes, sir.

Q. Did you ever sell a 15-inch tree? A. Yes, sir.

By Mr. Carey:

Q. Mr. Manda, you have examined the plan of the railroad company for the construction of the embankment and the railroad tracks on the property that they are to take? A. Yes, sir. 40

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Q. Can you give us the height of the embankment at the various points along the strip of land?

The Court: Cannot those points be agreed to?

Mr. Carey: I think they can.

10 Mr. Stallman: I have the plans, we have used them all through this case, and we will put them in evidence.

Q. Will you state what effect upon the adjoining property this embankment, and the use of the embankment for railroad purposes, as shown on the company's plan of construction, will have upon the adjoining property?

20 Mr. Stallman: I think that is objectionable as being speculation. Of course, it is not based upon any actual facts; it is based upon his knowledge of plans that have not been brought out before the jury as to what facts he would endeavor to give his opinion on; and, in the second place, even then it is pure guesswork.

30 The Court: It may be a well known fact. I cannot say that you are right about that, because it may be a well known fact among horticulturists that certain conditions produce certain effects upon plants. Of course, if it is pure conjecture then a motion to strike out would prevail. The objection will be overruled subject to your right to move to strike out.

An objection to this ruling is noted by the appellee as ground of appeal.

40 Q. Answer the question, if you can. A. In the first place, a bank of 14 feet or more, and a railroad—

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Mr. Stallman: Just a minute. This is just what I mean, if the Court please. The witness is going on and making a conjecture; he is not speaking to any particular facts; and I therefore think that what we ought to do is to have the facts brought out, so in case Mr. Manda is going to make conjectures on assumptions that are not facts we can object to it formally. 10

The Court: I thought perhaps time could be saved. We have almost reached the adjournment hour; suppose you submit these plans to Mr. Carey during the adjournment hour and see if they can be used, so that the facts will be in evidence.

Mr. Carey: We will pass that, then, for the present.

Q. Mr. Manda, in laying out these grounds did you lay them out as you have shown on the map here? A. Yes, sir. 20

Q. What was the object which you had in view in laying them out, and how did that object contribute to the use of the property as you used it prior to the time of these condemnation proceedings? Step down there, if you want to and point. A. On the several driveways located the buildings, located my beds, and planting of all kinds of plants, with a view so that I could take a customer either coming in a carriage, or on foot, and show them over a certain road, or over a certain part, the plants on both sides, so as to display my goods for sale. This is the only way I have. We do not advertise. We have to sell to people that come and visit the nursery and see the stock, especially those expensive plants, the people want to see them. So I have, in the first place, built a road that connects here (indicating). This is our 30 40

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office, and this is the main packing shed, which connects with all the greenhouses. There is another greenhouse here (indicating). Persons with automobiles or carriages, coming in here can go right around, if they don't want to go over the rest of the ground, and can come out this way (indicating). We have to have more than one
10 road for entering and going out of the property. So I built a road taking in the first place all the buildings, offices, and little evergreen gardens, and all these here herbaceous plants. This road went right to the end of the property, curving all around here, going through here, and entering here again (indicating); so that if people wanted to see some plants in there they can go through this road, along on this branch, we have connected our property with property on this side of the
20 branch of the Rahway river—

Q. Never mind that, Mr. Manda, over there.
A. And this road along the right of way over here, and goes through the middle of what we call our evergreen nursery where we grow all varieties of evergreen plants.

Q. Does that line indicate where the new line crosses that road? A. Yes, sir; the line here denotes the present right of way of the D., L. & W., cutting away all this section of the ground.

30 Q. Will you point out to the jury what arrangement it would be necessary to make in order to get another road there in place of the one that is taken? A. As this part of the road would be a dead road, leading to nowhere, and the original ground between the bank and the greenhouse, to construct a road which we could display our stock to advantage on both sides, we will have to make a new road which will naturally come through here (indicating), the other side of the green-
40 house, for we have a road here connecting with

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this road, and connecting with this road here (indicating); so that for short hauls we could go right around the place, coming in one road and going out the other, without blocking.

Q. What objection, if any, would there be to having a road along this wall and embankment here? A. Well, simply that there is no advantage to us in advertising a railroad bank, which is not a thing of beauty, and we therefore could not induce a customer, in taking him through those parts of the ground.

10

Q. What, if any, changes will have to be made in connection with the space where these plants are grown, the evergreens and plants of that variety? A. Those plants will have to be moved to some place, and other plants moved again from places where we want to put those evergreens and box wood, so it will necessitate almost rearrangement of one-third if not one-half of this section of the nursery.

20

RECESS.

Mr. Stallman: I have here cross sections of this map.

Mr. Carey: We might use this to stipulate in the record the distance. You might state it, Mr. Manda will follow your statement of the fact.

Mr. Stallman: This is a cross section profile of the embankment, and the cross sections are as if the embankment was cut right off. The first section being indicated on the large map as section AA immediately at Third street, and on the lefthand side is the retaining wall on the lefthand side of the railroad, opposite from Mr. Manda, and the other wall on the righthand side shows the cross section of the wall at Third street, along Mr. Manda's property. The wall as shown on this profile

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is 12 feet from the ground line, just about, a somewhat crooked line, indicated by yellow shading underneath. From that point to the top of the coping is 12 feet.

The Court: That is at Third street.

10 Mr. Stallman: At Third street, the cross section of the existing retaining wall along Mr. Manda's property. That wall in 100 feet—the top of the wall—slopes down to about a foot above the ground, so that the coping only will extend above the ground. The height of the ties above the top of the ground, at the ground level at Third street, is $16\frac{1}{2}$ feet; that is practically the same elevation of rail in those tracks as the main tracks further to the east. The next cross section is marked on this profile cross section

20 B. At Fourth street the map shows a street running from Valley down to the railroad, which is Fourth street, and this second cross section is taken along the middle line of Fourth street, and it shows the new embankment in a yellow line and the old ground surface in a brown line. The profile also shows on the righthand side a line marked "Proposed right of way line." That is the line where this wire fence has been built. And it

30 also shows that from that line over to the old property line, a dimension of 35 feet, it shows the height of the embankment at the center line of the track, which is shown on this map to be built right over the old property line, the height of the tie is about 11 feet above the old ground level. The next cross section is marked section C—

The Court: To the top of the tie?

40 Mr. Stallman: To the top of the tie from the old ground line would be 11 feet. And

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this profile shows that the shoulder of the embankment at the end of the tie is just exactly 30 feet from this fence, the new fence. The next cross section is marked Section C, just across the railroad at the point where Mr. Manda's crossing is, where he drives across the track into the other land on the other side of the railroad, being across this road connecting the two properties, and it shows the new grade line of the embankment by yellow lines, and the old ground surface at that point in a brown line; and the height of the top of the tie of this new track above the old ground level is about 9 feet, maybe an inch or two short of 9 feet, above the old ground level, and at the end of the tie, and height of the embankment, is 23 feet from the fence. The lower cross section shows a height of section D, which is very nearly the south end of the property, down near the other end, shows the height of the new embankment. But the other long yellow line on this map will be disregarded, Mr. Carey, and we have agreed that the construction indicated there will not be built at this time. But it shows the height of the embankment shown there as about 8 feet above the old ground level.

Mr. Carey: That is the top of the tie. 30

Mr. Stallman: The top of the tie.

The Court: Giving the distance to the fence line, what point on the railroad track are you indicating?

Mr. Stallman: The shoulder of the embankment, where the top of the bank arrives at its highest elevation.

The Court: What do you say that is at Fourth street?

Mr. Stallman: At Fourth street that is 40

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just 30 feet from the fence; that is the end of the tie, the highest point.

The Court: And at Third street?

10 Mr. Stallman: At Third street, and for 100 feet south from Third street there will be a retaining wall built to retain the embankment, and that retaining wall will be 12 feet high at Third street, and runs down to about a foot high at 100 feet away. The retaining wall would be right on the line.

Mr. Carey: Mr. Stallman, will you give us, please, the distance of the toe of the bank from the line in each instance, that is, Fourth street?

20 Mr. Stallman: At Fourth street the line of the slope 7 feet from the fence; and at the present crossing, where the grade crossing is now, it shows it to be 4 feet, shows the slope 4 feet from the fence.

Mr. Carey: And did you give us the distance of the shoulder of the embankment at the last cross section?

The Court: He said 8 feet.

Mr. Carey: That was the height of the embankment. The distance of the shoulder from the property line.

30 Mr. Stallman: That will be practically the same as it is at the present crossing.

Mr. Carey: That is about 23 feet, the shoulder?

Mr. Stallman: Oh, I thought you meant the toe. Yes, the shoulder is 23 feet at section C, and 20 feet at the last section, from the fence line to the top of the bank. In each of these cases I have taken the end of the tie as the top of the bank, because the tie is higher than the bank.

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The Court: Before you proceed, the facts

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stated by Mr. Stallman with reference to this embankment are to be received as testimony, are they?

Mr. Carey: Yes.

Q. Mr. Manda, at the intermission you were asked about replanting part of the ground. Why will that be necessary, Mr. Manda? A. Because the plants that are planted now along the bank could not exist in the condition that will be created by the bank being raised 14 feet, or 10 feet, or 12 feet, and therefore will have to be shifted to other parts of the ground, and other plants changed again from other parts of the ground to fill that space. 10

Q. Why will one variety of plant grow there and another not, Mr. Manda? A. There is some plants that can stand the exposure, such as smoke, and lack of proper light and air, somewhat better than others, although any plant to thrive well has to have light, air and sun. 20

Q. Have you made any investigations to ascertain how far, and to what extent, the adjacent property will be shaded because of this embankment which is to be erected there? A. Yes, sir, I have.

Q. And will you state to the jury how you made the examination? A. I had this map here prepared by the railroad, giving the elevation of the different cross sections. I have measured that out, and added to it a car standing on a track, and have deducted the distance between the track proper and the space that would be between the new right of way—between the new property line—and deducted that, made allowance for the shadow. 30

Q. Mr. Manda, in making these calculations state whether or not you used the elevations shown 40

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by the railroad company's map? A. Yes, sir, exactly.

10 Q. And will you state the results of the investigation which you made as to the shadow? A. I have measured the shadows at different times in the morning, and up until noon, that is, between noon and one o'clock, at which time the sun will shift in this direction, so that the shadow will not be detrimental to us there. In the morning the shadow I found was four times as long as the object.

Q. At what time in the morning? A. At eight o'clock in the morning.

Q. (By the Court.) What time of the year was that? A. Just now, your Honor, this time of the year, this month.

20 Q. (By Mr. Carey.) Go on and state what other measurements and calculations you made. A. Then between nine and ten o'clock the shadow was three times the length; between eleven and twelve the shadow was about double its length; and between—that is 12 to 1 o'clock—it was about the normal; that is, the shadow was only the length of its object.

30 Q. At what time do you say the sun comes in so as to light up on the westerly side of the object? A. About two o'clock in the afternoon, at this time of the year.

Q. Now, Mr. Manda, will you state what effect shading of nursery plants has upon the development of the plant. A. It weakens the growth, renders the plant more susceptible to disease, and invites attacks of insects.

Q. Do you make that answer as the result of experience? A. Yes, sir, forty years' experience.

40 Q. What depreciation, if you are able to state, would result in the value of the adjacent land because of the shading occasioned by the new embankment?

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Mr. Stallman: I object to that on the ground that that is speculation, and is not based upon any facts in evidence, and necessarily based upon a state of facts which may never exist. We do not know from this witness's testimony what object he took in order to estimate the shadow. He is speaking of depreciation which necessarily must depend upon some actual facts, just what is going to happen, and there is no testimony of that kind here. 10

(Question read.)

Mr. Carey: I will withdraw that question at present.

Q. What object did you take with which to measure shadows? A. I took a pole and measured that, measured the shadow, and I took my own self and marked the spot, and measured the shadow. 20

Q. Well, this pole that you speak of was how high? A. The pole I speak of was 30 feet high.

Q. Now, the 30 feet marked what? A. Marked the bank at Third street, and a car on top of it.

Q. Now, the car, what did you allow for the car? A. 14 feet.

Q. And how did you get that amount? A. Measured one right in the railroad freight yard. 30

Q. What kind of car? A. Freight car.

Q. Now, in taking the distance that the shadow was thrown you computed four and a half times the length of this pole which you took? A. Four times.

Q. In the morning? A. In the morning.

Q. Now, to get the length of the shadow of the embankment—that is, the shadow of the embankment and the car, too? A. Yes, sir.

Q. Now, to get the length of the shadow of the 40

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embankment alone, without a car on it, you do what? A. Would simply take the height of the embankment.

Q. 16, and multiply it by— A. By 4.

Q. By this factor, whatever it may be. Now that is the pole which you used on the Third street end of the property, is it? A. Yes, sir.

10 Q. How many sections did you— A. Three sections.

Q. And how far away from Third street was the second section which you measured? A. The second section was 100 feet from Third street, at the ending wall, like.

Q. And what was the height of the pole there? A. The pole was the same height.

20 Q. Well, the embankment is not the same height there, is it? A. Yes, sir; it is over 16 feet at that point, according to the railroad figures.

Q. Where did you take the next measurement? A. In front of the palm house, over here (indicating).

Q. How far from Third street? A. That is 200 feet from Third street.

Q. And what did you use as the height of the embankment there? A. I used a 29 foot pole.

30 Q. And what was the next section where you made measurements? A. That is the last section I made with the poles. The other shadows I tried myself and Mr. Karlstrom with our own bodies.

Q. The embankment slopes as you go toward the southerly end of the property? A. Yes, sir, according to the plans it falls one foot in one hundred.

Q. And did you take account of that fall in making your measurements? A. Yes, sir.

40 Q. Now, Mr. Manda, can you tell us how far, up to the time, two o'clock in the afternoon, when

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the sun shines in on that side of the embankment, how far on the average the adjacent land would be affected by the shadow of this embankment?

A. I have taken the half of my calculation, that is, I have allowed only double its length of the shadow, although it was four in the morning, three later on, and two later on, and then down to one, I have taken two, that is double the length of the object as the shadow, by my calculation.

10

Q. And did you compute the area covered by that average shadow? A. Yes, sir, I have.

Q. And what did you find it to be? A. I have measured at Third street a rail 16 feet high from the ground of the nursery, and a car 14 feet on top of it, which makes 30 feet in height; doubling that by two that makes 60 feet of shadow; less 14 feet, which is the between the—as shown on that cross section—which is 14 feet between the rail and the right of way of the property of the railroad, the rail stands 14 feet in a direct line, so allowing that 14 feet it would make at that point a net shadow of 46 feet. At Fourth street, that is the next cross section, which is over here (indicating), the rail is 12 feet in height, the car 14 feet in height, making a total of 26 feet; multiplying that by two makes 52, and allowing 30 feet, the distance of the railroad right of way to the rail itself, would make 22 feet. At the present crossing, which is over here (indicating), I figured that the rail would be 9 feet high, the car 14 feet, making 23 feet; multiplying it by two would be forty-six, and allowing 23 feet of distance between the right of way and the rail would make a net shadow of 23 feet. At the far end—that is over in this section (indicating)—there is a high knoll of the property, which is about equal height what the rail will be according to the railroad calculation, so that the property there will

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10 be even; there is no allowance for height of the bank, only for the car, of 14 feet, which double shadow would make 28 feet, and deducting from that 18 feet of space between the rail and the railroad right of way would make 10 feet of shadow. Now, in arriving at the figures, I have taken each of these sections between one and the other, added together, and divided by two, and arrive at the square feet of ground that will be affected by the shadow.

By the Court:

Q. Why did you divide by two if you have taken four different locations? You have taken four different locations? A. Yes, your Honor, but I divided between the locations.

20 Q. Each one? A. Yes, your Honor. Now, for instance, the distance between Third street and Fourth street, 485 feet in length, would have a shade area of 16,490 feet; between Fourth street and present crossing, length 252 feet, the shade area would be 5,770 square feet. From the present crossing to the end the shade would be 4,125 square feet, making a total of 26,385 feet of shaded property according to the calculation methods that I have taken.

By Mr. Carey:

30 Q. That, in each instance, included a car on top of the track? A. Yes, sir.

Q. Did you make a computation to see how much the shade area would be in the absence of a car? A. No, sir.

Q. You can do that, can you? A. Yes, sir.

40 Q. Will there be any other detrimental effect arising out of the presence of this embankment, and the use of it for railroad purposes? A. There would be the forming of pockets of gas and smoke,

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and the lack of circulation of air. That is, the bank standing out to that height, and the cars on top of it, it will stop the circulation of air, so that between the bank especially here (indicating), between the bank here and the greenhouses it would make a sort of dead body of air; beside, it will be charged with sulphurous gases, which are very injurious and detrimental to plants.

10

Q. Now, Mr. Manda, what effect upon plant life has this lack of circulation? A. Well, the plants, in some cases, will not grow at all; in some cases they will grow very puny, become diseased, and become infested with insect life.

Q. (By the Court.) To what extent would the gas and smoke form pockets, and would there be the lack of circulation, by reason of the embankment upon the land taken from you, and what it would have been had the embankment been raised upon the land of the railroad company upon its right of way, without having taken any land from you? A. Well, this will bring the detrimental effect closer to the greenhouses, which is our most expensive stock.

20

Q. To the extent of the number of feet taken, I suppose? A. Yes.

Q. (By Mr. Carey.) Can you tell us approximately how far this influence with respect to lack of circulation of air will extend? Just answer yes or no, if you have any judgment upon that matter. A. It would extend for about twice or three times the width of the shade area; three times the width of the shade area.

30

Q. Mr. Manda, can you estimate for the benefit of the jury the probable depreciation in this adjacent land by reason of the cutting off of the sunlight, and the lack of circulation of air, and the gases that would be mingled with this non-circulating air?

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Mr. Stallman: That question is objected to.
The Court: The question is, can you?

A. Yes, sir.

Q. And on what basis do you make your estimate of its effect?

10 The Court: No amount, now; you should not place any figure upon it.

A. From forty years practical observation in not only my own place, but on places of our patrons in different parts of the country, both here and in Europe.

20 Q. Now, will you tell us, if you are able to, what percentage of decrease in the valuation of this shaded land will probably arise because of this embankment concerning which you have testified, and the proposed use of this property for railroad purposes.

30 Mr. Stallman: I object to that question. I think it is incompetent, and even speculative, for the witness to testify, or attempt to testify, to the money value, or the money damage, caused by shade which he has measured upon the theory that there will always be standing freight cars all over this track. I will expect to show, when my time comes to put in the case, that this track is an old track into the yard for the carrying of freight into the freight yard, and not a storage track. And also, as Mr. Manda says, he bases his calculation upon the sunlight on this November day; but, so far as we know, no computation has been made for the difference in the angle of the sun along in June, or the summer time of the year. That shows the speculative theory of it as to sunlight. On the matter of
40 lack of air, that depends entirely on the blow-

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ing of the wind. There can be no air pocket when the wind is blowing, and Mr. Manda certainly is not competent to testify, and base a calculation on the assumption that the wind will, or will not, blow. It seems to me that that is getting into the realm of speculation; that is not evidence, and cannot be the subject of sworn testimony. Similarly on the matter of gases; whether or not it is a fact that gases do escape from a locomotive, that they will come down and form a pocket, are questions of expert testimony which Mr. Manda has not qualified himself to testify to. It depends upon the nature of the gases, and a number of things which, so far as Mr. Manda is concerned, and the foundation he has laid for these opinions, are all guess-work, and depending on things which no man can tell whether they are going to happen, or not, let alone putting a money value on these things; and it is on that ground also I wish to object to the question put to Mr. Manda as to the money consideration, as to the effect of lack of sunlight, circulation of air and diffusing of gases, and that sort of thing.

(Question read.)

The Court: I do not think Mr. Manda has shown qualification to answer that question.

Q. Mr. Manda, have you had experience in the matter of shading of plants in growth? A. Yes, sir.

Q. And the effect of shading of plants? A. Yes, sir.

The Court: He has already answered that, and given the effect.

Mr. Carey: May I have the record show that the objection was sustained?

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The Court: Certainly, and you object to that ruling, and the objection will be noted.

An objection to the ruling of the Court is noted by the appellant as ground of appeal.

10 Q. Mr. Manda, what, if any, effect will the erection of this embankment which has been described, and the laying of the railroad track on the embankment, and its use for railroad purposes, have upon the greenhouses? A. It will affect the growth in the greenhouses very materially; it will destroy the paint of the greenhouses, and it will blacken the glass so that, especially in the winter time, we cannot get the maximum light which is necessary for proper plant growth. The shifting of the cars back and forth, and the engines, will give off volumes of smoke
20 which will be driven by the winds into the greenhouses, especially in the summer time when we have to keep our greenhouses open. We had the same experience when they were digging Third street; we had to keep our windows closed on account of the smoke and gas, which was disagreeable for man to stand in there, the same as if you filled the room with illuminating gas, which is very bad for growing plants. We had to close everything up, and have the greenhouses heated
30 so as to prevent—

Mr. Stallman: I must object to this; a boiler, or steam shovel, working out in the street, using soft coal, is not comparable to the work we are doing here.

The Court: Comparison with the work in the street should be stricken out.

40 Q. Mr. Manda, in the matter of fighting disease, take the disease resulting from lack of light and circulation of air, what can be done in the way

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of fighting disease, and insect pests, occasioned by lack of air and by shade? A. We have to resort to insecticide, playing them as often as necessary. Under the state law of New Jersey we cannot ship a single plant out of the state, nor is it permitted for the railroad company, or express company, under heavy fine, to carry plants out of the state without being inspected by the state entomologist. Those inspections are twice a year, and we have to get a bill of health before we can ship; and shipping from outside, whether from foreign lands, we have to give notice to the department of agriculture at New Brunswick, and they send an expert, an entomologist, and he examines the stock so as to keep all diseases, and all the insect enemies, out of the state. 10

Q. What kind of diseases, and what kind of insect pests, arise from lack of circulation of air, and light? A. Almost every disease and insect known to plants; there are a great many of them. When there is a certain class congested together, they are apt to get the disease, more so than when they are scattered; so that the cultivation of any kind of class, the disease will develop. 20

Q. If the disease, or insect pests, arise along this embankment because of lack of circulation of air, and lack of light, is there, or is there not, danger of spreading throughout the nursery? A. Yes, sir. 30

Q. What do you say that it would be necessary to do in order to fight these conditions? A. Spray with insecticides; have men going through, examining the plants, and either by hand removing the diseased part from the badly infected part of the plants, or use sprayers.

Q. Can you give any estimate—answer yes or no—can you give any estimate as to the probable additional expense to be incurred because of the 40

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cutting off of the light and circulation of air by reason of the embankment raised on this property taken from you? A. Yes, sir.

Mr. Stallman: I make the same objection to the question as I did before, and on the same grounds.

The Court: He has just answered "Yes."

10

Q. Now, will you state what in your judgment will be the necessary annual expense to be incurred by reason of these conditions?

Mr. Stallman: That is objected to on the ground it is too remote and speculative.

The Court: I think it is entirely too conjectural. The objection will be sustained, and an objection to that ruling will be noted.

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An objection to this ruling of the Court is noted by the appellant as ground of appeal.

Q. Mr. Manda, have you made a calculation as to the probable expense of removing the plants which will necessarily have to be removed because of the taking of this land, and its use for railroad purposes along the adjoining property? A. Yes, sir.

Q. And will you tell us what the probable expense of such removal will be?

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Mr. Stallman: I would like to have first a statement of just what work is contemplated.

The Court: Perhaps that should precede the question.

40

Q. Will you point out to the jury and the Court the extent to which transplanting and changing the use of the adjoining property will be necessary? A. We will have to move practically every plant in front here, and for a distance of from 50 to 75 feet of the bank we will have to move plants

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here (indicating) so as to allow us to put out a new driveway. Unfortunately our place is planted; the property is taxed so high we have to use every square foot of land we have, consequently we never have an acre, or two or three acres of empty space that we could transplant our stock; consequently we have to go into an arrangement of this sort, and move plants two or three times, taking one plant, put it somewhere else, take that plant again and set it somewhere else, to accommodate the plant that we have to shift by reason of putting in a new driveway, and by reason of elevating these tracks. So that the expense, figuring it— 10

Q. (By the Court.) Mr. Manda, you state just what you find it will be necessary to do; state in detail what you find it is necessary to do, and, if to remove the plants, where it is necessary to remove them. A. All the box wood and evergreens over here will have to be moved way off here (indicating), in a section where we have box wood, or have the evergreens over here, taking all the stock from here (indicating). 20

Q. (By Mr. Carey.) Mr. Manda, when you say "here," will you say something— A. Between those roads, the greenhouse, and I will say across to Third street, this section here, and these sections here will have to be removed. 30

Q. (By the Court.) That means south of that? A. North of the railroad.

Q. But west of the bed you have just been speaking of? A. South, southwest.

Mr. Carey: Let us have these directions here. It shows the railroad runs generally in a northerly and southerly direction, and away from the railroad would be westerly. I suppose. In other words, this, in general, would be a westerly direction, and this east- 40

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erly and this northerly, and this southerly (indicating on map).

By a Juror:

Q. The evergreen and box plants, would they be affected by shadow more than other plants?

A. Shadow and smoke.

10 Q. What other plants would you put there? A. Just the commonest and cheapest plants, because we would not risk anything expensive; willows, maples and shrubbery; then this would have to be transferred to be of practical use to us.

Q. (By Mr. Carey.) You are asked the question just what you propose to do with your plants?

20 A. (Indicating on map.) Take the plants from here and transfer them over here, and those plants over here transfer over here; so that taking the area that we have to transplant it will be equal to two to two and a half acres of plants that have to be moved and changed and new condition made according to the conditions. When I laid out my place I laid it out according to the conditions of the plan laid down: the railroad was on the ground, and that is 65 feet away from there.

By a Juror:

30 Q. Would that 65 feet make any great difference to you? A. Yes.

Q. Do you really know what arrangement you would make? Can you say offhand what you would do? A. I have figured it out before I came here, because I have to make my plans sometimes five years ahead; in growing plants we have to figure ahead, and the moment this condemnation started I had to figure what I had to do.

40 The Court: Do you wish to ask him anything by way of cross examination on this subject?

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Mr. Stallman: Yes, I think so.

The Court: You may ask him, unless Mr. Carey wishes to pursue the matter further.

By Mr. Stallman:

Q. Have you stated, Mr. Manda, all the transfers which you propose to make? A. As far as this part of the ground is concerned, yes, sir. 10

Q. Go on and state any others which will have to be made.

Mr. Stallman: May I ask you, please, instead of saying "this," and "this," and "there," if you could describe, in referring to your map, to the place next to Third street, or the plot next to the railroad, or next to this driveway, some language that would indicate to the stenographer in future references to this map just what you are pointing at. 20

Mr. Carey: Try to identify it as near as you can by roadways.

Q. Go on and state. A. The section beginning at Third street and going southward, taking in the section between the greenhouse and the newly acquired right of way of the D., L. & W. will have to be changed entirely to the cross street which is about 300 feet from Third street. 30

Q. (By the Court.) To where? A. The cross street.

Q. (By Mr. Carey.) Where do you propose putting that? A. These will have to be planted in the block of land near the east branch of the Rahway river.

Q. Isn't that fully planted now? A. Yes, sir.

Q. Then how are you going to put it there? A. I will have to take the other stock and put it somewhere else; that I will have to take across the 40

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brook, or east branch of the Rahway river, and put it in the block located parallel with Church street.

Q. Isn't that planted? A. Yes, sir.

Q. What are you going to do with that? A. Have to engineer it, and put it wherever I can.

10 Q. Well, proceed. A. Then from this section, which is the least desirable, and we grow the roughest class of plants, I will have to take these plants and plant in the space along the embankment, so as to in one way hide the embankment, and the other way make use of the land, which will be all the uses we can use it for; and this driveway which extends across Fourth street, and down to our right of way, we will have to move the evergreens that are too close and especially on this side, too close to the bank.

20 Q. When you say "this side" which side do you mean? A. The side of the bank.

Q. The easterly side? A. The easterly side of the D., L. & W. Railroad.

By the Court:

Q. What will you do with them? A. These we will have to plant where we planted the space of our evergreen nursery, across the track, between the track and adjoining Fourth street.

30 Q. Is that already planted? A. That is planted excepting one here, and one there, where a plant has been sold, and where it has been dug out and shipped out; and these sections where we will have to put a driveway. Not only that we have to build a driveway, but we will have to fill it up so as to have an even driveway; it will take a considerable fill, because the land there is somewhat lower, being moist, and where we can grow now the Japan maples, between the greenhouse and east branch of the Rahway river, and
40 on the east, bounded by Third street.

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By Mr. Carey:

Q. Have you given there the transplanting you had to do? A. Yes, sir, the other transplanting where I have to shift to make a space.

Q. Have you the computation of what the cost of doing that work will be? A. Yes, I have.

Q. How much is it?

Mr. Stallman: I desire to object to this computation, first, on the ground that it includes a number of things for which I believe the railroad company is not answerable. The witness testified that he is going to make some changes along the track there for the purpose of hiding the embankment. It seems to me also, from his description of what he is going to do, that the purpose of making the changes is very largely to accommodate his business; that is, to guarantee in the future against any change, or loss of his business, which he now fears. On that phase of it I think the rule is clear, that damages which are feared will be incurred in the future are speculative, and cannot be recovered. And if they cannot be recovered, then he certainly cannot recover any sum of money based upon an expenditure which they expect to make to insure against such loss on the same ground, as being remote and speculative. 10
20
30

The Court: The witness mentioned those matters as being incidental to the height of the bank. I understand his testimony to be that the location of the plants now near the railroad, it will be necessary to remove them on account of the weakening of the plants, and their liability to disease and insect decay, and put others in their place, and I will, therefore, overrule the objection.

Mr. Stallman: May I add to my reasons 40

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10 other ground of objection, which is, that the fear that he will have to make these changes on account of the condition that he said will exist, is in itself remote and speculative; that there will be insects there, and that there will be lack of circulation of air, and that there will be this shade on account of freight cars standing on the track. The basis of his calculation is likewise speculative, and I would like to have that ground also as part of my objection.

The Court: It appears it is not part of the main track, but is a freight track, and they have a right to have the cars standing there if they desire, and I think the jury can take that item into consideration. The objection will be overruled.

20 An objection to this ruling of the Court is entered by the appellee as ground of appeal.

A. That will put us to a cost of \$2500.

Q. Have you made a computation to ascertain the cost of this road which you will have to build there to take the place of the road which will be taken by the railroad company? A. Yes, sir.

Q. And what is the cost of that? A. The cost of the road will be \$300.

30 Q. And is there any other loss connected with that road? A. The grading; the bringing of the ground to the even level to put the road on will cost \$45.

Q. Making a total of how much? A. \$345. That is figuring a dollar per running foot, lineal foot.

Q. Lineal foot of what? A. Of the road; about ten cents a square foot to make the road.

Q. (By the Court.) The road is 10 feet wide? A. Yes, sir.

40 Q. (By a Juror.) What is the top soil worth there? Thirty cents a foot? A. Thirty cents.

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Q. Can you make use of that? A. Yes, sir. That has not been included. We have to dig the road out, and it is filled up with top soil.

The Juror: I refer to the top soil to be taken out of the new road.

By Mr. Carey:

Q. Have you any charge for the top soil where the new road is to come there? A. No, sir, nothing but the top soil taken from us by the D., L. & W. Railroad. 10

Q. Changing of water pipes; if there is anything necessary in regard to that state what it is, and how much it will cost. A. At the present our main water pipe feeding all the property comes from Third street to the main road down in the corner of the greenhouse; from there it is carried through this part down to the present— 20

Q. Tell us what that part is? A. Through the part below the greenhouse.

By the Court:

Q. On what side? A. On the easterly side.

Q. I thought we were going to call that west, beyond the tracks. Let us assume that the track runs north and south, the greenhouse towards Third street. A. Yes, sir, your Honor, and into the road part of which is taken by the railroad. 30

Q. Then how? A. Then we have to take the line up and carry it on to our property.

Q. Where does it run from that road parallel with the track? A. Across the road in a southerly direction all through the land.

Q. The question is what will be necessary to do? A. Well, take it up, and lay new water pipe, which I figured would cost about \$85.

Mr. Carey: Cross-examine.

*Albert A. Manda, for Appellant—Cross**Cross Examination by Mr. Stallman:*

Q. Mr. Manda, did I understand you correctly to say that when you bought the land it was quite low? A. Yes, sir; that is the two sides; the side against the railroad was low, and there was a hill in the middle.

10 Q. And it was used as a dump? A. Yes, sir, God forsaken land.

Q. Forsaken by the owners at that time, was it? A. Partly so; they never looked at it.

Q. And you had to do quite a good deal of work in order to bring it up to grade? A. Yes, sir; bring it up to the condition to use for our business.

Q. How much land have you in connection with your nursery there? A. All together?

20 Q. Yes. A. Well, roughly, about twenty-three to twenty-four acres.

Q. And have you got it all developed to the state which you say this strip is? A. No, sir; some of the land did not need that development.

Q. It was naturally good, was it? A. Naturally good from the river back, naturally good alluvial soil.

30 Q. And where the land is naturally in good condition for your business you do not spend any money on treating it? A. Well, depend on what we are going to use it for.

Q. Now, you do find that it is necessary to do something every year to the land? A. Well, if we want to keep it up, yes, sir.

Q. Well, did you keep it up? A. I hope so.

Q. Well, then, did you do something to that land along the railroad every year? A. Yes, sir.

Q. Why was that necessary? A. To keep it up in the condition that it was put in.

40 Q. What were the circumstances under which that land deteriorated every year? A. Well, the

Albert A. Manda, for Appellant—Cross

plants that grow any will take certain part of the good of the soil, and we have to put so much more in again so as to keep it in condition.

Q. Can you say offhand with approximate accuracy how much of your nursery there has got this top soil on it that you had to develop?

Mr. Carey: I do not think that is material; we are wandering away from the question which is to be submitted to the jury. 10

The Court: The objection will be overruled.

A. All the land that has been laid out in propagating beds.

Q. How much in area? A. Three and a half to four acres.

Q. And does that lay all alongside of Third street, or along the railroad? A. On Third and the railroad. 20

Q. Along those fronts? A. Along those fronts.

Q. Now, will you tell me, within the last year before this work was started, whether you sold any oak or elm trees over ten inches in diameter?

A. Not within the last season; not the last season.

Q. When is the last time you ever sold a tree which was ten inches in diameter? A. Last winter. 30

Q. A year ago? A. No, this winter, last winter.

Q. When did you sell one before that? A. Oh, often; sometimes we sell whole carloads.

Q. The market is rather limited, though, for that sort of thing, isn't it? A. Well, don't sell them every day, no, sir.

Q. Now, Mr. Manda, you are not a chemist, are you? A. No, sir. I pretend to know one profession, and that is enough for any man. 40

Albert A. Manda, for Appellant—Cross

Q. Have you ever made an analysis of the gases resulting from the combustion of anthracite coal? A. No, sir.

Q. You don't know what those gases are? A. Well, not technically; I know when I meet it.

10 Q. Now, you said you would spend about \$2500 in switching a lot of your plants from along the railroad over to the center of your establishment, and changing some that are now there to some other part. Do you know from your computation about how much of that amount you have figured in on account of shade? A. Sir?

Q Do you know how much of the \$2500 you have figured as the expense of moving you would have to do on account of the shade that you think this embankment is going to cast? A. Well, I could not divide it in zones like that.

20 Q. You made a lump sum, did you? A. I figured what I thought we would have necessarily to do. We don't spend any more money than we can possibly help; and those are the figures I arrived at it will cost us to change things; even if plants would grow there we can't have a bed cut off by your fence.

30 Q. I show you three pictures taken from the same place, will you state whether or not that represents the entrance, the roadway entrance, which is being taken in this condemnation proceeding in part? A. Yes, sir.

Q. And is that a correct representation at the time it was taken? A. Yes, sir.

Q. And when were these taken? A. That was taken the week before the condemnation proceedings.

Said pictures offered in evidence and marked Exhibits P4, P5 and P6.

40 Q. (By a Juror.) When was that? A. That

Albert A. Manda, for Appellant—Cross

was some time in September; it was after the railroad started proceedings against us for acquiring the land.

Q. (By Mr. Carey.) Mr. Manda, what are the linings along the road, the borders? A. Those are the specimen evergreens.

Q. Extending on both sides? A. On both sides. That is the way the road was before it was interfered with. 10

Q. Mr. Manda, have you measured the distance of your greenhouse from the top of the embankment, and from the railroad track? A. Yes, sir.

Q. Can you give those distances? A. Well, the distance is 35 feet to the right of way—the new right of way—of the D., L. & W. Railroad.

Q. 35 feet, that is to the fence line? A. To the fence line, yes, sir.

Q. Then we can get the remaining distance from the map? A. From the map. 20

Q. Which house is that? A. That is the big palm house, the one nearest to the railroad, where we keep our choice specimen palms, and other specimen exhibition plants.

Q. And what is the distance of the greenhouse next to Third street from the fence line? A. From the fence line is 90 feet, about 90 feet.

Q. And what is the one on the other side, that is, on the southerly side? A. That would be about 100 feet, because the line runs more southeasterly, it doesn't run straight. 30

Q. And what is the height of the embankment opposite the greenhouses, if you can tell? A. According to the cross section of the D., L. & W. Railroad it would be about 13 feet.

Q. And what opposite the other greenhouse? A. Well, it rises up from that to 14 feet.

Q. And does it go down on the southerly side? A. Yes, falls down one foot in a hundred accord- 40

Albert A. Manda, for Appellant—Cross

ing to the plan; that is all I can say; the track isn't there.

Q. You spoke of these border evergreens having been along the roadway there for twelve years; do you mean the same ones are there, and have been there for twelve years, that the railroad company has taken? A. No, sir.

10 Q. What do you mean? A. I mean the planting was arranged, where a customer came and selected the very individual plant we had to take it up and replace it from either a similar kind, or other kind, to keep the line always intact.

Q. Mr. Manda, you were asked on cross examination about the sale of the top soil, and you stated, as I recall it, that you do sometimes sell top soil? A. Yes, sir.

20 Q. Will you state what price you get for it when you sell it?

Mr. Stallman: Objected to. That is personal property. We are not taking personal property.

Q. When you sell top soil do you take it off of your grounds? A. Sir?

Q. When you sell top soil do you take it off of your grounds? A. Yes, sir.

30 Q. And is it of the same character as the top soil which was on this property which the railroad takes? A. Yes, sir.

Q. Now, what do you get for it when you sell it?

40 Mr. Stallman: I renew my objection. I do not think it is proper in a matter of this kind to show the few sales Mr. Manda testified, which are necessarily retail sales, and cannot be any criterion of the value. It is not something that he has there for sale, it is not part of his business, and, consequently, a few sales of that kind of personal chattels, is not evidential of the value of the plants.

Albert P. Cane, for Appellant—Direct

The Court: The matter was brought out on cross examination, and the objection will be overruled.

An objection to this ruling is noted by the appellee as ground of appeal.

A. We sell this simply to customers who purchase plants for use where we are anxious to— 10

Q. You told that already. I asked— A. We sell it by the box, and put it into cubics which would average \$4 to \$5 a cubic yard of such soil as we want to go around the root of the plant when it is planted, so as to have a good hold.

Mr. Carey: That is all. I asked yesterday to have the privilege of recalling Mr. Manda after we put in some other testimony, to take further testimony from him which was excluded because the other testimony was not in. 20

ALBERT P. CANE, sworn for the appellant.

Direct Examination by Mr. Carey:

Q. Where do you reside? A. Springfield, New Jersey.

Q. What is your business? A. Real estate and building. 30

Q. How long have you been in that business? A. Real estate ten years, building seven years.

Q. Your real estate business is in what locality? A. South Orange and Springfield.

Q. Are you familiar with the Manda property which is under condemnation? A. I am.

Q. Made an examination of it for the purpose of estimating its value? A. Yes, sir.

Q. Were you familiar with the buildings that were on the property? A. I was. 40

Albert P. Cane, for Appellant—Direct

Mr. Stallman: What property?

Q. Were you familiar with the buildings that were on the Pierson property? A. The Pierson property you refer to as being opposite, on the other side the track?

Q. Diagonally across Third street. A. Yes, sir.

10 Q. What class of building have you had experience in? A. Frame, also brick and tile.

Q. Did you make an estimate of the value of this brick building which was on the Pierson property? A. I did.

Q. And how much did you estimate its value?

Mr. Stallman: Just a minute. I would like to ask the witness a little further as to his qualifications.

20 The Court: You may do so.

By Mr. Stallman:

Q. When did you make your estimate? A. On the building?

Q. Yes. A. Yesterday morning.

Q. Didn't I understand Mr. Pierson to say that building was burned down? A. Yes, sir.

30 Q. Did you make your estimate from your recollection? A. I recall the building, the condition it was, and the size of it scaled from an atlas which I have in the office.

Q. Did the atlas show the size of the building? A. The atlas was drawn according to scale, and I scaled the building as shown on the atlas.

Q. (By the Court.) What size did it show the building to be? A. May I refer to the memorandum for that?

Q. If there is no objection. A. The main brick building scales about 24 by 36, and there is an addition to it, an extension, 28 by 24.

40 Q. (By Mr. Stallman.) Did you ever build a

Albert P. Cane, for Appellant—Direct

building like that? A. I built a building similar to it last year, I completed a building that cost approximately \$30,000, tile and brick, two-story building, a mercantile building, stores, apartments upstairs.

Q. And what dimension of walls have you taken into your estimation? A. On which building?

10

Q. On this old building? A. I figured it to be one foot thick.

Q. (By the Court.) Both stories? A. Yes, sir.

Q. (By Mr. Stallman.) And what kind of roof? A. Flat tin roof.

Q. What size of beams? A. Which floor?

Q. All through. A. 2 by 12, 2 by 10.

Q. Where did you get that information? A. From Mr. Pierson.

Q. You went and asked him what was in the building, did you? A. Asked him the size of the beams.

20

Q. Do you know when the building was built? A. Only from information. I didn't know the building when Mr. Halsey bought it, and the exact date Mr. Pierson gave me as 1878.

Q. How many times have you been in that building? A. Oh, many times; my office was a block and a half from the building, and I have been through there many times.

30

Q. Passed it? A. Passed it.

Q. How many times have you been through the building? A. Not over two or three times.

Q. Ever been upstairs? A. Yes, sir. Mr. Pierson was a very intimate friend of mine, and I have been in there with him.

Q. Are you an expert on boilers and engines? A. No, sir.

Q. Did you ever build a brick smoke-stack? A. Yes, sir; brick chimney.

40

Albert P. Cane, for Appellant—Direct

Q. I don't mean a chimney. I mean a brick smoke-stack for an engine and boiler to run machinery? A. No, sir.

Q. That was on this building, wasn't it? A. I didn't figure on that, I figured on the building.

Mr. Stallman: I don't think this witness is qualified to give an estimate of the value of this structure.

10

By the Court:

Q. As of what date did you figure the value? A. As of the date the Halsey estate bought it from Pierson.

Q. When was that? A. That was about 1906, June, 1906.

Q. In estimating the value of this building you estimate it to have been built when? A. 1878.

The Court: I think the witness can answer the question.

20

Objection to this ruling is noted by the appellee as ground of appeal.

Witness: The main brick building, 24 by 36, I estimated at \$2,160. new; the extension \$600, 20 by 24, makes a total of \$2760; I have allowed for depreciation of twenty-eight years one-half per cent. a year, \$1159.20, makes the building worth at the time of the sale \$1600.80; in addition to the other brick building—if you want me to mention these two smaller buildings.

30

By Mr. Carey:

Q. You may give an estimate on those. A. One was an old shed, enclosed, about 16 by 20, I placed a value on of \$150; and the other one is an open shed, which was practically new at the time of the sale, I estimated at \$200, makes a total value of the buildings \$1950.80.

40

Albert P. Cane, for Appellant—Direct

Q. Did you estimate the value of the land taken in this condemnation in the proceeding now in court? A. I did.

Q. And what value did you conclude that property was worth as land?

The Court: Speaking of which? The Pier-son property?

Mr. Carey: No, the Manda property; the property in the condemnation. 10

By Mr. Stallman:

Q. This property is located on Second street, and Third street, is it not? A. The Manda property is located on Third street.

Q. Did you dispose of any property on Third street? A. Not on Third street; the nearest two blocks from there, Milligan place, two houses and two lots. 20

Q. Where is that, what direction is it? A. Southeast from Third street. Milligan place runs parallel with Third street, and two blocks from it, between Prospect and Academy.

Q. That is beyond Valley street? A. Above Valley street.

Q. Next to Valley street is Prospect? A. Academy, and then Prospect. Milligan place runs from Academy to Prospect, one block long.

Q. How far from Third street? A. About three blocks; two blocks up and one block over. 30

Q. That property would be about three blocks to the east, and three or four blocks from Third street? A. About three blocks from Third street.

Q. That is the nearest you sold property there? A. It is.

Q. What was the character of that property? A. Buildings.

Q. Lots? A. Only the lots on which the build-ings were located. 40

Albert P. Cane, for Appellant—Direct

Q. And when you sold them they had the houses on? A. Yes, sir.

Q. You never sold any property which is comparable to Mr. Manda's land there, have you? A. No, sir.

10 Mr. Stallman: I don't think this witness is qualified to give an estimate on Mr. Manda's property.

By the Court:

Q. How many sales have you made in South Orange? A. Most of my sales are made over in that location, and Springfield.

Q. How many sales in South Orange? A. All together since I have been there?

Q. Yes. A. I couldn't say that; a good many; thirty, forty, fifty.

20 Q. How many in this locality? A. Those two are the nearest to this particular locality. Three or four blocks from there I sold two or three others, vacant land.

Q. Vacant land? A. Vacant land, and also with the buildings.

The Court: I think the jury may consider the weight to which the testimony is entitled.

An objection to this ruling is noted by the appellee as ground of appeal.

30 (Question read.)

Mr. Carey: I withdraw that question.

By Mr. Carey:

Q. Mr. Cane, in your judgment how does the Manda property which is under condemnation, compare in value with the Pierson property diagonally across the street? A. The front part of it, 64.7 on Third street, running back 113 feet, I should think that identical.

40

Not Cross Examined.

George E. Stone, for Appellant—Direct

GEORGE E. STONE, sworn for the appellant.

Direct Examination by Mr. Carey:

Q. Dr. Stone, where do you reside? A. In Amhurst, Massachusetts.

Q. How long have you resided there? A. About twenty-five years.

Q. And what is your profession, Doctor? A. I devote my time to the study of plant diseases; in other words, to plant pathology and plant physiology. 10

Q. How long have you been engaged in that work? A. Practically all my life.

Q. Are you in any wise connected with Amhurst College? A. I am connected with the agricultural college of Amhurst.

Q. Are you doing this work of which you speak in connection with the college? A. I am. 20

Q. Are you a member of the faculty? A. I am.

Q. How long have you been a member of the faculty? A. About twenty-five years.

Q. Are you a member of any professional society? A. A great many of them.

Q. Will you name some of them? A. The American Association for the Advancement of Science, and most of the botanical societies and pathological societies in this country.

Q. Are you the author of any treatise upon the subjects which you are investigating? A. I have published a great deal upon light in relation to greenhouse construction, diseases, and have studied light in connection with plants in general; also published a great deal in regard to gases, various gases, particularly their effect upon vegetation. 30

Q. Doctor, will you state what the effect upon plant life is of a diminution of the light to which it is subjected? A. Plants grow, plants obtain 40

George E. Stone, for Appellant—Direct

10 over ninety-five per cent. of their food from the air; about two to three per cent. comes from the soil; they obtain that food from the air through the carbonic acid. The action of sunlight on the leaf decomposes into carbonic acid; now plants assimilate food through their leaves in proportion to the light intensity; I should say they assimilate more in strong light than weak light; and we can say this accurately and definitely, that the assimilation of carbon, or the taking in of the food, by plants is strictly proportionate to the light intensity. We can say further that the growth of the plant is approximately proportionate to the amount of food which they obtain.

20 Q. (By a Juror.) Is that true of all plants, with reference to light? A. That is true of all plants with, perhaps, a few exceptions; some plants, no doubt, that we cultivate here in the fields, get more light than they need. That is to say some tropical plants, I will mention the potatoe, for example, as one, the potatoe does the best, grows faster, when it is spread with Bordeaux mixture, or when the leaves are covered with anything, fine line, when the leaves are shaded; and we account for that fact in this way; the potatoe being originally a tropical plant, grew in the shade of large palms, and so forth, consequently, 30 when we grow it in this region, in midsummer, it possibly gets too much light, and we increase the growth by shading it somewhat. But there are only a very few exceptions to that rule.

By Mr. Carey:

40 Q. What is the result to plant growth of the free circulation of air? A. Free circulation of air is always beneficial to plants in every way. On the contrary, a stagnant air is very bad; it induces disease. The whole theory of modern

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greenhouse construction, which is exemplified by the building of larger areas for plants, larger houses, is based on the fact that confined spaces are bad for plants. So that greenhouse constructors have, for the last twenty-five years, been constructing their houses with the idea that plants get more air, that there will be a better circulation. Now, a stagnant air induces a great many diseases. I can name numerous cases, damping off, as caused by fungus; if they grow in stagnant air, the light is poor, fungus will come on the stem, and account for many diseases of our plants in greenhouses, like, for example, chrysanthemums, when grown very close together, and big stalk run up six feet high, such growth prevents circulation of light and air around the base of the plant, and the lower leaves are susceptible to a fungus rot. And the same is true of tomatoes, and a great variety of plants.

Q. Have you visited the Manda property? A. I have visited the Manda property.

Q. When? A. Sunday.

Q. And had you ever been there before that time? A. No, sir.

Q. Did you observe the character of plants which are growing on the Manda property next to the property which is being taken in this condemnation proceeding? A. You mean outdoors?

Q. Yes. A. In general I observed that.

Q. And did you also observe the character of the plants in the greenhouses? A. I did.

Q. Are these plants which are growing outside susceptible to the same diseases arising from lack of light and lack of air which you have mentioned in connection with other plants? A. Well, all plants are rendered more or less susceptible to lack of light—they are rendered more or less susceptible to disease by lack of light—but not all

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of them, perhaps, to the same extent as regards circulation. A great many of the plants which I noticed there, those perennial plants, which are rather thick in beds, they would be more susceptible to lack of circulation, perhaps, than some of the large plants which I noted.

10 Q. What diseases arise from lack of light, or proper amount of light? A. Well, lack of light produces a great many diseases in more ways than one; it would take quite a while, perhaps, to enumerate them all. But, in general, I can say that a lack of light is responsible for the non-development of woody tissue, and when woody tissue is not developed it is more susceptible to sun scorch, and to the general infection of various fungus diseases, that is, those which are produced by fungi, small plant organisms which are parasitic, and also includes those produced from bacteria.

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Q. Were the plants which you saw in the greenhouses susceptible to the same results from lack of light, and lack of circulation, lack of air, which you have spoken of? A. Yes, they are.

Q. Which to the greater extent, those inside of greenhouses or those outside? A. I should say those inside the greenhouses are more likely to be affected, perhaps, or are more affected, from these troubles, because they are growing at a different season of the year. The light is very poor in winter, often, and they are forced during the dormant season, in other words.

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Q. In your examination of the Manda property did you take into account the location of the outdoor plants alongside the property to be taken, and also the location of the greenhouse with reference to the place where the embankment is to be raised on the property? A. I noticed the general location of the greenhouses to the embankment, and the plants, in a general way.

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Q. It appears from the testimony of the maps in the case, Doctor, that the heighth of the embankment including the ballast under the tracks, at Third Street is about 14 feet above the level of the ground, that the heighth of the embankment opposite the first greenhouse from Third Street, including ballast, is about 13 feet; will you state what effect upon—

10

The Court: 11 feet at Fourth Street.

Q. And 11 feet at Fourth Street. Do you know where Fourth Street is, Doctor? A. No, I don't, I don't think I noticed.

Q. (Indicating on map.) Here is Third Street as shown on the map, here is Fourth Street, and here is what is known as the palm house and the large greenhouse back of it, extending on each side of the palm house. What effect upon the circulation of air would an embankment such as I have described to you have, Doctor?

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Mr. Stallman: I object. The examination of this witness has not shown him to be qualified to prophecy at this time what will be the air conditions at this point. The gentleman certainly does not know when and how the wind is going to blow, or what direction it is going to come from, nor any of the things that must necessarily be taken into consideration. I think that to prophecy what the condition of the air would be at any given time is absolutely impossible, and, certainly, this witness is not qualified to make any such prophecy.

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By the Court:

Q. Have you studied the effect of such an embankment upon the circulation of air, Doctor? A. Of this particular embankment?

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Q. Well, a similar embankment. A. Well, of course, we know from common knowledge that embankments of the average—

Q. No, the question is whether or not you have studied the effect of such an embankment, or construction, upon air circulation? A. Yes, in a general way I have. I have seen the effects of embankments on vegetation.

The Court: I am inclined to permit the question. The objection will be overruled, and an objection to that ruling may be entered.

An objection to this ruling is noted by the appellee as ground of appeal.

Mr. Stallman: Could I examine this witness to find out?

The Court: Yes.

20 By Mr. Stallman:

Q. Doctor, in endeavoring to arrive at some conclusion as to the effect of this embankment upon the air currents, what width of opening between the obstructions to the air have you taken into consideration? A. I don't think I get your point there, quite.

Q. Well, in order to have any interference with the circulation of air you have got to have some obstruction, do you not? A. Yes.

Q. And whether that will be an obstruction or not, depends upon the direction in which the wind is blowing, does it not? A. That would have something to do with it, undoubtedly.

Q. Now, you are unable to state, from your experience or knowledge of that locality, how the wind is likely to blow at any given time, aren't you? A. All I know about that is I suppose that the winds come from the direction of the railroad towards the southeast, or southwest.

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Q. And what are the grounds of your supposition? A. Merely by inquiry; the prevailing winds.

Q. And is it not a fact that if the wind goes over an obstruction, that in the course of a few feet, more or less, the air current of this wind will reach the ground? A. There will be a tendency to form a pocket.

Q. Have you made any experiments, Doctor, to— A. Why, yes, I have—

Q. Just a minute, until I finish my question. Have you made any experiments to determine whether or not a pocket exists where the ground is on a slope, as against a condition where the wind is blowing off a vertical wall? A. I have seen the effects on plants in such cases. As a matter of fact, when you come to certain atmospheric conditions we find there is an immense variation in two localities. You can hang up two thermometers a yard apart and they will vary. The atmosphere is full of pockets owing to radiation of heat from the wall, obstructions and such things.

Q. Isn't it true you would find air pockets in the atmosphere generally where there are no obstructions? A. Yes, I think that is so.

Q. And this is due to inequalities in the atmosphere itself? A. The atmosphere does not mix very well.

Q. Isn't it a fact that any prognosis as to what the condition will be, on an assumed character of construction, is very largely a guess? A. It is to a certain extent, but I think we can say that even a fence affects to quite an extent the nature of the atmosphere in the immediate vicinity of that fence.

Q. Now, supposing right along this railroad track there had been a paling fence for a thou-

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sand feet along Mr. Manda's property for a great many years, would you say that the existence of that fence had a disadvantageous, or advantageous, effect on the plants growing alongside of it?

A. What kind of fence do you say?

10 Q. A wooden paling fence, 5 or 6 feet high a space of three inches between them? A. The space between, of course, would have a bearing on that matter, the space admitting light and air in between.

Q. A wire fence would not interfere very much with the air current, would it? A. A wire fence would not hardly affect anything, and a picket fence with open spaces between would have very little effect; a solid board fence would.

20 Q. And I asked you before, the condition of the air there would depend in a very large measure upon the frequency and the velocity of the wind, would it not? A. Yes, and direct sunlight.

Q. (By the Court.) Also the direction of the wind, would it not? A. Yes, sir, the direction of the wind, and sunlight, too.

Mr. Stallman: I think I should insist on my objection on these grounds, because we are getting into a realm of speculation.

30 (Question read as follows: "What effect upon the circulation of air would an embankment such as I have described to you have, Doctor?")

The Court: The objection will be overruled. An objection to this ruling is noted by the appellee as ground of appeal.

40 Q. Answer the question, Doctor. A. The effect of the embankment would materially affect vegetation from the point of view of winds, and particularly sunlight. It would have a tendency to have a pathological effect in this way, that if an

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embankment was high enough to shade those plants we would get pernicious diseases; for instance, lilacs when grown in the shade always mildew; even grass, growing on the north side of the building, will mildew. A great many plants, too numerous to mention, are affected by obstructions to shut out light, and obstructions to shut out air. Moreover, any obstruction which would prevent the sun from reaching those plants for two hours in the morning would be a great disadvantage, because most of the diseases of plants, whether inside of the greenhouse, or outdoors, are produced through the influence of moisture. If there is a little dew on a plant that remains on the foliage for even a space of two hours during the morning, that dew is sufficient to induce pathogenic organisms. Fungi, too, affect the plant. That is well brought out in the matter of greenhouse work. Some of the best rose growers in this country construct their houses, not east and west, but a little north of east, in other words, northeast and southwest. The rose grower has to syringe his plant every morning; he takes a fine hose syringes those plants every morning. He can only do that on bright sunshiny mornings, when the sun will take that moisture and dry it off very quickly. Now it is found that in those houses running a little north of east, and tip towards the sun, that he can syringe those plants with a much greater degree of safety from infection than he could if the house was not placed in that position, because the sun will dry off the foliage quicker than if placed east and west. If moisture would remain on the foliage of a rose plant an hour too long, or half an hour too long, the black spot of the fungus, or the mildew, will have time to germinate and infect that plant. Sometimes fifteen minutes will prevent an infec-

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tion. Now in the case of an embankment, if the moisture, the dew, were kept on, allowed to remain on those plants an hour, or two, or three hours in the morning, they would be much more susceptible to infection of various mildews, and the chances are they would be affected with various rots. That is a well-known pathological fact.

- 10 Q. Now, Doctor, how far at right angles from this embankment where it is 13 feet in height would the conditions which you have mentioned probably extend? A. Well, that is quite a hypothetical question, because the sun is all the time changing in its height. In the summer the sun is nearly practically overhead, whereas in the winter, at this time, the sun might not be more than thirty degrees high; and one would have to take into consideration, in answering that question,
- 20 the time of the year, perhaps, the height of the sun in the heavens, and the angle at which it would cast a shadow. So much variation in the sun. Now in the summer, of course, a wall there 14 feet high would probably always cast a slight shadow. Even when the sun was in the heavens at twelve o'clock the probability is a cement wall 100 feet long would cast a slight shadow, and there would be a place very close to the wall where it would always be shaded; whereas, at this
- 30 time of the year, it would cast a considerably larger shadow, because the sun is low in the heavens, and a larger area would be shaded. An embankment would not cast as much shadow as a wall, because the wall being vertical, and the embankment being slanting would not cast half as much. The question is one depending very largely upon the day of the year, and the height of the sun, and whether twelve o'clock in the morning, nine o'clock in the morning, or ten
- 40 o'clock in the morning. The tendency would be

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to cast a shadow more or less, prevent the sun from reaching the plants, and the dew would remain on the plants so long as the sun could not get onto them, and evaporate the dew. I have a little diagram here in a publication which I wrote some years ago, which gives the angles of the sun at different seasons of the year; and I have made a few very brief sketches as to what might happen in such seasons of the year by an embankment—drawings in reference to the palm houses. I made these drawings from some stakes that are up there near the palm house, I think they are 28 feet high, assuming, I presume, an embankment there with a freight train on it would reach 28 feet, and November 21st, at noon— 10

Mr. Stallman: I object to this. The stakes are out on the fence line; there will not be any bank there. 20

The Court: I think the answer should be based upon some question to which an objection might be made.

Q. Have you made any sketch showing the effect of an embankment located where the embankment is to be on the property of Mr. Manda, as showing the effect upon the greenhouses adjacent thereto? A. I have.

Q. Now, will you state from your sketch and calculation what the effect of such an embankment will be with respect to shading the greenhouse, the palm house? 30

Mr. Stallman: It does not appear that this witness knows where this embankment is going to be. He said before, in his voluntary statement that there were some stakes there along the fence. To be sure there are, but they are 30 feet from the embankment.

The Court: Do you know where the embankment is? 40

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Witness: Yes, I do.

The Court: The objection will be overruled.

An objection to this ruling is noted by the appellee as ground of appeal.

10 A. In these sketches that I made here I made them from a stake, a series of stakes, which I think are 28 feet high, a certain distance from the palm house, supposed to represent, as I understand it, an obstruction which might occur.

By a Juror:

Q. Are those stakes on the embankment, or some other place? A. I believe these are taken from the course of the embankment.

20 Q. Are you sure they are? You saw the stakes, didn't you? A. I saw the stakes.

Q. Where were they? A. These stakes were 35 feet from the palm house.

Q. Were they on the property line, or on the embankment, or do you know? A. (Not answered.)

By Mr. Carey:

Q. Were those right along the fence? A. I think they were along the fence.

30 Q. Well, that is not the location of the embankment, Doctor, the embankment is—

A Juror: 21 feet further back, about.

The Court: Well, at Fourth Street the shoulder of the embankment is 30 feet from the fence line.

40 Q. Doctor, it appears that the top of the embankment directly opposite the palm house is 70 feet from the palm house; now can you tell from the calculations which you have made there what

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the effect in the matter of shading will be? A. This plan would not be correct, then. I could not tell from this plan exactly what the shading would be; but there would be some shading, at any rate, I should say, of the lower portion of the house.

By a Juror:

10

Q. You think a bank 12 feet high, sloping bank of that kind, would throw some shadow 70 feet away; is that what I understand you to say, there will be some shadow? A. A bank 14 feet high, 70 feet away, would not throw very much shadow.

Q. Would it throw any shadow 70 feet? A. I question whether it would.

Q. You don't know whether it would? A. I don't know.

20

By Mr. Carey:

Q. Depend on the time of the day. A. I think the shadow 70 feet away would be very slight. I got the impression the other day that the bank was closer, and this sketch I have here, I believe it represents 35 feet from the palm house.

The Court: It would be improper to give a calculation based upon wrong premises.

Q. The calculation you made was based upon an object how many feet high? A. 28 feet high. .30

Q. And that included the embankment, and also a freight car on top of that? A. Yes.

Q. Did you make any calculation, Doctor, to show the shading in connection with this wall which was to be built here—some 90 feet in length, I think, Mr. Stallman?

Mr. Stallman: Won't you in your question give the Doctor a description of that wall?

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Q. The wall being 14 feet high at Third Street, and sloping down to about a foot in height at the southerly termination of the wall 90 feet, or thereabouts, from the street.

The Court: 100 feet Mr. Stallman said.

10 Mr. Carey: The wall, it appears now, is not to be carried down fully 100 feet; that would bring it down exactly to the surface of the ground; but they have cut the wall off at 90 feet, so it will be about a foot above the surface of the ground.

Q. Did you make any calculation with respect to that, Doctor? And as against that is to be an embankment which carries it up to— A. That wall would not affect any of the greenhouse in the point of shade, but it would affect plants
20 growing near that wall at probably all seasons of the year, and particularly more in August than it would in June, when the sun angle would be very much greater. I can show that from a little chart I have got here showing the angle of the light at different seasons of the year, and can
30. imagine a ten foot wall here, and see what the angle would be. At November 21st, or January 21st, at ten, A. M., or two, P. M., a wall like that would cast a considerable shadow; whereas July 21st, the longest season of the year, or May 21st, it would not cast so long a shadow. I should say perhaps in July a ten foot wall might cast a shadow 6 feet—

By the Court:

Q. At what hour of the day? A. At twelve o'clock of the day it might cast a shadow 6 feet; the base of the shadow would be 6 feet from the wall; the shadow would be 6 feet.—

40 Q. At that hour the sun would be in the south, wouldn't it? A. Yes.

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Q. You are not stating that with reference to this wall, are you, which runs in a general north and south direction? A. This wall would cast more in the morning than in the afternoon. This wall does not run exactly east and west, and the shadow cast in the morning would be much greater than that cast in the afternoon; be greater for example, at ten o'clock than it would at one o'clock, on account of the wall running not exactly east and west. 10

By Mr. Carey:

Q. You noticed the direction of the wall here; this is north and south, Doctor, and here is the wall near the railroad. What time of the year would the greatest shadow be cast by that wall and this embankment opposite the greenhouse?

A. What time of the year? 20

Q. Yes. A. Well, the greatest shadow would be cast always when the sun is lowest in the heavens, which would be December 21st.

Q. (By the Court.) Would that be so with a wall running in the direction that this wall is running? The sun is further to the south then, isn't it? A. Yes, I think that is so. I think the shadow would cast even in that case. Shorter days; December 21st.

Q. (By Mr. Carey.) The longer shadow would be what time of the day, Doctor? A. In the morning; get a greater shadow in the morning than in the afternoon; early morning. 30

Q. Is there any difference in the effect of light on plant growth during the different periods of the day? A. A decided difference. The morning light will average throughout the year from twelve to eighteen per cent. more intense than the afternoon.

Q. And being more intense is it more beneficial 40

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to plant life? A. More beneficial; the plant will grow more in the morning on that account, because the plant will grow in proportion to the light that reaches it.

10 Q. Are you able, in your investigation of this subject with reference to this embankment, and the location of the adjoining property, and the purpose for which it is used, to give us an estimate of how far the harmful effects will extend, if they will extend, from that wall, and from the embankment, upon the adjoining property.

20 Mr. Stallman: I want to object to that question. It calls for a conclusion, calls for expert testimony, and I think the question should either contain, or the answer should be predicated upon facts which will go upon the record. In other words, not have the witness to guess the facts upon which he gives the conclusion.

The Court: Perhaps that should be done, the height of the embankment being given, and the distance of the shoulder of the wall from the right of way line.

30 Q. The height of the embankment varying from 13 to 11 feet from the surface of the ground, and the distance of the embankment, the highest point in the embankment, to the adjoining property—

The Court: From 13 to 9, isn't it? 9 at the right of way?

Mr. Carey: Well, I will incorporate that. I had not intended to incorporate that section in the answer.

The Court: Very well, you are right about it.

40 Mr. Carey: Taking the point out as far as beyond the greenhouse at Fourth Street.

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Q. The height of the embankment varying from 16½ feet at Third Street to 11 feet at Fourth Street, and the distance of the shoulder of the embankment varying from—

Mr. Carey: Have you that?

The Court: 12 feet just on the line at Third Street, and 30 feet from the line at Fourth Street.

10

Witness: May I have the question?

Q. Have you made a calculation to determine how far the injurious effects from shading arising from this embankment and wall will extend upon the adjoining Manda property, if at all, taking into account the fact that at Third Street the wall and embankment are 16½ feet in height, and the wall being 12 feet in height, and the shoulder of the embankment at Fourth Street being 11 feet high and 30 feet from the right of way. A. From the light point of view the wall would undoubtedly render quite a little proportion of the land near the wall unsuitable to grow plants; they would not receive the light necessary, and there the light would not be sufficient to be able to counteract the effects of dew, which it is necessary for the dew on the foliage to be dispensed with as quickly as possible, to have the sun dry it out, to prevent infection.

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Q. (By the Court.) The question is to what extent, how far out on the plaintiff's land? A. That depends on the season of the year; the sun is changing so much; it would be more in one season than another; be more in August than in June. But at all times there is going to be considerable of shadow cast there, especially in August, when the sun is low in the heavens, going to be considerable shadow cast there, and it will not be convenient to grow plants very close to that wall.

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Q. (By Mr. Carey.) How far will this injurious effect extend in the month of August, in your judgment? A. I should think in the month of August that that wall would continuously cast a shadow, even at twelve o'clock, some 7 or 8 feet wide from the base of the wall; and at nine o'clock in the morning, eight o'clock in the morning, the shadow would be extended very much indeed, and it is the morning sun that plants need; it is the morning sun that is necessary for plants to grow; it is the morning sun that is necessary to remove the dew, and in the morning the shadow cast might amount to a number of yards.

Q. Now as to the embankment beyond the wall, Doctor? A. The embankment being cut off, as I understand it, sloping, is not going to constitute such an obstacle. At certain seasons of the year there would be a shadow cast a few hours in the morning by the embankment; but in the summer season it would only amount to a few minutes, a few hours, in the morning, when the bank would cast very much of a shadow. But it would be necessary I think, however, not to utilize right to the embankment; the plants would have to be kept back a certain distance; there would be a loss of the land.

Q. How far? A. Well, at noon in summer that embankment would cast no obstruction whatsoever; but in the morning the bank would cast a shadow, perhaps, as I say, from a few minutes to an hour or so, and perhaps in August—

Q. How far would it extend from the shoulder of the embankment in those few minutes up to an hour?

The Court: Assuming the embankment to be 30 feet from the line at Fourth Street.

A. It depends somewhat on the time of the day.

Q. Well, say in the morning between seven and

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eight o'clock. A. At what time of the year, for example?

Q. In the month of August. A. It is very difficult to estimate that offhand.

Q. (By the Court.) The sun would be two hours high then, would it not? A. Yes, probably.

Q. Would there be any shade? A. I don't think there would be very much shade at that time of day of an embankment that distance away. 10

Q. (By Mr. Carey.) Where the shade is sufficient to cause disease of the plant what will be necessary to be done in order to protect the plants? A. I would not care to grow plants there myself.

Q. Why not? A. Because they would be too susceptible to infection. I should move them out where they would get the sun. 20

Q. Well, if they were growing there what would be necessary to do? A. There is nothing that can be done.

Q. Anything in the way of spraying them, anything of that kind? A. No, nothing whatsoever.

Q. And if disease gets into one part of the nursery what is the probable result? A. Well, certain diseases, of course, will spread, but other diseases are due more to abnormal conditions than anything else, and might not spread very much. The diseases that would be produced by a wall like that would be due, of course, to the wall, to the abnormal condition. 30

Q. Speak a little louder, Doctor. A. The diseases that would be produced there near the wall would be produced by the abnormal conditions due to the wall.

Q. (By the Court.) You mean by that they would not spread? A. Some might spread, and some might not; some would, and some would not. 40

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10 Now, if it was an asparagus rust, it would spread, because dew is one of the principal causes of the asparagus rust which you suffer from so much here in New Jersey, and if asparagus was grown near that wall, and the dew was on that asparagus and the sun was shaded from those plants for an hour or two in the morning, the chances are in favor every time of the plants becoming infected with the rust, and the rust being a parasite would be capable of infecting other plants.

Q. (By Mr. Carey.) Doctor, what gases are produced as the result of the combustion of anthracite coal? What injurious gases? A. The pathologists are concerned only in the sulphurous gases as the result of coal combustion, sulphur dioxide and sulphur trioxid.

20 Q. Are those gases produced in coal when it is burnt in the locomotive engine? A. They are.

Q. And what becomes of those gases? A. Those gases go in the atmosphere.

Q. What is the specific gravity of those gases as compared with air? A. They are much heavier.

Q. The result is what? A. They have a tendency to settle down.

30 Q. What effect do gases of that description have upon plant life? A. All of the gases, sulphur gases, are disastrous to plant life, inducing a burning of foliage, falling off of leaves, various types of burning, and so forth, closing of blooms, falling of blooms. In fact, the reactions are innumerable on the part of the plant, even in the same species of plants.

Q. What effect would the embankment and wall have upon the dissemination and passing away of those gases? A. I think it would have rather detrimental.

40 Q. How? Why? A. Well, the idea that there

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is more or less of an obstruction formed there, and a pocket, which might not at all times be detrimental, but sometimes I think it would be detrimental to the passing away of the gases.

Q. You speak about pockets of air being formed by reason of the embankment, would those pockets have any effect upon the distribution of the gases? A. They would have a tendency to—the gases would have a tendency to become stagnant there, settle down, not move. 10

Q. Under which condition would they disseminate and pass away most quickly, with the embankment present, or without the embankment? A. I should say without the embankment.

Q. Now, if a freight car stands on these tracks, or a line of freight cars, would that have any tendency to increase the damage done on account of the shading, and lack of circulation of air? A. It certainly would. 20

Q. Will this embankment which has been described to you, located opposite the greenhouse, have any effect, in your judgment, upon the ventilation of this greenhouse? A. I think it might affect the ventilation somewhat.

Q. In what way? A. Well, there would not be so free a circulation there with the bank as there would be without the bank.

Q. Assuming that this railroad track is 30 feet away from the property line, and is used for moving freight trains, freight cars, backwards and forwards on, in your judgment will the greenhouses be affected injuriously by reason of gases thrown off from the engine? A. They are likely to be; you never can tell, of course, what is going to happen. 30

Mr. Stallman: That is just the point of the objection I have been making right along. I think in a case of this kind we ought to stick 40

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somewhere near to facts. The witness says "You never can tell," and I do not think he ought to go on encumbering this record with inference on inference not founded on facts.

10 The Court: It certainly ought to amount to reasonable likelihood. The mere possibility that a thing might happen ought not to be the basis of damages.

Q. What, in your judgment, is the probability with respect to gases being collected in the greenhouses by reason of the operation of this line of railroads in that position. A. Any greenhouses located near a railroad where that greenhouse is, is sure to be affected at times with gases from the railroad.

20 Q. And what will be the effect of the gases if they do get into the greenhouse upon the character of the plants that are therein contained.

The Court: Upon the character of the plants?

30 Q. Upon the kind of plants? A. All plants are affected by gases, some different than others, but there are many factors that come into play there; the strength of gas; the amount of gas in the house. Sometimes the gas would close the flowers; sometimes cause the flower to drop off; more often burns the leaves, destroys the leaf; sometimes burns the edges of the leaf, sometimes the center of the leaf, but in all cases gases have a very injurious effect upon plants, and even, probably, more effect in a house like that, taking place all the time, which might not always be discernable.

By a Juror:

40 Q. Will the effect of those gases be any greater

George E. Stone, for Appellant—Direct

now that the railroad track is 35 feet closer to the line, than it was at the original laying of the track?

Mr. Stallman: May I correct the impression of the juror? The track will be not 35 feet nearer, but 13.

Q. 13 feet nearer? A. Yes, I think there would be. 10

Q. Would the damage be as great to the greenhouse with the track being laid on an embankment, as they were when they were on the level with the rest of the property? A. I think there would be greater damage.

Q. I wish you would explain that. I cannot see where, when the tracks are higher up in the air, the gases would have a chance to go over the greenhouse? A. From the simple fact that there is an obstruction there in the way of a pocket, likely to hold certain gases down, work in the greenhouse more densely, more easily, than they would if the track was lower. 20

By Mr. Carey:

Q. If gases do accumulate in the greenhouse what, in your judgment, will be the comparative ease with which they will be gotten out of the greenhouse in the absence of the embankment, as compared with the presence of the embankment? A. Will you please state that once more, I didn't quite get your meaning. 30

Q. If the gases do collect in the greenhouse will it be more difficult, or less difficult, to get them out after the embankment has been raised? A. I think it will be slightly more difficult, because an obstacle there on the track, or railroad, would prevent—would affect—the circulation of air. 40

George E. Stone, for Appellant—Cross

By a Juror:

Q. Would the direction of the wind affect that any? A. Yes, to a certain extent, I think.

Q. How would it? A. The direction of the wind would have a great deal to do in destroying the pocket; a great deal to do.

10 *Cross Examination by Mr. Stallman:*

Q. Doctor, will you step down here to this map, I want to point out to you the wall that starts back at Third Street, 14 feet high, and slopes down to nothing, or will be a foot high at the end of 100 feet. Have you taken a wall of that character into account in your testimony? A. I think so.

20 Q. Now, will you take your pencil, or my pencil, and indicate on this map the line of the shadow at twelve o'clock on an August day? A. The points of the compass, of course, are not quite so familiar to me as they are to you. I understand this is south here (indicating), and the sun would be off in this direction, and the shadow would be cast in that direction.

Q. Take the highest point of the wall, 14 feet high, and show me where the shadow would go where the wall is 14 feet high? A. The shadow will be cast in this direction (indicating).

30 Q. Go out in the street, wouldn't it? A. Some of it would be cast here, but some of it out in the street, perhaps, but quite a little be cast here (indicating).

Q. Take a wall 2 feet high down at the end, or a foot high, how much shadow does that cast?

Mr. Carey: Objected to because it refers to an embankment 2 feet high.

40 Q. Just the wall itself, would there be any shadow cast that would be appreciable? A. You mean a foot high here (indicating).

George E. Stone, for Appellant—Cross

Q. You remember I asked you whether you gave your testimony with reference to a wall that was 14 feet high here (indicating), and sloped down to a height of one foot 100 feet away; you recall that? A. Sloped down to one foot 100 feet away?

Q. Yes; that point where I am pointing with my pencil is 100 feet from the street, and the wall is a foot high; would there be any appreciable shadow there? A. Do I understand this wall is only a foot high at this point? 10

Q. Yes, sir, it slopes down. At the street it is 14 feet high, and it slopes down to a foot high; did you give your testimony on that basis? A. No, I must confess I did not quite understand that; I thought that wall was 14 feet high from here to here (indicating).

Q. That is what I assumed, you were led into some error on that. I understand you to say that with the greater heat, or degree of light, of the sun, the greater is its efficiency in feeding plant life? A. Did you say heat? 20

Q. That the greater the intensity of the sunlight, that there is more efficiency in its feeding plant life? A. Yes, there is.

Q. Don't you get the greater degree of heat as the sun rises? A. Yes.

Q. You would not say, would you, Doctor, in looking at this map, that at two o'clock in the afternoon there would be any shadow cast by the railroad construction there? Would not the sun be on that side of the railroad construction in the afternoon? A. The sun does get around, to be sure, in the afternoon, but the afternoon sun is not so good as the morning. 30

Q. Now, the greenhouse that you have been testifying about has been the palm house, has it not, 70 feet from the top of the embankment? A. Yes. 40

George E. Stone, for Appellant—Cross

Q. Would you want to say that the large greenhouse which is located right in the middle of it, back 130 feet from the top of the embankment, 13 feet high, would be affected by that embankment? A. You say the top of the greenhouse?

Q. No. The greenhouse, I have just scaled it, is about 130 feet away from the embankment. A.
10 What time of day did you say?

Q. I will put it any time of the day. The big greenhouse, 130 feet away from the top of the embankment, would not be affected by the embankment as far as sunlight is concerned, would it? A. Only very little in the morning it might, perhaps, be affected.

Q. Five or six o'clock? A. Depends on the season of the year, it might be five or six o'clock, might extend to seven or eight o'clock.

20 Q. That the shadow would be ten times the length of the object? A. Beg pardon!

Q. That the shadow would be ten times the length of the object? A. I don't want to state just how long it would be.

Q. I said the greenhouse was 130 feet away, and the embankment 13 feet high. You would not say, would you, that the greenhouse over there would be affected by that embankment? A. Not under those conditions, no, sir.

30 Q. You were at the Manda property once? A. Yes, sir.

Q. Now, the matter of gases. What is the percentage of sulphur dioxide from the combustion of anthracite coal? A. I am sorry to say I am not chemist enough to tell you that.

Q. Do you recall that it is about four-tenths of one per cent.? A. Will you please ask me the question once more.

40 Q. Do you recall that the proportion of sulphur dioxide arising from the combustion of anthracite

George E. Stone, for Appellant—Cross

coal is about four-tenths of one per cent.? A. I know coals differ very much in that respect.

Q. Have you ever made examination? A. No, I have never made examination.

Q. I am speaking now of the combustion of anthracite coal as produced in the region around Scranton, Pennsylvania. Have you ever made any test or examination to determine what is thrown off from that combustion? A. No; all I know, in general, is that some coal has very little sulphur in it, mere traces; some has more. 10

Q. Then any effect on this property would depend on the kind of coal used, wouldn't it? A. The kind of coal would have an influence.

Q. And you are not prepared to say the kind of coal that is used there, or what its effect would be? A. No, I cannot.

Q. There is arising from combustion of anthracite coal a carbon oxid, is there not? A. Yes. 20

Q. And that is very beneficial to plant life, is it not? A. That is beneficial at about fourteen per cent.

Q. There is that per cent. in the combustion of anthracite, is there? A. Probably not.

Q. Have you ever made any test to determine the head of the exhaust steam that comes through a smoke-stack on a freight engine? A. I have not. 30

Q. Have you ever made any test to determine the velocity of the exhaust? A. I have not.

Q. Do you know what the effect is of exhaust steam at high velocity carrying gases out of a smoke-stack? A. I have no information on that point.

Q. Do you know that exhaust steam coming at a high velocity through a smoke-stack disintegrates and breaks up the gases that are taken into the smoke-stack from the fuel combustion? A. I could not say as to that. 40

*George E. Stone, for Appellant—Redirect**Redirect Examination:*

Q. If there were freight cars standing on the top of this embankment which is 13 feet high, and the freight car was 16 feet high—

Mr. Stallman: I object to your assuming a freight car is 16 feet high.

The Court: 14 feet.

10

Q. Well, 14 feet high, making a total elevation here on this embankment of 27 feet, would that obstacle shade the large square greenhouse at the time mentioned by Mr. Stallman with respect to the embankment alone? A. How many feet is that freight train to be from the greenhouse?

Q. About 135 feet. A. I think it would cause a shade in the morning.

Q. Up to what time? A. Depend, of course, on the season of the year.

20

Q. Say in the month of August. A. I really have no definite records on that point, but I should say it would affect to some extent in the morning.

30

Q. (By the Court.) Doctor, in view of the variation of the sun from the number of degrees north of the equator in summer, to the same number of degrees south of the equator in the winter, making that variation from north to south in the sun between summer and winter, is there any appreciable difference in the shadow that will be thrown by reason of an obstruction in an exact northeast and southwest direction? A. I should think there would be a very appreciable difference.

40

John K. Farquhar, for Appellant—Direct

JOHN K. FARQUHAR, SWORN for the appellant.

Direct Examination by Mr. Carey:

Q. Where do you reside? A. In Boston.

Q. What is your business? A. Horticulturist.

Q. How long have you been in that business?

A. For over forty years, all my lifetime.

Q. Are you a nursery and horticultural proprietor at this time? A. I have a nursery, or various nurseries, aggregating 250 acres in Massachusetts; extensive greenhouses. 10

Q. Are you connected with any horticultural society? A. I am connected with a great many horticultural societies. I am a Fellow of the Royal Horticultural Society of London, where I spent four years in the experimental gardens at Chiswick. I have just been elected president for the third time of the Massachusetts Horticultural Society. Previous to being elected president I controlled its exhibitions for some ten years or more. I was during the last year president of the Society of American Florists. I have also been elected for the fourth year president of the Horticultural Club, which has a membership extending from Maine to Washington. 20

Q. Washington State? A. Washington, D. C. We have a great many members out in the west who would like to come, but we feel that it would be an imposition to allow them to pay a membership fee, and travel so far, so people from west of Chicago have open invitation. 30

Q. Have you acted as judge of horticultural exhibitions? A. I have very often served in that capacity.

Q. Where? A. I was asked to go over to London at the great international exhibition in London some three years ago. I went over there and served in that capacity. I have also been 40

John K. Farquhar, for Appellant—Direct

asked, but, unfortunately, I was not able, to go to the exhibition in Belgium the following year.

Q. Have you acted in that capacity in this country? A. I have.

Q. Frequently or otherwise? A. Why, a number of times. I tried to avoid acting in that capacity, but I have been called in in New York, and places like that. I tried to avoid serving as judge.

Q. What is the general line of your products, Mr. Farquhar? A. I have almost everything in the horticultural line. We have extensive greenhouses in which we propagate and sell all sorts of plants in the spring; we have a very extensive business in herbaceous plants, perhaps the second largest in this country. We have a large business in trees and shrubs. We have introduced our creations at Harvard University, introduced many hundreds of entirely new shrubs which we are growing and developing; a few of them have been disseminated, but many of them are not yet in commerce in this country.

Q. Mr. Farquhar, do you grow and deal in the same character of plants that Mr. Manda does? A. We do.

Q. Are you in any way connected with the Manda property? A. I am not. We are competitors. Sometimes he gets business I think we ought to get, and I get some in New York.

Q. You come to New York and get business, and he goes into New England cities? A. We like very well to come to New York and get business, because it is of a larger character than New England; there is more money here.

Q. Do you meet Manda in competition in New York business? A. We do.

Q. How long have you known the Manda prop-

John K. Farquhar, for Appellant—Direct

erty in South Orange? A. I think I have known it eighteen or twenty years.

Q. You have known it practically all that time then? A. Well, within a comparatively short time, from the time when Mr. Manda first started his greenhouse there. He had a greenhouse when I first went on it.

Q. Mr. Farquhar, did you notice the character of the top soil on the property that is taken by the railroad company? A. I did. 10

Q. Will you describe it, please? A. In horticultural work—

The Court: No, just describe the soil, that is the question.

A. The soil there was a first-class sponge. In horticultural work the soil should be spongy, should be virtually a sponge; if we have shallow soil, we have light sponge; if we have deep soil we have a large sponge. Now the value of the large sponge, or deep soil, is very obvious; it absorbs moisture, when you get moisture on it from heavy rains it stores up that moisture and holds it like a sponge, and supplies it gradually to the plant as it may be needed. And such a soil as that, to the depth Mr. Manda has there, will hardly dry up; and such a soil as that for the purpose, not so much of landscape generally, but of nursery ground, to propagate these herbaceous plants in the manner now done, is a great labor saving arrangement, inasmuch as in the early summer you can take these plants and tear them apart, and simply put those plants in that soil. That soil is of a quality to act on the propagating plant. It saves the work of first taking these divisions and cutting them, then the labor of transplanting them. Mr. Manda has brought— 20 30

The Court: The great trouble, Mr. Farqu- 40

John K. Farquhar, for Appellant—Direct

har, is, you are giving us very interesting information, but the question has been answered long, long, ago.

Q. Did you notice the depth of this soil? A. I tested it in various places.

10 Q. With what result? A. I went over it pressing my heel in, and I found that with two or three pressures I could insert my heel from six to eight inches in almost any part of the ground; and then, to verify that, I took a spade and dug to the depth of the spade handle, so that I was satisfied there was an average of two and a half to three feet of soil over that ground.

20 Q. In connection with your nursery work do you prepare soil in that way yourself? A. We do, but we hardly go to that depth; we pay money for the labor end of it.

Q. You prepare soil for propagating purposes in your own nursery? A. We do.

Q. Now, from your experience in connection with the preparation of such soils, can you tell us what a soil of that depth that you found on the Mandā property will add in value to the natural condition of the land for nursery purposes? A. I would say at least—

30 Mr. Stallman: I desire to enter an objection to that question; this witness is not qualified as to answer it in this particular location.

The Court: The objection will be overruled.

An objection to this ruling is noted by the appellee as ground of appeal.

A. I would say at least twenty-five cents per square foot.

40 Q. Mr. Farquhar, did you examine the location

John K. Farquhar, for Appellant—Direct

of this proposed embankment on the Manda property? A. I did.

Q. And the wall? A. Yes, sir.

Q. And did you notice the position of the proposed wall with reference to the greenhouse, and also to the adjacent property where the propagating beds are toward Third Street? A. I did.

Q. Mr. Farquhar, assuming that at Third Street there is a wall $14\frac{1}{2}$ feet high, running down, as it extends backwards 80 feet, to one foot in height; that on top of this, extending above this wall, is an embankment which carries the total height up to $16\frac{1}{2}$ feet at Third Street, and down to 11 feet at Fourth Street, that at Third Street the wall being perpendicular, and that at Fourth Street the shoulder of the embankment is 30 feet away from the line fence which you saw there; and that the embankment from the end of the wall slopes down to the ground, and also the embankment on top of the wall slopes; what effect if any, in your judgment, will this wall and embankment have upon plants on the Manda property adjacent to it? 10 20

Mr. Stallman: I object on the ground the witness has not shown himself qualified to answer.

The Court: The objection will be overruled. 30

An objection to this ruling is noted by the appellee as ground of appeal.

A. It will have an injurious effect.

Q. In what way? A. It would change the character of the growth of all the plants in the immediate vicinity of the wall, or embankment; you would get a softer, larger cell, a looser character of growth in the plant; the plant would not be as hardy. This altered condition would have a 40

John K. Farguhar, for Appellant—Direct

tendency to sour the soil more than anything, from the absence of circulation of wind over it; the drying effect of the soil; the exclusion of the sun, so that your soil would become sour, so much more readily preventing the proper nutrition of many kinds of plants.

10 Q. Have you formed an opinion as to how far on the Manda property this effect would extend, if it would extend over on that property, at various places there?

Mr. Stallman: Objected to on the same ground as before.

The Court: The objection will be overruled.

An objection to this ruling is noted by the appellee as ground of appeal.

20 A. That injury would extend, I would say, about three or four times the distance of the height of the wall.

Q. That is, from the shoulder of the embankment? A. Well, from a line from the apex of the bank, from the perpendicular of the apex of the bed.

Q. Of the bed, you mean the embankment? A. Yes, sir.

30 Q. What effect would the embankment have, in your judgment, upon the distribution of gases arising from an engine passing on the track?

Mr. Stallman: That is objected to on the ground the witness has not shown himself qualified to answer that question.

The Court: The objection is sustained.

Q. What is the effect of coal smoke upon plant life, if you know?

40 Mr. Stallman: Objected to on the ground there is no evidence of coal smoke going

John K. Farquhar, for Appellant—Direct

around the plants in this case; and also on the ground of the witness's qualification.

The Court: I suppose he should be first qualified, either by having observed the effect of it, or by knowledge of the effect of it.

Q. Have you observed the effect of smoke from combustion of coal on plant life? A. I have. 10

Q. When, and where? A. At various greenhouses in the vicinity of Boston, one, particularly, at Forest Hills, where a great deal of damage was done; one owned by a Mr. Farrell, another by Mr. Wilton. That was one of the first instances that came to my knowledge.

Q. How far from the tracks? A. Well, in some cases they ran to within, I should judge 20 feet of the track, but it extended out from it perhaps nearly 200 feet. 20

Q. What effect did you notice in connection with these cases of smoke from combustion of coal upon plant life? A. (Not answered.)

Q. (By the Court.) Do I understand this was the effect of combustion of coal upon plant life in the greenhouses from locomotives on the outside? A. Yes, sir. I understand that what I am to testify—

Q. No, is that your observation? A. Yes, sir, both outside and inside. 30

Q. (By Mr. Carey.) Answer the question, now, Mr. Farquhar.

Mr. Stallman: What is the question?

The Court: What effect he observed in the greenhouses.

A. At times it is impossible to open your ventilators because of the—

Mr. Stallman: I object to that. 40

John K. Farguhar, for Appellant—Direct

The Court: Yes. The question is what effect you observed.

10 A. (Continued.) Sometimes when the ventilators were open the plants were covered with coal dust, and gas would get in browning the edges of the leaves, sometimes, browning in spots of the leaves, destroying the edges of flowers sometimes, causing them to drop and wilt sometimes.

Q. Did you investigate the damage where flowers were destroyed by smoke, roses? A. I gave expert testimony where a very valuable lot of roses had been destroyed by the burning down of—this was smoke by the burning down of a round house.

Q. How far did the damage extend?

Mr. Stallman: I think it is immaterial.

20

The Court: I sustain the objection.

Q. What effect, in your judgment, if any, will the embankment have upon the dissemination, clearing away, of gases from the railroad?

Mr. Stallman: Objected to on the ground of the witness's qualification.

The Court: I think I must sustain that objection, unless he has observed a similar situation.

30

Q. Have you observed the effect of an embankment upon the dissemination of smoke and gases?

A. I have.

Q. When, and where? A. I have done that various times. We have had experience of it in some of our own nurseries; one located on the New Haven branch, where smoke settled at a certain time.

40 Q. What was the character of the embankment there? A. Well, it was quite a steep embankment.

John K. Farguhar, for Appellant—Cross

Q. How high? A. I should think it must have been 12 feet or more.

Q. How far away from the greenhouse, or flowers? A. Well, this was on plants growing on nursery ground. We found we had a deposit of soot, on rhododendrons, for instance, and we found the edges of the leaves of the rhododendrons curled and brown, and the edges of the leaves for one-eighth of an inch or quarter of an inch in some cases destroyed. 10

Q. How far did that extend? A. This went back probably 100 to 200 feet.

Q. And where did the smoke come from? A. Came from the locomotives of the New Haven road.

Q. Now, will you state whether or not this was more noticeable adjacent to the embankment than it was in other places where there was no embankment? A. Well, we didn't have that trouble where there was no embankment. We have our nurseries now where the railroad is below, and we have no trouble with that. 20

By Mr. Stallman:

Q. You said you, in measuring the top soil there, took a spade and dug a hole down to the depth of the spade handle, is that right? A. Yes, sir. 30

Q. Do you have a distinct recollection of making that hole? A. I do.

Q. That is the only one you made, isn't it? A. That is the only hole I made.

Q. And why do you tell me from digging that one hole you were satisfied the average depth of that top soil was from 2 to 3 feet? A. Because I went over that land and stepped on it. I can tell a good deal of the character of land when I walk over it. 40

John K. Farguhar, for Appellant—Redirect
Harry B. Weiss, for Appellant—Direct

Q. Can you tell how deep it is by walking over it? A. I can form an idea how deep it is.

Q. Can you guess within a foot or two? A. I would satisfy myself there was at least a certain depth of soil there, a certain sponginess which was equivalent to depth in the case of inferior soil.

10 Q. But you cannot dig one hole and say that is the average depth of the top soil over an area, can you? A. Well, I—

Q. Answer that yes or no. A. Neither answer would be quite correct, your Honor. I went over this field and stamped with my heel here and there; I took a place where I found what I regarded as a minimum resistance to my foot pressure, and I tested that by digging, which confirmed my judgment of the character of the soil.

20

Redirect Examination:

Q. Did you see where the railroad company had excavated? A. I did.

Q. When? A. Yesterday.

Q. And what depth of top soil did you notice along the line of excavation? A. From two, two and a half, three feet.

30

RECESS.

HARRY B. WEISS sworn for the appellant.

Direct Examination by Mr. Carey:

Q. What is your business? A. I am Assistant State Entomologist.

Q. Of what state? A. Of New Jersey.

40 Q. And you are living where? A. At New Brunswick.

Harry B. Weiss, for Appellant—Direct

Q. And what are your duties as Assistant State Entomologist? A. I have charge of the inspection of nurseries, and of imported stock coming into New Jersey.

Q. And in that connection do you see all the nurseries of the State of New Jersey? A. I visit all the nurseries.

Q. How long have you been connected with this work? A. The last ten years. 10

Q. Are you connected with any societies? A. I am a member of various entomological societies in the United States; the American Entomologist Society; the Association of American Economic Entomologists.

Q. Are you connected in any way with the New Jersey State College? A. I am instructor in entomology.

Q. And what kind of entomology? A. Economic entomology. 20

Q. That relates to what? A. Injurious insects, and, to a certain extent takes in the injurious diseases of plants.

Q. Are you the author of any publication on those subjects? A. I am.

Q. Of what character? A. They are entomological in character and appear in United States and Canadian scientific magazines.

Q. Have you had occasion, in connection with your business, to ascertain the effect of embankments near to and alongside of nursery property? A. I have. 30

Q. For how long? A. For the past four years.

Q. And in relation to what? The effect of embankments and things of that kind in relation to what? A. In relation to the stock growing near such embankment.

Q. And will you state whether or not it has any effect upon stock? A. Such embankments usually 40

Harry B. Weiss, for Appellant—Direct

cut off light and air. The digestion of plants is carried on in the presence of sunlight, and when the sunlight is cut off the digestion stops, and the plants are unable to resist disease.

10 Q. What effect has circulation of air on plant life? A. Air ventilation is also necessary, inasmuch as the swaying of trees caused by air induces a greater circulation of sap. The sap is carried to the outermost part of the tree by this swaying; and inasmuch as plants breathe in the same manner as human beings, they, too, must have a supply of fresh air; otherwise they degenerate in quality.

Q. What effect does bad air have upon plant life? A. It has a bad effect.

20 Q. In connection with your work have you also had occasion to investigate the effect of smoke from burning coal upon plant life? A. I have had occasion to observe it.

Q. Have you any chemical knowledge? A. I have.

Q. What are your qualifications? A. I was chemist of the Scientific Preservation Company, a Philadelphia concern, for a year and a half.

Q. Where did you get your chemical education? A. At the University of Pennsylvania.

30 Q. In the course of your duties have you inspected the Manda property? A. I did.

Q. Do you regularly inspect greenhouse properties and nursery properties throughout the state? A. I regularly inspect all properties twice a year.

Q. What is the object of that inspection? A. To determine if the plants are free from diseases and injurious insects.

40 Q. If you find diseases or injurious insects, what is then done? A. The diseased stalk is usually burned. If the insect infested stalk can

Harry B. Weiss, for Appellant—Direct

be sprayed with advantage it is sprayed; if that cannot be done such stalk is burned before a certificate is issued.

Q. What is the result with respect to shipments from a nursery whose stock is found diseased? A. When diseased stock is found in a nursery all shipments are held up. No nurserymen can ship stock without a state certificate certifying the stock is free from insects and disease. 10

Q. Where is the state certificate? What is done with the state certificate, or a copy of it? A. It is placed on the outside of every package leaving the nursery.

Q. Are there any diseases of plant life, or affections of plant life, induced by a lack of circulation of air? A. There are such diseases.

Q. Will you state what they are? A. The grape mildew, for instance, strawberry mildew. 20

Q. How about insect troubles? A. It is an accepted fact among entomologists that plants weakened in character are always susceptible to insect troubles.

Q. Have you examined the Manda property with respect to the strip of land which the railroad company is taking under condemnation proceedings? A. I have.

Q. When have you done that? A. About two or three weeks ago, I judge. 30

Q. Before the hearing before the commissioners? A. Yes, sir.

Q. Have you been there since that time? A. I have been there once since that time inspecting some imported stock.

Q. What effect, in your judgment, would be produced from Third street to Fourth street—do you know where Fourth street is? A. I think Third street is the—

Q. The street in front of the nursery property. 40

Harry B. Weiss, for Appellant—Direct

A. The street in front of the nursery property, and Fourth street must be the first street below, towards the round house.

Q. You know the location of those streets, do you? A. Yes, sir.

Q. You can see them on the map there. Now, what, in your judgment, would be the effect upon the circulation of air upon the lands adjacent to the strip of land taken by the railroad company, of a wall 14 feet high at Third street, and sloping down to one foot in height about 30 feet back from Third street—

The Court: 90 feet.

Q. —about 90 feet back from Third street, with an embankment above the wall, bringing the embankment up to 16½ feet at Third street, and sloping down to 11 feet at Fourth street, the shoulder of the embankment at Fourth street being 30 feet away from the new property line.

Mr. Stallman: I object to that on the ground the witness has not shown sufficient qualification to answer it, and, in any event, it is most remote and speculative.

The Court: The objection will be overruled.

An objection to this ruling is noted by the appellee as ground of appeal.

A. Such an embankment would seriously interfere with ventilation, or the air drainage.

Q. What do you mean by "air drainage"? A. Air drainage can be compared somewhat to water drainage; if there isn't good surface drainage, or subsurface drainage in the soil the water collects around the roots of plants, which is a bad feature, causes rot. Air drainage can be compared to that. There must be fresh air continually passing around and through the branches of the stock.

Harry B. Weiss, for Appellant—Direct

Q. What would be the cause of this interference with the air drainage? A. The embankment itself.

Q. Which direction of the wind would this be most noticeable and most deleterious? A. The wind coming from the east.

Q. And which least deleterious? A. Coming from the west.

10

Q. What would be the probable result upon plants growing upon the adjacent Manda property by reason of failure of, or improper, circulation of air?

Mr. Stallman: Objected to on the ground the witness has not shown himself qualified.

The Court: The objection is overruled.

An objection to this ruling is noted by the appellee as ground of appeal.

20

A. The plants will become weak in character.

Q. And in your judgment how far will this effect be noticeable from the fence line, the new fence there?

Mr. Stallman: Objected to on the same ground.

The Court: The objection will be overruled.

An objection to this ruling is noted by the appellee as ground of appeal.

30

A. Where the embankment does not approach the greenhouses it will be most noticeable as far as the shade extends; but when the embankment approaches the greenhouse it should be noticeable entirely between the greenhouse and the embankment, all of that space.

Q. Point to the space which you think would be covered by that detrimental effect? A. (Indicating on map.) The more detrimental effect

40

Harry B. Weiss, for Appellant—Direct

would take place here, for instance, than along here.

Q. That is northerly from the palm house? A. To the north of the palm house.

Q. That would be the most detrimental, and southerly the least detrimental; is that right? A. Yes, sir.

10 Q. Now, while you are there will you tell me what—how far back in a westerly direction will this detrimental effect, in your judgment, extend? A. As far as air circulation goes it will include all of these greenhouses.

Q. And how about the property adjacent to the greenhouses? A. The effect will become less as you get further back here (indicating).

20 Q. Now, coming to this map, Mr. Weiss, where we have the layout of the property shown, will you point out what sections will be most affected? A. This effect will undoubtedly extend to this place in here (indicating), most of it.

Q. You see where the railroad is to take? A. The railroad comes along here (indicating).

Q. That is where the railroad now is; this is the line; you notice that line here (indicating)?

A. Yes. Of course, you will get less effect along here.

30 Q. Now, this lack of circulation of air that exists, what effect will that have upon the disposal of the gas that may be thrown off by engines operated on the track?

Mr. Stallman: Objected to on the ground it is based upon an hypothesis not proved in this case.

(Question withdrawn.)

40 Q. Have you made any investigation as to the gases resulting from the combustion of coal? A. I have.

Harry B. Weiss, for Appellant—Direct

Q. What are those investigations? A. I have examined gas from the combustion of coal, blue gas, for hydrogen sulphide, and sulphur dioxide, both of which are extremely fatal to plant life.

Q. State what proportion of those gases respectively is injurious to plant life. A. Atmosphere containing 1 part of hydrogen sulphide to 3000 parts of air is injurious to indiginous plants, and to evergreens also. An atmosphere containing 1 part of sulphur oxide to 10,000 parts of air is fatal to plant life—ten to twenty thousand parts of air. 10

Q. Can you tell what percentage of sulphur exists in authracite coal? A. From five-tenths to one per cent. of sulphide.

Q. In the combustion of anthracite coal will you state whether or not these two injurious gases are given off? A. Those gases are always formed and given off. 20

Q. Now, will you state whether or not, in your judgment, the plants adjacent to this new property line will suffer from coal gases?

Mr. Stallman: I would like to cross examine this witness as to his qualification to answer that.

The Court: You may do so.

By Mr. Stallman:

Q. Under what conditions and circumstances did you make the examination of anthracite coal to determine the gases that emanate from combustion? A. These samples of gases were drawn from a chimney, from an ordinary furnace burning anthracite coal. 30

Q. And did you make the test yourself? A. I made the test myself.

Q. Do you know the head of steam exhausted through a locomotive smoke-stack? A. I know 40

Harry B. Weiss, for Appellant—Direct

that at times it is exhausted through a locomotive stack.

Q. That is not what I am asking you; I asked you if you knew the head of steam exhausted through a locomotive smoke-stack? A. No.

10 Q. What is the effect of heat on these gases that that you have spoken of? A. Heat would disseminate them, and would enlarge their volume.

Q. And decrease their specific gravity, would it not? A. No, the specific gravity of the gas remains the same whether it occupies a small or large space.

Q. Technically I am wrong, of course, but it causes a very substantial diffusion of the gases, doesn't it? A. Heat will diffuse the gas, expand it.

20 Q. What is the effect of moisture on these gases? A. Both of these gases take up moisture very readily; they have a great affinity for moisture.

Q. Do you know the velocity at which steam is emitted from a locomotive smoke-stack? A. I do not.

Q. Have you ever made a test of that? A. I have never made a test.

30 Q. Take the combination of velocity with which steam is exhausted from a smoke-stack, the moisture of the steam and the heat of the steam, are you able to say what the effect would be of the gases discharging from a smoke-stack under those conditions? A. It would seem to me—

Q. Well, do you know? A. I don't know.

Mr. Stallman: I renew my objection.

40 (Question read as follows: "Now, will you state whether or not, in your judgment, the plants adjacent to this new property line will suffer from coal gases?")

Harry B. Weiss, for Appellant—Direct

The Court: I assume that refers to coal gases which will probably be emitted from locomotive engines.

Mr. Carey: That is what I intended to include in the question.

The Court: I will overrule the objection.

An objection to this ruling is noted by the

10

appellee as ground of appeal.

A. They will undoubtedly injure the stock adjacent to the embankment.

By Mr. Carey:

Q. Which stock are you referring to now, inside or outside? A. Both inside and outside.

Q. Are you able to form an opinion how far this injury will be probably apparent?

Mr. Stallman: I desire to make the same objection on the same ground.

20

The Court: The objection will be overruled.

An objection to this ruling is noted by the

appellee as ground of appeal.

A. From previous experience I can form an opinion.

Q. Will you state that opinion? A. As far as the greenhouse stock is concerned it would affect practically all the greenhouse stock; the effect on the outside stock would be confined mostly to that lying between the greenhouse and the embankment.

30

Q. What, in your judgment, would be the percentage of damage to the greenhouse stock arising from this cause?

Mr. Stallman: I desire to interpose an objection to the question on the ground that the witness is not qualified, and, of course, has

40

Harry B. Weiss, for Appellant—Direct

no knowledge of the greenhouse situation there, and its nature.

The Court: I think it ought to be preceded by questions whether or not he could tell; as to whether or not he is able to state the percentage of damage.

10 Q. Are you able to state the percentage of damage which will probably result to the stock of the greenhouses? A. I am.

Q. Will you state it?

Mr. Stallman: I object to this on the ground before stated.

The Court: The objection will be overruled.

An exception to this ruling is noted by the appellee as ground of appeal.

20 A. The damage will be at least fifty per cent. That will simply be growing plants under adverse conditions all the time. It is just as if somebody came into a factory and reduced the motive power by one-half or more; the output is bound to be decreased.

30 Q. Why is it in your judgment, that this result will arise in the greenhouses? A. Simply because these gases, being heavier than the air, will find their way into the greenhouses through the ventilators, and becoming laden with moisture in this greenhouse atmosphere they will fall down on the plants, and do their damage. It is practically impossible to get rid of such gases before they do damage.

Q. You spoke of some previous experience a moment ago on which you were basing opinion, will you state what your experience was? A. As to the effect of such similar gases on stock?

40 Q. Yes. A. I have repeatedly made experi-

Harry B. Weiss, for Appellant—Direct

ments with both hydrogen sulphide and sulphur oxide with a view to killing insects on plants, and have always succeeded in killing the plants.

Q. Have you stated whether these gases are heavier, or lighter than air? A. They are heavier than air.

Q. If disease should result in the neighborhood of this wall what would be the probable result to the rest of the nursery? A. Inasmuch as disease spores are carried by the air, other parts of the nursery would become affected. 10

Q. Is there any preventative from infection from these causes which you have enumerated? A. These diseases can be prevented before they have made their appearance, but once after they attack the plant it is hopeless to try to come back with it.

Q. What, in your judgment, will be necessary in order to fight these diseases which you have mentioned? A. I don't know how it is possible to fight them as long as he has conditions there which will always support them. 20

Q. Can he do anything? A. He can destroy the infected plants, and thus prevent it from spreading.

Q. Is there any preventative methods that can be used? A. He might, for instance, cover up his plants with Bordeaux mixture, but it is practically impossible to cover all the plants. The plant diseases are really microscopic plants themselves which take root and live in other plants. You can, however, prevent them from taking root by covering the plants with lime and copper sulphate in combination. 30

Q. Will you state what would be the probable extent to which that would be rendered necessary?

Mr. Stallman: Objected to as being purely speculative. 40

Harry B. Weiss, for Appellant—Cross

The Court: Yes. I think to point to which that leads is obvious.

Cross Examination by Mr. Stallman:

10 Q I understood you to say that during the last four years you have made some experiments and tests with reference to a nursery near an embankment; is that right? A. Not strictly an embankment; I have not made those tests, I made observations where nursery stock has been grown at a surface lower than the level of the surrounding country.

Q. What do you mean by surrounding country? Hills off in the distance? A. Hills adjoining nursery stock.

20 Q. Do you know South Orange very well? A. I believe I do, I have been there a number of times.

Q. Don't you know there is a considerable elevation up on Prospect street, about two blocks west of Mr. Manda's property? A. I know there is an elevation to the west of the property.

30 Q. How do you account for the gases on Mr. Manda's plants down there in the hollow of that hill? A. There is so much open ground surrounding it, you have not such a small enclosure, and the air has a broader sweep in that section.

Q. Well, there is a hill on one side; doesn't that make a big difference? A. Not if the other side is lacking a hill.

Q. You say you observed smoke; was the observation you made of smoke some criterion on which you have based your testimony today? A. I don't quite understand the question.

40 Q. You said in answer to a question of Mr. Carey that you have made some observation of smoke, the effect of smoke on plants? A. I said gases, didn't I, instead of smoke?

Harry B. Weiss, for Appellant—Cross

Q. If you said smoke you did not mean it, is that it? A. I think I said gases; both; it doesn't make any difference; both smoke and gases can be taken in combination; gases are always present, while sometimes smoke is absent.

Q. Now, supposing you had wind blowing against a twelve foot tight board fence, or wall, do you know how far beyond that wall it would be before that breeze would strike the ground, assuming the ground to be level? A. The wall perfectly — or the fence, with no chinks in it. 10

Q. That wall, or a straight fence, or wall, tight? A. I can't give you the exact number of feet away before the air would strike the ground.

Q. Why not? A. I have never made any particular measurements.

Q. Then you don't know? A. Well, I should judge it would be— 20

Q. Well, do you know? I am not asking you to guess for me, I want to know what you know? A. No, I don't know.

Q. Do you know whether it makes any difference whether the wind is blowing over an embankment that slopes at grade of 7 feet in 10, for instance? A. I do. I have observed smoke with such enclosures does not spread out readily.

Q. I ask you whether you know whether it makes any difference in the current of wind whether it strikes a brick wall, or is blowing over an embankment with a slope to it? A. It doesn't make any difference. 30

Q. How do you know? A. Well, an obstruction is an obstruction.

Q. How is that? A. I say a barrier is a barrier in all cases, whether it consists of brick and stone, or earth.

Q. After a gas, or current of air, passes an obstruction, doesn't it spread, spread fan like? A. It spreads fan like out along that barrier. 40

Harry B. Weiss, for Appellant—Cross

Q. Does it make any difference whether the barrier is horizontal or vertical? A. Whether the barrier is horizontal or vertical? The barrier should be vertical. If it is horizontal I fail to see how it would be a barrier. If it was horizontal it would simply cut the air.

10 Q. You don't quite get it. Assuming you had erected out in an open field where the wind would get to it, a board 20 feet high and 2 feet wide; I assume that immediately behind that board there would be a V-shaped space that the wind would not touch, wouldn't there? A. Yes, sir.

Q. Do you know how far beyond that board the currents of air would converge, and come together? A. At a very short distance beyond such a small board.

20 Q. That is, the wind on each side of this board, after it passes the board, would spread fan like, and meet again behind the board at a very short distance behind it; and when you say "a very short distance" do you mean probably the width of that board? A. Probably the width of that board, yes.

30 Q. Now, take it the other way; supposing you erect a board on posts, stick a board 2 feet wide and 20 feet long up on posts 10 or 12 feet high, it would have the same space behind that board, a V-shaped space that the wind could not get at it for a short distance, wouldn't it? A. Provided no other obstructions were within that V-shaped enclosure. If you had other obstructions—

Q. Wait a minute. Take my hypothesis. Take a board stuck up vertically, the length of the board horizontal with the plane of the earth—do you get me? A. Not quite.

40 Q. Supposing this blotter to represent a board stuck up in a field, and the wind was blowing in this direction, if the wind was blowing there would

Harry B. Weiss, for Appellant—Cross

be a space immediately behind that board where the wind would not touch it, wouldn't there? A. Yes, sir.

Q. Now, as you come back a little ways the current of air passes over this, this current of air would come down a little bit, and this would come up a little bit, and come together, wouldn't it? A. Those air currents would have a tendency to meet on the other side of the board. 10

Q. Supposing there was something under that board, that that board sat on the ground, would not that air current going over the top of it strike the earth at some point beyond that? A. It would.

Q. Where? A. I don't know the exact distance.

Q. Now you have given your testimony today with reference to the effect of coal gases, and I think you testified on my former cross examination that you never made any of those experiments with the gases issuing from a locomotive smoke-stack? A. No, I never did. 20

Q. But you do know that the gases coming out of a locomotive smoke-stack come out under far different conditions than out of a stove pipe chimney, don't you? A. At times they do, at times they do not.

Q. (By the Court.) Explain that. A. If there is no smoke coming through the smoke-stack how would these gases be carried off, for instance? It is quite evident the gases would not come out with any great degree of velocity. I have seen smoke coming from a locomotive smoke-stack and simply pouring down on the side of the locomotive. 30

Q. (By Mr. Stallman.) On the Pennsylvania railroad? A. On practically all railroads.

Q. Ever see it on the Lackawanna? A. I think I did.

Q. Where? A. Running from Hoboken to South Orange. 40

Harry B. Weiss, for Appellant—Cross

Q. When? A. At various times during the summer.

Q. During this past summer? A. I think I have—

Q. You saw black coal smoke coming out of a smoke-stack— A. Not perfectly black. I have seen coal smoke. It all depends—

10 Q. Is there any way that you know of to measure the volume of the atmosphere above a locomotive smoke-stack? A. To measure the volume of the atmosphere? There is no way that I know of.

Q. Then, if you haave a locomotive exuding gas and steam out of a smoke-stack on a railroad track, what percentage, or ratio, is that gas to the surrounding atmosphere? A. The gases hang together, they do not disassociate for some time.
20 The percentage coming from a locomotive smoke-stack—

Q. Don't go into a general philosophical or technical discussion, but answer.

The Court: You stopped the witness at a point where he is answering.

A. (Continued.) And the percentages coming from a locomotive smoke-stack from the combustion of coal under any consideration or condition are always injurious to plant life.
30

Q. That is not what I asked you. I asked you what the ratio was of gases emitted from the smoke-stack of a locomotive engine from the combustion of anthracite coal into the heavens? A. It is impossible to say.

Q. (By the Court.) The analysis you made resulting in your finding from one-half to one per cent. of injurious gases in the combustion of coal was taken from the top of the chimney before there
40 was any diffusion in the air? A. It was taken

John H. Voorhees, for Appellant—Direct

from down near the surface of the fire before there was any diffusion.

Q. (By Mr. Stallman.) Is there any way at all in which you can tell the proportion of these gases with the velocity, the heat and moisture of steam passing through them, with the atmosphere? A. **There is no way in which I could tell.**

Q. Do you know whether gases resulting from the combustion of anthracite coal when shot through a smoke-stack retain any volume of particles? A. They must contain a volume, otherwise they could not exist. 10

Q. What are the volumes of those particles? A. That is an impossible question; I can't tell; I can't answer.

JOHN H. VOORHEES, sworn for the appellant. 20

Direct Examination by Mr. Carey:

Q. What is your occupation? A. I am connected with the New Jersey Agricultural College in the capacity of tutor, extension work, dealing largely with subjects of soil fertility. I also render considerable service during the summer as farm efficiency expert.

Q. How long have you been engaged in that work? A. I have been engaged with the experiment station for two years, or a little less, but I have been connected with agriculture in one way or another since my boyhood. 30

Q. Are you a member of any scientific societies along this line? A. Yes, sir. I belong to the Association for the Advancement of Science, to the Association of Agronomists, and to the Association of Farm Management.

Q. Those societies have for their object what? 40

John H. Voorhees, for Appellant—Direct

A. The advancement of agricultural science, with the exception of one, which is more the advancement of all sciences.

Q. Have you visited the Manda property? A. Yes, sir.

Q. When, recently? A. A week ago tomorrow.

Q. For what purpose did you visit it, Mr. Voorhees? A. To study soil conditions.

Q. Did you make a study of the soil conditions on the property which the railroad company is to take, or has taken? A. I did.

Q. State what your investigation and studies were in that particular. A. I studied the soil from a point of view of fertility, largely, considering its mechanical and physical composition, and whatever physical properties would tend to show its value for agricultural purposes, and the potential fertility contained, as well as the actual fertility.

Q. This study was made. I presume, with reference to the top soil on the property? A. Exactly.

Q. Did you notice the depth of the top soil? A. I did.

Q. State what you found out with reference to that. A. We dug with a spade all along the property every 20 or 30 feet as deep as 2½ feet. We further noticed the railroad, that is, the working of the railroad's cranes, which were excavating along the property, or within the property which has been condemned.

Q. Steam shovels operating on cranes? A. Yes, sir.

Q. They were then excavating, were they? A. Yes, sir.

Q. Did you notice the depth of the top soil along the line of the excavation? A. Yes, sir.

Q. Now, will you state what you found in this investigation digging these holes you mentioned,

John H. Voorhees, for Appellant—Direct

and also state what you found with reference to observing the excavation made by the railroad?

A. I observed first that the soil was in excellent tilth.

Q. What do you mean by that? A. That means physical and mechanical condition for agricultural purposes. And that that tilth extended, not as we find in the ordinary farm, four, five, six inches, but to a depth of 2½ feet where we dug, and to as deep as the cranes, or the steam shovels, were excavating, which was no less than three, and I am prepared to say, four, in some cases. It was a very pliable soil, and contained large quantities of organic matter, showing its great utility to retain moisture and plant food. 10

Q. How would you characterize this soil as to its goodness or badness? A. Well, it is a difficult matter to compare soil in exactly that light. I can say that I have not visited any farm in the State of New Jersey which presents a better soil from either a physical, mechanical or chemical point of view. 20

Q. And have you found any better soil in any place in the State of New Jersey? A. Not in my memory, considering those three points. I have found soils which might contain more organic matter, on account of their character, being washed down, and decomposition entirely of vegetable matter. 30

Q. What percentage of organic matter did you find in this soil? A. I made a test of this in the laboratory, and found that there was fifteen per cent. of organic matter.

Q. Is that above, or below the ordinary? A. That is very much above. The best authorities on that subject give the average run of organic matter in soils as generally less than one per cent, but occasionally rising as high as five. I would 40

*John H. Voorhees, for Appellant—Cross
Lawrence Corbitt, for Appellant—Direct*

quote Hilgard of California and Van Slike of New York—

Mr. Stallman: That is not proper, if the Court please.

The Court: Oh, no.

- 10 Q. Have you made few, or many, examinations of soil in the State of New Jersey? A. That is part of my work, and "few" and "many" are comparative terms. My report for the past year shows I have visited 188 farms during the past year ending November 1, 1914, and while I have not made chemical analyses of all these soils, that is part of my work, and such tests have been made of many.

20 *Cross Examination by Mr. Stallman:*

Q. Do you know, Mr. Voorhees, whether, in order to carry on a nursery and plant business, this soil required attention every year? A. . . .
solutely.

LAWRENCE CORBITT, sworn for the appellant.

30

Direct Examination by Mr. Carey:

Q. Where do you live? A. South Orange.

Q. What is your occupation? A. Private gardener.

Q. Where? A. Seton Hall College.

Q. How long have you been there? A. Fourteen months.

Q. What experience in gardening had you had before you went there? A. All my life.

40

Q. For whom? A. G. B. Schley, Short Hills.

Lawrence Corbitt, for Appellant—Direct

Q. How long were you with Mr. Schley? A. Seventeen years.

Q. What did you do while you were there? A. I had charge of 3600 acres.

Q. Of what? A. Farm, garden and greenhouse.

Q. To what extent did he have greenhouses and nurseries on his farm? A. Well, he had ten large greenhouses there. 10

Q. You had charge of those? A. Yes, sir.

Q. What else? A. An extensive vegetable and flower garden, and about 800 acres under cultivation, the rest in woods, shrubbery.

Q. Did you notice the depth of the soil on the Manda property? A. Yes, sir.

Q. In how many places did you test it? A. I think I tested it in six different places.

Q. How? A. With the spade.

Q. How deep did you find it? A. I made it from 32 to 42 inches. 20

Q. Where were those tests made? On the property that the railroad has taken.

Q. Have you noticed the excavations made by the railroad? A. Yes, sir.

Q. How deep have you noticed the top soil where excavation had been made? A. Well, I have not measured it, what the railroad had dug up.

Q. What, in your judgment, is the character of this top soil? A. Well, the soil, I should think, was very highly—good soil. 30

Q. When you were with Mr. Schley did you have occasion to purchase, or in any way acquire, top soil of this character? A. We had at different times a few years ago.

Q. And are you able from your experience to tell us the value per square foot of top soil of this character, and of the depth that it is found on the Manda property? A. Well, yes, I paid— 40

Lawrence Corbitt, for Appellant—Cross

Mr. Stallman: Just a minute. Are you answering yes or no?

Witness: Yes, sir.

Q. And what, in your opinion, is the value of it?

10 Mr. Stallman: I object to it on the ground the witness has not shown himself qualified to give the value of the top soil of this property in South Orange.

The Court: The objection will be overruled.

An objection to this ruling is noted by the appellee as ground of appeal.

A. I paid then for Mr. Schley \$2.50 a cart load.

20 Q. And how did that soil which you bought for that price compare with this? A. It wasn't anything near as good.

Q. This top soil that you bought for Mr. Schley, did you have to do anything with it immediately, or not?

Mr. Stallman: Objected to as immaterial.

Q. Anything by way of enriching it?

The Court: I sustain the objection. He said it was not as good.

30 *Cross Examination by Mr. Stallman:*

Q. You say that you dug into this top soil and found that it ran from 32 to 42 inches deep, with a spade; did you dig a hole 42 inches deep with a spade? A. Yes, sir.

Q. How big was that hole? A. Two feet and a half in diameter.

Robert Karlstrom, for Appellant—Direct

ROBERT KARLSTROM, sworn for appellant.

Direct Examination by Mr. Carey:

Q. What is your business? A. Nurseryman, horticulturist.

Q. Where are you employed? A. W. A. Manda, Incorporated, South Orange.

Q. How long have you been employed there? 10
A. About seventeen years.

Q. Are you connected officially with the company? A. I am.

Q. In what capacity? A. Secretary and manager.

Q. Have you had any experience in horticultural affairs prior to your employment with the Manda Corporation? A. Yes, sir.

Q. Where? A. The Royal Horticultural Academy of Sweden, at various societies in Europe and for five years and a half I held a position as forester of the Forest Department of Hartford, Connecticut. 20

Q. Do you know how the top soil on the Manda property was cultivated and brought up to its present condition? A. Yes, sir; I do.

Q. How was it done? A. Constantly adding new soil and fertilizers.

Q. Have you had any experience in landscape gardening? A. Yes, sir, I have. 30

Q. In that connection state whether or not you formulate and bring together top soil? A. Yes, sir, I do.

Q. And how does the value of the top soil which you made use of in landscape gardening compare with the value of top soil on this strip of land which the railroad company is to take, comparing quality?

Mr. Stallman: Objected to as immaterial.

The Court: I suppose he is qualifying him 40

Robert Karlstrom, for Appellant—Direct

to give value. I will overrule the objection.

A. The inventory value of the top soil is put lower than the price that we get for it, that we can make it for.

Q. That was not an answer to my question. You answered me that, in connection with landscape work, you have compared and formulated
10 top soil for that purpose? A. Yes.

Q. Now, have you become familiar with the cost of top soil by reason of doing this work? A. Yes, sir.

Q. And, by reason of your experience in connection with landscape gardening and greenhouse work, are you familiar with the value of top soil such as is found on the Manda property? A. Yes, sir, I am.

Q. And can you estimate the value of that top
20 soil per square foot? A. Yes, sir.

Mr. Stallman: I desire to enter my objection to this question on the ground it is attempting to value the land in separate parts, which I think is objectionable.

The Court: I will overrule the objection.

An objection to this ruling is noted by the appellee as ground of appeal.

Q. Will you tell us what the value of the top
30 soil on this strip is at the depth to which this top soil goes, the value per square foot? A. Thirty cents.

Q. You said that in the making of this top soil you were continually adding new soil and fertilizer? A. Yes, sir.

Q. How much fertilizer did you add on this property per square foot last year? A. Part of it we didn't add any, and other parts again we added the usual amount.

40 Q. (By the Court.) What is that? A. Covering

Albert A. Manda (rec'd), for Appellant—Direct

the top to the depth of about three inches, or four inches, and digging it down. Sheep manure sometimes, sometimes chemical fertilizer.

Q. (By Mr. Stallman.) You do that every year, about? A. Yes, sir.

Q. How often? A. Every year in places, that is ready to receive new plants.

Q. And what kind of fertilizer is it you put on three or four inches deep? A. That is decayed manure. 10

Q. Anything else? A. Sheep manure, chemical fertilizers.

Q. You do that every year? A. We do, yes, sir.

ALBERT A. MANDA, recalled for the appellant.

20

Direct Examination by Mr. Carey:

Q. Mr. Manda, you were testifying to what you conceived to be the value of this strip of land, taken as land without the top soil on it, and you stated that you compared it with the Pierson property after allowing for the value of the buildings; at that time that was not in evidence, as to the value of this brick building; now will you state what allowance you made for the value of buildings on the Pierson property? 30

Mr. Stallman: I object to that.

The Court: You see it is not his allowance, Mr. Carey.

Mr. Carey: It is in evidence now what the buildings are worth. I am asking him now to analyze his method of arriving at the value of the land after deducting the value of the buildings, in making his comparison with the Pierson property.

(Question read.) 40

Charles I. Bech, for Appellee—Direct

The Court: I will sustain the objection. He has already said as land it was as valuable as the Pierson property.

10 Q. Will you state, Mr. Manda, how you arrived at the value which you placed upon the property which the railroad company is to take, that is, the land as land? A. I was comparing the value of the land proper in my estimation, deducting for the buildings that were on Mr. Pierson's property, which adjoins another piece of property I owned there, and which I have known for the last twenty-one years, deducting for the value of the building.

Q. And what deduction did you make for the value of the building?

Mr. Stallman: Objected to.

20 The Court: I will sustain the objection.

An objection to this ruling is noted by the appellant as ground of appeal.

Not Cross Examined.

Appellant Rests.

CHARLES I. BECH, sworn for the appellee.

30 *Direct Examination by Mr. Stallman:*

Q. Where do you live? A. South Orange.

Q. How long have you lived there? A. Forty years.

Q. What is your business? A. Hardware merchant.

Q. Do you have anything to do with real estate? A. I have.

Q. Have you any official position in South Orange? A. Yes, sir.

40 Q. What is it? A. President of the Board of Assessors.

Charles J. Bech, for Appellee—Direct

Q. What other office do you hold in a business way? A. President of the South Orange Building & Loan Association, and Secretary of the Sinking Fund Commission.

Q. Of the Village of South Orange? A. Of the Village of South Orange.

Q. Do you know the property of the W. A. Manda Company, or W. A. Manda, Incorporated? 10
A. I do.

Q. Do you know the property the railroad wants to take, or has taken? A. Yes, sir.

Q. What do you know of the value of real estate in the vicinity? A. By making loans for the build- and loan association in the immediate vicinity, adjoining some of the property.

Q. Do you have personal knowledge of any sales in the immediate vicinity? A. I have.

Q. Where? A. On Third street; two of them, 20
in fact, on Third street, one adjoining west of the Manda property, directly west.

Q. Will you point out to the jury on the map? A. I think I can. (Indicating on map.) Why, these three houses right here were bought by Dominick Mercadant, running from there 122 feet to the corner of Church street, and running back 105 feet.

Q. You were present at that transfer or sale? 30
A. I was not present at the sale, but previous to the purchase of that he came to see me, and asked me how much loan he could get onto the property; personally, as I approve of the loans, and investigate, I appointed a committee, and the committee loaned him \$1600—

Mr. Carey: That is objected to.

The Court: The objection is sustained.

Q. I do not care so much about the loan, as the price for which it was sold, and your knowledge 40
of it. A. The price it was sold at?

Charles I. Bech, for Appellee—Direct

Q. Yes. A. \$6000—

By Mr. Carey:

Q. Wait a moment. Do you know of your own knowledge? A. Yes, sir.

10 Q. Were you present at the transaction? A. I was present between the offer and the purchase, because they came to my store to complete the deal, and see how much they could get, and how they could get the money.

Q. That is something they told you at the time?

A. Yes, sir, between the seller and the buyer.

Mr. Carey: I object to the testimony.

The Court: The objection is overruled.

By Mr. Stallman:

20 Q. \$6000 was the price paid for that tract? A. Yes, sir.

Q. How large was it? A. 122 feet in front, adjoining Mr. Manda, and 105 feet in depth with three houses.

Q. The 105 feet being on Church street? A. Yes, sir.

Q. Are you acquainted with those three houses?

A. I am.

30 Q. Have you had any experience in the building line that would enable you to form a judgment as to the value of these buildings? A. I have.

Q. And what is your experience in that line?

A. By building houses for myself, and being chairman of the Committee on Buildings previous to my becoming president of the association.

Q. You are speaking now of the building and loan association? A. How?

Q. When you say "association" you mean the building and loan association? A. The building and loan association.

40 Q. You have built houses for yourself? A. I have.

Charles I. Bech, for Appellee—Direct

Q. How long have you known those buildings?

A. Oh, thirty-five years.

Q. Have those three houses been there thirty-five years? A. About that.

Q. Well, do you know their general condition at the time they were sold to Mercadant? A. Yes, sir.

Q. And what, in your judgment, was their value at the time? 10

Mr. Carey: I object to that. The witness is not competent to testify as to the value of buildings of this description; and, in the second place, he has not shown sufficient familiarity with the buildings to enable him to express an opinion.

The Court: The objection is overruled.

An objection to this ruling is noted by the appellant as ground of appeal. 20

Q. Will you answer the question? A. What is the question, please?

Q. The value of these three buildings. What, in your judgment, was the value of these buildings at the time they were sold to Mercadant? A. I should say \$1500 apiece.

Q. And when was that? A. About 1911.

Q. Two or three years ago? A. Yes.

Q. What, in your judgment, Mr. Bech, was the value of the lot as land without the buildings? A. About \$10 a foot. 30

Q. Do you know how it compares as to its elevation as to grade with the adjoining property of Mr. Manda? A. About on a level, in fact, I think it is a little bit higher at the Church street end than it would be at the railroad end; practically the same, but I think a shade higher at Church street.

Q. Do you know any other property that has been sold in that vicinity? A. Yes, sir. 40

Charles J. Beck, for Appellee—Direct

Q. Where? A. That lower map covers some right on the east of the tract. This house here. (Indicating.) It is on Third street, east of the railroad, and adjoins Abraham Ball's property, 33 by 150, with a house on it. It was sold by the Brown estate to Martin McCarter. There was 100 foot lot there, and it is equal division into three lots, one-third of 100 feet, our mortgage called for 33 feet 4 inches in front and 150 feet in depth.

Q. What was the price of that? A. (Not answered.)

By Mr. Carey:

Q. Do you know the price of your own personal knowledge? A. Yes, sir.

Q. Were you present at the time of the conveyance? A. No, sir. I was present at the time the seller and buyer called at my office.

Q. Before the purchase? A. Yes, sir; he would not make the purchase unless the loan was granted.

Q. And what you know about it is what passed between them at that time? A. Yes, sir.

Q. How long was that before the conveyance?

Mr. Carey: I object to it as incompetent.

30 By the Court:

Q. Do you know whether the sale was completed upon the same terms? A. I do, because I know the party loaning the second mortgage.

Q. What is that? A. I know the party that gave him the difference of what we loaned, and the purchase price. And he came to me—the second party that holds the second mortgage, came to me and asked me to keep him posted that he keeps his monthly payments up, to make him secure.

40 Q. That you know because the second mortgage told you? A. Yes, sir.

Charles I. Bech, for Appellee—Direct

By Mr. Stallman:

Q. Was the agreement to purchase made in your presence? A. Yes, sir, I wrote the agreement.

The Court: The objection will be overruled.

Q. What was the price, Mr. Bech? A. \$2100.

Q. (By Mr. Carey.) When was that sale? A. 10
In 1912.

Q. (By Mr. Stallman.) Were you familiar with the character of the building that was on that lot? A. Yes, sir.

Q. What kind of building was it? A. A small six-room house, I believe.

Q. Frame? A. Frame.

Q. And from your experience are you able to form a judgment of its value at that time? A. I am. 20

Q. And what in your judgment was its value? A. (Not answered.) 20

By Mr. Carey:

Q. Just a moment. What investigation did you make to ascertain its value? A. By going to the house and inspecting the property previous to the loan.

Q. Personally? A. Personally, I always do, besides the committee.

The Court: You may answer it. 30

By Mr. Stallman:

Q. What, in your judgment, was the value of the building? A. 1500.

Q. Do you know of any other real estate sale in that vicinity? I do not mean right on the same street, but in the same vicinity. A. Why, there was one sale on Valley street, one block from that. Mrs. Murphy bought it, 25 feet front by, I think, 110 deep, adjoining Mr. Tillou. 40

Charles I. Bech, for Appellee—Direct

By the Court:

Q. I did not get the dimensions. A. I would not be positive of the depth, but I do know the front, 25 feet.

Q. And what do you think the depth is? A. About 110. That was sold for \$1800.

Q. (By Mr. Carey.) How do you know that? A. 10 By Mrs. Murphy telling me, the owner.

Mr. Carey: I ask to have that stricken out.

The Court: It may remain.

By Mr. Stallman:

Q. Will you say, Mr. Bech, from your knowledge and experience in real estate, what you consider land worth on Third street between Valley street and Church street?

Mr. Carey: I object to the witness testifying, on the ground he has not qualified to 20 judge of the value of real estate.

The Court: The objection will be overruled.

An objection to this ruling is noted by the appellant as ground of appeal.

A. Well, I think it is worth more between Valley and the railroad, than it is between the railroad and Church, because it is higher land.

Q. That is, on this block between Valley street and the railroad? A. It is more valuable than 30 being low, but at the same time objectionable on account of the round-house, freight-yard, and surroundings in general; the above property is owned by Mr. Manda there, and very nicely laid out in plants and shrubbery.

Q. What, in your judgment, is the value of the land? Give us on each side of the railroad. A. I should say it was worth, east of the railroad, I 40 should say worth between \$12 and \$15; closer to Valley it would be \$15; lower down \$12, and the other side \$10.

Charles I. Bech, for Appellee—Direct

Q. That is lot value? A. It is lot value.

Q. And when you say lot value what depth do you take into consideration? A. About 150 feet, as the general run of them are. Of course, there has been property sold west of the railroad for less money than \$10.

Q. Now, do you know of any sales, say on the streets adjoining Third street, that you have personal knowledge of? A. Yes, on Church street. 10

Q. Church street is the street that runs into the rear of Mr. Manda's property, is it? A. Yes.

Q. Whereabouts on Church Church street? A. I should say round in there (indicating); Third street, on the westerly side. The person who purchased—Mercadant, who purchased the Brown property, formerly lived there and sold to a party by the name of Twitcherling.

Q. Well, this one here, Smith; have you personal knowledge of that, Mr. Bech? A. Yes. 20

Q. And what was the size of the lot that was sold? A. 50 by 100.

Q. Was it vacant or improved? A. Improved.

Q. What kind of improvement? A. Just an ordinary house and barn.

Q. And what was the selling price? A. \$2200.

Q. A 50 foot lot and a house and barn? A. Yes, sir.

Q. And located how far, would you say, from Third street? A. Oh, I should say 150 to 175 feet; I can't say that exactly. 30

Q. What, in your judgment, is the value of land on Church street for front foot lot?

Mr. Carey: I object to it as immaterial.

The Court: I think the substantial similarity ought to be shown, as well as the location.

Q. Can you tell us? A. Yes, sir.

Q. Can you tell us how that property on Church 40

Charles I. Bech, for Appellee—Direct

street, which will be on the northwesterly side of Church street, compares with this property which the railroad is taking from Mr. Manda on Third street, as to surroundings? A. Well, the surroundings of Mr. Manda are better.

Q. They are? A. Yes, they are better.

10 Q. Well, we will withdraw that. Now, have you any knowledge of the value of acreage property? A. I have.

Q. What knowledge have you in that connection? A. I have bought several tracts of land containing acreages, and so on.

Q. Right in the Village of South Orange? A. Both in the village and township.

Q. Now, speak as to the village. What acreage property do you know of right in the Village of South Orange? A. That I know of?

20 Q. Personally, or that you know of. A. Directly across from Mr. Manda I have eight acres, or did have, running almost from Roland avenue over here to Fourth street, towards Fifth; Academy street and Fourth street.

Q. Does that lay right across Valley street from Mr. Manda's property? A. Directly across.

Q. I show you the Manda property on Valley street; you know that property? A. Oh, yes, sir.

30 Q. The property you own is directly across Valley street from that? A. Begins at this corner and runs Massell Terrace, Fifth street and 250 feet beyond Fifth street and up Fourth, and over Academy to the place of beginning.

40 Q. How does that land compare in general character and surroundings, elevation, and so forth, with the property which the railroad company is about to take? A. Oh, it is away ahead of it; a good street; the property has got the cars running in front of it, and restricted property where nothing but substantial houses, no factories, saloons or anything of that kind may be built.

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Q. You say you bought that? A. Yes.

Q. And how recently did you buy it? A. In '93. 1893.

Q. (By the Court.) Twenty-one years ago? A. No, it isn't twenty-one years ago. That is a mistake. 1903.

Q. (By Mr. Stallman.) And will you tell us what you paid for it? 10

Mr. Carey: That is objected to. It is too remote in time and also too remote in distance.

Witness: I would not tell him, anyhow.

The Court: That disposes of the objection. The witness declines to state.

Witness: I will tell you what I will sell it for.

Q. Have you sold any of it? A. Yes, sir. 20

Q. How, in lots? A. Yes, sir.

Q. What did you get for it? A. (Not answered.)

Q. (By Mr. Stallman.) Wait a minute. Have you sold any in lots? A. Yes, sir.

Q. When? A. Last July.

Q. And how far from the Manda property under consideration on Third street? A. Well, the property is about here; about a block and a half (indicating on map).

Q. Well, it is two blocks and a half from the Church street end of the Manda property, isn't it? A. Why, yes, but as I understand it, the yellow line is the property the railroad is taking, isn't it? 30

Q. Yes. A. Didn't you ask me how far it is from the property they are taking? A. Block and a half.

Q. How far from the Third street front of that property? A. Two blocks and a half.

Q. That is how far? A. The blocks are about 40

Charles I. Bech, for Appellee—Direct

450 feet long, as a general rule; that would be about 900 to 1100 feet.

Q. Is Fourth street improved? A. Yes, sir; macadamized, gas, water, sidewalks and gutters.

Mr. Carey: It is objected to as too remote.

The Court: The objection is overruled.

10 By Mr. Stallman:

Q. Sales, not offers. A. Actual sales. The last one I sold on Valley street, do you want?

Q. (By the Court.) You spoke of one on Fourth street. A. I know, that is actual sale, too.

By Mr. Stallman:

Q. Well, take the one you spoke about. A. That was last July.

20 Q. How much? A. \$18 a front foot; \$20 on Valley street.

Q. Let us get down to some acreage that is not quite so ancient, and tell us where the acreage is that you know about, and what the price was. First, where? A. That I owned? That I sold?

30 Q. That you bought or sold either for yourself or anybody else? A. Well, I was appointed as chairman of a committee for procuring the playground for the Village of South Orange; not by the Board of Trustees, but by a committee of citizens.

Q. You bought the playground, did you? A. I did everything but the buying; I got the prices, and everything else, but the deed was given to the authorities that had it in charge.

Q. Did you negotiate the sale? A. Yes, sir.

Q. Where was the property? A. Adjoining K. More, right at the depot.

40 Q. How does that compare as to nearness to the business community of South Orange, and surroundings, with the Manda property along the

Charles I. Bech, for Appellee—Direct

railroad between the round-house and the palm house on Mr. Manda's land? A. No comparison in my mind.

Q. That don't give us anything. A. I want to preface it with that. The only comparison there is, it is the same strata. It is half a block from the depot. There is the depot (indicating on map), and this property is right here beyond that. Instead of a round-house, which is noisy, and all that, we have got the South Orange Field Club, one of the best kept grounds, I suppose, in the State of New Jersey; and in back of it there is the golf grounds of the Meadow Land Society; and all around are substantial places and large fine houses. 10

Q. Does the railroad adjoin this play field? A. It passes it.

Q. Adjoins it? A. Adjoins it. 20

Q. (By the Court.) But there was no opening to South Orange avenue of that tract until it was condemned, was there? A. Until it was condemned, there was not.

Q. (By Mr. Stallman.) That was purchased on an acreage basis, was it? A. Yes, seven acres.

Q. Tell us what was paid for those seven acres? (Not answered.)

By Mr. Carey: 30

Q. How far is that from the Manda property on Third street? A. Why, three blocks from South Orange avenue would be Manda's, and half a block north would be the playground.

Q. That would be 1500 feet? A. If the blocks were 500 feet it would be.

Q. Right next to this property was the Kraus More coal yard, wasn't it, adjoining it? A. Yes, sir.

Q. And the property, at the time it was pur- 40

Charles I. Bech, for Appellee—Direct

chased, had no frontage on South Orange avenue, had it? A. No, sir.

Q. Did it have any frontage on any street? A. It had no frontage, but right of way into it.

Q. What kind of right of way was it? A. Through another man's land, a right of way behind Decker's store.

10 Q. How long was that right of way? A. A block.

Q. 450 feet? A. If that is the length of the block; I can't tell exactly.

Q. And this land was quite low, was it? A. Not any lower than that whole valley; it is about the same level.

Q. Swampy, wasn't it? A. One end was, and the other was a big sand hill, had to be dug away to make it level. The lower part along the river was somewhat swampy.

20 Q. How large a plot was it? A. About seven acres.

Q. And how much was swampy? A. Not more than an acre, and that is giving it good leeway.

Q. In the spring of the year wasn't it so swampy it could not be crossed over? A. It may have been. I have never crossed it, but I know the hill was not; in my recollection when I went to view the ground it was all drained off; they had drains to carry it into the river.

30 Q. You are sure there was no swamp on the hill; how high was the hill? A. I should say in elevation at least 10 feet along the Kraus More land.

Q. What was the length of the land on the Kraus More coal yard property? A. I could not tell you, not in feet.

Q. Approximately. A. If I had a map here I could show you exactly. It ran to within 100 feet of Mead Street.

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Mr. Carey: If the Court please, I object to the evidence as to value of this property. That is certainly very different property from the property we have under discussion.

The Court: It seems to me there is sufficient similarity for it to be a standard of comparison. It appears that in Mr. Manda's property there is this railroad freight-yard, and in front of the playground there is the Kraus More lumber yard; on the rear part of Mr. Manda's land is this private right of way across the railroad, and in order to reach the playground there is this entrance one block long from South Orange avenue; they are both near the railroad. To the extent that it is similar it may be used as a standard of comparison of value. I will overrule the objection.

10

20

By Mr. Stallman:

Q. Give us the price now, Mr. Bech? A. \$3500.

Q. \$500 an acre? A. No, the entire plot.

Q. You said seven acres, didn't you? At \$3500 that would make \$500 an acre? A. Yes, that is the price it was bought at; it was awful cheap, I will say.

Q. That is all right; we want the price, you don't know until you are buying or selling whether it is cheap. Now, Mr. Bech, I intended to ask you before, what, in your opinion, is the value of the land which the railroad company is taking from Mr. Manda; and tell me in giving your estimate how you figure it, on the street frontage, and what else you figure, and then the balance of it running along the railroad back to the round-house, how you calculated that plot.

30

The Court: Maybe he does not calculate it that way at all, Mr. Stallman. I think the

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Charles I. Bech, for Appellee—Direct

better question is to ask him his opinion of the value, and how he arrives at it.

Q. Mr. Bech, will you do the best you can? A. What do you want to know?

Q. Your idea. A. You want to know the front foot, the value I would put on Mr. Manda; what
10 the value of the property taken by the railroad in my estimation is?

Q. The land taken by the railroad company from Mr. Manda has a frontage on Third street of 62½ feet; one line of it runs back 100 feet on a straight line, as you will see by reference to the map, and then the line—the width of the parcel—gradually narrows until at the round-house end it is 20 feet wide. Do you follow me? A. I do.

Q. Now, the area of the entire parcel is 38,000
20 square feet, is it not?

Mr. Carey: 38,900.

Q. 38,000 or 39,000 square feet; and including the frontage on Third street will aggregate eighty-nine one-hundredths of an acre. Now, considering the area of this parcel, and its frontage on Third street of 62 feet, what, in your opinion, is the value of that piece of land as land? A. Just as land?

30 Q. Yes.

Mr. Carey: Mr. Stallman, add to your question with a private right of way across that property to Fourth street.

Mr. Stallman: I do not think it is in this case. I will amend that question by adding that the witness may assume, in determining the value of that strip which the railroad company is to take, that a right of way exists between that evergreen nursery on Valley
40 street and the main nursery on the other side

Charles I. Bech, for Appellee—Direct

of the track, without specifying exactly where that nursery is.

Mr. Carey: I object to that statement because it does not conform to the facts.

Mr. Stallman: The fact of the matter is Mr. Manda contends that the railroad company is obligated to maintain a crossing at a certain place, and that contention the railroad company disputes, and Mr. Carey and I have practically agreed that that dispute shall be settled elsewhere than in this case; and now, as I understand it, he wants me to ask this witness's opinion based upon the existence of a right of crossing at a place which is disputed, and, naturally, I do not want to involve that point in my question. 10

The Court: After this argument I think you had better ask your question again, and then the Court will rule upon it, Mr. Stallman. 20

Q. Mr. Bech, will you give us your best judgment as to the value of this piece of land which the railroad company is taking from Mr. Manda, having a frontage on Third street of 62½ feet, and having that width for about 100 feet, and running back from that point in width to a width of 20 feet at the rear, the whole containing about eighty-nine one-hundredths of an acre? 30

The Court: You may answer that.

A. In view of the fact that Mr. Manda has improved that land there to the purpose he is using it for I should say for a depth of 150 feet, I should say that that land was worth \$30 a foot; and for the rear land I should say—what is there left then? Can anyone tell me?

Q. About three-fourths of an acre. A. I should say about a thousand dollars. 40

Charles I. Bech, for Appellee—Cross

Q. Then \$30 a foot, \$1860, about \$2860 for the whole piece? A. As a whole, I should say.

Cross Examination by Mr. Carey:

Q. Mr. Bech, what is the character of the neighborhood of Church street? A. A closely populated neighborhood.

10 Q. And what people live there? A. Why, contractors, and laboring men.

Q. Largely an Italian settlement? A. It is an Italian neighborhood.

Q. Colored people also live on that street? A. Not in that section. They do further toward South Orange avenue.

Q. No colored people living there? A. There are some colored people living there also; some on Third street.

20 Q. And colored people living in this section of Church street? A. Not that I know of.

Q. Do you know whether there are or not? A. I do.

Q. There are none? A. There are none.

Q. But in this section there are some? A. Yes, further over toward the avenue.

Q. It is largely occupied by Italians, is it not? A. Yes, it is, excepting that abutting Mr. Manda's property, there is a large stable, Kiernan's stable, contractors.

30 Q. Occupying a large tract there? A. Yes.

Q. Does that add to the value of the surrounding property? A. That property is bringing more on Church street—

Q. No, you are not answering my question. I ask you if that stable located there adds to the value of the surrounding property on Church street? A. I don't think it does, put I don't think it decreases it any either.

40 Q. What do they keep in the stables? A. Horses.

Charles I. Bech, for Appellee—Cross

Q. How many? A. I imagine he has got twenty horses.

Q. And you think that does not depreciate the value of that property for residential purposes?

A. Does not seem to, because property is bringing more now than it did five years ago; it is a scarce article there.

Q. Now, will you tell us about how far it is from this property that the railroad company are to take over to Church street where this property is located that you have testified about? A. I can give it exactly by looking at the map. I have not the measurements. 10

Mr. Carey: Mr. Stallman will tell us.

Mr. Stallman: 600 feet between that line and the line of Church street.

Q. This other property you testified about on Church street was located about that point (indicating)? A. About there. 20

Q. And this was also owned by and sold by an Italian, was it not? A. Yes, sir.

Q. Laboring man? A. He was a mechanic.

Q. What was his business? A. Celluloid worker.

Q. Where was the Mrs. Murphy property? A. On Valley street. It is right about the second house on the easterly side of Valley street. 30

Q. When was that property sold? A. About five years ago.

Q. Has property increased in value there since that time? A. No, sir; mine has not; I have some that has not.

Q. No change in value there? A. Not to my knowledge. That is probably the only sale—I have heard of one, but you don't take hearsay for evidence.

Q. Now, this property which was bought for 40

Charles I. Bech, for Appellee—Cross

playground purposes, was that sold cheaper by the owner because it was purchased for playground purposes? A. It was.

Q. He was a public spirited man? A. Yes, sir.

Q. Who was the man? A. It was a company with Mr. Edward S. Allen as its secretary.

10 Q. So that is hardly a fair criterion to judge the value of other property by, is it, at this time?

A. Well, I cannot say that it is not, because if they wanted to sell the property they might have sold it for the same price to somebody else; but they say that as a pretext to make themselves popular for all I know.

Q. Yes, and to benefit the public? A. Perhaps, I can't tell you their thought.

Q. Have you bought and sold property on which there are old houses yourself? A. Yes, sir.

20 Q. Where? A. South Orange.

Q. How long since? A. On which there were houses?

Q. Old houses. A. Old houses? Yes, sir. There is one on that map, I guess.

Q. You testified to property here on which the houses were thirty years old, something like that, what property was that? Three houses? A. Yes, three.

30 Q. And how old do you say those houses were?
A. I presume about thirty-five years old, something like that; thirty, thirty-five.

Q. How did you arrive at the value of those houses? A. By going and viewing them, calculating their value, and the ground, and taking the value of the houses and land at so much per cent. to make up the value.

40 Q. What I want to know is what your processes were for arriving at the value of those houses that were thirty-five years old? A. By taking the ground value?

Charles I. Bech, for Appellee—Cross

Q. (By the Court.) No, the houses alone. A. By going in them and looking at them, the condition they are in; at that time they were in pretty good condition, they just had new shingles on them, on the roof.

Q. (By Mr. Carey.) You did not estimate the cost of building a house like that? A. No, sir, the present condition.

10

Q. The ordinary method of doing that is to estimate the cost of putting up the building new, and then figuring the depreciation, isn't it? A. Present condition.

Q. Well, that will get the present value? A. Well, I valued them, as I told you, at \$1500 apiece, and the lot at \$10 a foot for the ground.

Q. You do not follow the method then, of estimating the cost of putting up a new building, and then taking off so much for depreciation? That is not your method of estimating? A. Not my personal method, no; I take present conditions.

20

Q. And you judge values from the present condition without taking into account at all what it would cost to build new a property of this character that you are valuing? A. That is my personal method of placing valuation.

Q. How old was Mrs. Murphy's house? A. I should say thirty years; thirty, thirty-five years.

Q. And you arrived at the value of that in the same method as you did the other? A. I did not arrive at that; I just told you what Mrs. Murphy said it cost her.

30

Q. You did not estimate the value of the house at all? A. I hadn't anything to do with it. I was present in the tax office when she made the statement.

Q. You are familiar with the Pierson property diagonally across the street from that property? A. Yes, sir.

40

Charles I. Bech, for Appellee—Cross

Q. How does the Manda property compare for a distance of 113 feet back from Third street, with the Pierson property back 113 feet from Third street; I mean the land alone? A. In my estimation there is no comparison; the Pierson property is far superior to the Manda property.

10 Q. What makes it superior? A. It is higher; it is dryer; it had a right of way; had a switch which made it valuable and had a frontage on two thoroughly paved and macadamized streets, and guttered, with all the improvements that were possible for the Village of South Orange to present to it.

Q. But this depth of 113 feet did not have a frontage on two streets? A. No; the other did.

20 Q. I am asking you about the comparative value of 113 feet in depth of the Manda property with 113 feet in depth of the Pierson property on Third street? A. Regardless of the frontage?

Q. Just those two sections which I call your attention to. A. I don't follow you in that respect.

30 Q. I say what is the comparative value of the Pierson property on Third street back a distance 113 feet, as compared with the value of the Manda property fronting on Third street and going back for a distance of 113 feet, making your comparison on the basis of front feet? A. Why, I should prefer the Pierson property.

Q. I don't ask you what you prefer, I ask you how it compared as to value? A. Why, I should say that the Pierson property was worth more money by a thousand dollars.

Q. How much more per front foot? A. Oh, now, that is a hard question, because it has two frontages.

Q. No, but it has not two frontages. A. I beg your pardon, it has.

40 Q. I am asking you about that part of the prop-

Charles I. Bech, for Appellee—Cross

erty— A. Oh, on Third street. Why, it is not worth as much as I testified to Mr. Manda, and I qualified my estimate of Mr. Manda's by saying the amount of the work, and the business it was used for, it would be worth \$30 a front foot for that particular purpose.

Q. 113 feet in depth of the Pierson property would not be worth \$30 per front foot? A. No, 10
it is not, for building purposes, I want to qualify.

Q. For any purpose for which it could be used? A. Oh, no; Mr. Manda's property is not worth for building purposes any more than \$10 a front foot.

Q. I didn't ask you the value for building purposes. Let me ask you once more, what is the difference in value, if any, per front foot, for the Pierson property fronting on Third street and running back 113 feet, and the Manda property fronting on Third street, going back a distance of 113 feet? I make it 113 feet because that takes it back to the middle of the block. A. Do you wish me to answer for building purposes? 20

Q. I want you to answer as to the value of the property. A. I should say they are both \$10 a foot.

Q. (By the Court.) Regardless of the purpose? for the best purpose for which they may be used? A. \$10 a foot for building purposes for both of them. 30

Q. Why do you say for building purposes? A. That is the best use they could be put to.

Q. (By the Court.) Yet you say \$30 a front foot for Mr. Manda's? A. That is for the particular purpose he uses it; he has worked so hard on it, and brought it to a state of ground for his purposes. I think his purpose, reaping benefit three times a year, or ten times a year, is more than you can do with a house. But for building purposes neither one of them are worth more than \$10 a foot. 40

Julius V. Burgeman, for Appellee—Direct

By Mr. Carey:

Q. Do you undertake to place a value on the Manda property for nursery purposes? A. No, I am not expert enough for that.

Q. Then why do you say for the purpose Mr. Manda used it it is worth so much? A. In my opinion.

10 Q. You don't know anything about it, do you? A. I did not say that.

Q. Well, do you know the value of the property for nursery purposes? A. In a measure, yes.

Q. How do you? Of your knowledge? A. By having a garden there ever since I have been in town, and I know enough to attend to it, and what I raise on it.

Q. What do you raise on it? A. Vegetables.

20 Q. Did Mr. Manda raise vegetables? A. I never saw any on it. I raised flowers also.

Q. Of the same character as he has there? A. Some of them, peonies, I have.

Adjourned to November 25, 1914, at nine o'clock A. M.

JULIUS V. BURGEMAN, sworn for the appellee.

30 *Direct Examination by Mr. Stallman:*

Q. Mr. Burgeman, where do you reside? A. Borough of Bronx, New York City.

Q. What is your business? A. Doing landscape gardening, planting, florist business, nursery business, and so on.

Q. How long have you been in that business? A. Ever since I was born, in Kingston, New York, with my father, and my brothers after my father's death, and then for myself.

40 Q. And how many years is that, Mr. Burgeman? A. Well, about forty.

Julius V. Burgeman, for Appellee—Direct

Q. Mr. Burgeman, did you, at the request of the railroad company, make an examination and inventory of the nursery stock on the Manda property which the railroad company is taking?

A. Yes, sir.

Q. And in making your examination and inventory did you have the inventory made by Mr. Manda? A. Yes, sir.

10

Q. Now, I wish you would tell us just how you made this inventory, checking the inventory made by Mr. Manda. A. Well, we were on the property. Mr. Manda had his inventory that he had submitted, I believe, to the railroad company, which was given to me in the railroad company's office. We counted the plants and valued them according to the values that I have been in the habit of paying, from the catalogue prices that I have been in the habit of buying from, and from different nurserymen. In some cases we found the count just the same as Mr. Manda's.

20

By Mr. Stallman:

Q. Have you recently examined the catalogues of houses in this line of business? A. Yes, sir.

Q. Have you those with you? A. I have some with me, yes, sir.

Q. How do the prices in the catalogues which you have examined for this class of stock, compare with the prices which you have marked on this inventory?

30

Mr. Carey: I object. You cannot tell from the catalogues what the nature of the stock is; it cannot be defined with any degree of accuracy at all. No person would venture to buy a large quantity of plants from a mere catalogue.

The Court: But it might be a guide. Objection overruled.

40

Julius V. Burgeman, for Appellee—Cross

Plaintiff's counsel objects to this ruling of the Court.

Objection noted as ground of appeal.

10 Q. Will you tell us, in a general way, Mr. Burgeman, how the prices which you have used compare with the catalogue prices of houses in this business? A. The prices that I have used would compare about the same as those of the catalogue. In some instances we have allowed a little more to Mr. Manda than the catalogue.

Q. (By the Court.) Whose catalogue did you use? A. One of the Elizabeth nurseries, in Elizabeth, only a few miles from here. One of the largest in the country.

20 Q. What other? A. Morris nursery, James Meehan & Sons and I have one from Vanderbohn's.

Q. Where is he located? A. Aubenbosch, Holland, known as The Almy nurseries.

Q. Is that the one you use as a standard for comparison of prices of a person in this country? A. No, sir; the Elizabeth nursery is the one I used.

Cross Examination by Mr. Carey:

30 Q. Do I understand, Mr. Burgeman, that you never purchased plants as single plants? A. Not in this variety, not in herbaceous plants.

Q. Herbaceous plants. Did you ever buy them as single plants? A. No, sir.

Q. Never in your experience? A. No, sir.

Q. Let me ask you how you got any information, then, to place prices as single plants in the inventory you made? A. Why, from the catalogue.

40 Q. What catalogue were you reading from? A. Several.

Julius V. Burgeman, for Appellee—Cross

Q. What catalogue were you reading from just now? A. From the Elizabeth nursery.

Q. That is the catalogue you read in connection with placing the prices on these plants, is it? A. Yes, sir.

Q. Where did you get these plants from? A. I don't know where they came from. I didn't bring them here. 10

Q. You didn't bring them? A. No, sir; I had nothing to do with their being here.

Q. You used the Elizabeth catalogue for prices when you wanted to fix prices on single plants, is that right? A. Yes, sir.

Q. When you fixed prices on clumps you fixed them from your own knowledge, is that right? A. From catalogues, as well as my own experience in buying plants.

Q. (By Juror No. 12.) Did you buy from these Elizabeth people—nurseries? A. No, sir. 20

Q. Then you took a catalogue from some one from whom you had never purchased and you fixed the prices on this Manda stock, did you? A. We never bought herbaceous stock; we bought evergreens.

Mr. Carey: Why don't you answer the question?

Q. (Question read as follows: "Then you took a catalogue from some one from whom you had never purchased and you fixed prices on this Manda stock, did you?") A. For herbaceous plants. 30

James W. Wagner, for Appellee—Direct

JAMES W. WAGNER, sworn for appellee.

Direct Examination by Mr. Stallman:

Q. Mr. Wagner, where do you live? A. Chatham, New Jersey.

Q. What is your business? A. Rose growing.

Q. Where are your greenhouses, in Chatham?

10 A. In Chatham, yes.

Q. Are your greenhouses situated near the railroad track? A. Yes, they adjoin the railroad; our property adjoins the railroad.

Q. What is the distance of your greenhouse from the railroad? A. The nearest house is about 20 feet from the railroad.

Q. What is the difference in elevation to the railroad? Is there an embankment there? A. There is an embankment.

20 Q. And trains pass on the embankment along your property? A. Yes.

Q. Do you know, Mr. Wagner, whether or not the passage of locomotives along this track, passing your greenhouse, has had any effect on your plants in your greenhouse?

Mr. Carey: I object to that as immaterial.

The Court: Objection overruled.

An objection to this ruling is noted by the appellant as ground of appeal.

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A. In my experience we have never had the slightest difficulty with gas from locomotives.

Q. Over what length of years, terms of years, do you speak? A. Personally I have been connected with them ten years.

Q. Do you have occasion to ventilate your greenhouses? A. Yes, constantly.

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Arthur E. Hartung, for Appellee—Direct

ARTHUR E. HARTUNG, recalled in behalf of appellee in surrebuttal.

Direct Examination by Mr. Stallman:

Q. Do you know of some of these imported evergreens, as to which Mr. Manda has just testified that you put a lower valuation on them than he paid for them? A. I know the ones he is speaking of, yes, sir. 10

Q. Did you see that plant? A. I did.

Q. Is there anything on it especially that induced you to put the price on it that you did? A. No more than that it is not a plant which is in the market today. It is not a plant which you could go out and duplicate. A plant for market purposes is not considered a high priced plant unless, if your neighbor wanted one, you could place one for him also. 20

Q. What makes value on these things for selling purposes? A. Demand.

Q. How would propagation be made from a tree of that kind? A. Not juniper, to my knowledge.

Q. Is there any assurance, and definite knowledge, of what the result would be if you attempted to propagate from it? A. You would spoil your tree by trying to propagate from it.

Q. (By a Juror.) It is not a propagating plant, in other words? A. Not junipers. I have never been able to propagate from those. 30

Q. (By another Juror.) Golden privet, how do you arrive at that price? A. Manda's golden privet is no different from any I ever handled.

Q. Can you buy a plant 20 feet high? A. I saw no plant 20 feet high on Mr. Manda's property. He had California privet which were valued at \$20.

Q. Is that a fair price, \$1? A. That plant is practically worth, at its outside, for cuttings—it is a plant that the market has no demand for. 40

Arthur E. Hartung, for Appellee—Direct

Q. (By Mr. Stallman.) Did you observe any of those imported things that had deteriorated in condition? A. A great many of his evergreens. His azaleas were very, very poor. I noticed other plants. His plants were worth far less today than they were when Mr. Manda put them in bed.

10 Q. There is a depreciation of price whether they are imported or domestic? A. Yes, sir, very, very often.

Q. (By a Juror.) These azaleas that Mr. Manda said were worth \$3.50 apiece, what do you think of them? A. I found them very, very poor; in fact, in this one bed I found two of them that were entirely dead which he had listed—I think our list will show where we marked two in bad condition, in dying condition. I considered them very poor. A great many of Mr. Manda's plants
20 are very poor in my estimation.

Mr. Carey: The testimony as to those azaleas was \$1.50.

The Juror: Exactly. Maybe I misunderstood the witness.

The Court: That is correct.

Cross Examination by Mr. Carey:

30 Q. You don't know how long it was before you went there to examine those plants that the railroad company had begun condemnation proceedings, and therefore had possession of the property, do you?

Mr. Stallman: I object.

The Court: Objection overruled.

A. I do not.

Q. Those plants need constant care, don't they?

A. Somewhat.

Q. In order to keep them in good condition?

40 A. Yes.

Judge's Charge

Q. If by reason of the condemnation, or if after the condemnation was begun the railroad company didn't take care of them they would depreciate in value, wouldn't they? A. Not to the extent that those—

Q. They would depreciate? A. Somewhat.

Q. Some of them would die? A. They need care, yes, sir. 10

Q. Some of them would die? A. Probably.

After recess.

Counsel summed up.

The Court charged the jury as follows:

JUDGE'S CHARGE

Dungan, J.

Gentlemen: The right of eminent domain, the power to take private property for public use, is a governmental function, and the State has delegated that power to certain public serving corporations, such as railroad companies, and has authorized them to take so much private property as may be necessary for the proper purposes of such companies. But our fundamental law provides that they may not do so except upon making just compensation to the owners therefor. With the question of whether or not the land in question is necessary for the purposes of the Delaware, Lackawanna & Western Railroad Company you have nothing to do. That has already been determined. You start your consideration of this case with that fact assumed; that is, that it is necessary. The question with which you are concerned in this hearing is only one of compensation; that is, what will be just compensation to W. A. Manda, Incorporated, for the property 20
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Judge's Charge

taken for the best and most beneficial use to which the property is capable of being put, and for damages to the remaining property by reason of the taking. As was tersely expressed in a Wisconsin case on the subject, vs. The Railroad Company, in 27 Wis. p. 478, "Just compensation means the payment of such a sum of money to the owner of the property proposed to be taken as will make him whole, so that upon the receipt by him of the compensation awarded he will not be any poorer by reason of the property being so taken," and, I may add, no richer either.

To emphasize the importance of your present office, it may not be amiss to remind you of the safeguards the law throws around this arbitrary taking of private land for public use; to secure to the owner, on the one hand, what will be just compensation to him, and, on the other hand, to protect the corporation taking the land from extortion and punishment for taking what is necessary the better to serve the public of which you and I are a part. First, in a proceeding of this kind, upon application of the railroad company, upon showing the propriety of taking the lands, a Justice of the Supreme Court appoints three commissioners, usually men of high standing in the community, to determine, after hearing both parties, what will be just compensation to the owner. But the decision of those commissioners is not final. The law provides that either party may appeal from that decision; the railroad company, if the award is deemed too high; the landowner if it is deemed too low. This appeal is to the Circuit Court of the county, and so jealous is the law of the rights of the parties in a case so important, that the ordinary panel of jurors summoned to serve in that court are not permitted

Judge's Charge

to determine the question of compensation, but it is required that a special panel selected from among the representative business men of the community be called into service for that purpose. Even in the selection of the trial panel from this special panel great care is exercised. The Court selects a list of forty-eight names of representative men of the community, and submits that to the parties, or their attorneys, and each party strikes twelve of these names, the least desirable from their standpoint, from the list. The remaining twenty-four are summoned to appear on the day fixed for the trial, and then, when the trial jury is drawn, each party has the right to challenge six of these. It is after just such a procedure as this that you have been selected to determine what will compensate the Manda Corporation for the taking of this land, which it was powerless to prevent; and, at the same time, you should refrain from an award of excessive damages against the railroad company for doing what the law permits, and what is presumed to be for the public convenience.

With the award of the commissioners you are not concerned. It is not even proper that you should know what it was; and if any of you by chance should know what it was, it will be your duty absolutely to disregard that knowledge in determining the amount of your award upon this hearing.

As an aid to your judgment two classes of testimony have been produced, as is usual in such cases. One class relates to what other property in the neighborhood has been sold for; and the other consists of the opinion of persons more or less expert in judging values. This testimony is supplemented and aided by your own view and inspection of the premises: and the purposes

Judge's Charge

of permitting that is to enable you to exercise your judgment in the light of such inspection, as applied to the testimony produced before you. The object of permitting testimony of the amounts paid for other property is to enable you to make a comparison of values upon the theory, when such sale is by a willing seller not compelled to sell, to a willing purchaser not compelled to buy, that the one would not sell, nor the other buy, unless the price fixed was near the true value of the property. But such sales should be reasonably near in time, unless it appear that there has been very little, or no, change in real estate value in that locality. And there should be a substantial similarity of the property sold to the property taken, to be of much or any value in aiding you to determine the value of the land in question; and to the extent only that the land, its location, condition and use, are substantially similar, is such testimony valuable as a standard of value; and where there is no substantial similarity, testimony of such sales is of no value, and should not be considered by you.

There have been produced, as I have already suggested, what are known as expert witnesses, who give their opinion as to the value of this land, and of the plants. An expert witness is one who is skilled in a particular business, or profession, and is possessed of peculiar knowledge of the subject upon which he is called to testify. Such knowledge may be acquired by study, observation, practice, and familiarity generally with the subject upon which he testifies. Expert testimony is the opinion of such a witness; and the value of the testimony of experts depends upon their skill, or knowledge of the subject and particular matters about which they testify, and their experience. Their testimony is to be

Judge's Charge

weighed by you the same as the testimony of other witnesses. That is, you have a right to observe them, and their manner of testifying, and to consider their apparent intelligence, and their knowledge of the subject about which they testify, and to consider whether or not the reason given for their opinions are satisfactory to you as reasonable men. You are not bound by the opinions of these witnesses, or any one of them, as to the value of these lands and these plants. But their evidence you may consider in connection with all the other facts in evidence upon these respective points. 10

Upon the subject of other sales I shall call your attention shortly to the testimony, although not at great length, because you have given most careful attention to this case, and it would be impossible, anyway, for the Court, within the range of a charge, to cover all the testimony given in a three days' trial. But whether or not it is recited by the Court, you should give consideration to all the testimony which has been given upon these various points. From the fact that it is not recited by the Court it is not to be considered by you that such testimony is of no weight upon the point to which it applies. 20

A great deal has been said about the Pierson property as a comparison of value. It appears that this Pierson property is on the northerly side of Third Street, and east of the railroad track, very near to the property in question; and it appears that in 1906 this property sold for \$12,000. Mr. Pierson says that the frame buildings were worth only \$250. He says the buildings were built in 1878. But it appears upon cross examination that the other buildings upon the property, beside these frame buildings—you will remember he was not permitted to give his 30 40

Judge's Charge

opinion of the value of the brick building, because the Court felt he was not qualified to give such opinion—it appeared there was a brick mill there upon the property; a side track connected with the main railroad; that there was an engine, boiler, elevating machinery, a large chimney, and the foundation of another building.

- 10 Mr. Cane, another witness produced on the part of the appellant, the Manda Company, says that the buildings, in his opinion, at the time of that sale were worth \$1950.80. And the railroad company called a witness—I do not at this minute recall his name—he said that in his opinion those buildings were worth \$2500. It appears, however, you will remember, that this lot is upon two streets, Second Street and Third Street. All these matters should be taken into consideration
- 20 by you.

- It appears, by the railroad company's witnesses, that there was at Third Street—you will remember the location, the next street west of the Rahway river—the sale of three lots there, the Mercadant sale it has been called. These lots were 122 by 105. This sale was for \$6000. And the testimony of Mr. Bech is that in his opinion the buildings upon those three lots were worth \$4500, leaving a value of \$1500 for the land. Mr.
- 30 Boe testified that in his opinion those buildings were worth \$1800 apiece. Mr. Bech also testifies that in his opinion the land abutting on Third Street, west of the railroad, is worth \$10 a front foot, and east of the railroad \$15 a front foot. He testifies to another sale east of the railroad in 1912 of a lot 33 feet by 250 for \$2100, and gives his opinion that the value of the building was \$1500 leaving the value of the land \$600. Mr. Bech says that he himself owned a tract of land
- 40 of eight acres on the east side of Valley Street,

Judge's Charge

adjoining the Manda land, which is east of the railroad track; and that the land which he bought several years ago by acres, he sold a part of it on Fourth Street at \$18 a front foot, and on Valley Street at \$20 a front foot. He testified to the sale of the playground property, seven acres, at \$3500. But you will remember the similarity, and the differences, between this property and the property in question. That property it appears had no street frontage, that the only way to reach the property was through a private way from South Orange Avenue, leading in a generally northerly direction to it. That property bounded on a lumber yard, coal yard and on the railroad company's right of way; and there was some suggestion in the testimony that there might have been some allowance made by reason of the purpose to which the land was to be devoted. All those matters, of course, you may take into consideration. 10 20

Mr. Frank H. Taylor speaks of a tract of land of nine acres which he says was half a mile away. You see that is quite a distance away. He says it was a residential property, in a general westerly direction from this property, and he says that the nine acres sold for \$15,000 cash.

I have not attempted to call your attention to all the details of these sales, or to all the sales. I have simply called your attention to these items which you may take into consideration as standards of value in that locality to the extent I have previously indicated; that is, to the extent that there is a substantial similarity between the properties; and where that similarity ceases, they should not be used as standards of value at all. 30

As to the value of the land in question. Mr. Manda gives his opinion of its value. He is the 40

Judge's Charge

owner of the land, and has a right to value it, and has valued it, and gives his judgment of the value of the land taken as mere land, 62½ feet on Third Street. He says by reason of the top soil which has been placed upon that land it has been made up, built up, year by year, and there is an added value of thirty cents a square foot for 36,550 square feet, or \$10,905, so that, according to his judgment, this land in its present condition is worth \$27,905. Mr. Farquhar, the gentleman from Boston, you will remember, gives no opinion as to the value of the land itself, but he gives his opinion of the value of the top soil, which he says is twenty-five cents a square foot. And Mr. Karlstrom, who is employed by Mr. Manda, also gives it as his opinion that this top soil adds thirty cents a square foot to the value of the land. These figures are not to be applied to this top soil as a mercantile proposition, as something that is to be taken from the land and marketed. These figures are to be considered by you in determining the value of the land as a whole. As is expressed in the railroad company's seventh request to charge, and which I conceive to be good law in this case, the rule is accurately stated thus: "In this case it appears that on the land condemned were a number of large fixed trees, not nursery stock"—those I have not mentioned yet, but Mr. Manda, you will remember, testifies there were some trees there which were not nursery trees, and which could not be removed, and this request which I am about to charge you applies to the trees, the fixed trees that were not nursery trees, as well as to this top soil—"In this case it appears that on the land condemned were a number of large fixed trees, not nursery stock, and a layer of top soil.

Judge's Charge

These trees and the top soil are a part of the land, and cannot be valued separately and apart from the land, but may be taken into consideration to determine to what extent, if any, the value of the land is enhanced for a fair sale in the market." That is a correct statement of the law, and I charge you that. On the other hand, of course, you will consider all the other testimony on the part of the Manda Corporation as to value. I shall mention only that of Mr. Manda, and Mr. Farquhar and Mr. Karlstrom. All the others you are to remember and take into consideration. ✓

10

On the part of the railroad company Mr. Bech testifies—and Mr. Bech, you will remember, is the gentleman who has held positions in South Orange; he says that he was president of the Board of Assessors, and president of the South Orange Building & Loan, and made appraisements for the building and loan, and that he was secretary of the Sinking Fund Commission; and he says that he is familiar with values there; and he is the gentleman, you will remember, who owned the land on the east side of Valley Street. He says that in his opinion this land taken is worth \$2875; and he fixes that by taking the 62½ feet frontage and 150 feet deep at \$30 a front foot, and adding \$1000 for the rear land. He did not give the total of those figures, but I have figured it out.

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Mr. O'Brien, who says that he has been for twenty-four years in the real estate business in South Orange and vicinity, gives it as his opinion that this frontage, 150 feet deep on Third Street, is worth \$25 a front foot, and that the balance of the land is worth \$2000, making his estimate of the value of the plot \$2900. That is, he gives that total; it does not prove to just that

40

Judge's Charge

amount. That is, you will find by multiplying his figures by \$25, and adding \$2000, it amounts to something more than that. But in giving the total he said it was \$2900.

Mr. Stallman: May I suggest it was \$2000 an acre.

10 The Court: Well, you will remember that, gentlemen, \$2000 an acre.

Mr. Taylor, who says that he has been in the real estate business for thirty years, gives it as his opinion that this land, at \$30 a front foot, is worth \$1875; and he figures the balance of the land at just $\frac{1}{3}$ of what he figured per square foot the frontage. He figured the frontage at twenty cents a square foot, running back 150 feet, and beyond that $6\frac{2}{3}$ cents per square foot; 20 so that his total valuation was \$3807.86 for the land.

The nursery stock, as was suggested early in the suit, was upon this land when the railroad company took the land, and, unless an arrangement should be made with the Manda corporation, an amicable arrangement, for the taking of the nursery stock, the railroad company was obliged to take this stock as well as the land, and to compensate the Manda corporation for it, and 30 you are as much concerned with the value of this nursery stock as with the value of the land. By agreement of counsel the proof upon the value of this nursery stock has been very much restricted. Inventories have been placed in evidence which you will have with you when you retire to consider your verdict. I may say right here that the principal difference in these inventories made for the railroad company, and that made for the Manda corporation, seems to be in the character 40 of the count, the count on behalf of the Manda

Judge's Charge

corporation having been made with reference to single plants, that is, where the plants were in clumps. Mr. Manda and his witnesses, Mr. Stewart and Mr. Karlstrom, and other witnesses whom he has produced, say it is proper in estimating the value of these clumps to estimate the value of the separate flowering stems; that each is properly a unit, and that that is the proper way to count in making the inventory, and making the count. On the other hand, the evidence on the part of the railroad company was that there was a market value for clumps, and they say that they have given that market value. They do not deny that there may be a market value for the single plants, but they also say there is a market value for clumps such as were found upon the Manda property. 10

Mr. Manda says, and his inventory shows, that the estimated value of these plants was \$21,738.91, from which one hundred plants were sold, leaving the estimated value of \$21,703.98. But there are included in this inventory certain trees which Mr. Manda admits are not properly nursery stock; but he only admits that there are five or six of such trees; and it appears that the trees which he stated were not nursery stock have been estimated at \$100 each. So, upon the principle I have given you, there must be deducted from the inventory of nursery stock, in considering the values placed upon it by Mr. Manda and his witnesses—the value of these trees considered as I have already indicated with reference to the value of the land. 20 30

Mr. Stewart, a gentleman who is an editor upon floral matters, and who has been in business for years, gives his testimony, and says that he has examined these figures from this inventory, and that he finds some of them pretty close 40

Judge's Charge

to full value, or a little more, and some of them under. He says that the evergreen trees might reasonably have been put considerably higher.

Mr. Farquhar, the gentleman whom I have already mentioned, says that the prices are very fair as a whole; that the prices of the evergreens are decidedly under their value.

10 Mr. Corbitt, who is with the Seton Hall College, says that he counted the beds where the discrepancy was; and, as I have already suggested, that the main difference in the count appears to have been in the method. He says that the railroad company was right as to clumps, but when they were divided into units Mr. Manda was right. He says that the prices were fair and reasonable.

20 Mr. Kalstrom, whose testimony I have already mentioned, says that he made this count, and that the prices were fair, and those which were received by the Manda corporation from their customers.

On the other hand there have been produced here on the part of the defendant Mr. Burgeman, Mr. Winnewasser and Mr. Hartung. Those three gentlemen made an inventory of these plants together, and their inventory will be before you when you get to the jury room, and you may
30 look it over. Upon that inventory is what they fix as the value of these plants, and the total is \$4656.54.

Mr. Peterson, connected with the F. & M. nursery at Springfield, in Union county, says that he made a count and gives his estimate of the value at \$4297.95; and he says that the proper way to count is by clumps.

There is in this case a further element of damage, and that relates to the construction itself.
40 As I have already indicated to you, what the

Judge's Charge

plaintiff is entitled to receive is not only compensation for the land and other property taken, but he is entitled to be compensated for any damage which, in reasonable contemplation, this taking of his land, and building of the embankment thereon, may reasonably cause him. A number of witnesses have been produced who state that in their opinion the erection of this building will cast a shadow upon this land which will have a deleterious effect upon the plants; that gases will be emitted from the locomotive engines which will have a deleterious effect; and that the building of this embankment upon this land will affect the circulation of air, and they give you their reasons for their opinion. You have listened to them attentively, and there is no reason for my rehearsing all this testimony. 10

On the part of the defendant Mr. James H. Wagner has been produced as a witness. He says he is a rose grower, I think at Chatham, and he has there a greenhouse adjoining the railroad property under circumstances which you may find substantially similar. He says that his greenhouses are situated along the embankment—and, by the way, I neglected to mention that one or more of these witnesses testified that in their opinion these influences will have their effect upon the plants in the greenhouses, as well as upon the plants outside—but Mr. Wagner says that although the nearest point of his greenhouse is within 20 feet of the railroad track, where there is an embankment, and that in the rear of his greenhouse there is a freight track, and that the embankment is from four to twelve feet high near his greenhouse, that although he has had an experience of several years there, and they ventilate the greenhouse constantly, they have never had the slightest difficulty from gases from locomotives. 20 30 40

Judge's Charge

Mr. Manda has given you an estimate of the quantity of land that will be shaded, and the quantity of land from which it will be necessary for him to make removals of plants. He says that he will take the valuable stock which is now along the railroad track from the line of shadow, put them in another location, and move to that location the least valuable stock. But you will remember that he makes his estimate of the number of feet that will be shaded upon the theory that upon this track there will be railroad cars 14 feet high. Now this is a feed track; there has been no testimony on the part of the railroad company, but, of course, they have a right to place cars there, and you may take that into consideration, and whether or not it is likely that these cars will be upon the feed track. The figures given by Mr. Manda of the cost to him of the removal of the plants—and he has a right to make this change, and if you find it is necessary by reason of the gases, and restriction of light and air to make this removal, he has a right to remove them, and make the use of his land as advantageous as it was before, if possible, and recover from the railroad company the cost of the removal—he says the cost will be \$2500; building a road \$300; the grading of that road will cost \$45; and it will be necessary to make certain changes in water pipes at a cost of \$85. These changes, if you find them necessary to be made, and those figures to be reasonable, Mr. Manda has a right to recover from the railroad company.

You will see that these figures differ materially for the total damage, ranging from the lowest figures given on the part of the railroad company, \$10,102.95, to \$52,038.98, the figures given on behalf of Mr. Manda. These figures on behalf

Judge's Charge

of Mr. Manda are \$17,000 for the land as land, \$10,905 added value for the top soil; \$21,203.98 for the plants, deducting \$500 from that value on account of the trees; \$2500 for removal of plants; \$300 for road; \$45 for grading, and \$85 for change of water pipe, making altogether \$52,038.98 at which Mr. Manda places his damage.

The lowest figures on the part of the railroad company, Mr. Bech's figures, the value of the land \$2875 for the land; Mr. Peterson's figures for the plants \$4297.95, making a total value for the property taken in the opinion of those witnesses of \$7172.85. You will remember there is no testimony, save that of Mr. Manda, as to the cost of shifting these plants, if you find the shifting to be necessary. And if you do find that the shifting of these plants will be necessary, and that the figures of Mr. Manda are correct as to the shifting, building of road and grading, and the pipes, there should be added to that their cost, which he says will be \$2930. So that the figures given on behalf of the railroad company, adding to them the cost which Mr. Manda has given for removal of plants, grading, and so forth, would make the total amount \$10,102.95. Here are the figures which you gentlemen have, and it is for you to determine the correctness of these figures upon the basis I have already stated.

To sum up. It is your duty to consider all the testimony, as I have already indicated, whether it is recited by the Court, or not; and if the Court has misquoted any testimony, you are to disregard it. You have heard this testimony just as well, and just as carefully, as the Court has, and if you find the Court has misquoted any testimony, absolutely disregard it and use your own recollection of the testimony upon any point

Judge's Charge

where the Court has made an error. The testimony you must consider, as well as your own view of the premises; and it will be your duty, by your verdict, to make Mr. Manda whole, so that upon the receipt by him, as I have already suggested, of the amount of your verdict, he will not be any poorer by reason of his property having been taken; but do not render a verdict which will make him any richer than he would have been if his property had not been taken. Just and reasonable compensation should be the measure of his damages, and the amount of your verdict.

I am requested by the appellant, Mr. Manda, to charge:

1. The "just compensation" which the constitution of this state requires shall be made to the landowner in condemnation cases, requires that the railroad company in this case shall make good to the owner all the pecuniary outlay which it is or will be compelled to make by reason of the appropriation of its property, and by reason of the use to which the railroad company puts or will put the property appropriated. I charge you that.

The second, third and fourth requests to charge, while they appear to me to be good propositions of law in the abstract, I believe not to be applicable to this case, and, therefore, I shall decline to charge them.

5. In this case the railroad company has defined its plan of constructing its railroad upon the land taken, and the jury should award them damages to the remaining lands of the owner based on the use of the land taken in any lawful mode within the plan presented by the railroad company. I charge you that.

6. If the jury finds that substantial damage

Judge's Charge

will probably be done to appallant's adjoining lands, or greenhouses, or to the plant growing thereon or therein, by reason of obstruction to light, or to the free circulation of air, occasioned by erecting an embankment upon the lands acquired of the appellant by the condemnation proceedings, and the use of said lands and embankment for railroad purposes in the manner indicated by the plan of construction put in evidence by the railroad company, they should award to the appellant such sum as in the exercise of reasonable judgment they believe will constitute just compensation therefor.

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That is applicable to the removal of the plants, and the building of the road, and grading of the road, and changing of the pipes, I charge you. Beyond that it is not applicable to the proven facts in this case.

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7. The jury must not accept as evidence of value the catalogue of the Elizabeth nursery. It is received only for the purpose of showing the source from which the witness derived his knowledge of values. We have no evidence as to the standing or character of the nursery in question. I charge you that.

I am requested on the part of the railroad company to charge as follows:

1. In estimating the value of land taken for public use, it is the market value of the property which must be considered.

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2. The market value of the property is the price it would bring if the owner was willing, but not compelled, to sell it, and a purchaser was willing, but not compelled, to buy it.

3. The market value of property in any locality may be determined by the prices paid for other lands in that locality, comparable with the land in question as to location, surroundings, im-

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Judge's Charge

provements, etc., and taking into consideration any circumstances which may add to and detract from its value.

10 4. The value of the land is to be ascertained with reference to its present condition and use, or any use for which it is available in its present condition, but the value cannot be estimated with reference to any intended or future use.

5. The land must be valued as land, and not for the elements which compose the land.

6. The jury may take into consideration any facts which affect the value of the land, including the character of the soil, but your verdict must respond to the rule that the value of the land is the price it would bring in the market.

I charge you this sixth request. I have already charged the 7th, which is as follows:

20 7. In this case it appears that on the land condemned were a number of large fixed trees, not nursery stock, and a layer of top soil. These trees and the top soil are a part of the land, and cannot be valued separately and apart from the land, but may be taken into consideration to determine to what extent, if any, the value of the land is enhanced for a fair sale in the market.

30 8. In estimating the value of the nursery stock, you cannot allow the owner the prices for which the stock is sold after it is removed from the ground.

9. In estimating the value of the nursery stock, you must consider its condition in the ground at the time of condemnation, what attention, care and expense is involved in converting it from that condition to a commodity ready for delivery to a customer, or into a separate propagating plant.

40 10. Considering the condition of the nursery stock in the ground, you may further consider the probability of its survival, and you may consider

Judge's Charge

what proportion of this stock might be sold or require transplanting.

11. In estimating the value of the nursery stock, you must determine the market value in its condition at the time of taking, i. e., in the ground.

12. In estimating the market value you may take into consideration what other plants or nursery stock of similar kind and character are sold for by other dealers in the same business. 10

13. In considering the matter of damages to the remaining land, you are to take into consideration only such damages as are reasonably probable to result from the taking of the land and the use to which it is to be put. Remote and speculative consequences should have no place in your considerations.

14. In considering the testimony of the witnesses you may take into consideration the interest they may have in the result of this proceeding, and the extent to which their credibility is affected by such interest. 20

I am also requested to charge you upon the time at which the railroad company may take possession. Under the law of eminent domain in this state the railroad company is entitled to take possession only when they have paid into the Court of Chancery the amount of the award of the commissioners, and notice to that effect has been given to the landowner. I have here a certified copy of the order of the Chancellor of this State from which it appears that this amount of money was paid into the Court of Chancery on the 10th day of October, 1914; so until that time, and until the landowner, the Manda corporation, had been notified of the payment into the Court of Chancery, the railroad company had not the right to enter upon and take this land. I understand these proceedings to have been offered in evidence, is that correct? 30 40

Judge's Charge

Mr. Stallman: Only with reference to the date. Mr. Carey and I agreed that the date of the payment should be shown.

Mr. Carey: The date at which they are entitled to take possession is when notice is served on the owner.

10 The Court: That is it, and after payment has been made to the Court of Chancery.

Mr. Carey: We did not receive notice until the 16th or 17th.

Mr. Stallman: Mailed on the 15th, and received, probably, the 16th.

The Court: By agreement of counsel that is the date the railroad company had the right to take possession. You may retire.

20 Mr. Carey: In this connection may I ask your Honor to call the attention of the jury to what I conceive to be the law on the subject, that the value of the property is to be considered as of the time when the condemnation proceedings are commenced by the filing of the petition in condemnation?

The Court: Is there any dispute about that in this case? Has there been shown to be any difference on the subject?

30 Mr. Carey: The only reason I call attention to that is the fact that after that time there was no duty upon us to take care of the property.

The Court: I am not willing to charge that.
(The jury retires.)

Mr. Carey: I pray to enter an objection to the language used by the Court in connection with the charge, which was, in substance, to the effect that the jury could not value the top soil separate and apart from the land.

The Court: That is charging, practically, the seventh request of the appellee.

40 Mr. Carey: The Court substantially charged that before reading the request.

Judge's Charge

The Court: Wherever it is found in the charge an objection will be noted.

An objection to this part of the charge is noted by the appellant as ground of appeal.

Mr. Carey: I desire to note an objection to the refusal of the Court to charge that the witnesses of the appellee did not take into account, in fixing the value of the land, the added value of the top soil. 10

The Court: I will put that this way; if you are entitled to have an objection noted for that reason you may have it.

Mr. Carey: Also I desire to note an objection to the limitation made by the Court upon the application of the sixth request to charge made by the appellant.

The Court: Allowed.

An objection to this portion of the charge is noted by the appellant as ground of appeal. 20

Mr. Carey: I pray an objection to be noted also to the refusal of the Court to charge the second request of the appellant as follows:

2. If the owner will be compelled to make an annual outlay by reason of the appropriation of its property and the use to which the part appropriated is put, and such outlay will be continued in the future, the annual outlay should be capitalized, and such sum awarded as damages as will, at the legal rate of interest, produce an income sufficient to meet the annual outlay which the owner will probably be required to make. 30

The Court: The objection may be noted.

An objection to the refusal of the Court to charge as requested is noted by the appellant as ground of appeal.

Mr. Carey: I also pray an objection to be noted to the refusal of the Court to charge the third request of the appellant as follows: 40

Judge's Charge

3. If by reason of the appropriation of its property and the use to which it is or will be put by the railroad company, the cost of carrying on the owner's business on the remaining properties is increased, the annual amount of such increased cost should be capitalized, and such sum awarded as damages on account of such increased cost as will, at the legal rate of interest, produce an income sufficient to meet such increased annual cost of carrying on the owner's business.

The Court: The objection may be noted.

An objection to the refusal of the Court to charge as requested is noted by the appellant as ground of appeal.

Mr. Carey: I also pray an objection to be noted to the refusal of the Court to charge the fourth request of the appellant as follows:

4. If the jury find that the embankment erected by the railroad company upon the property taken and the use the railroad company are to make of the property taken, will require additional labor and the use of materials and remedies to prevent injury and disease to the plants grown on the owner's property adjacent to the property taken, then the jury should capitalize the annual cost of such labor and materials, and award the owner for damages, on account of such annual cost such sum as will, at the legal rate of interest, produce an income sufficient to meet the annual cost of such labor, materials and remedies.

The Court: The objection may be noted.

An objection to the refusal of the Court to charge as requested is noted by the appellant as ground of appeal.

An objection is noted by the appellant to the charge by the Court of the 5th request of the appellee, as ground of appeal.

Judge's Charge

An objection is noted by the appellant to the charge by the Court of the 6th request of the appellee, as ground of appeal.

An objection is noted by the appellant to the charge by the Court of the 9th request of the appellee, as ground of appeal.

An objection is noted by the appellant to the charge by the Court of the 10th request of the appellee, as ground of appeal. 10

An objection is noted by the appellant to the charge by the Court of the 13th request of the appellee, as ground of appeal.

Mr. Carey: I also wish to note an objection to the denial by the Court of the request to charge that after the filing of the condemnation proceedings in the Circuit Court, the appellant was not burdened with the duty of caring for the property. 20

The Court: No such request was preferred in time to be charged; that was preferred just before the jury retired.

Mr. Carey: That, it seemed to me, arose out of the charge of the Court.

The Court: There has not been in this case any question of any addition of value, as I apprehend it, to the property at any time, which would make that necessary. 30

Grounds of Appeal.

NEW JERSEY COURT OF ERRORS AND
APPEALS.

	<p style="text-align: center;">W. A. MANDA, INCORPORATED, <i>Appellant,</i></p> <p style="text-align: center;"><i>vs.</i></p> <p style="text-align: center;">DELAWARE, LACKAWANNA & WEST- ERN RAILROAD COMPANY, Lessee of the Morris & Essex Railroad Company, <i>Respondent.</i></p>	<p style="font-size: 3em; line-height: 1;">}</p> <p style="text-align: center;">On Appeal.</p> <p style="text-align: center;">In Condemna- tion Pro- ceedings.</p>
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The appellant states the following grounds of appeal:

- 20 The following questions were overruled:
- (1) Q. (To the witness Louis H. Pierson) From your experience in connection with building work that you have done, are you able to give us the value of those buildings on this property?
- (2) Q. (To the witness Albert A. Manda) Now, will you tell us, if you are able to, what percentage of decrease in the valuation of this shaded land will probably arise because of this embankment concerning which you have testified, and the proposed use of this property for railroad purposes?
- 30 (3) Q. (To the witness Albert A. Manda) Now, will you state what in your judgment will be the necessary annual expense to be incurred by reason of these conditions?
- 40 (4) Q. (To the witness Albert A. Manda) Mr. Manda, you were testifying to what you

Grounds of Appeal

conceive to be the value of this strip of land, taken as land without the top soil on it, and you stated that you compared it with the Pierson property after allowing for the value of the buildings; at that time that was not in evidence as to the value of this brick building. Now will you state what allowance you made for the value of the buildings on the Pierson property? 10

The following questions were admitted:

- (5) Q. (To the witness Charles I. Bech) And what, in your judgment, was their value at the time?
- (6) Q. (To the witness Charles I. Bech) Tell us what was paid for those seven acres?
- (7) Q. (To the witness Julius V. Burgerman) How do the prices in the catalogs which you have examined for this class of stock compare with the prices which you have marked on this inventory? 20
- (8) Q. (To the witness James W. Wagner) Do you know, Mr. Wagner, whether or not the passage of locomotives along this track, passing your greenhouse, has had any effect on your plants in your greenhouse? 30
- (9) The Court charged the jury as follows: 30
 "As to the value of the land in question. Mr. Manda gives his opinion of its value. He is the owner of the land, and has a right to value it, and has valued it, and gives his judgment of the value of the land taken as mere land, 62½ feet on Third Street. He says by reason of the top soil which has been placed upon that land it has been made up, built up, year 40

Grounds of Appeal

by year, and there is an added value of thirty cents a square foot for 36,550 square feet, or \$10,905, so that, according to his judgment, this land in its present condition is worth \$27,905. Mr. Farquhar, the gentleman from Boston, you will remember, gives no opinion as to the value of the land itself, but he gives his opinion of the value of the top soil, which he says is twenty-five cents a square foot, And Mr. Karlstorm, who is employed by Mr. Manda, also gives it as his opinion that this top soil adds thirty cents a square foot to the value of the land. These figures are not to be applied to this top soil as a mercantile proposition, as something that is to be taken from the land and marketed. These figures are to be considered by you in determining the value of the land as a whole. As is expressed in the railroad company's seventh request to charge, and which I conceive to be good law in this case, the rule is accurately stated thus: 'In this case it appears that on the land condemned were a number of large fixed trees, not nursery stock'—those I have not mentioned yet, but Mr. Manda, you will remember, testifies there were some trees there which were not nursery trees, and which could not be removed, and this request which I am about to charge you applies to the trees, the fixed trees that were not nursery trees, as well as to this top soil—'In this case it appears that on the land condemned were a number of large fixed trees, not nursery stock, and a layer of top soil. These trees and the top soil are

Grounds of Appeal

a part of the land, and cannot be valued separately and apart from the land, but may be taken into consideration to determine to what extent, if any, the value of the land is enhanced for a fair sale in the market.' That is a correct statement of the law, and I charge you that. On the other hand, of course, you will consider all the other testimony on the part of the Manda Corporation as to value. I shall mention only that of Mr. Manda, and Mr. Farquhar and Mr. Karlstrom. All the others you are to remember and take into consideration." 10

- (10) The Court also charged the Fifth request of the Appellee as follows:

"The land must be valued as land, and not for the elements which compose the land." 20

- (11) The Court also charged the Ninth request of the Appellee as follows:

"In estimating the value of the nursery stock, you must consider its condition in the ground at the time of condemnation, what attention, care and expense is involved in converting it from that condition to a commodity ready for delivery to a customer or into a separate propagating plant." 30

- (12) The Court also charged the Tenth request of the Appellee as follows:

"Considering the condition of the nursery stock in the ground, you may further consider the probability of its survival, and you may consider what proportion of this stock might be sold or require transplanting." 40

Grounds of Appeal

(13) The Court refused the request of the Appellant to charge the jury as follows:

“That the value of the property is to be considered as of the time when the condemnation proceedings are commenced by the filing of the petition in condemnation.”

10 (14) The Court refused the request of the Appellant to charge the jury as follows:

“If the owner will be compelled to make an annual outlay by reason of the appropriation of its property and the use to which the part appropriated is put, and such outlay will be continued in the future, the annual outlay should be capitalized, and such sum awarded as damages, as will, at the legal rate of interest, produce an income sufficient to meet the annual outlay which the owner will probably be required to make.”

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(15) The Court also refused the request of the Appellant to charge the jury as follows:

“If by reason of the appropriation of its property and the use to which it is or will be put by the railroad company, the cost of carrying on the owner’s business on the remaining properties is increased, the annual amount of such increased cost should be capitalized, and such sum awarded as damages on account of such increased cost as will, at the legal rate of interest, produce an income sufficient to meet such increased annual cost of carrying on the owner’s business.”

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(16) The Court also refused the request of the Appellant to charge the jury as follows:

“If the jury find that the embankment erected by the railroad company upon

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Grounds of Appeal

the property taken and the use the railroad company are to make of the property taken, will require additional labor and the use of materials and remedies to prevent injury and disease to the plants grown on the owner's property adjacent to the property taken, then the jury should capitalize the annual cost of such labor and materials, and award the owner for damages, on account of such annual cost such sum as will, at the legal rate of interest, produce an income sufficient to meet the annual cost of such labor, materials and remedies." 10

- (17) That the Appellant requested the Court to charge the jury as follows:

"If the jury find that substantial damage will probably be done to appellant's adjoining lands, or greenhouses, or to the plant growing thereon or therein, by reason of obstruction to light, or to the free circulation of air, occasioned by erecting an embankment upon the lands acquired of the appellant by the condemnation proceedings, and the use of said lands and embankment for railroad purposes in the manner indicated by the plan of construction put in evidence by the railroad company, they should award to the appellant such sum as in the exercise of reasonable judgment they believe will constitute just compensation therefor." 20 30

The Court limited the application of said request as follows:

"That is applicable to the removal of the plants, and the building of the road, and grading of the road, and changing of 40

Grounds of Appeal

the pipes, I charge you. Beyond that it is not applicable to the proven facts of this case.”

- (18) The trial court declined to set the verdict aside and grant a new trial.

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VREDENBURGH, WALL & CAREY,
Attorneys of Appellant.

Service of the within grounds of appeal is hereby acknowledged this 9th day of September, 1915.

M. M. STALLMAN,
Atty. of Resp.

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