

New Jersey Court of Errors and Appeals

Howard W. Miller,
*Plaintiff and
Respondent,*

vs.

I. P. Thomas & Son Com-
pany,
*Defendant and
Appellant.*

On Appeal from
Supreme Court.

BRIEF FOR DEFENDANT AND APPELLANT.

I.

The principal question upon this appeal is the approval of the Supreme Court of the refusal of the trial Judge to charge to the jury the defendant's request to charge.

The Supreme Court held, first, that the legal impropriety of this request is apparent, because it involved a series of unconnected legal principles, and,

second, that the last sentence in the request was not the law of New Jersey.

We cannot accept this view. We submit that the request is a logical, connected statement of legal principle down to the point respecting reasonable doubt. Moreover, there is nothing about the request that could have been confusing to the trial Judge. We submit that this request stated fairly the various factors that the jury should have had presented to them for their consideration in reaching a rational verdict in this case. We do not understand that legal propriety requires absolutely such minutiae as that a clearly stated request shall be divided into paragraphs preceded by numbers.

We contend that the entire paragraph, down to the part relating to reasonable doubt, should have been charged by the trial Judge, for the reasons presented in the brief, to the Supreme Court hereto attached.

We submit further that the last few lines of the request, to wit,—“If there is a reasonable doubt as to the cause of the injury, the benefit of the doubt will be given to the defendant if his trade is a lawful one, and the injury is not the necessary and natural consequence of the act, as in all actions of this nature the burden of proof is upon the plaintiff,” is sound law, and that it should have been charged to the jury in this case.

Clearly, this principle holds nothing more than that the burden of proof is upon the plaintiff to establish the cause of the injury in negligence, when there is reasonable doubt as to that cause, when the trade engaged in is a lawful one. The effect of this doctrine would be to bar a jury from rendering a verdict upon an inference of negligence in this class

of cases when there is reasonable doubt as to the cause of the injury.

Regardless of this point, it is evident that the defendant was bitterly prejudiced by the fact that the trial Judge dismissed the substantial testimony of the defendant as to the cause of the injury by the mere statement that "the damage must be directly traceable to the alleged nuisance in question and not to any other cause." He failed to add a single explanatory or directory statement in connection with this, and omitted those explanatory and directory statements presented in our request to charge.

We, therefore, submit that judgment below must be reversed. We note that the printed book in this court does not contain a copy of the opinion of the Supreme Court, and, therefore, annex it hereto.

PER CURIAM.

NEW JERSEY SUPREME COURT.

HOWARD W. MILLER,

vs.

I. P. THOMAS & SON COM-
PANY.

} JUNE T., 1915.

Appeal from Gloucester Circuit Court.

Argued before GUMMERE, Chief Justice, and Jus-
tices SWAYZE and BERGEN.

For Appellant, GASKILL & GASKILL.

For Respondent, JOHN BOYD AVIS.

Per Curiam:

This was an action to recover for damages done to the growing crops on the plaintiff's farm by noxious gases and vapors emitted from the factory of the defendant. There was a verdict for the plaintiff, and judgment thereon.

The first ground assigned for reversal is that the Court refused to charge the following request: "The injury must be clear, direct and positive. It must

be the legitimate and natural result of the nuisance charged and in no essential degree the result of other artificial causes. If the injury is in part the result of other causes, the action must fail, unless it be clearly established that the injury would not have resulted except for the vapors. So, too, the injury must be of a tangible character. It must be a sensible injury, discernable to an ordinary person, and no wise dependent upon scientific tests or microscopic examinations to discover. The injury must be such as is apparent to the eye in its ordinary condition, and must be actual and substantial, and not contingent, prospective or remote, and must be clearly traceable to the nuisance charged. If there is a reasonable doubt as to the cause of the injury, the benefit of the doubt will be given to the defendant if his trade is a lawful one, and the injury is not the necessary and natural consequence of the act, as in all actions of this nature the burden of proof is upon the plaintiff."

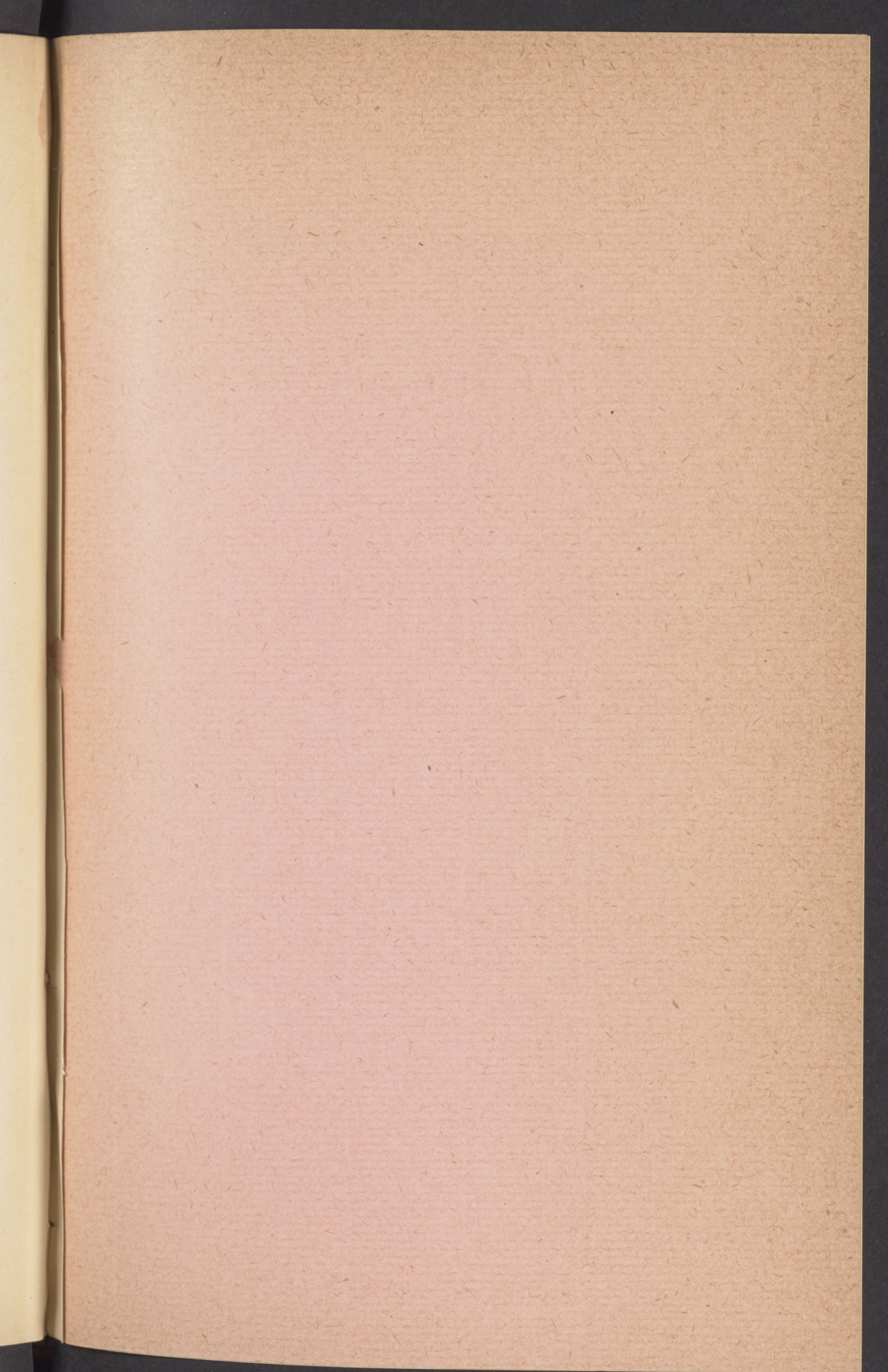
The legal impropriety of this request is apparent. It involves a series of unconnected legal principles, some of which were applicable to the case, and some of which were not. That part of it which asserts that the defendant is entitled to the benefit of a reasonable doubt as to the cause of the injury means, as we understand it, that the plaintiff was bound to prove his case beyond a reasonable doubt in order to recover. This we conceive not to be the law in cases of this character. Moreover, all of the propositions contained in this request which were sound, and which had any relevancy to the case as made before the jury, were charged by the trial Court.

It is further contended that the Court erred in admitting testimony of the emission of noxious fumes and gases on dates other than those spe-

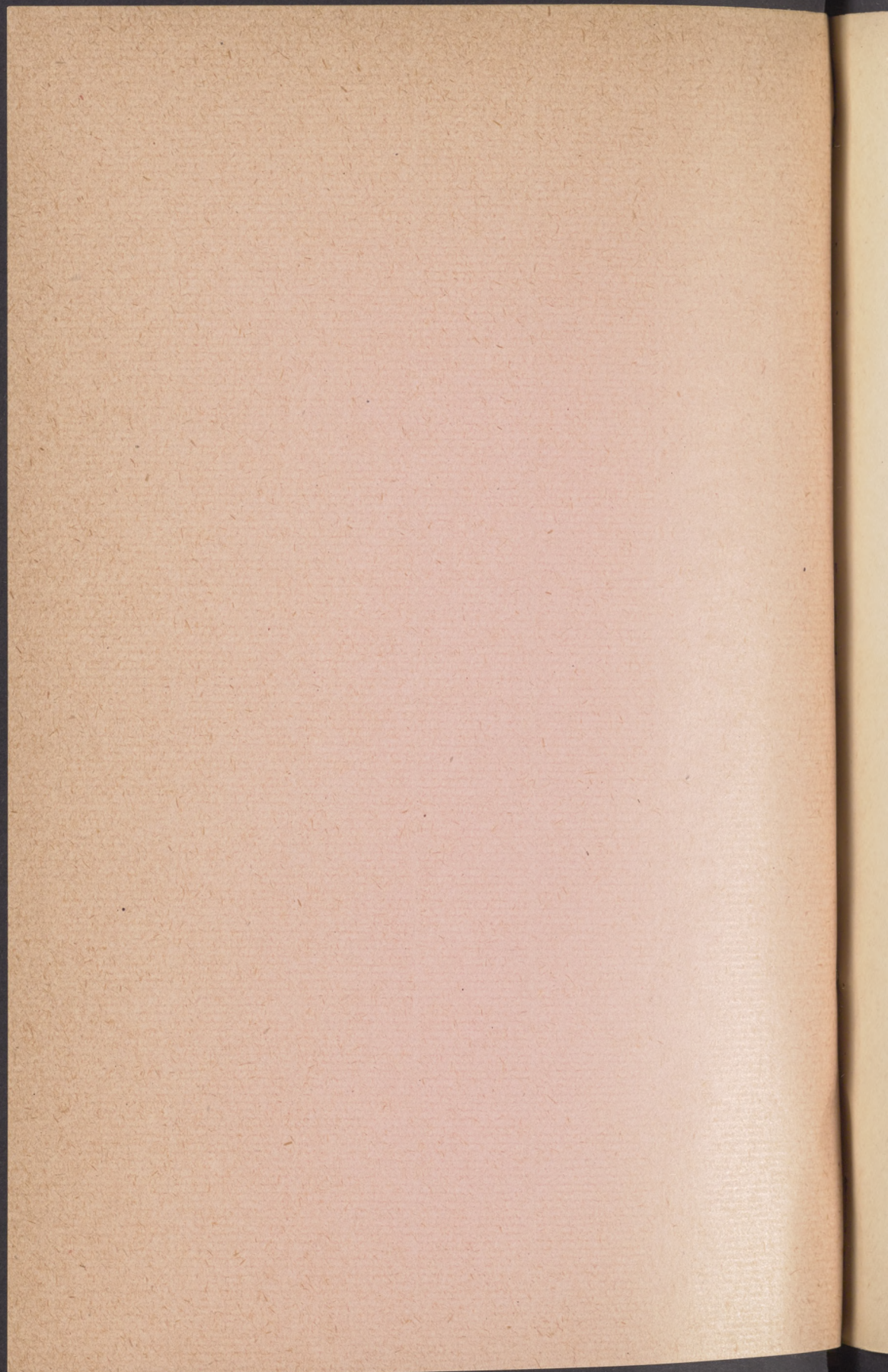
cifically set forth in the complaint. The complaint alleged that the defendant on the 21st day of May, 1909, and on other specified dates in that month, in the month of June, the month of July of that year, and on other specified dates in the month of May, 1911, "and on divers other days and times between the first date aforesaid and the commencement of the suit," caused these noxious fumes and gases to be emitted to the damage of the plaintiff. All of the testimony admitted was confined within the period between May 21, 1909, and the beginning of the suit, and was properly received.

Lastly, it is asserted that it was improper for the Court to permit the plaintiff's counsel, on the cross-examination of one Albertson, a witness produced by the defendant, to ask him whether he had ever collected anything from the defendant company for damages that their fumes and gases had done to his crops. The argument is that this raised a harmful issue entirely immaterial to the issue set forth in the pleadings. But counsel seems to have overlooked the fact that the witness had already testified on his direct examination that the fumes and vapors coming from defendant's factory across his orchard, were not at all injurious to his crops, or to the trees that bore them. The cross-examination was manifestly competent as tending to discredit this testimony.

The judgment under review will be affirmed.



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NEW JERSEY SUPREME COURT.

HOWARD W. MILLER,
Plaintiff and Respondent,
vs.
I. P. THOMAS & SON COMPANY,
Defendant and Appellant.

ON APPEAL.

BRIEF FOR DEFENDANT AND APPELLANT.

I.

The Complaint charges that on the 21st, 22nd, 27th and 28th days of May, and on the 5th, 6th, 27th and 30th days of June, and the 1st, 8th and 10th days of July, in the year 1909, and on the 18th, 19th and 20th days of May, in the year 1911, and on various other days and times between the date first aforesaid and the commencement of the suit, the defendant operated its Fertilizer Plant or Factory in such a careless and negligent manner that vast quantities of noxious, destructive, poisonous, unhealthful and foul vaporous gases, fumes, smoke, dust and other matters escaped and flowed from the factory over and upon the lands of the plaintiff and scorched and killed large quantities of vegetables

and fruit growing thereon. The second count charges, without allegation of negligence, that the defendant, on the dates aforesaid, in the manner aforesaid, scorched and killed large quantities of vegetables and fruit growing on the plaintiff's premises.

The Answer denied the charge of nuisance and damage set forth in the Complaint.

When the case first came on for trial the plaintiff suffered a voluntary non-suit; upon a retrial of the cause, the jury were unable to agree, and upon the third trial the jury rendered a verdict of \$1,800 damages.

II.

The errors upon the trial of the case are the admission of illegal evidence and the refusal of the Trial Judge to charge the defendant's request to charge, or to cover that matter in the charge delivered to the jury.

The proposition requested and refused is as follows:

"The injury must be clear, direct and positive. It must be the legitimate and natural result of the nuisance charged, and in no essential degree the result of other artificial causes. If the injury is in part the result of other causes, the action must fail unless it be clearly established that the injury would not have resulted except for the vapors. So, too, the injury must be of a tangible character; it must be a sensible, visible injury, discernible to an ordinary person and nowise dependent upon scientific tests or microscopic examination to discover. The injury must be such as is apparent to the eye in its ordinary condition, and must be actual, sub-

stantial, and not contingent, prospective or remote, and must be clearly traceable to the nuisance charged. If there is a reasonable doubt as to the cause of the injury, the benefit of the doubt will be given to the defendant, if his trade is a lawful one, and the injury is not the necessary and natural consequence of the act, as, in all actions of this nature, the burden of proof is upon the plaintiff." (See *Wood's Law of Nuisances*, page 624, Section 539.)

The objection to the admission of evidence is based upon the refusal of the Trial Judge to limit the proofs to the dates and occasions stated in the Complaint.

III.

It is stated in the *Cyclopedia of Law and Procedure*, Volume 29, page 1159, Section 6:

"One who uses his property in a lawful and proper manner is not guilty of a nuisance merely because the particular use which he chooses to make of it may cause inconvenience or annoyance to a neighbor, and nothing which is legal in its erection can be a nuisance *per se*, nor can any lawful business be spoken of as a nuisance, nor will such a business be enjoined merely because it cannot be carried on without some degree of offense and annoyance to those living near it."

It is important that the Court recognize the fact that a manufacturing plant of Commercial Fertilizer uses little animal matter and gives off little, if any, odor. There is no proof in the case of foul or unhealthful odors emitted from this plant.

In order that the Court may appreciate the character of this plant, in a few words, we quote from an article upon "The Need of Phosphoric Acid in Feeding Plants and Animals," published in the Rural New Yorker in the issue of May 22, 1915, by H. R. Lewis, the Chief Officer of the New Jersey Experimental Plant at New Brunswick:

"Phosphoric acid is one of the three basic ingredients of all fertilizers, nitrogen and potash being the other two. While the nitrogen gives the plant its luxurious green color and keeps it in a healthy condition, and while the potash is building the structure of the stalk and keeping the plant upright, the phosphoric acid is especially concerned in furnishing materials for the manufacture of seeds. Soils vary greatly in the natural amount of these ingredients which they hold. Different crops require different amounts of these plant food materials. A knowledge of the source and uses of phosphoric acid for growing crops, together with the approximate amounts required, will serve to stimulate us to a greater appreciation of its importance. Phosphoric acid, as used in fertilizers, comes from two general sources, mineral phosphates coming from phosphate rock and so-called organic phosphates coming from bone. Phosphoric acid exists in a variety of forms, some of which are soluble in water, while others require considerable weathering before they will become available to the plant. *The great bulk of phosphate acid offered for sale in the United States is of the mineral nature, and is manufactured from South Carolina, Florida, or Tennessee phosphate rock, its trade name being acid phosphate. These rocks are ground and treated with strong sulphuric acid, which reduces the phosphate to a more soluble and available condition.*"

* * * * *

“And so it is that phosphoric acid, a compound which I am afraid we are prone to neglect, is one which should be of special consideration to us. In the plants it is one of the three most essential parts of their food, going as it does primarily to make seeds, while in the animal it is not only one of the main constituents of the bone, but it performs a valuable function of maintaining complete and proper digestion. Let us then give our growing plants plenty of acid phosphate in our fertilizer formula, our poultry plenty of bone and meat scrap, and let our young pigs have at all times access to charcoal, bone meal and wood ashes. Phosphoric acid is a mineral, yet it has its work to do; it is not expensive to secure nor is it troublesome to use. More attention to its use will mean better crops and bigger animals.”

We submit as a fundamental proposition that as factories for the manufacture of acid phosphate are both lawful and essential, it is requisite that the operation of these factories be given the full protection of the law and be safeguarded from malicious attacks.

The plaintiff has not attempted to prove that the plant was negligently constructed or that it failed to have modern machinery and appliances. There is no dispute of the testimony for the defendant that the plant is modern in every particular and contains the most modern and efficient appliances and methods of operation. (See testimony of John J. Gesselman, page 185, and Ralph C. Gardner, page 189.)

The plaintiff's case is based upon negligent operation as stated by Anthony Aschenbrenner, a former employee of the Company. This witness stated fairly accurately the method of operation of the part of the plant under attack.

He said that off and on in 1909 and prior to that time he was employed in the Sulphuric Acid House of the defendant company (page 115). That he was a "pump man" and looked after that part of the plant and kept it in running order under the directions of the Superintendent. He said (page 116) the Acid Plant consists of the Burner House, the Chamber Room and the Pump Room. That the Burner House contained thirty burners or kilns, for burning pyrites or copper ore. That upon a fire of wood and coke this copper ore is shoveled; that sulphur gas burns off and passes through a flue into an oven called a Niter Oven. There they dump Nitric Soda into the pot through a funnel. That there are two of these pots or Soda Ovens; from them the resulting fumes or gases pass through the Glover Tower, where they mix, and pass through a flue into a set of chambers where it condenses. These chambers are large rooms closed in or lined with sheet lead. At the bottom of each chamber is a pan which collects the acid. After the gases pass through the last chamber or condenser all the sulphur gas has been condensed and utilized and nothing remains but the nitric gas, which is pumped into another tower called the Gay-Lussac Tower, where an acid flowing down takes it up so that it can be pumped back into the Glover Tower and again utilized.

That there must be a draught chimney from the chambers up through the roof into the open air, for the purpose of regulating the draught on the chambers. He said that when the proportions of sulphur gas and nitric gas were not correct, and when the plant wasn't watched so carefully as to ascertain this fact, that it would go "sour" and there would be more sulphur gas than could

be condensed by the nitric acid, and this sulphur gas would go out the chimney exit into the air. He stated that he had seen gases from this exit in small and in great quantities, and he was particular to watch the "foxtail."

On cross-examination he stated that the burning of copper pyrites is a continuous process, and that the making of sulphuric gas was observable when shoveling in the ore. On re-direct examination he stated that the watching of the foxtail was not the method prescribed for conducting the operation of the plant, but that the scientific method was the watching of the temperatures in the Chamber Room. If there was a change up or down from a given point, that too much sulphur gas was being made and the amount of ore should be cut down. On re-cross-examination he said that the overcharge of copper ore was nobody's fault, but that it was unavoidable, and meant a dead loss in the operation of the plant.

The plaintiff called another former employee by the name of Pitcher. He testified (page 143) that he was employed by the defendant company as chemist in 1911 and 1912. That the company's Acid Plant manufactured sulphuric acid from pyrites or iron sulphides, by cooking the sulphides and getting sulphurous oxide gas, and converting that into sulphuric acid in lead chambers by the action of sulphuric acid, sodium nitrate or potassium nitrate. That the proportion of gases is worked out by chemical equation. That when the soda gas is too low the sulphur gas probably would not be all converted into sulphuric acid. That in the defendant's plant the excess probably would be absorbed in the sulphuric acid in the last tower, but if not absorbed, then it would go out the

tower. That when the soda gases are in excess, the opposite would take place if it were not caught in the last tower. That in 1911 he had seen gases escape—but only the nitric gas. That when it left the tower it was carried by the wind in whatever direction it was blowing. *That the gas would be so highly dissipated it would be hard to say where it went, but he had seen it go as far as one hundred feet. On cross-examination he said by "dissipated" he meant "diluted." That it spreads out and becomes attenuated and more and more mixed with the air, and the further from the stack, the more and more dissipated and attenuated it becomes.*

We submit that this evidence of this chemist as to the attenuation and dilution of the relatively small amount of gas in the vast volume of air is extremely important, because this is a lawful business and conducted in a lawful manner and without injurious effect upon any other farmer.

IV.

The great volume of testimony in this case was directed to the question of injury and its cause. The plaintiff and some witnesses on his side testified to the original luxurious condition of the foliage, etc., then observation of gas or fume across the farm, and finally a condition of injury. Although the defendant was unable to meet the first and second propositions of alleged fact, it did show convincingly (although not successfully) that the injury was due to other causes, namely, disease and improper cultivation and handling. Although this was

a matter of the first importance the Trial Judge dismissed it with the bare statement that :

“The damage must be directly traceable to the alleged nuisance in question and not to any other cause.”

He declined to charge :

“The injury must be clear, direct and positive. It must be the legitimate and natural result of the nuisance charged, and in no essential degree the result of other artificial causes.”

His refusal to charge likewise omitted any reference to mixed causes, *i. e.* :

“If the injury is in part the result of other causes, the action must fail unless it be clearly established that the injury would not have resulted except for the vapors.”

His refusal to charge ignored this important proposition :

“If there is a reasonable doubt as to the cause of the injury, the benefit of the doubt will be given to the defendant, if his trade is a lawful one, * * *”

We press upon the attention of the Court the evidence of Horace Roberts, a specialist in fruit growing. *Many other witnesses were called on this subject by the defendant, but his evidence is sufficient for our purpose.*

He testified for the defendant (page 193) that he is forty-seven years of age and is a farmer and fruit grower. That he owns and operates twenty farms, but not quite as many now as formerly, as he has started three sons in the same business. He said he had made a study of the growth and diseases of fruit trees, of the insects

which attack the fruit and the method of treating disease of trees. That he and his sons have in fruit trees over 600 acres, comprising over 60,000 fruit trees. That the preceding year, before he divided the farms with his sons, his sales, clear of commission, were over \$95,000, while the sales from fruit alone were something over \$60,000. That the profit for that year was about \$18,000. That he was President of the New Jersey Horticultural Society for the term of two years, and is still Chairman of the Executive Committee of that organization. That he is also the Vice-President of the American Pomological Society.

He said (page 196) that he made a visit to the plaintiff's farm to look over his claim of damage on June 25, 1909, with several others. That he examined the farm thoroughly; he noticed the peppers looked very well; there was nothing the matter with the peppers but they were healthy and ripe. The other damage to crops, except the fruit orchards, was very trivial and will not be considered in this Brief, but attention will be confined to the alleged injury to the orchards (page 197).

“Ques. Well, what if anything, did you notice with reference to the apple orchard on that occasion?

Ans. The apples were dropping; it was very dry weather and they were very much troubled with fungus disease.

Ques. Was there anything unusual in the dropping of the apples as you noticed them on that occasion?

Ans. No.

Ques. Was it the ordinary June drop from an orchard of that character?

Ans. We thought so.

Ques. Now, you say they were suffering from fungus diseases. Will you please tell us what and how they affect the trees or the fruit?

Ans. Why, the nature of fungus diseases that were there? You see, they hadn't been sprayed at all; there had been nothing at all to combat them, and there was the frog-eye fungus and the leaf spots and the cedar rust fungus.

Ques. Now, would proper treatment have prevented in a measure any ravages that would come from those fungus diseases?

Ans. Oh, yes, they can all be checked.

Ques. All be checked?

Ans. Yes.

Ques. And do you check them in your operations?

Ans. Yes.

Ques. How?

Ans. By spraying.

Ques. And right here let me ask you, how many times a year do you find it necessary or essential to spray your apples?

Ans. Why, we do it at least three times, and commonly more; I should say at least four times we do it and even more.

Ques. And when do you commence?

Ans. Why, we spray in winter time with something for fungus and for scale, usually lime and sulphur; sometimes oils; then just before they bloom we spray with something to hit the curculio, and just as soon as the bloom falls we spray with something for the curculio and the coddling moth and the fungus diseases; a couple of weeks later we go at them again for the coddling moth—not the coddling moth—yes, the coddling moth that time and fungus diseases, and we like to do it later in the summer for the fungus diseases.

Ques. Now, then, the result of that effort is what, with reference to the quality and quantity of the crop?

Ans. Why, it is improved in both quantity and quality.

Ques. And the absence of that spraying in your experience would result in what?

Ans. Why, like we saw it there, we would expect to see at that time of year, see the apples coming off, and see the trees looking as we saw them.

Ques. Then the condition that you saw that orchard in was the result of failure to spray and properly care for it?

Ans. That is what we reported to the company.

Ques. What else, if anything, did you notice?

Ans. We noticed the hedge rows and poison vines, and the fungus was very bad that year and it even affected the chestnut oaks; we saw the fungus on them, saw it on the poison vines.

Ques. In June, June 25th, the early apples are pretty well matured by that time, aren't they, pretty well along?

Ans. Well, yes; they begin to show very well.

Ques. How did the crop that Howard had on his orchard strike you?

Ans. Why, it was better than the average for the year; it was better than we had at home with all my care; it is better than Elmer Clement had. We went over and looked at his orchard the same day; it was better than he had.

Ques. Did you notice anything the matter with the twigs or the branches in the orchard on that occasion?

Ans. That year it was more the fungus trouble; it was 1911 when the leaf blight and all the blights were so bad. This year there was more fungus troubles than blight troubles.

Ques. Seasons or years vary in that respect, do they?

Ans. Oh, yes.

Ques. Did you notice any twig blight that year?

Ans. Not very much; no.

Ques. What was it, in your judgment—I will cross that out. What was it, if you know, that caused the dropping of the apples that were on the ground when you were there in June, 1909?

Ans. The fungus troubles, fungus diseases

Ques. Did you examine the leaves on the trees or any of the apples on the ground?

Ans. Yes.

Ques. And what did you ascertain from that examination?

Ans. We were willing to say it was the fungus troubles, also helped out by insects; the codling moth and curculio all had their share in it, too.

Ques. Was that apparent on the fruit that was on the ground?

Ans. Oh, yes, it all shows there; it was the combination that threw them off.

Ques. You say you walked all around the place, then you went in what is called the young orchard and the old orchard, did you?

Ans. Yes; we even felt the hot bed sash.

Ques. For what purpose?

Ans. Well, if there was any acid or anything of that kind I have been told it would show first on glass; glass is very sensitive.

Ques. And was there any indication?

Ans. Absolutely clean; that is, just touched it, and it all wiped off clear.

Ques. And the effect of acid on glass is to cloud it?

Ans. Yes.

Ques. Make it obscure?

Ans. Yes.

Ques. What did you notice, if anything, in what is called the old orchard, the oldest trees there, with reference to any dead limbs and so forth?

Ans. Well, the old orchard is very old, the limbs there, they looked as if they had been dead for a good while. I don't think he had made an effort to cut out the old dead limbs off of that orchard.

Ques. What do you call the old orchard?

Ans. Right up next to the house, the part nearest to the house.

Ques. Now, did the fruit trees in May or June of 1909 show that they had been recently trimmed?

Ans. No; there wasn't much evidence of trimming there.

Ques. Was there much or little old or dead wood in the trees?

Ans. That larger orchard, the one nearest the factory, there wasn't very much dead wood in there; it hadn't made much growth. You see, it hadn't been fertilized, hadn't been manured, there hadn't been much growth, there wasn't very much there to trim out.

Mr. Avis: I object to the answer and ask that it be stricken out with relation to the fertilizer and so forth.

Ques. I was just going to ask about that; is it necessary in addition to spraying trees to fertilize the orchard to feed the trees?

Ans. It is necessary if you want to get the full quantity and full quality of fruit.

Ques. Do you fertilize your orchards?

Ans. Oh, yes.

Ques. What fertilizer do you use; what character of fertilizer; I don't mean the make?

Ans. Why, it varies with year to year a little bit. We give them an abundance of lime, an abundance

of phosphoric acid, and an abundance of potash and ammonia. We regulate that a little better with the quantity of fruit we have.

Ques. Do you make any effort by chemical analysis or otherwise to ascertain what the soil needs or what the tree needs in the orchards?

Ans. Why, we get them by watching the trees and watching the fruit, the way they mature their fruit.

Ques. That tells you the kind of fertilizer to apply for another year, does it?

Ans. That is a guide to us.

Ques. Now, then, was there any evidence that this orchard had been fertilized at all?

Ans. It looked like a starved orchard, and Mr. Miller told me that he hadn't fertilized or manured it; that is, the main part of the orchard, next to the factory.

Ques. You learned that, as a fact, that they had not been fertilized or manured, from Mr. Miller?

Ans. Yes.

Ques. Consequently you say that there would be little if any growth on that account?

Ans. Very little growth.

Ques. How old, Horace, would you say that oldest orchard was or the oldest part of the orchard?

Ans. Next to the house? Oh, I suppose they are sixty years old.

By the Court:

Ques. What is the life, the ordinary life of an apple orchard?

Ans. Why, something generally happens to them, but I have trees at home that my father gathered apples from when I was a little boy, and he would be close to eighty-five years old if he was living now, and they are still healthy and strong.

By Mr. Joseph Gaskill:

Ques. It depends on the care and the treatment of the trees, doesn't it?

Ans. Yes.

Ques. Now, did you see in the orchards there any evidence of the trees being burned or injured on one side any more than on another?

Ans. No; I didn't see that.

Ques. *Did you see anything in the orchard like a burning of the leaves and twigs all on one side of the trees toward the factory or the mouth of the creek, more so than on any other part of the tree?*

Ans. No.

Ques. Horace, what effect on young fruit or blossoms does a northeast storm or wind have?

Ans. Why, it is very serious; it is not at all unusual if we have a big storm at that season of the year for us to lose our fruit crop.

Ques. And suppose the northeast winds bring in a fog and a mist from the river and the creek, blowing over the orchard, what effect would that have?

Ans. The fog and mist would be a protection rather than otherwise.

Ques. The fog and mist would be a protection from the effects of a northeast wind unaccompanied by fog or mist, is that right?

Ans. I think so.

Ques. *Do apple trees as a general rule bear uniformly each year?*

Ans. *The natural way in the orchards, what we used to always expect before we got to spraying, would be a full crop and then a few, have a crop and then a few. They have their on years and off years.*

Ques. *Alternate years?*

Ans. *Alternate years; yes.*

Ques. *Were 1909 and 1911 the fruit years or off years?*

Ans. They were off years.

Ques. 1908, 1910 and 1912 were the fruit years, were they, at that period?

Ans. Yes; and 1914.

Ques. That is your experience, is it, growing and marketing apples?

Ans. Yes.

Ques. Mr. Miller has testified that within, I forget just what period or how recent—the testimony will show—that he trimmed his orchard and took out forty cart loads of limbs and dead wood and stuff from the trees. What have you to say as to that quantity from the observation that you made there in 1909?

Ans. Well, he could trim those old apple trees next to the house and fill a great many carts without making much mark on the orchard.

It don't take much big apple tree wood to fill a cart, and those are very large apple trees and a good many dead limbs in them. I don't doubt but what he got that many.

Ques. And you were a witness at the former trial in 1906?

Ans. Yes.

Ques. I think you testified at that time that there was no evidence that the orchard had been recently trimmed?

Ans. No, there wasn't; you see, the old orchard he had not trimmed and this orchard next to the factory where there wasn't much growth, there wasn't any particular need of trimming.

Ques. Now, when did you go there again, Horace?

Ans. I was there in July in 1909.

Ques. The same year?

Ans. No, 1911.

Ques. Oh, in July of 1911?

Ans. Yes.

Ques. That was after the second damage had been complained of?

Ans. Yes.

Ques. Going back for a moment, you said there wasn't much growth in the young orchard there toward the phosphate works; why was that?

Ans. Well, it was bearing very heavily, a great orchard to bear, and it wasn't half farmed and it wasn't fertilized at all; the trees were not making the growth they should.

Ques. Did you notice anything about the cultivation of the soil, the plowing in 1909—I am going back to that?

Ans. In 1909 it had just been plowed just before we had gotten there, just a few days; it was a very, very dry time and it helped—the plowing then would help throw off those leaves, because any farmer will know that going in when soil is very dry and plowing, it is impossible to plow shallow; you can plow deep or you can't plow at all, and they had gone through in that dry weather and plowed that way.

Ques. And was it plowed deep or shallow?

Ans. Deeper than it should be.

Ques. *What was the effect of that deep plowing?*

Ans. *They made the trees look worse; they showed the drouth; they were suffering from drouth.*

Ques. *Did it cut any roots?*

Ans. *Yes, it cut roots.*

Ques. *What effect does that have?*

Ans. *Well, it stunts the tree, helps check the tree, helps retard the growth, especially at that season of the year.*

Ques. Let's go on to 1911; you went there you say in July of 1911? Who was with you then?

Ans. Arthur Collins, Mr. Miller, I think Mr. Lippincott, Mr. Stines; Mr. Avis was there.

Ques. Senator Avis, the counsel?

Ans. Yes, Senator Avis.

Ques. Now, then, did Mr. Miller take you around over the orchard at that time?

Ans. Mr. Miller went around all over it and showed us the trees.

Ques. Pointed out that which he claimed was injured?

Ans. Yes, we went around with him all over.

Ques. Now, then, as a matter of course, he was pointing out that which he claimed was injured by fumes from the phosphate works?

Ans. He was showing us the damaged places.

Ques. That he claimed?

Ans. Yes.

Ques. Now, then, just tell us what you saw at this place, and what, if anything, was the matter with the trees that he pointed out to you in July of 1911?

Ans. Why, there were all kinds of things; there was the fire blight and the leaf blight, the twig blight and all these fungus diseases. 1911 was the worst epidemic of blights we have had for a long time, and it didn't seem to make much difference what was the matter with the tree, he would show us that tree.

Ques. And those things that you have described, were they evidenced by the appearance of the tree and the examination that you made?

Ans. Oh, yes, we could look in the trees but there was nothing unusual that I saw, nothing that I could not trace to natural causes.

Ques. That is what I was going to ask you, those trees that Howard Miller pointed out to you, the parts of the trees in July, 1911, did you see anything that could not be traced to natural causes?

Ans. No.

Ques. Those various blights and fungus diseases?

Ans. No.

By the Court :

Ques. Did you see anything in the appearance of these trees that would indicate that they had been hurt by the fumes from this factory?

Ans. No, not at all.

Ques. Did you see any evidence that fumes had come in contact with the trees?

Ans. No. I would like to explain a little the effects of some of these.

Mr. Joseph Gaskill: Yes, do so, please; explain the effect of these blights and these diseases.

The Witness: May I quote from authorities on it?

Ques. If you have any authorities there and any illustrations I will ask you to show them to the Court and jury. What is it you have in your hand?

Ans. I have a bulletin by W. M. Scott; he is one of the best known authorities of the United States. He was with the Department of Agriculture a good many years, but he was taken out, and he was one of the best known authorities on this there is in the United States.

Ques. And what is the date of the pamphlet you have?

Ans. It don't seem to be dated.

Ques. Very well.

Ans. 1912. Now, one of the fungus diseases that we can recognize there easily is the frog-eye, that is one of the commonest. "Leaf spot, also known as frog-eye, is perhaps the most common fungus disease affecting the foliage of the apple. It occurs in all humid sections of America where the apple is grown and in unsprayed orchards causes considerable dam-

age, even defoliating the trees by mid-summer. This loss of foliage not only prevents the proper development of the fruit, much of which drops prematurely, but also weakens the trees and fruit buds for the following year's crop."

Ques. Now, then, Mr. Roberts, did you find that frog-eye disease in the orchard on the trees that Howard Miller pointed out to you in July of 1911?

Ans. Yes; also 1909.

Ques. Now, then, what else; you spoke about a cedar rust, I think. Have you got an illustration of that here?

Mr. Avis: He didn't see any cedar rust down there that I recollect.

The Witness: I found that on the apples in 1912.

Ques. Now, show that to the jury, that cedar rust.

Ans. That is the common thing you see on an apple.

Ques. Point to the illustration of Plate 12.

(Witness complies.)

Ques. Is this the leaf as it is affected with cedar rust?

Ans. Yes.

Ques. Now, then, Mr. Roberts, the description, just give us that, please.

Ans. "The disease first appears as small purplish specks which rapidly enlarge and finally reach a diameter of from one-eighth to one-half inch, and become reddish brown in color. The spots are usually circular but after mid-summer they may become irregular or lobed in outline, the central portion changing to a gray color. This lobe extension of the disease is apparently due to a secondary growth of the fungus from two or more points on the margin of the original spot. A large number of spots

may occur on a single leaf, which in such cases will usually turn yellow and drop. The fungus causing leaf spot also causes the black rot or ring rot on the fruit and twigs, especially those killed by pear blight. Fungus growing in these dead twigs produces spores in great abundance and the leaves become affected principally from this source. The fungus passes the winter in dead cankers on the trunks and branches, and it grows on dead twigs, in limb and trunk cankers and in old leaves. During the early spring spores are produced in great numbers, and those that find lodgment on the young leaves germinate if moisture is present. The resulting fungus threads enter the tissues producing characteristic leaf spot. The disease begins to appear in early spring soon after the young leaves unfold and infection continues to take place until mid-summer or somewhat later. The principal infection period is early in the season while the leaves are young, as the fungus does not seriously attack more mature leaves." Now, treatment—

* * * * *

"Ques. Now, let's go into the pear orchard, July of 1911.

Ans. The pear orchard showed signs of blight, leaf blight, and it was on a very poor piece of ground, and it hadn't had any care.

Ques. What was the evidence that that pear orchard hadn't had any care?

Ans. Why, there were briars in it.

Ques. Whereabouts were the briars?

Ans. Right in there among the pear trees, briars and bushes.

Ques. How big?

Ans. Why, as high as this table.

Ques. Well—

Ans. And they hadn't been trimmed.

Ques. They had not been trimmed?

Ans. No.

Ques. Was there any fruit there?

Ans. Yes; I think so.

Ques. Was there as much fruit as you, from your knowledge, experience and study, would estimate trees in that condition and without care and cultivation could produce?

Ans. Oh, they didn't have half a chance. Some of those trees had apparently never grown very much since they were first put out; some were comparatively large trees. Some were missing; there was some peach trees there instead of pear trees, and the poorest piece of ground on the farm, I think.

Ques. Was there anything else that you observed at that time?

Ans. I observed these blights very carefully at that time.

Ques. Which blights now do you refer to—this is July of 1911—what you have already spoken about?

Ans. The blights in the apple orchard, yes. May I read from the authorities a little on blights?

The Court: Oh, no, no."

The Court will be interested in observing that no one else in that neighborhood suffered any injury from noxious gases or fumes from that plant. Isaac Jones (page 92), Alfred Jones (page 104), Richard Wood (page 105) and Matthew Thompson (page 110) were called for that purpose, but the results were negative. The latter man farmed the farm upon which the Fertilizer Plant was located, and although (page 112) the wind blew right over his farm, it never did any harm of any account—merely nipped the leaves a little, but did not interfere with the

crop. Moreover, John J. Albertson (County Engineer of Camden County), the owner of the farm east of the plant, across the creek and about 200 feet away, said that he has owned that farm for about twenty years. That the fruit from the orchards on that farm is better and sells for higher prices than that from his other farms. That (page 237) there are no fumes from the plant which are destructive to the trees or crop from that orchard.

V.

This case was tried in the Circuit Court and, consequently, a rule to show cause would have been returnable before the Trial Judge. We submit that the Trial Judge failed to grasp and apply in his charge the legal principles governing a proper settlement of this case. Consequently, it has been necessary to present the case to the Court upon legal errors only.

Notwithstanding the fact that this defendant was entitled to be safeguarded in its business with all the protection that the law affords, the Trial Judge did not announce a single proposition favorable to the defendant, except the insufficient statement that the damage must be directly traceable to the alleged nuisance in question and not to any other cause. He stated flatly that a person must use his property in such a way as not to injure the property of his neighbor; and then stated the plaintiff's contention, and then stated that the defendant denies that it maintained a nuisance, and that if there was a failure of crops it is not responsible. There is not a word in the charge that covers the principles of law so clearly stated in the request and copied from Wood's Law of Nuis-

ances, page 624, Section 539. It is not surprising that the jury was so misled as to the issues and proofs in the case as to render so exorbitant a verdict for the losses sustained in two poor fruit years.

VI.

We submit that legal error was committed by the Trial Judge in refusing to limit the evidence as to the omission of noxious fumes and gases to the specific dates set forth in the Complaint. Five instances of this character are set forth in the Grounds of Appeal.

A serious error was committed (Sixth Ground of Appeal) in the examination of John J. Albertson (page 238).

Ques. And did you ever collect anything from the I. P. Thomas & Sons Company for damages that their fumes had done your crops?

Mr. Joseph Gaskill: One moment; I object. You mean the present company since Mr. Lippincott has had charge of it?

Mr. Avis: I don't care anything about that; I mean the I. P. Thomas & Sons Company. The question asked by Judge Gaskill, if the Court please, was whether he had ever seen any fumes come over there, whether he had ever had any damage.

The Court: It seems to me that is proper cross-examination.

Ans. Yes.

Mr. Joseph Gaskill: I ask the benefit of an exception.

The Witness: I don't know who was the owner, but a good many years ago we had a corn crop in that meadow that was damaged.

This raised a harmful issue, entirely immaterial to the issue set forth in the pleadings. Mr. Lippincott, the President of the Company, testified in answer to this testimony that he became connected with the defendant in 1895. That the plant burned down in August, 1897. That it was rebuilt in 1898, but that the Acid Plant had been entirely modernized. That in the old plant no effort was made to condense any fumes. That in 1897 the interest of I. P. Thomas was purchased, and he was given as a dividend about \$112,000 in old and doubtful accounts that had accumulated during his time, and that this dividend was subject to an account on the books of Parry & Albertson for damages.

It is respectfully submitted that judgment must be reversed with costs.

GASKILL & GASKILL,
Attorneys and of Counsel with Appellant.

NEW JERSEY COURT OF ERRORS AND
APPEALS.

HOWARD W. MILLER,
Plaintiff and
Respondent,

VS.

I. P. THOMAS & SON COM-
PANY,

Defendant and
Appellant.

ON APPEAL.

BRIEF FOR PLAINTIFF AND RESPONDENT.

JOHN BOYD AVIS, Attorney.

This is an appeal from the Supreme Court on the affirmance of a judgment of the Gloucester County Circuit, rendered on the verdict of a jury; the action was commenced in the Gloucester County Circuit Court for damages alleged to have been sustained by plaintiff because of the destruction of and damages to certain crops and trees on farm of plaintiff, by noxious gases and fumes emitted from the fertilizer plant of defendant.

The appellant's brief states that the chief point before the Court is the approval of the Supreme Court of the refusal of the trial Judge to charge the defendant's requests. An examination of the case shows that that portion of the requests which was good, was charged by the trial Court. That portion of request which asked the Court to charge "reasonable doubt," is surely not the law of this State on this subject. The plaintiff in a civil action is not required to prove his case beyond a reasonable doubt, but by a preponderance of evidence.

The theory of appellant is not clearly stated in his brief, but if it is that the action was based upon an act that might be criminal, this proposition is clearly disposed of in the case of *Blackmore vs. Ellis*, 70 N. J. L. 264.

The fact that the trade engaged in is a lawful one, would make no difference as to the application of the ordinary rules of evidence, or instructions. 29 *Cyc.* 1270, note 62.

The Supreme Court was right when it held that if a request to charge contained some propositions of law which were good, and others which were bad, the Court was justified in refusing to charge all of the requests.

"It is not error to refuse a request to charge several propositions if any of them are bad."

Consolidated Traction Co. vs. Chenowith,
58 N. J. L. 416.

"When a party asks for instruction which is partly good and partly bad, it is proper to refuse it altogether."

Dedrick vs. Central R. R. Co., 74 N. J. L.
424, 427;

See also, *Miller vs. Delaware River Trans.
Co.*, 85 N. J. L. 700, 702;

See also, *Floresch vs. Donnell*, 82 Atl. 733, 734.

The farm of plaintiff on which the crops and trees were growing, adjoins the lands of defendant, and is situated about two hundred to three hundred yards from defendant's factory.

The proof tended to show that under certain conditions of atmosphere and direction of wind, the gases and vapors were carried across the farm of plaintiff along the ground, which caused the injury complained of.

The complaint contains two counts,—one of negligence, and one alleging nuisance.

The testimony tends to show both negligence and nuisance.

Anthony Aschenbrunner testifies, on pages 121, 122 and 123 of printed book, that there were times when an overcharge of sulphur gases would cause a gas to be emitted from the stack of the factory, which at times passed low over Mr. Miller's property, and a similar condition existed when there was an overcharge of nitric gases.

Albert M. Pitcher's testimony also shows escape of gases caused by failure to have proper proportions of mixture of sulphuric and nitric gases, pages 143 to 148.

This testimony shows negligence in the operation of the plant to such an extent as to allow the escape of gases and fumes, which might be conserved.

In both counts of the complaint, in addition to alleging specific days that the fumes and gases escaped, it is also alleged generally that the fumes and gases escaped on divers other dates and times between May 21, 1909, and the date of the commencement of this action, to wit, April 18, 1913.

The first ground of appeal is with relation to testimony of Isaac Jones, found on pages 93 and 94.

All of the testimony of Mr. Jones is with relation to the gases and fumes emitted from the factory of defendant. This testimony we deem to be competent, as it corroborates the other witnesses as to the color and nature of gases or fumes escaping from the factory of defendant, pages 96 and 97, and also as to the effect of these fumes on eyes and throat, &c., pages 98 and 99.

All of this testimony tends to prove the nuisance and seems perfectly competent.

The second and third grounds of appeal allege improper testimony given by Richard Wood, whose testimony is found on pages 105 to 109 of the printed book.

The testimony given by Wood is along the same line tending to corroborate other witnesses as to nuisance, and that the fumes went in the direction of Mr. Miller's property.

We fail to find anything in his evidence improper or irrelevant.

The third ground of appeal is with relation to testimony of A. J. Trumbull found on pages 161 to 164 of printed book. This testimony refers to the question of nuisance and was proper and competent.

The same objection is made to the testimony of W. Earle Miller, in the fifth ground of appeal, and we deem it competent for the same reason.

The sixth ground of appeal alleges impropriety in the cross-examination of John J. Albertson, a witness called and examined by defendant.

This witness on pages 235, &c., testified that he had been a part owner in a farm, across the creek from the defendant's plant and Miller's farm, for about twenty years. His testimony related to a pe-

riod of twenty years and by it defendant endeavored to show that during that period there had been no nuisance emanating from defendant's plant, and that no damage had been done to his fruit trees or crops by fumes, during that time.

This witness on page 237 of printed book, testifies:

“Q. From your experience and observation can you say whether or not any fumes that came across the creek from this factory in your orchard are destructive or not?

A. I can say they are not to our trees.

Q. Not destructive?

A. Not at all.

Q. Or to the crop?

A. No, nor to the crop.

Q. Are they beneficial than otherwise?

A. Well, we have gotten very satisfactory crops from that farm and very satisfactory prices, more so than either of the other farms.”

The question objected to by defendant's counsel was asked for the purpose of discrediting the witness' statements, and showing that as a matter of fact the fumes had damaged his crops on this same farm which he was then testifying about. It was not asked to in any way prove the damage to plaintiff's property.

His testimony covers a period of twenty years, and whether the damage to witness' crops was in 1905 as suggested, or earlier, it was within the time to which his testimony on direct examination related.

The reply to the questions along this line on page 239 demonstrate the propriety of this question.

“Q. I don't care about that, it was somewhere about that time: might have been before, probably. I don't know. The fumes came over

there and damaged your crops did they, your corn crop?

A. Yes.

Q. And I. P. Thomas & Son Company paid you for the damage?

A. They did without question. Came over and saw it and paid us for it."

We cannot understand upon what basis this examination could form a ground for appeal or reversal.

The last ground of appeal is based upon the Court's refusal to charge a request of defendant.

All of the requests with the exception of the last one are fully covered by the charge of the Court.

The first point in request is that "The injury must be clear, direct and positive." This request is charged by the Court wherein it said, "Now, if the plaintiff's crops and trees were not damaged by reason of the nuisance sought to be established in this case, you are bound to decide for the defendant, &c."

Several times in its charge, the Court with relation to damage or injury instructed the jury that plaintiff must make out his case showing both the maintenance of a nuisance and his damage by a preponderance of evidence, completely covering this portion of request.

The second point in request is that "It must be the legitimate and natural result of the nuisance charged, and in no essential degree the result of other artificial causes."

This request was charged by the Court in the general charge as follows:

"The plaintiff cannot recover for anything not caused by defendant: in other words, the

damages must be directly traceable to the alleged nuisance in question and not to any other cause.”

This and other portions of charge cover this request completely, as well as the third point in request to charge.

The fourth point in request is covered by general charge of Court, and there was no evidence produced in the case which relied upon scientific tests or microscopic examinations.

The fifth point in request was covered by Court’s charge as shown in printed book, and as herein set forth, and no effort was made in the case to predicate damages upon anything contingent, prospective or remote, or that was not apparent to the eye.

The sixth point in request is improper and illegal. The law places the burden on plaintiff to establish his case by a preponderance of evidence, only, but he is not required to prove his contentions beyond a reasonable doubt as suggested in this request.

Every legal suggestion in the request was charged by the Court fully and completely, although not in the same language.

The judgment in this case is sustainable on both counts in complaint, under the decision of the Court of Errors and Appeals in the case of *Hinmon vs. Somers Brick Co.*, 75 N. J. L. 869, wherein the Court held:

“An allegation in a declaration that defendant negligently allowed noxious fumes to escape from its factory to the damage of plaintiff’s crops, does not require proof of the precise negligence which caused such fumes to escape, for from proof of the escape and consequent damage therefrom, negligence will be inferred.”

The testimony of the witnesses forming the basis for grounds of appeal from No. 1 to No. 5, inclusive, we claim was admissible to corroborate testimony of plaintiff, even though the witnesses, whose testimony is objected to, did not actually see the damage done, as tending to prove that the nuisance objected to was a continuing nuisance and of the same character as that testified to by plaintiff.

“Testimony tending to show that others were annoyed and injured by smoke and cinders is competent as tending to prove that the nuisance objected to was capable of inflicting the injury complained of. *Crane Co. vs. Stammers*, 83 Ill. App. 329.”

29 Cyc., p. 1267, N. 34.

Under all of the circumstances in this case, we respectfully submit that there was no reversible error, and that the judgment should be affirmed.

JOHN BOYD AVIS,
*Attorney for Plaintiff-
Respondent.*

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Ralph C. Gardner	189	190	
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Thomas C. LeFevre	261	264	
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NOTICE OF APPEAL.

NEW JERSEY SUPREME COURT.

HOWARD W. MILLER,
Plaintiff-Appellee,
vs.
I. P. THOMAS & SON COM-
PANY,
Defendant-Appellant.

ON APPEAL. 10
NOTICE OF APPEAL.

To John Boyd Avis, Esq., Attorney of Plaintiff and Appellee:

Take Notice that the defendant, I. P. Thomas & Son Company, appeals to the Court of Errors & Appeals from the whole of the judgment entered in this cause on the following grounds: 20

1. Errors in the record.
2. Affirmance by the Supreme Court of the judgment in the Gloucester Circuit Court.

GASKILL & GASKILL,
Attorneys of Appellant.

[ENDORSED]

30

Service acknowledged Nov. 27, 1915.
John Boyd Avis,
Atty. for Plaintiff-Appellee.
(Filed Nov. 30, 1915)

Rule of Affirmance.

NEW JERSEY SUPREME COURT.

10	HOWARD W. MILLER, <i>Plaintiff-Appellee,</i> vs. I. P. THOMAS & SON COM- PANY, <i>Defendant-Appellant.</i>	}	ON APPEAL FROM GLOUCESTER CIR- CUIT COURT. RULE OF AFFIRM- ANCE.
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20 This cause having been duly argued at the June Term, 1915, of this court, by Gaskill & Gaskill, of counsel for the appellant, and John Boyd Avis, of counsel for the appellee, and the Court having considered the same, and finding no error in the record or proceedings in the Gloucester County Circuit Court;

30 It is thereupon ordered and adjudged that the judgment of the Gloucester County Circuit Court removed by the appeal in this cause, be affirmed, with costs; and that the record be remitted to the Gloucester County Circuit Court, to be proceeded with in accordance with this judgment and the practice of said court.

Dated November 24, 1915.

Entered November 24, 1915.

On motion of

JOHN BOYD AVIS,
Attorney of Appellee.

I, WILLIAM C. GEBHARDT, clerk of the Supreme Court of the State of New Jersey, do certify that the foregoing is a true copy of the notice of appeal filed and also of a rule entered in the minutes of the court in the above-stated cause.

In testimony whereof I have set my hand and the seal of said court at Trenton, this thirtieth day of November, A. D. Nineteen hundred and fifteen.

WM. C. GEBHARDT,
Clerk. 10

GROUND OF APPEAL.

NEW JERSEY SUPREME COURT.

HOWARD W. MILLER,
Plaintiff & Appellee, }
vs. } **ON APPEAL. 20**
I. P. THOMAS & SON COM- } **GROUND OF APPEAL.**
PANY, }
Defendant & Appellant. }

To John Boyd Avis, Esquire, Attorney of Plaintiff:

The appellant states the following grounds of appeal: 30

1. The trial Judge unlawfully admitted illegal evidence from Isaac Jones as follows:

“Q. During the year 1909, did you notice anything coming out of the stacks of the I. P. Thomas & Son Company’s plant?”

A. Well, I couldn't say I seen it so often.

Q. Well, what did you see?

(Objection that the proof must be limited to 1909 and the time when the alleged injury was done.)

The Court: I think you are entitled to show anything from the 18th of May on. Exception noted for the defendant."

10

2. The trial Judge unlawfully admitted illegal evidence from Richard Wood.

"Q. After May 18th, 1909, did you ever see these fumes that have been spoken of?

(Same objection as before and exception taken to the ruling of the Court.)"

3. The trial Judge unlawfully admitted illegal evidence from Richard Wood.

20

"Q. Now, won't you tell us how far you could see this fume that you speak of?

(Objected to this class of testimony as irrelevant to the issue in this case. The objection overruled and exception noted for the defendant.)"

4. The trial Judge unlawfully admitted illegal evidence from A. J. Trumbell.

30

"Q. During 1910, have you ever observed anything coming from the I. P. Thomas & Son Company's factory?

(Objected to as incompetent and immaterial. Objection overruled and exception noted.)"

5. The trial Judge unlawfully admitted illegal evidence from W. Earle Miller.

"Q. Between the 20th day of May, 1909, and

May, 1911, did you experience or see anything with relation to these fumes?

(Objected to as immaterial and because the testimony does not relate to the dates fixed in the complaint. Objection overruled and exception noted for the defendant.)”

6. The trial Judge unlawfully admitted illegal evidence from John J. Albertson.

“Q. And did you ever collect anything from the I. P. Thomas & Son Company for damages that their fumes had done to your crops? 10

(Objection made to the question. Ruled to be proper cross-examination. Exception noted.)”

7. Because the trial Judge unlawfully refused to charge the defendant's request to charge as follows:

“The injury must be clear, direct and positive. It must be the legitimate and natural result of the nuisance charged, and in no essential degree the result of other artificial causes. If the injury is in part the result of other causes, the action must fail unless it be clearly established that the injury would not have resulted except for the vapors. So, too, the injury must be of a tangible character, it must be a sensible, visible injury, discernible to an ordinary person and nowise dependent upon scientific tests or microscopic examinations to discover. The injury must be such as is apparent to the eye in its ordinary condition, and must be actual, substantial, and not contingent, prospective or remote, and must be clearly traceable to the nuisance charged. If there is a reasonable doubt 20 30

as to the cause of the injury, the benefit of the doubt will be given to the defendant, if his trade is a lawful one, and the injury is not the necessary and natural consequence of the act, as, in all actions of this nature, the burden of proof is upon the plaintiff."

GASKILL & GASKILL,
Attorneys and of Counsel
with Appellant.

10

[ENDORSED]

Service acknowledged March 24, 1915.

John Boyd Avis,
Atty. for Plaintiff and Appellee.
(Filed Apr. 28, 1915.)

Wm. C. Gebhardt,
Clerk.

20

JUDGMENT RECORD.

*The State of New Jersey to I. P. Thomas & Son
Company, a Corporation:*

You are summoned to answer the an-
[SEAL] nexed complaint of Howard W. Miller,
30 in an action at law in the Gloucester
County Circuit Court. And take notice that unless
you file your answer to said complaint with the clerk
of the Gloucester County Circuit Court, at Wood-
bury, within twenty days after service upon you of
this writ, and the annexed complaint, the plaintiff

may proceed in the suit, and judgment may be entered against you.

Witness, HOWARD CARROW, ESQUIRE, Judge of our said Gloucester County Circuit Court, at Woodbury, this eighteenth day of April, nineteen hundred and thirteen.

JAMES LAFFERTY,
Clerk.

JOHN BOYD AVIS,
W. EARLE MILLER,
Attorneys.

10

Complaint.

GLOUCESTER COUNTY CIRCUIT COURT.

HOWARD W. MILLER,
Plaintiff,
vs.
I. P. THOMAS & SON COM-
PANY, a corporation,
Defendant.

20

ACTION AT LAW.
COMPLAINT.

Plaintiff, Howard W. Miller, of the Borough of Paulsboro, County of Gloucester and State of New Jersey, says: 30

First Count:

1. At the times herein stated, defendant was, and still is, a corporation of the State of New Jersey.

2. Plaintiff is, and at the times hereinafter stated, was the owner and in possession of a certain farm and messuage situate in the Borough of Paulsboro aforesaid, and adjacent to the factory and works of the said defendant, upon which said farm said plaintiff planted, raised and cultivated peppers, corn, apples, pears, shade and fruit trees, the raising and cultivation of which was the plaintiff's business and means of livelihood.

10 3. Defendant, before, and at the times hereinafter stated, was the owner, possessor and operator and manager of a certain plant, factory or works, situate in the Borough of Paulsboro aforesaid, which said works were occupied and used by the said defendant for the manufacture and production of fertilizers, phosphates, chemicals and other commodities, and in the manufacture thereof the said defendant used certain chemicals and other materials, and also certain machinery and apparatus.

20

4. The said defendant, on the 21st, 22nd, 27th and 28th days of May, and on the 5th, 6th, 27th and 30th days of June, and on the 1st, 8th and 10th days of July, in the year 1909, and on the 18th, 19th and 20th days of May, in the year 1911, and on divers other days and times between the 1st date aforesaid and the commencement of this suit, in the producing, mixing and preparing of the phosphates, fertilizers, chemicals and other substances, materials and commodities, so carelessly, recklessly, negligently and improperly manufactured, produced and mixed the same, and operated and managed the said machinery and materials so used as aforesaid, and used and operated such improper, inefficient, defective and unfit machinery and apparatus in the manufacture of

30

its said product, that vast quantities of noxious, destructive, poisonous, unhealthful and foul vapors, gases, fumes, smoke, dust and other matters were permitted, allowed and did escape and flow from the factory of said defendant at the respective times and dates aforesaid, over and upon the lands and premises of the plaintiff, and upon the peppers, corn, apples, pears, shade and fruit trees, &c., thereon, growing on the property of plaintiff, and by reason thereof large quantities of the said vegetables and fruit have been and were scorched and killed and utterly and entirely destroyed, and whereby a large number of said fruit trees have been utterly and entirely destroyed and rendered unfit for use and became a total loss, and large numbers of said fruit trees have been damaged, scorched, burned and rendered of greatly decreased value to plaintiff. 10

Second Count:

1. Paragraphs 1, 2 and 3 of the first count are made a part of this count. 20

2. On the 21st, 22nd, 27th and 28th days of May, and on the 5th, 6th and 27th and 30th days of June, and on the 1st, 8th and 10th days of July, 1909, and on the 18th, 19th and 20th days of May, 1911, and on divers other days and times between the first date aforesaid and the commencement of this suit, the said defendant has employed and used, and still uses in the preparation of its phosphates and fertilizers at its factory, aforesaid, certain chemicals and other substances, and has allowed and still allows vast quantities and volumes of noxious, destructive, poisonous, unhealthful and foul vapors, gases, fumes, smoke, dust and other matters to escape and 30

flow from the said factory, works and premises of the said defendant, at the respective times and dates aforesaid, over and upon the lands and premises of the said plaintiff, and upon the peppers, corn, apples, pears, shade and fruit trees, &c., thereon growing, being the property of said plaintiff, whereby large quantities of the said vegetables and fruit have been scorched and killed, and utterly and entirely destroyed, and whereby a large number of said fruit trees have been utterly and entirely destroyed, and rendered unfit for use, and became a total loss, and large numbers of said fruit trees have been damaged, scorched, burned and rendered of greatly decreased value to plaintiff.

Plaintiff demands \$5000 damages.

JOHN BOYD AVIS,
W. EARLE MILLER,
Attorneys for Plaintiff.

20

STATE OF NEW JERSEY, }
GLOUCESTER COUNTY, } ss.

WILLIAM C. ALLEN, of full age, being duly sworn on his oath says, that he is the sheriff of the County of Gloucester and that on the twenty-first day of April, A. D. 1913, he served a true copy of the summons and complaint attached hereto with the schedule thereto annexed, and the notice thereon endorsed, on the within-named defendant, I. P. Thomas & Sons Company, personally, by delivering the same to Henry Lippincott, president of the I. P. Thomas & Sons Company, on the train leaving Woodbury at 9.17 A. M.

WILLIAM C. ALLEN.

Sworn and subscribed to this 21st day of April,
A. D. 1913, before me,

HARRY W. COHILL,
Comm. of Deeds.

[ENDORSED]

Duly served April 21, 1913, on I. P.
Thomas & Sons Company, by deliver-
ing a copy of the same personally to
Henry Lippincott, president of the I. P.
Thomas & Sons Company, on the train
leaving Woodbury at 9.17 A. M.

10

William C. Allen,
Sheriff.

Fee \$2.65.

Filed Apr. 26, 1913.

James Lafferty,
Clerk.

20

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Answer.

GLOUCESTER COUNTY CIRCUIT COURT.

HOWARD W. MILLER, <i>Plaintiff,</i>	}	ACTION AT LAW. ANSWER.
vs. 10 I. P. THOMAS & SON COM- PANY, a corporation, <i>Defendant.</i>		

The defendant, a corporation of New Jersey, with offices at Paulsboro, in the County of Gloucester and State of New Jersey, answering says:

- 20 1. It admits the matters stated in the first paragraph of the complaint.
2. It admits that the plaintiff is and was as stated, the owner and in possession of a certain farm adjacent to the factory and works of the said defendant, and that the plaintiff tilled and cultivated the said farm and raised peppers, corn, apples, pears, shade trees and fruit trees thereon.
- 30 3. It admits the matters stated in the third paragraph of the complaint.
4. It denies all of the various matters stated in the fourth paragraph of the complaint.
5. The defendant avers that the various matters

set forth in the first count of the complaint do not state a legal cause of action against the defendant.

Second Count:

1. Paragraphs 1, 2 and 3 of the answer as above set forth are repeated as to paragraphs 1, 2 and 3 of this count.

2. (4) The defendant denies all of the various matters set forth in the second (4th) paragraph of this count of the complaint. 10

5. The defendant avers that the various matters set forth in the second count of the complaint do not state a legal cause of action against the defendant.

Grounds of Defense.

1. This defendant has not been guilty of any act of negligence in the premises. 20

2. This defendant has committed no nuisance whereby the plaintiff has suffered special damage.

3. This defendant has constructed, installed, operated and maintained its factory and works at Paulsboro with due diligence and care.

4. The complainant does not set forth a legal cause of action against this defendant. 30

GASKILL & GASKILL,
Attorneys of Defendant.

[ENDORSED]

Filed May 10, 1913.

Jas. Lafferty.

Rule for Judgment.

GLOUCESTER COUNTY CIRCUIT COURT.

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HOWARD W. MILLER,
Plaintiff,
 vs.
 I. P. THOMAS & SON COM-
 PANY, a corporation,
Defendant.

ACTION AT LAW.
 RULE FOR JUDGMENT.

20

This action having been tried before Judge Howard Carrow, with a jury in the presence of counsel of the respective parties, on February 15th, 16th and 17th, 1915, and the jury having returned a verdict in favor of the plaintiff for \$1800 damages:

It is ordered that judgment final be entered in favor of the plaintiff and against the defendant, for the sum of \$1800 and the plaintiff's costs to be taxed.

On motion of

30

JOHN BOYD AVIS,
 W. EARLE MILLER,
Attorneys for Plaintiff.

Entered March 18th, 1915.

JAMES LAFFERTY,
Clerk.

[REVENUE STAMP]

STATE OF NEW JERSEY, }
GLOUCESTER COUNTY, } ss.

I, JAMES LAFFERTY, clerk of the County of Gloucester, and clerk of the Circuit Court holden therein, do hereby certify that the foregoing are true and correct copies of the complaint, answer and minutes, in the foregoing case, as the same are of record and on file in my office. 10

In Witness Whereof, I have hereunto set my hand and affixed the seal of said county, at Woodbury, N. J., this twenty-seventh day of March, A. D. nineteen hundred and fifteen.

JAMES LAFFERTY,
Clerk.

20

30

Notice of Appeal.

GLOUCESTER COUNTY CIRCUIT COURT.

10	HOWARD W. MILLER, <i>Plaintiff and Appellee,</i> vs. I. P. THOMAS & SON COM- PANY, <i>Defendant and Appellant.</i>	}	NOTICE OF APPEAL.
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To John Boyd Avis, Esq., Attorney of Plaintiff:

Take notice that the defendant appeals to the Supreme Court of New Jersey from the judgment entered in this cause for damages in favor of the plaintiff and against the defendant.

GASKILL & GASKILL,
Attorneys of Appellant.

A true copy of the original.

(Seal) JAMES LAFFERTY,
Clerk.

30

[ENDORSED]

Filed Apr. 1, 1915.
Wm. C. Gebhardt,
Clerk.

GLOUCESTER COUNTY CIRCUIT COURT.

HOWARD W. MILLER,
Plaintiff and Appellee,

vs.

I. P. THOMAS & SON
COMPANY,
Defendant and Appellant.

NOTICE OF APPEAL. 10

To John Boyd Avis, Esq., Attorney of Plaintiff.

Take notice that the defendant appeals to the Supreme Court of New Jersey from the judgment entered in this cause for damages in favor of the plaintiff and 20 against the defendant.

GASKILL & GASKILL,
Attorneys of Appellant.

A true copy of the original.

(SEAL)

JAMES LAFFERTY,
Clerk.

NEW JERSEY SUPREME COURT.

10	HOWARD W. MILLER, Plaintiff and Appellee. VS. I. P. THOMAS & SON COMPANY, Defendant and Appellant.	}	ON APPEAL GROUNDS OF APPEAL.
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To John Boyd Avis, Esquire,
 Attorney of Plaintiff.

20 The Appellant states the following Grounds of Appeal.

1. The Trial Judge unlawfully admitted illegal evidence from Isaac Jones as follows:

Q. During the year 1909 did you notice anything coming out of the stacks of the I. P. Thomas & Son Company's plant?

A. Well I couldn't say I seen it so often.

Q. Well what did you see?

30 Objection that the proof must be limited to 1909 and the time when the alleged injury was done.

The Court. I thing you are entitled to show anything from the 18th of May on. Exception noted for the defendant.

2. The Trial Judge unlawfully admitted illegal evidence from Richard Wood.

Q. After May 18th, 1909, did you ever see these fumes that have been spoken of?

Same objection as before and exception taken to the Ruling of the Court.

3. The Trial Judge unlawfully admitted illegal evidence from Richard Wood.

Q. Now won't you tell us how far you could see this fume that you speak of?

Objected to this class of Testimony as irrelevant to the issue in this case. The objection overruled and exception noted for the defendant. 10

4. The Trial Judge unlawfully admitted illegal evidence from A. J. Trumbull.

Q. During 1910 have you ever observed anything coming from the I. P. Thomas & Son Company's factory?

Objected to as incompetent and immaterial. Objection overruled and exception noted. 20

5. The Trial Judge unlawfully admitted illegal evidence from W. Earle Miller.

Q. Between the 20th of May, 1909, and May, 1911, did you experience or see anything with relation to these fumes?

Objected to as immaterial and because the Testimony does not relate to the dates fixed in the Complaint. Objection overruled and exception noted for the defendant. 30

6. The Trial Judge unlawfully admitted illegal evidence from John J. Albertson.

Q. And did you ever collect anything from the I. P. Thomas & Son Company for damages that their fumes

had done to your crops?

Objection made to the question. Ruled to be proper cross-examination. Exception noted.

7. Because the Trial Judge unlawfully refused to charge the defendant's request to charge as follows:

The injury must be clear, direct and positive. It must be the legitimate and natural result of the nuisance charged, and in no essential degree the result of other artificial causes. If the injury is in part the result of other causes, the action must fail unless it be clearly established that the injury would not have resulted except for the vapors. So, too, the injury must be of a tangible character, it must be a sensible, visible injury, discernible to an ordinary person and nowise dependent upon scientific tests or microscopic examination to discover. The injury must be such as is apparent to the eye in its ordinary condition, and must be actual, substantial, and not contingent, prospective or remote, and must be clearly traceable to the nuisance charged. If there is a reasonable doubt as to the cause of the injury, the benefit of the doubt will be given to the defendant, if his trade is a lawful one, and the injury is not the necessary and natural consequence of the act, as, in all actions of this nature, the burden of proof is upon the plaintiff."

GASKILL & GASKILL,

Attorney and of Counsel with Appellant.

THE STATE OF NEW JERSEY TO
I. P. THOMAS & SON COMPANY, a
Corporation:

You are summoned to answer the
annexed complaint of Howard W. Mil-
ler, in an action at law in the Gloucester 10
County Circuit Court. And take notice that unless you
file your answer to said complaint with the Clerk of the
Gloucester County Circuit Court at Woodbury within
twenty days after service upon you of this writ, and the
annexed complaint, the plaintiff may proceed in the suit.
and judgment may be entered against you.

WITNESS, Howard Carrow, Esquire, Judge of
our said Gloucester County Circuit Court, at Woodbury,
this eighteenth day of April, nineteen hundred and thir-
teen. 20

JAMES LAFFERTY, Clerk.

JOHN BOYD AVIS.
W. EARLE MILLER,
Attorneys.

GLOUCESTER COUNTY CIRCUIT COURT.

10	HOWARD W. MILLER, Plaintiff.	} ACTION AT LAW. COMPLAINT.
	vs.	
	I. P. THOMAS & SON COMPANY, a Corporation. Defendant.	

Plaintiff, Howard W. Miller, of the Borough of Paulsboro, County of Gloucester, and State of New Jersey, says:

FIRST COUNT.

1. At the times herein stated, the defendant was, and still is a corporation of the State of New Jersey.
2. Plaintiff is, and at the times hereinafter stated, was the owner and in possession of a certain farm and message situate in the Borough of Paulsboro aforesaid, and adjacent to the factory and works of the said defendant, upon which said farm said plaintiff planted, raised and cultivated peppers, corn, apples, pears, shade and fruit trees, the raising and cultivation of which was the plaintiff's business and means of livelihood.

3. Defendant, before, and at the times hereinafter stated, was the owner, possessor and operator and manager of a certain plant, factory or works, situate in the Borough of Paulsboro aforesaid, which said works were occupied and used by the said defendant for the manufacture and production of fertilizers, phosphates, chemicals and other commodities, and in the manufacture thereof the said defendant used certain chemicals and other materials, and also certain machinery and apparatus. 10

4. The said defendant, on the 21st, 22nd, 27th, and 28th days of May, and on the 5th, 6th, 27th and 30th days of June, and on the 1st, 8th and 10th days of July, in the year 1909, and on the 18th, 19th and 20th days of May, in the year 1911, and on divers other days and times between the 1st date aforesaid and the commencement of this suit, in the producing, mixing and preparing of the phosphates, fertilizers, chemicals and other substances, materials and commodities, so carelessly, recklessly, negligently and improperly manufactured, produced and mixed the same, and operated and managed the said machinery and materials so used as aforesaid, and used and operated such improper inefficient, defective and unfit machinery and apparatus in the manufacture of its said product, that vast quantities of noxious, destructive, poisonous, unhealthful and foul vapors, gases, fumes, smoke, dust and other matters were permitted, allowed and did escape and flow from the factory of said defendant at the respective times and dates aforesaid, 20
over and upon the lands and premises of the plaintiff, and upon the peppers, corn, apples, pears, shade and fruit trees, &c., thereon growing on the property of plaintiff, and by reason thereof large quantities of the said vegetables and fruit have been and were scorched and killed 30

and utterly and entirely destroyed, and whereby a large number of said fruit trees have been utterly and entirely destroyed and rendered unfit for use and became a total loss, and large numbers of said fruit trees have been damaged, scorched, burned and rendered of greatly decreased value to plaintiff.

SECOND COUNT.

10 1. Paragraphs 1, 2 and 3 of the first count are made a part of this count.

20 2. On the 21st, 22nd, 27th and 28th days of May, and on the 5th, 6th, and 27th and 30th days of June, and on the 1st, 8th and 10th days of July, 1909, and on the 18th, 19th and 20th days of May 1911, and on divers other days and times between the first date aforesaid and the commencement of this suit, the said defendant has employed and used, and still uses in the preparation of its
30 phosphates and fertilizers at its factory, aforesaid, certain chemicals and other substances, and has allowed and still allows vast quantities and volumes of noxious, destructive, poisonous, unhealthful and foul vapors, gases, fumes, smoke, dust and other matters to escape and flow from the said factory, works and premises of the said defendant, at the respective times and dates aforesaid, over and upon the lands and premises of the said plaintiff, and upon the peppers, corn, apples, pears, shade and fruit trees, &c., thereon growing, being the property of said plaintiff whereby large quantities of the said vegetables and fruit have been scorched and killed, and utterly and entirely destroyed, and whereby a large number of said fruit trees have been utterly and entirely destroyed, and rendered unfit for use, and became a total loss, and large numbers of said fruit trees have been damaged,

scorched, burned and rendered of greatly decreased value to plaintiff.

Plaintiff demands \$5000. damages.

JOHN BOYD AVIS,
W. EARLE MILLER,
Attorneys for Plaintiff.

STATE OF NEW JERSEY,
GLOUCESTER COUNTY.

} ss.

10

William C. Allen, of full age, being duly sworn on his oath says, that he is the Sheriff of the County of Gloucester and that on the twenty-first day of April A. D. 1913, he served a true copy of the summons and complt. attached hereto with the schedule thereto annexed, and the notice thereon endorsed, on the within named defendant, I. P. Thomas & Sons Company personally by delivering the same to Henry Lippincott, President of the I. P. Thomas & Sons Company, on the train leaving Woodbury at 9.17 A. M. 20

Sworn and subscribed to this
21st day of April, A. D. 1913,
before me, Harry W. Cohill,
Commi. of Deeds.

} WILLIAM C. ALLEN.

GLOUCESTER COUNTY CIRCUIT COURT.

10	HOWARD W. MILLER,	Plaintiff.	}	ACTION AT LAW. ANSWER.
	vs.			
	I. P. THOMAS & SON Co., a Corporation,	Defendant.		

The Defendant, a Corporation of New Jersey with
 offices at Paulsboro, in the County of Gloucester and
 20 State of New Jersey, answering says:

1. It admits the matters stated in the First Para-
 graph of the Complaint.

2. It admits that the Plaintiff is and was as stated,
 the owner and in possession of a certain farm adjacent to
 the factory and works of the said Defendant, and that
 the Plaintiff tilled and cultivated the said farm and raised
 Peppers, Corn, Apples, Pears, Shade Trees and Fruit
 30 Trees thereon.

3. It admits the matters stated in the Third para-
 graph of the Complaint.

4. It denies all of the various matters stated in the
 Fourth paragraph of the Complaint.

5. The Defendant avers that the various matters set forth in the First Count of the Complaint do not state a legal cause of action against the Defendant.

SECOND COUNT.

1. Paragraphs 1, 2 and 3 of the Answer as above set forth are repeated as to paragraphs 1, 2 and 3 of this Count.

10

2 (4) The Defendant denies all of the various matters set forth in the Second (4th) paragraph of this Count of the Complaint.

5. The defendant avers that the various matters set forth in the Second Count of the Complaint do not state a legal cause of action against the Defendant.

GROUND OF DEFENSE.

20

1. This Defendant has not been guilty of any act of negligence in the premises.

2. This Defendant has committed no nuisance whereby the Plaintiff has suffered special damage.

3. This Defendant has constructed, installed, operated and maintained its factory and works at Paulsboro with due diligence and care.

30

4. The Complaint does not set forth a legal cause of action against this Defendant.

GASKILL & GASKILL,
Attorneys of Defendant.

GLOUCESTER COUNTY CIRCUIT COURT.

10	HOWARD W. MILLER, Plaintiff,	}	ACTION AT LAW.
	vs.		RULE FOR
	I. P. THOMAS & SONS COMPANY, a Corporation, Defendant.		JUDGMENT

This action having been tried before Judge Howard Carrow, with a jury in the presence of counsel of the respective parties on February 15th, 16th, and 17th, 1915, and the jury having returned a verdict in favor of the plaintiff for \$1800 damages:

It is ordered that judgment final be entered in favor of the plaintiff and against the defendant, for the sum of \$1800. and the plaintiff's costs to be taxed.

On motion of

JOHN BOYD AVIS,
W. EARLE MILLER,

Attorneys for Plaintiff.

Entered March 18th, 1915.

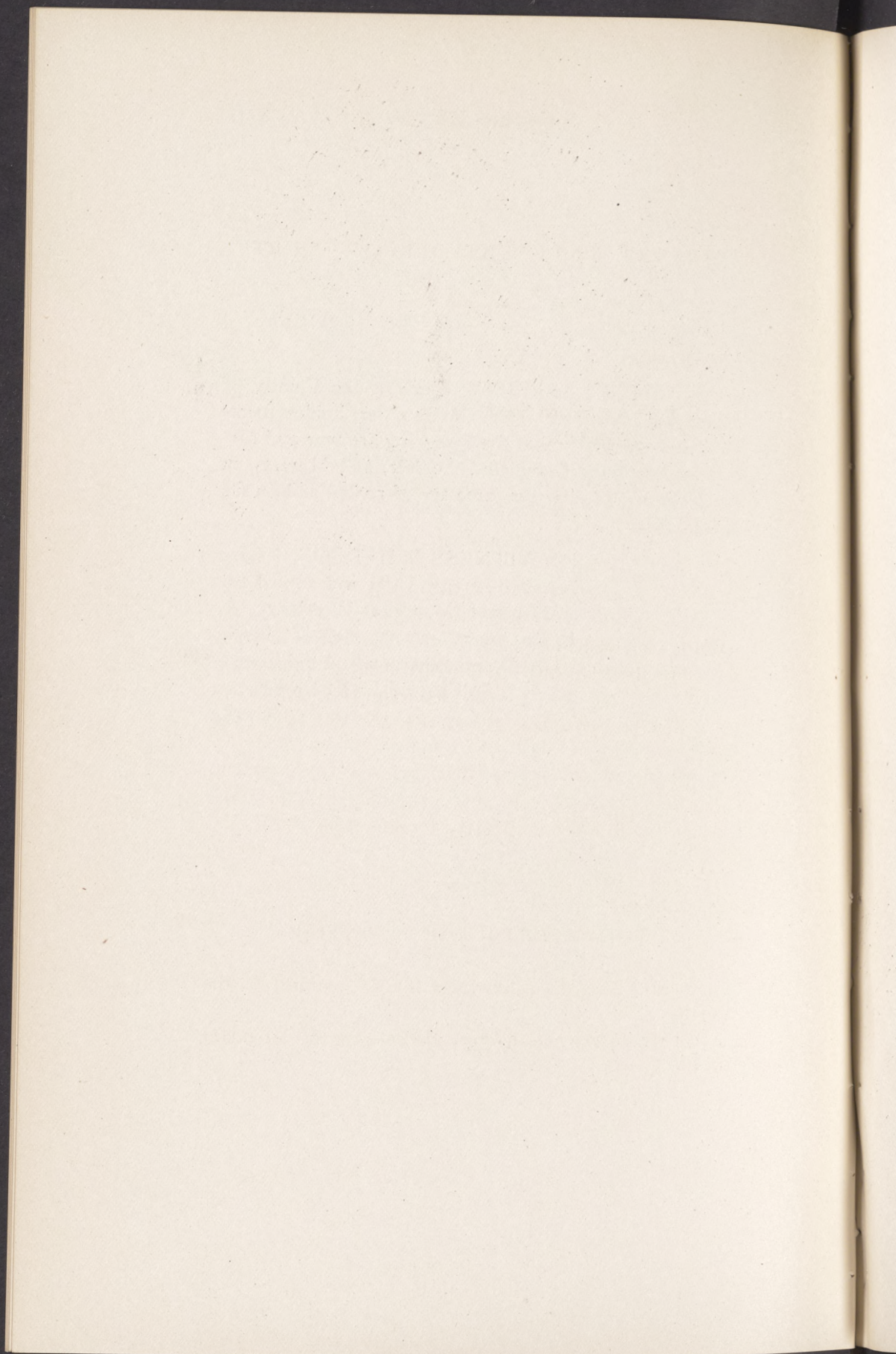
James Lafferty, Clerk.

STATE OF NEW JERSEY,
 GLOUCESTER COUNTY, .

} SS. (STAMP)

I, JAMES LAFFERTY, Clerk of the County of 10
 Gloucester, and Clerk of the Circuit Court holden there-
 in, do hereby certify that the foregoing are true and cor-
 rect copies of the Complaint, Answer, and Minutes, in
 the foregoing case, as the same are of record and on file
 in my office.

IN WITNESS WHEREOF, I have
 hereunto set my hand and affixed the
 seal of said County, at Woodbury, N.
 J., this twenty-seventh day of March,
 A. D., nineteen hundred and fifteen. 20
 JAMES LAFFERTY,
 Clerk.



GLOUCESTER COUNTY CIRCUIT COURT.

HOWARD W. MILLER,
vs.
I. P. THOMAS & SONS
COMPANY,

} ACTION AT LAW. 10

February Term, 1915.

APPEARANCES:

For the Plaintiff, JOHN BOYD AVIS, Esq., 20
W. EARLE MILLER, Esq.
For the Dedendant, GASKILL & GASKILL, Esqs.

Before CARROW, J. and a Jury.

THE CASE FOR THE PLAINTIFF.

30

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

(Mr. Joseph Gaskill opens the case for the defendant to the jury).

HOWARD W. MILLER, SWORN.

By Mr. Avis.

Q. Where do you live, Mr. Miller?

A. I live at Paulsboro.

Q. What is your occupation?

A. Well, I have a farm; I didn't do very much of
10 anything this summer.

Q. You have a farm—where is the farm located?

A. It is located along the Mantua Creek, adjoining
the property of the I. P. Thomas & Sons Company.

Q. In what municipality?

A. In Paulsboro.

Q. How many acres have you, Howard?

A. About seventy.

Q. Do you know how many acres there are of the
I. P. Thomas & Sons Company plant, farm and all?

A. I think somewhere around eighty.

20 Q. Where is the I. P. Thomas & Sons Company
plant located with relation to Mantua Creek?

A. It is along the Mantua Creek and the Delaware
River; Mantua Creek borders it on the eastern side and
the Delaware River on the northern side.

Q. The plant itself, the buildings of the I. P.
Thomas & Sons Company, where are they located with
relation to the Creek and River?

A. They are along Mantua Creek.

30 Q. About how far from the mouth of the creek
where it empties into the river, can you tell us?

A. I should think something like a quarter of a
mile.

Q. What is the nature of the plant there as you
see it? I am not speaking technically, but what is there,
what is on the ground?

A. There is a phosphate manufacturing plant and acid plant.

Q. Buildings, are they?

A. Buildings.

Q. How much land do they cover, do you know?

A. The buildings? Oh, I should think the offices and buildings covered two acres.

Q. Will you look at this photograph that I show you and tell me whether that is a correct representation or about a correct representation of the plant as it appears from the opposite side of the creek? 10

A. This purports to be water?

Q. Yes, that purports to be the creek.

A. I should think that was the plant.

(Said photograph is marked P1 for identification).

Q. Now, where is your property line with relation to the plant, speaking now of the buildings?

A. The plant is pretty close to the southerly edge of their high land, and then there is a strip of meadow land in between that and my land. 20

Q. In what direction is your farm from the plant?

A. Well, mostly south and southwest and west.

Q. Can you tell about how far it is from the buildings of the Company to your property line?

A. Beginning with the buildings that are closest to my land?

Q. Closest to you, yes, the buildings nearest to your property line.

A. I should think from two to three hundred yards. 30

Q. And your line is up or down the creek from them?

A. Up the creek from them.

Q. That is, shown by this picture—it is in that direction, is it?

A. It is in that direction, yes.

Q. What did you grow on that farm in 1909, Howard? Were you living on it then?

A. Yes, sir.

Q. What did you grow there that year—what did you have on there growing?

A. Well, I had apples growing, pears, cantaloupes, peppers, corn, sweet potatoes, watermelons.

Q. Where is the apple orchard located on your place with relation to the creek and also the property line
10 of the Thomas Company?

A. From the south to toward southwest, I should think.

Q. How near to the line of the Thomas Company's land?

A. I don't think it is over seventy-five feet, seventy-five to a hundred feet.

Q. Your orchard then does not run right up to the line?

A. There is a hillside between that and sort of
20 hedge like that runs down to this meadow, between the actual trees and the property line.

Q. Is there any land there which you farm?

A. No, sir.

Q. Then the land that runs up to the property line is really a part of your orchard, although there are no trees right up to the line, is that correct?

A. Well, there is a hedge growing up there like; the hillside slants down to the meadow.

Q. In 1909, where were your peppers growing?
30

A. They were growing in a young orchard.

Q. What direction is that from the main orchard which you have spoken of?

A. It is about southwest from—or probably a little more west than southwest from the Company's plant.

Q. With relation to the main orchard which you

have spoken of which is near the line of the Company and the buildings of the Company's plant, were the peppers in line or out of line from that?

A. Well, a part of the orchard was in line with that.

Q. What was the condition of your apple orchard, how many trees did you— I will withdraw that first question, Mr. Stenographer. How many trees did you have at that time in your whole orchard, apple trees?

A. As I found the trees scattered around the different places? They are in different sections. 10

Q. All over your farm.

A. 404, I think.

Q. What was the general condition of those trees, say, on the 15th of May, 1909?

A. 1909? I noticed them later than the 15th of May, 1909.

Q. Well, when did you notice them and what was their condition?

A. They were in bloom, or had been in bloom, falling off and apples setting; the apples set before the bloom falls off. 20

Q. What was the quality of the apple set for that year?

A. Well, it looked all right, a pretty good heavy set mostly on the trees. We have a great many everbearing trees, that bear every year, early apples.

Q. What about your peppers, what condition were they in about the middle of May of that year?

A. They were in good condition.

Q. Do you know when they were set out? 30

A. Yes, sometime in May.

Q. How many did you set out?

A. Well, I think it was about eight thousand hills, about eight thousand hills.

Q. Can you tell us about how much land that

would cover?

A. Well, I had them four feet and a half, I think, by two feet, that would be ten feet—oh, between an acre and a half and an acre and three-quarters.

Q. What happened there, if anything, the latter part of May, 1909?

A. It was a damp day the 21st of May, the wind bearing from the northeast. Acid fumes came over through the orchard and deposited on the trees and on
10 the peppers, cantaloupes and other things.

Q. Were you home that day?

A. I was home that day, yes, sir.

Q. Now, what first called your attention to what you call acid fumes, just tell us what called your attention and what you saw?

A. Well, I felt the acid fumes in my—piercing, like sticking a needle quickly in your eye, feeling it on your throat, on your lips, sort of a burning feeling.

Q. When you felt that, what did you do?
20

A. I went over and told them—

Q. I mean, before that, what did you see? Did you go out and look at anything?

A. I saw the fumes through the orchard.

Q. What was it that you saw?

A. Sort of vapor like, fume.

Q. Did it have any color to it?

A. A light color.

Q. Did you follow it up in any way to see where it
30 came from?

A. I could see it coming from the plant over.

Q. Now, just tell us what you saw about that, won't you?

A. I saw it leading right from the stack of the plant right over to the farm and through the orchard. I could then see no marks on the trees. I knew the result

of it from former experience. I went over and told Mr. Stines.

Q. Now, tell us first about what you call a stack—won't you tell us what you mean?

A. Well, the acid plant has a stack, it is a round stack of metal, I think, and the mixing house has a wooden stack, a square wooden stack on the top of the building.

Q. Both of those stacks, as you call them, where do they come out? 10

A. They come out in the air.

Q. Higher than any part of the building?

A. They are on the top of the building.

Q. Well, after you saw these fumes in the orchard, that you saw, what did you see with relation to the plant?

A. I looked to see whether the fumes were coming from the plant.

Q. What did you see?

A. I saw a yellowish fume coming from the acid plant, and a white or a light coming from the mix. 20

Q. Do you mean that you saw it actually coming out of the stacks?

A. I saw it coming out of the stacks and out of the windows in the mixing house.

Q. Where did that vapor or fume, as you call it, go? What became of it after it came out of these stacks and windows?

A. That went with the wind, whichever way the wind was blowing.

Q. I mean, this particular day, which way did it go? 30

A. It came over to my place with the wind.

Q. Did you see that?

A. I saw it.

Q. After you saw it, what did you do?

A. I went over and told Mr. Stines, asked him to stop it.

Q. Who is Mr. Stines?

A. Mr. Frank Stines is the superintendent of the—

Q. He was superintendent at that time?

A. He was at that time.

Q. Was there any effect after you had told him what was happening?

10 A. One or the other of the days,—I went over the 21st and the 22nd both,—I don't recollect which day— one day he stopped the mixing and one day he didn't, but they didn't stop the acid plant no day.

Q. Now, that was on the 21st, you say it was?

A. That was the first day I went over.

Q. What happened on the 22nd at your farm?

Now, tell us about that, what you saw on the 22nd.

A. The same thing on the 22nd, came over, and I went over again. I had some difficulty in locating Mr. Stines; I had to go around through the building, and I
20 found him and told him about it.

Mr. Gaskill. I object to the conversation.

The Court. Strike out the conversation.

Mr. Avis. There is no conversation yet being related; he was just going to; the Judge was apprehending it, probably.

Q. How long has Mr. Stines been the superintendent there?

A. I can't answer that question, a number of years.

30 Q. Was anybody else in charge of the plant while he was superintendent there?

A. Not that I know of.

Q. How many times have you been over there while he was superintendent?

A. Oh, been over there frequently, many times.

Q. When you called Mr. Stines' attention to this

situation, did he say anything to you about it?

A. Yes.

Q. Answer yes or no.

A. Yes.

Q. Now, don't answer this question until the Court rules on it—what did he say?

Mr. Joseph Gaskill. I object to that as incompetent.

Mr. Avis. Now, if the Court please, to be perfectly fair about it, your Honor ruled that out before. 10

Mr. Joseph Gaskill. The point of the objection made before, which was the subject of the ruling, was that the superintendent is there for the purpose of conducting the operations of the plant and not there to speak for the owners or to bind them by anything he may say.

Mr. Avis. Now, my insistent is, if the Court please,—I am not doing this to be disagreeable about it; I simply want it on the record and I feel it ought to be—my insistent is that we have proven Mr. Stines as the superintendent of the plant and had charge of it; that if he made any statement at that time to Mr. Miller, who was not acquainted with the manufacture of acids or fertilizer, with relation to the conditions of the plant or the conditions under which it was then running, as to whether or not there were acid fumes escaping from it which might do injury, it would be perfectly competent for this jury to hear; in other words, that it would bind the corporation, because it was in the operation of the plant and this was at a time when Mr. Miller was claiming that this fume from the plant was causing injury. 20 30

The Court. He could not bind his principal beyond the scope of his agency.

Mr. Avis. That was your Honor's idea before.

The Court. The objection is sustained.

Mr. Avis. And I presume there is no necessity

under the present law, but I would like an exception, if it is necessary.

Mr. Joseph Gaskill. I think our highest Court has declared that it is desirable that exceptions be taken; I think Judge Lloyd—

The Court. Oh, undoubtedly.

Mr. Avis. I would like an exception then.

The Court. You except to my ruling?

Mr. Avis. Yes.

10 Q. That was the 21st and 22nd of May, wasn't it, you were speaking about?

A. The 21st was the first day I went over.

Q. You were home both of those days?

A. Yes.

Q. What was the condition of the weather on those days?

A. The weather was—the wind blowing from the northeast, damp, heavy, disagreeable. The sun came out in the afternoon of the 22nd.

20 Q. What happened with relation to any of your crops of apples or peppers when the sun came out?

A. I could see all—I went down in the orchard, watching it, I could see the leaves parched, burned brown, and the next day the little apples were on the ground, fell in the night, I presume; there weren't many on the ground, hardly any on the ground when I first went down, now and then one.

30 Q. In what proportions did those little apples get on the ground the next day when you went down there, what quantities?

A. Oh, vast quantities; the ground was covered in some instances, as a tree was burned more than another tree was, the quantity was greater.

Q. Now, did you examine the trees to ascertain their condition as to what you call burned?

A. Why, yes.

Q. Now, won't you just explain in a general way what the appearance of the trees was?

A. They would burn the leaves, burn, spot the leaves, some of them the whole of the leaf, some of them the leaf—some I have broken the twig on the end and it would be all burned, like it would be if a fire had gone through it, because I have seen that similar effect too, that would be burned, all dry, the bark of the twig.

Q. Did you count the trees that had been affected in this manner? 10

A. In 1909 there was either eighty-one or eighty-nine, and in 1911—they were the two respective numbers, eighty-one one year and eighty-nine the other.

Q. You can't tell now which is which, this time?

A. No, I can't tell; I have been here—

Q. Won't you explain to the Court and jury just what portions of these trees were affected in the manner which you relate? 20

A. Which parts of the trees?

Q. Yes, if there was any difference as to the sides.

A. They were affected worse on the north side, on the northeast side; the side facing the Phosphate Company's plant.

Q. Did you have any trees that were standing by themselves that were in any way affected?

A. I had trees that were out in other parts that were by themselves that were affected.

Q. What effect did you notice on those trees? 30

A. Well, it would draw all around under that tree and burn it more all around than it would where they were in rows. It kind of came down the aisle when it was in the row.

Q. Did you follow it up in any way to ascertain whether any other trees or hedge rows had been in any

way affected?

A. I did.

Q. Tell us about that, won't you?

A. Well, I saw a burned—

Mr. Joseph Gaskill.—I object to that as immaterial.

The Court. What was that?

Mr. Avis. The question is whether there was any other trees or anything to indicate a similar condition on any other trees that he had on his place excepting these
10 apple trees that he speaks of.

Mr. Joseph Gaskill. There is no claim for damages?

Mr. Avis. No. Do you want me to tell the jury?

Mr. Joseph Gaskill. No.

Mr. Avis. Are you willing I shall make a statement to the Court?

Mr. Joseph Gaskill. Yes.

The Court. (After conference between Mr. Avis and the Court.) Was this question raised before?
20

Mr. Joseph Gaskill. Yes, I think it was, and your Honor ruled it out.

Mr. Avis. I don't think so, Judge; your Honor wouldn't allow us to show some burning of other trees on Mr. Miller's place that were not in the damage proposition, but there was nothing said, as I recollect it, in relation to the line in the direction of this factory; that is my present idea, not for the purpose of claiming damages.

30 The Court. The strict law is that the proof must be confined to the issue.

Mr. Avis. That is right, sir.

The Court. And inasmuch as these other trees are

not the subject matter of this litigation, I doubt the propriety of the question.

Mr. Avis. Before ruling on that, will your Honor allow me just to say a word? You see, the issue here, as has been stated by Judge Gaskill is that they are not responsible for this injury; that is their attitude. Now, supposing we can show that foliage and grass and trees in the line between where we claim the damage and where this plant is had the same appearance along a direct line, the same burned appearance, as Mr. Miller called it, leading from the plant? 10

The Court. There is a good deal in what you say, but I think we had better confine this case strictly to the issue, Senator.

Mr. Avis. Well, your Honor will allow me an exception to that. I simply want to show the conditions which will lead—of course, that is the only thing that we have to show— 20

Mr. Joseph Gaskill. You brought up the same matter with reference to poison vines.

Mr. Avis. Yes; those poison vines that are over on his place.

Mr. Joseph Gaskill. The attempt was made to show the killing of poison vines; it was the same general proposition. 30

The Court. What was my ruling there?

Mr. Joseph Gaskill. You over-ruled it.

Mr. Avis. That was not the same kind of offer. These poison vines were shown to be on the corner of the burned area from the plant, beyond the apple orchard, further away from the plant than the apple orchard was, and your Honor, I think probably properly, ruled that out. Now, I am not trying to show damage; I am simply trying to show where this damage came from. We have shown by the testimony of the witness that he saw
10 fumes in the orchard, he saw that they were coming out of a stack and across his place; now, if we show that between his orchard and the place where he says these fumes came from that there was other vegetation this same day that he looked at his own orchard, that there was other vegetation in the same condition that his orchard was, wouldn't that be fair to go to a jury to say as to where that fume came from? It seems to me it is the most pertinent thing and material thing in this case.

20 The Court. Well, upon the same theory, if a man was to bring an action for negligence for personal injuries received by him, could he show also that somebody sitting alongside of him was also hurt in the same accident?

Mr. Avis. I think so; I think,—if the Court please, here is my idea—I think, if the Court please, if a man used a rifle and hit you and I was between you and him and the ball went through me first that you would have a
30 perfect right to show for the purpose of showing that there was an injury there—you would have a perfect right to show that I had been standing between you and the man who used the rifle and it had gone through me first, if I was here to tell the story, or somebody else was here to prove it. Supposing, if the Court please,—if you will pardon me just a moment—that a shot was fired

through a door; couldn't you prove the hole in the door?

The Court. Well, I understand, it is a very interesting proposition that you are raising, but I think it is a good deal safer as a rule to adhere to the strict law which requires the evidence to be confined to the specific issue, and we will not go into any outside excursions; we will confine it to the damage claimed in this case.

Mr. Avis. Your Honor sustains the objection? 10

The Court. The ruling is against you, yes.

Mr. Avis. Will you allow me an exception?

(Exception allowed for the plaintiff.)

Q. Did you examine your pepper patch on that day after the sun came out?

A. Either that day or the next, I won't say which. 20

Q. What condition did you find the pepper patch in?

A. I found the peppers burned, blotched, some of them burned down.

Q. What was the result on the pepper patch?

A. A number of them died.

Q. Well, what proportion? What proportion did not bear peppers that year?

A. Well, I couldn't tell in proportions; it went bias, cater-cornered across the patch. There was a corner that wasn't touched, and we based it from the way we picked peppers on the one corner of the patch, my loss. 30

Q. What was your loss on the peppers by reason of the condition you found them in after you say you saw these fumes?

A. We figured that loss \$150.

Q. Now, with relation to the apple crop that year, from your observation what would you say was the loss on the crop?

A. Judging from the bloom that I had and small apples that had formed and were healthy at the time, I estimated that loss from three thousand to thirty-two hundred baskets.

10 Q. And what was the price of apples of the character that you had growing there that year?

A. They were largely early apples; I estimated they would have cleared me about thirty-five cents.

The Court. How much would that be in dollars and cents? What does he say his loss was on that?

Mr. Avis. That would be between \$1050 and \$1100.

Q. Have you figured it out?

20 A. I think I figured it out at the last trial, the time the jury disagreed; I think I figured it out for you.

Q. Do you remember what it was?

A. No, not from memory; I could soon figure it again. It would be from \$1050 to \$1120.

The Court. How much?

The Witness. From \$1050 to \$1120.

30 Q. What effect did it have on the trees as to their future growth?

A. Well, it burned the leaves and the ends of the twigs, and they have died since, the ends of the twigs have. Now, I mean the ends of the limbs have died; not the whole tree has died.

Q. Well, how much of the limbs? You say the ends of the twigs were injured; now, how much of the limbs do you say have died?

A. Well, they have made no growth; some of them have died back almost to the trunk of the tree.

Q. How big a limb do you speak of now?

A. Well, I have noticed limbs there as large as my arm.

Q. Have there been many of them?

10

A. Quite a number.

Q. In the year, 1911, about the middle of May, what was the condition of this same orchard?

A. Well, they were in bloom and the foliage on it was green, not burned, not blotched, the same as the foliage is on any other tree.

Q. What happened that year that you observed?

A. I went away on the 18th to New York.

Q. What time did you leave home?

A. I left home at 5.23, left the station at 5.23 in the morning. 20

Q. And what was the condition of the weather that morning when you left?

A. It was muggy.

Q. Was it clear?

A. No.

Q. Which way was the wind blowing from?

A. From the northeast, I judge, the wind when I left early in the morning.

Q. Now, what was the condition of the apple trees and pear trees at the time that you saw them before you left that morning? 30

A. I didn't see them that morning.

The Court. What month was that?

The Witness. It was in May, 1911.

The Court. What day?

Mr. Avis. The 18th, he says, that he left.

The Witness. I didn't notice them that morning.

10 Q. When had you noticed them before that?

A. The day before.

Q. What condition were they in then?

A. The leaves were green, about half grown or partially grown. The small apples had formed on the trees.

Q. What was the condition of the crop apparently as to the amount of production?

A. Well, we looked to have a pretty fair bloom, looked to have a good bloom.

20 Q. Was that with relation to both orchards?

A. Oh, we had a wonderful bloom in the pear orchard—that was before that—a heavy bloom in the pear orchard. They had formed before that. They form earlier than apples.

Q. Now, when did you come home?

A. I came home on the afternoon of the 19th.

Q. That, is, the following day?

A. Yes, sir.

Q. Did you get home in daylight?

30 A. Oh, yes, I got home on the 5.22 train, I suppose about 5.35 I got down home. They met me there with the horse.

Q. Did you make any examination of the orchard that night when you came home?

A. Yes, I saw it as I came around Gill's Hill, which enters the central part of my place; we cut up around there for a short cut.

Q. What did you see?

A. I saw the leaves burned on the trees, got out and saw fruit burned, got out and made an examination right there. Then I got in and went up to the house again.

Q. What was the condition of the weather at that time? 10

A. Well, the weather was clear at that time.

Q. When did you after that make a careful examination of the orchard?

A. I went right down, went right on down before ever I went to the house.

Q. What condition did you find existing in the pear orchard?

A. Well, the pear orchard was turning black, the leaves were turned black. They blacken more than the apples do, the pear leaves do. 20

Q. How about the fruit on the pear trees?

A. Well, the clusters of fruit were falling off.

Q. What quantity had fallen at that time?

A. Well, I don't know about that at that time, that first day when I went up.

Q. Did you go to the apple orchard, go through there?

A. I went down through the apple orchard, yes.

Q. And did you then or later count the number of trees that appeared differently from what they had 30 before?

A. Yes, sir.

Q. What condition were the apple trees in at that time, the apples and leaves?

A. Well, they showed a considerable effect of hav-

ing been burned again.

Q. Was there any indication by the trees as to what direction whatever it was that had done the damage had come from?

A. Yes.

Q. What was that indication?

A. That was on the same side that it had been before, the northeast side, as having come from the factory.

10 Q. Did you see anything like fumes in the orchard at that time?

A. No, sir.

Q. What did you do the next day?

A. The next day, the next morning I got up and we still had damp air again early, and I smelled the fumes again, and I felt them early in the morning. I sent one of my boys over; I didn't go myself.

Q. Did you see any fumes that morning?

A. I saw them down in the orchard, yes, and saw
20 them coming from the stacks.

Q. That morning?

A. That morning, the 20th.

Q. Did you go away that day or stay home?

A. I went to a funeral that day.

Q. Where?

A. At Swedesboro.

Q. What time did you get home?

A. I got home toward night.

Q. When did you, if at all, make any more careful
30 examination of the orchards?

A. I went up to Paulsboro that night and saw some friends, some people there, farmers, and asked them to come down on Sunday, if they could, and they said they

would, so they came down and they made an examination on Sunday.

Q. Do you remember what day of the week the 18th was, the first day that you were away?

A. Yes, sir, Thursday.

Q. And the 20th when you went to the funeral was on Saturday?

A. On Saturday.

Q. Now, when you went through the orchard on this Sunday, the orchards, what condition did you find there? 10

A. Well, we found in many instances, the ground practically covered with apples, small apples, leaves, bloom, dried bloom.

Q. Did you examine any of the twigs or ends of the limbs at that time?

A. Yes.

Q. What condition did you find there?

A. Found them burned, parched, shrivelled.

Q. How about the pear orchard at that time? 20

A. That looked fierce Sunday morning; that looked just the same as though a fire had run through it.

Q. What condition were the pear trees in?

A. They were in pretty good condition before anything had happened to them.

Q. No, I mean then.

A. Oh, they were blackened and the fruit fallen off.

Q. What proportion of the fruit from the pear trees fell off that year?

A. Off what proportion of the trees? 30

Q. No, of the fruit.

A. Well, it all fell off some trees, every bit.

Q. How many trees were affected, as you say?

A. There was thirty-one out of forty-seven.

Q. How about the other sixteen—they weren't

affected at all?

A. Not so much; some of them were burned a little bit.

Q. How about the crop you got that year from the trees that were injured?

A. I got thirty-one baskets. Every tree that was up in the air at all it had burned; some smaller ones that were down back of the others they didn't hit so much. They didn't bear many pears anyhow and I got thirty-one
10 baskets all told.

Q. Can you recollect how many baskets you got off any one tree that year?

A. Yes, I got seven baskets off of one tree that was out—a large tree out near the end, out at the end.

Q. And you got how many baskets altogether?

A. Thirty-one.

Q. Now, have you made an estimation of the quantity of pears that you lost that year?

A. Well, I thought I would have had about 150
20 baskets, and I got thirty-one.

Q. And that estimate was based on your experience— How long had the orchard been there?

A. I don't know, Mr. Avis; I set that orchard out shortly after I bought the farm, the same time I set the young apple orchard out, but it had been there—that was in 1911—it had been there twelve or fourteen years, I should think.

Q. And what was the value of pears of that character in that year?

30 A. They usually brought us about thirty-five or forty cents when we sent them off; we gathered them and put them away and let them yellow up.:

Q. Did you figure up your loss by reason of the droppings that year?

A. I only figured it up that way, I didn't figure it

up in dollars and cents.

Q. 119 baskets at thirty-five or forty cents a basket, is that what you say?

A. Yes, that is what they would have brought.

The Court. What were the figures?

Mr. Avis. That would be around forty dollars; if you take it at forty cents it is forty-seven dollars and sixty cents.

10

The Court. Is that all the loss in 1911?

Q. How about the apples?

A. That is where we got our loss; we didn't get so much loss in dollars from the pears, because we hadn't enough pear trees to get so much from them.

Q. How about apples that year?

A. I thought I lost about twenty-five hundred baskets of apples. The price was very much better that year.

Q. What was the price of apples that year?

A. It would average about forty-five cents.

Q. That would be about \$1125 that you estimated your loss?

A. Yes.

Mr. Avis. I have figured it up at forty-five cents, twenty-five hundred baskets.

Q. Now, after 1911—

30

A. That is 1911 we are talking about.

Q. Yes, I understand that. After 1911, what did the trees do as to making growth or their condition after that time?

A. They haven't grown any since 1911. On the

other hand, they have gone back.

Mr. Joseph Gaskill. Which, apples or pears?

Mr. Avis. Apples, I am talking about.

Q. The apple trees, I am talking about.

A. They have gone back.

Q. Have you trimmed your orchard since that
10 time?

A. Since 1911?

Q. Yes.

A. Yes.

Q. Can you tell us what quantity of trimmings you
took out of it?

A. I can tell you since 1909 and 1912, one year, I
don't know which, when it was, we took out forty cart
loads, what we could stack on a cart, pitching it on with a
hay-fork.

20 Q. Do you know how long before that year they
had been trimmed?

A. We trim them nearly every year.

Q. They were trimmed properly?

A. They were trimmed properly.

Q. Trimmed properly?

A. Yes.

Q. Now, what was the average amount of dead
stuff which you trimmed out of them and took away?

A. Oh, from two to five cart loads.

30 Q. Was this trimming that you speak of all dead
limbs and twigs?

A. We didn't cut no live out.

Q. Did any of the trees die after 1909, that is,
that were affected at all, as you say, by these fumes?

A. Well, yes, there has been one or two died since

1909, and there is a good many dying now.

Q. Now, when you say dying, what do you mean, Mr. Miller?

A. I mean that they die into the trunk of the tree and the limbs break off with the winds. Some of them are standing there without any limbs at all hardly on them that in 1909 were in a good condition.

Q. How about your crop of apples in 1910 and 1912 and 1913?

A. I had a fairly good crop of apples in 1910 on 10 portions of the trees.

Q. What do you mean, when you say, "portions of the trees"?

A. I didn't have as many on the northeast side as I had on the other sides of the trees.

Q. Why was that?

A. Why, the limbs weren't there, the limbs were deadened, the branches were deadened.

Cross-Examination.

20

By Mr. Joseph Gaskill.

Q. Howard, when was it you bought this place and moved there? You did move there when you bought it, I assume, didn't you?

A. No, I did not.

Q. Well, when did you buy the place?

A. I bought the place in December of 1894.

Q. 1894?

30

A. I think so.

Q. Then you have owned the place twenty-one years, twenty years?

A. No, sir, I bought it in December of 1894.

Q. Now, the I. P. Thomas Fertilizer Plant was

located on their farm near the creek at the time you bought, wasn't it?

A. I presume they were.

Q. Well, you know it, don't you?

A. No, I don't know it; you want me to remember—I don't know it. I think they were; that same factory was there, whether they owned it or no.

Q. That is it, the fertilizer factory was there?

A. That same factory was there.

10 Q. That is it, that is what I want to get at. I understand you to say there was an old orchard on the place when you bought it, and afterward you planted the young orchard or planted an orchard?

A. There was more than one old orchard when I bought it, different stages.

Q. Now the old orchard, so to speak, is the orchard that is the one that you have described as being nearest I. P. Thomas's plant, isn't it?

A. No.

20 Q. Is that the young orchard?

A. No, but that is not the old orchard.

Q. Where is the old orchard?

A. The old orchard is on the east side, the east of this, on the eastern side of this toward the creek.

Q. Let's see if we can get it this way; we can understand it better. (Referring to map which has been placed on easel). You have never seen this map before, Howard?

A. No, sir.

30 Q. Now, Howard, assume until I can put our surveyor on the witness stand to identify the locations, that these round green spots on the map are trees—here are some smaller ones; that represents the pear orchard, doesn't it? Here is the factory.

A. To you it might.

Q. Well, you don't know whether it does to you or not?

A. It doesn't to me, no.

Q. What I wanted to get at was whereabouts—here is your house, here is your barn; now, where is the old orchard that you speak of?

A. It would be— This is the house; this is the crib-house; this is the potato house?

Q. I presume so.

A. That would be down in here (indicating on 10 map).

Q. Well, how near the line and how near the buildings—nearer the building or nearer the line?

A. Is this marsh land?

Q. That is marsh land; this heavy line here is the boundary line between you and I. P. Thomas Company.

A. There would be some in here, some of the old in here.

Q. Pointing to a place near what is represented as the pear orchard? 20

A. There would be some up here.

Mr. Avis. Pointing up nearer, toward the buildings.

The Witness. They located some trees there. (Pointing to a place near the barn).

Q. Won't you just point out on this map where the apple trees were that you say were injured in 1909?

A. You don't go out beyond here, do you? 30

Q. Here is your boundary line.

A. I have got trees down in here; there is no trees there. Some of them were injured in 1909.

Q. Beyond your house?

A. Yes.

- Q. Where else were there any injured in 1909?
- A. These trees were injured in 1909.
- Q. No, I am talking about apple trees, Howard.
- A. They were injured, some, down in here.
- Q. Pointing to a place to the east—
- A. That is the old orchard back of the potato house and up close to the crib house, up close in here.
- Q. Were they the same ones that were hurt in 1911?
- 10 A. Some of them were. We had various courses—there were no pear trees here in 1909.
- Q. No, I understand that. Now, Howard, I believe you don't spray your orchard?
- A. No, I don't spray it.
- Q. Never have sprayed it?
- A. Never have.
- Q. Never have treated the trees there for any of the diseases that fruit trees are subject to?
- A. I took them out when they had diseases.
- 20 Q. Well, I say, you never treated the trees while they were standing for any of the diseases that fruit trees are subject to?
- A. With spraying, such as that, no.
- Q. And in no other way except as cutting out dead wood?
- A. I took some of the trees out that were injured and gone.
- Q. Yes, took out some trees. Now, you didn't do anything either for the purpose of producing perfect
- 30 fruit, fruit without stings or blotches or knots or worms?
- A. No; by spraying, no.
- Q. How old, Howard, is the oldest orchard?
- A. I don't know.
- Q. Well, can you approximate?
- A. I can't approximate.

Q. Didn't you tell us once before it was thirty-five to forty years old?

A. No, sir, never told you that, not the oldest orchard.

Q. Well, are they that old?

A. They are older than that, the oldest.

Q. They are nearer fifty then?

A. I don't know.

Q. But you know that they are older than thirty-five or forty? 10

A. I think they are older than thirty-five years, yes.

Q. Now, this young orchard—did you set this young orchard out?

A. No.

Q. How old is that?

A. Well, that is not what I call the young orchard; I have a young orchard, but that orchard I don't know—I think that was seventeen years old when I bought the farm; that is what they told me; that would make it 20 about thirty-seven.

Q. And whereabouts are the young trees, the youngest trees of all?

A. I set an orchard out from the barn, all the way out to the lane.

Q. Assuming that this yellowish line here is the lane from your house out to the road, then these are the trees that you last planted?

A. Yes, sir. Well, that is part of it; there are some trees in there that I didn't plant. 30

Q. In 1909, after you had noticed what you term the burning appearance on the leaves, did that disappear during the season?

A. Did that disappear?

Q. That burning effect or appearance of the leaves?

A. Not on all of them; some of them hung there until they fell off in the fall, partially burned up; others fell on the ground.

Q. No, but you don't understand my question, Howard; I am not talking about whether the leaves fell or not, I am asking you whether or not this burned appearance on the leaves remained there or whether it disappeared—whether the leaves brightened up again at any time during the year?

10 A. Oh, no, they didn't brighten any more.

Q. At no time during the year?

A. No, not on some leaves.

Q. And that is true of 1911?

A. That is true of 1911.

Q. Now, with reference to your apples in 1909, you now say that your loss, as best you can estimate it, is \$1050 or \$1120?

A. At that many baskets at that price it figures out that

20 Q. Now, Howard, when we tried the case before, you swore that your loss in apples at that time was \$900, didn't you?

A. I didn't put it in that way, no, sir.

Q. Just listen to this question and answer of the trial in February of 1913: "By Mr. Avis." Speaking about the loss of the apple crop for that year, the previous question was, "What was your loss on the apple crop for that year." Then there was objection and the Court made its ruling, and then Senator Avis asked you:

30 "Did you figure it up at all?" and your answer was, "Hold on, we lost about \$900."

A. I say that now, that we lost that much, about \$900; I didn't say \$900.

Q. About \$900?

A. Yes.

Q. Well, it hasn't grown any since that time, has it?

A. I hadn't figured it out.

Q. I say, the loss hasn't grown any since that time, since February, 1913?

A. Well, it doesn't get any less.

Q. And it has not grown any since that time?

A. No, it has not, it just the same as it was then; I hadn't figured it out.

Q. Now, as a matter of course, that is a pure estimate on your part? 10

A. Oh, sure, the only way I have of getting at it.

Q. That is the only way you have in getting at it. Now, you had planted, you say, about an acre and a half or an acre and three-quarters of peppers?

A. Yes, sir.

Q. That year?

A. Yes, sir.

Q. Eight thousand hills?

A. About that. 20

Q. Now, then, how many hills were injured or destroyed, either?

A. Well, I don't know that.

Q. First let me put it this way, Howard; first, tell me how many were entirely destroyed, and then tell me how many were injured and how many you had left?

A. I can't tell you that; I can't answer that.

Q. Can't answer that?

A. No, sir, I estimated it.

Q. You didn't count it? 30

A. I didn't count it; as much as six or seven in a place were gone at times.

Q. Yes, I understand that, Howard. Was there any difference in the soil in that acre and a half or acre and three-quarters that you had planted in peppers—was

any part of it richer or more suitable for the growth of peppers than other parts?

A. I don't know; I can't say that there was. One part, one corner down near—

Q. Now, wait, Howard, I haven't got any question. You have already answered my question.

A. I didn't know whether it was satisfactory to you or no. I am willing to do it to your satisfaction.

Q. Now, Howard, you have told us at that same 10 time, that same trial, when we tried this case before, February, 1913, that—

The Court. Just wait a minute, was that 1913?

Mr. Joseph Gaskill. Yes.

The Court. Was that before me?

Mr. Avis. Yes, that was the time we got a non-suit.

20

Mr. Joseph Gaskill. No, you got the non-suit the first time. The jury disagreed the second time. This is the third trial of the same case.

Mr. Avis. Yes, I suffered a voluntary non-suit at that time because of the pleadings, if the Court please.

The Court. That was tried before me?

30 Mr. Avis. No, before Judge Cole, your Honor.

The Court. I was going to say, I didn't remember trying this case more than once.

Q. Now, then, at the time we tried it before Judge

Cole, you testified you lost about half your crop of peppers, didn't you?

A. I don't remember.

Q. That you got half a crop and lost half a crop?

A. I don't remember what I said there.

Q. How much did you get for the peppers that you sold, Howard?

A. I don't know that I estimated at the time.

Q. You can't tell us what you got for those that you sold? 10

A. No.

Q. When was it you did this figuring of \$150 on peppers?

A. During the season.

Q. And what was the basis of your figuring, if you don't know how many hills there were and don't know what you got for the rest?

A. Some rows that were burned pretty well up we would get none at all hardly off of them, that is, the difference would be so great that you noticed it, and there 20
was one corner up—

Q. Still you don't answer my question, Howard?

A. I am answering it in my own way.

Q. Just listen to the question and see if you can answer that question.

A. Well, ask it.

(Question repeated).

A. Upon where they were hit and where they weren't hit.

Q. That is all you can tell us? 30

A. That is all.

Q. And about half your crop was lost?

A. I don't know that.

Q. Didn't you tell us that before?

A. I don't know whether I did or no.

Q. It was a little fresher in your mind?

A. Then it was fresher in my mind.

Q. Now, listen to the questions that were put to you at that time and the answers you made: "What proportion of the crop of peppers was damaged after the fumes went over them? A. We thought about half injured, the injury done to them was fully one-half. Q. Do you know what the value of the half loss of those peppers was? A. I figured it out at the time that I lost
10 about \$150 on them." Now, did you get \$150 for the peppers you sold, Howard?

A. I expect I did.

Q. Do you know?

A. I don't recollect. What I say there is correct.

Q. Yes, but that ain't what I am asking you, though, Howard.

A. I know, but that has been a long time ago.

Q. I know, but you had this law suit on hand and was going for the I. P. Thomas people; so half the crop
20 you say you lost?

A. Yes.

Q. Now, you can't tell us what part of the crop—

A. No; you refer to that book.

Q. Wait; I say, you can't tell us how much you got for that part of the crop you sold?

A. What I answered you there; what I answered you there is correct.

Q. Read the question please. This about the loss, I am not talking about what you got from the sales. How
30 much did you get from the peppers sold in 1909; can you tell us?

A. If I told you there, I tell you the same thing now.

Q. Well, can you tell us now?

A. No.

Q. Did you replant any, Howard, after you saw this damage done?

A. I had none to replant with.

Q. And you did not attempt to replant?

A. I had none to replant with.

Q. I say, you did not attempt to replant?

A. I couldn't attempt.

Q. Well, did you kind of have it in the back of your head, Howard, that your chances would be better for getting money out of I. P. Thomas than getting it 10 out of the market?

A. What kind of a question is that?

Q. That is the question I asked you.

A. Well, it sounds pretty silly to me. I will answer any reasonable question that I can. In the back part of my head—

The Court. Just wait a minute, Mr. Miller; you are on the witness stand; you have no right to do anything or make any comments; you must answer questions 20 as they are propounded.

The Witness. Judge, I don't know how to answer that.

The Court. Just wait a minute; answer the questions as they are propounded; that is the only right you have.

Mr. Joseph Gaskill. Or else tell me that you can't 30 answer it. Now, just listen to the question and tell me whether you can answer it; if you can't answer, say so.

(Question repeated).

A. I have never got anything out of them yet for nothing; that is the only way I can answer it. I certainly didn't have that in my head.

Q. That is the only answer you can make?

A. That is the only answer I can make; I never got anything out of them yet for nothing.

Q. Now, Howard, at the time we had the first trial of this case here, you had not trimmed your orchard for years, had you?

10 A. Yes, sir.

Q. Now, isn't it a fact, Howard, that prior to the other trial that your attention was attracted to the fact that you took no care of the orchard and among other things you remember you were told that you plowed too deep, that you cut roots?

A. Fourteen inches, yes.

Q. Yes, fourteen inches; you remember that part?

Mr. Avis. This is in relation to the 1906 trial or the 20 trial of this case?

Mr. Joseph Gaskill. The 1906 trial.

Mr. Avis. I don't think he understood that.

Q. The 1906 trial. Now, then, isn't it a fact that your attention on that trial was directed to the fact that you had not trimmed that orchard for years, and isn't it a fact that you hadn't trimmed the orchard for years 30 prior to that trial of 1906?

A. I don't think so.

Q. That is the best answer you can give?

A. That is the best answer I can give.

Q. Now, you learned, didn't you, from experienced men that in plowing your orchard you had injured it by

plowing it too deep and cutting the roots, the surface roots of the trees?

A. I never plowed it any deeper one time than another, to my knowledge.

Q. Did you ever get it as deep as fourteen inches, Howard?

A. There is no pair of horses alive will pull a plow there fourteen inches deep, no certainly I didn't.

Q. Did you ever get it so deep that you cut off some big roots? 10

A. No, I never saw any big roots cut off.

Q. Wasn't your attention called to the plowing of your orchard by one of the farmers who came there and you were shown a large root that your man or boy had cut off?

A. No.

Mr. Avis. When was this time?

Mr. Joseph Gaskill. That is either 1909 or 1911. 20

The Witness. I have no recollection of anybody ever calling my attention to it.

Q. Now, Howard, the two occasions when this injury was done, as you claim, that is to say, in 1909 and 1911, it was foggy weather, misty days?

A. Sure.

Q. And there was more or less fog or mist that you could see in the atmosphere?

A. I know the difference between a fog— 30

Q. That ain't what I asked you, Howard.

A. There was some fog and there was some mist.

Q. Yes, there was some mist and the color of the mist in the orchard was about the same as the color of the mist at other places, wasn't it?

A. No.

Q. I am not talking about the color as it came from the stack; I am talking about the color in the orchard; didn't you say that that was kind of grayish?

A. I said it was light colored.

Q. Light colored?

A. Yes. At the time I saw—

Q. Now, wait, Howard. As I understand, Howard, from what you told Senator Avis, these fruit trees
10 were in good condition prior to this seeing of the mist or fog in May of 1911?

A. No, I said the foliage and bloom was fairly good. I didn't say the trees were in good condition.

Q. Well, the foliage and bloom indicated a good crop if there had been nothing, as you say, to have injured them?

A. We would have had a good many apples if there had been nothing to injure them.

Q. An ordinary, average crop?

20 A. I can't say about that; we would have had more than we usually have.

Q. That is true in 1911 as well as 1909, isn't it?

A. We would have had a larger crop than we did in 1910 in 1911 if there had been nothing hurt it; we had more bloom than we had before.

Q. And the trees had a healthy appearance as they were in bloom, the foliage?

A. The foliage was green, yes.

Q. Healthy?

30 A. Green.

Q. Healthy looking?

A. I can't answer that.

Q. Good bloom?

A. Right fair bloom on certain portions of the tree.

Q. Now, Howard, you said that you saw fumes coming out of the stack and also out of the sides of the buildings?

A. I saw it at the sides of the buildings; yes, I suppose it came out.

Q. Well, do you know whether— I understand you to say you saw it come out of the windows?

A. No, I said I saw it coming out of the stack and at the sides of the building.

Q. Then what you saw at the sides of the building 10 you don't know whether it dropped from the stack or whether it came out from the sides?

A. No, I don't know.

Q. Now, you know as a fact that they grind rock there, Charleston rock, phosphate rock?

A. Oh, I guess they grind that.

Q. And wasn't it the fine particles of the rock that you saw coming out of the stack or out of the windows?

A. There might have been some rock around the windows, but that wouldn't reach over to my place. 20

Q. How far from the top of the stack out of which you say you saw the yellowish fumes come—how far from that top could you distinguish the yellow color?

A. Since the occasion?

Q. No, no on those occasions.

A. I never measured it at all. Since the occasion—do you want me to answer it then?

Q. No, no, I am talking about those times. You say you had some gentlemen there one Sunday. That was in what year—1909, wasn't it? 30

A. No, that was in 1911.

Q. Was Mr. Mullen one of those men you had there at that time?

A. No, I couldn't get him there.

Q. You couldn't get him there?

A. No.

Q. Well, you did get him there on one occasion?

A. I got him there on Saturday, I think the following Saturday. It was one Saturday anyhow.

Q. What year was that, 1909 or 1911?

A. I think it was 1911.

Q. Howard, at the time we tried the case before, October, 1906, the first trial—

10 Mr. Avis. That is another case; you don't mean that is this case?

Mr. Joseph Gaskill. No, that is another case; when we tried the first case in 1906 it was this same orchard of apple trees that you claimed damages for at that time, wasn't it?

A. It was some trees that are in this same orchard and some other orchards.

20 Q. Yes, that is right. Now, just listen to this and see if you did not testify to this effect: "Q. Well, now, how many of these apple trees were destroyed? A. There is 178 of them burned badly, so that they are all shrivelled up, the fruit on them shrivelled and fallen off and the leaves, Q. Well, now, with regard to the life and future usefulness of these trees, what have you to say? A. I don't think they will ever amount to anything much more." Did you testify to that effect?

A. If I said there was 178 burned up, it is not what
30 I intended to answer. There is 178 trees in the orchard; I have no recollection of saying it, that there was that many affected at all.

Q. Well, Howard, outside of the number—suppose for the moment we pass the number—did you make the answer as I have read it to the questions that are here?

A. Repeat the question, please.

(Question repeated).

A. The leaves and fruit were burned and shriveled and leaves fell off and fruit fell off.

Q. Did you testify as here stated in this record?

A. Yes, that I didn't think they would amount to much more.

The Court. How many trees was that, Judge?

10

Mr. Joseph Gaskill. 178.

The Witness. No, I didn't answer it to that; you eliminated that.

Mr. Joseph Gaskill. Yes, I understand. This was on direct examination, Howard, by your own counsel at that time that I am asking you.

The Witness. I don't care who asked the question; 20
I never answered 178 all burned up and dead.

Q. Well, we may have to prove the record then. Now, then, listen to this by your counsel: "Now, Mr. Miller, why do you say these apple trees have been destroyed?" This is in 1906 when you are testifying. "Because they have lost their foliage, their twigs are burned, deadened, the ends of them all dead, and have made no growth since the deposit of fumes. Q. Well, is that a sign of death? A. Well, I should think so, with 30
weather, a season as we have had this year, if they made no growth. Trees that were not hit have grown, grown out great long twigs since all over the trees; these have shrunken." Did you make those answers?

A. That is my answer now, yes.

Q. That is your answer now?

A. That is my answer now.

Q. Then in other words, Howard, these trees for which you are now claiming damage were not in a healthy condition in May of 1909?

A. I have never said they were in a healthy condition.

Q. I am asking a question; listen to the question I asked. Wait, listen to the question.

10 A. I know what it is; I have got it.

(Question repeated).

A. The northeast side of them was not in a perfectly healthy condition, no.

Q. And you are claiming damages because there wasn't any fruit in 1909 and 1911 on the northeast side of these trees, aren't you?

A. And other parts of the trees, it swept under and burned the fruit off.

Q. And you are claiming damages now?

20 A. Yes.

Q. For the fact that the trees did not bear in 1909 and 1911 on the northeast side?

A. No, sir, I am not claiming damages for that; I am claiming damages for the fruit that was caused to fall off in 1909 and 1911.

Q. Did the apples fall off from the northeast side of these trees?

A. What was there fell off, and it fell off all around the tree, under the tree, wherever the fumes hit it.

30 Q. I thought you said the trees that were in the orchard, that didn't stand out by themselves, it was only the side of the tree next to the factory?

A. No, I said under it. This didn't hit and roll off; the wind blows under the tree and goes on, goes clear all over the farm and the neighboring farms.

Q. Then, Howard, the trees were not in a healthy condition in 1909 all over, were they?

A. I don't presume they have ever been in a healthy condition.

Q. Now, just answer the question, Howard; I am not talking about ever, I am talking about 1909.

A. On that side of the tree they weren't healthy, no; they had been burned.

By Mr. Avis.

Q. When you say they had been burned on that 10 side of the tree, do you mean all the limbs had been taken off straight up on that side?

A. Oh, no.

Q. When you say they weren't healthy on that side, did you mean they didn't have any blossom or apples on that side in 1909 and 1911?

A. No, I didn't mean that. The live limbs on that side had bloom on them and fruit on them; they were straggling on that side, where we had to take limbs out from former abuses. 20

Q. Since you have been on the farm, what has been your habit with relation to trimming the trees before and since 1906?

Mr. Joseph Gaskill. You asked him about that.

Mr. Avis. I didn't know whether I did or not before 1906.

Mr. Joseph Gaskill. I object to that as repetition; 30 he said nearly every year he trimmed them.

Mr. Avis. Very well then.

Q. In answer to one of Judge Gaskill's questions

you were going to say that you had measured where you could see the color of these fumes. Did you make any measurements with relation to the fume which you saw there on the days that you are claiming damage for now?

A. Yes.

Q. Now, what have you got to say about that?

A. From the time that I could discern this tail, as they call it— it gets weaker as it goes, acts like any color as it goes away from the stack; something, I presume, by
10 the action is taken from it,—I measured from the bush that I saw there to the acid works, stepped it, not measured, I stepped it, which is approximate to a measurement, and that was close to two hundred feet that I could see it from our place.

Q. That is two hundred feet on your place where you could see it?

A. No, it was two hundred feet, that is, I could see it before it settled down. It got down back of the trees; the apple trees were between me and there.

20 Q. Your man about two hundred feet you could see it from the house?

A. From the house toward me, yes, not quite two hundred feet.

Q. You mean, then it disappeared from your view back of the trees after that?

A. The trees obstructed it.

Q. When next could you see it?

A. I could see it coming on through the orchard in a lighter form, but I saw this tail going out in a straight
30 track.

Q. You say you could not get Mr. Mullen there, in reply to Judge Gaskill's question?

A. I got Mr. Mullen there once, the only one that did come, the only one of their witnesses that testified that ever responded to the request. Mr. Mullen did.

By Mr. Joseph Gaskill.

Q. Well, Howard, don't you remember that shortly after the first trial, referring to these same farmers and so forth, that you said that, "Those liars can never come on my place again?"

A. I don't remember ever saying anything of the kind. I gave them the privilege of bringing anybody—

Q. Wait, just answer the question; didn't you say that to Mr. Henry Lippincott shortly after that first 10 trial?

A. I don't think so.

Q. That those liars would never be allowed on your place again?

A. I don't think so.

Q. You remember that once we sent several of them there to see whether or not there had been any damage and you had them arrested for trespass—sued them for trespass?

A. Those fellows that came around back— 20

Q. Answer the question, Howard.

A. I didn't see them there.

Q. I say, you sued them for—

A. I sued some fellows for coming in there after I had forbidden them, yes. That was my legal right.

Q. Mr. Mullen was one of those that you sued?

A. I don't know who they were now.

Q. You sued everybody except my son?

A. I didn't sue him, the time he came.

Q. Not when he came at your invitation? 30

A. No.

Q. Don't you remember when he was there and you were pointing out what you claimed as an injury to the apple trees, he said, "Howard, you are mistaken; nothing wrong with those apples."

A. From all he said while he was there, and I will prove it—there was two of us together—

Q. Answer the question I put to you.

A. No, I don't remember saying that.

HOWARD W. MILLER, JR., SWORN.

10 By Mr. Avis.

Q. Howard, you are the son of Howard W. Miller, the plaintiff in this case?

A. I am.

Q. Where were you living in 1911 in May?

A. On the farm adjoining the phosphate works.

Q. How old are you now, Howard?

A. Seventeen.

Q. Do you remember the occasion in May of 1911
20 when your father went to New York?

A. Yes, sir.

Q. What occurred while he was away, with relation to anything happening in the orchard?

A. Acid fumes from the phosphate works came over into the orchard.

Q. What first attracted your attention to anything unusual?

A. Just a piercing effect on the eyes and in your throat and lips, called my attention to it.

30 Q. Had you felt that same thing before?

A. No, I never had.

Q. What did you do when you felt this, if anything?

A. I looked down through the orchard or I saw a gray, looked like a gray fog or mist down through the

orchard; I looked and saw where it was coming from, it was coming from the phosphate works.

Q. What did you see with relation to the phosphate works when you got down there?

A. Fumes were coming out of the stack on the phosphate works and coming right down on our farm.

Q. Did you follow them with your eye from the stack to the orchard?

A. Yes.

Q. Could you see, Howard, just where it came 10 from?

A. Oh, yes, sir.

Q. What kind of day was it, Howard?

A. It was a cloudy day; the sun was not out, but it wasn't so damp.

Q. When did your father come home?

A. He came home the 19th.

Q. Now, on this 18th, can you tell how long this fume, as you call it, continued to come across through the orchard and over the property? 20

A. It started sometime in the morning; I was outdoors when I noticed it, and it came over all that day. The next day it came over; I don't remember how long the next day it came over, but it came over some part of the day.

Q. Did your father at that time or any other time send you over to the factory with any message?

A. He didn't send me.

Q. After those two days? 30

The Court. Which orchard did you say was affected?

Q. Howard, can you understand this map generally? This is the plant of the phosphate works; this is

the house and this is the barn; can you tell which portion—this generally being the orchard—can you tell which portion the fume that you saw went across, here and here and here and where in that map?

A. There is a roadway from our house down through the orchard, and that is where I noticed it coming, through the roadway; that is where I went to look for it.

Q. Where is the roadway, toward the creek from
10 the barn or toward the road from the barn?

A. It is between the cribhouse and the barn.

The Court. What I wanted to know was whether the young orchard which Mr. Miller says he planted was affected in any way, or was it the old orchard?

Mr. Avis. This orchard down here?

The Court. Yes.

20

Mr. Avis. The plaintiff—

The Court. Was it affected in any way?

Mr. Logan Gaskill. I object to that sidebar examination.

The Court. It was not made very clear to my mind whether it was the orchard that was standing there for
30 some years that was the one that was affected or whether it was the new orchard.

Mr. Joseph Gaskill. I guess your Honor has about the same impression that the rest of us have.

The Court. What is that?

Mr. Joseph Gaskill. Very uncertain and indefinite.

The Court. That is the reason I asked this young man which orchard as far as he could observe was affected.

Mr. Logan Gaskill. Well, if the Court please, he has not yet testified there was any affected; I presume 10 he will, but he said he saw a fog in the orchard.

The Witness. A gray fume.

The Court. Go ahead then.

Q. Now, you say—suppose this is the barn and this is the cribhouse—you say a lane came down through the orchard between the two?

A. Yes, just a roadway made through the orchard. 20

Q. A roadway, not a public road?

A. No.

Q. Now, was it this roadway coming down through the orchard that was—

A. That is where I went to see where the fumes were coming from.

Q. That is where you noticed it, and these gray fumes, as you call them, you saw in that roadway, did you?

(Objected to).

30

A. I saw them in that roadway.

Mr. Logan Gaskill. I object to that as leading and suggestive.

Mr. Avis. He testified to it.

Mr. Logan Gaskill. That don't make any difference.

Mr. Avis. All right, if you want to take a lot of time; the witness testified to it before.

Mr. Logan Gaskill. I object to counsel repeating
10 over and over what he considers the testimony. Counsel
is not on the stand.

Mr. Avis. I will withdraw it.

Q. Now, then, you say the lane goes down here,
is that right?

A. About where my finger goes, just about in
there, if that is between the cribhouse and the barn.

Q. Where did you see these fumes in relation to
20 the lane?

(Objected to as leading and suggestive).

(Objection over-ruled).

(Exception noted for the defendant).

A. Why, it came through the orchard and through
the lane too. Of course, you could see it through the
lane, but it came through the orchard just the same as it
did the lane; you could see it all-through the orchard, and
I looked to see if it was going anywhere else.

Q. When you say 'all through the orchard,'
30 what part do you mean? What part did you go through
where you could see it?

A. Just between the cribhouse and barn; I went
down to the creek too.

Q. You also went to the creek?

A. Yes, they were building a new house down there; there was building down there.

Q. What have you to say about fumes down there?

A. That is where I saw it coming from the shack, and it was just coming over on our farm from there. It didn't go in any other direction.

Q. Now, after this was over, did you go through the orchard and look through any of the trees or leaves or apples that were on it?

A. I went and told my mother before, yes, but I 10 did go and look at the trees and saw that the leaves were burned. That was the 19th I saw that, after the sun came out in the afternoon; on the 19th the sun came out.

Q. How about the apples themselves?

A. I didn't take notice of the apples.

Q. You didn't go out the following day through the orchard?

A. No, I did not.

Q. Did you go out on this Sunday?

A. No, I did not.

20

Cross-Examination.

By Mr. Logan Gaskill.

Q. Now, these leaves, Howard, didn't get burned until after the sun came out, did they?

A. I didn't go look to see.

Q. Now, you have told us as though it were a matter of some importance that when the sun came out 30 you saw the leaves were burned. Now, were they burned after the sun came out?

A. After the sun came out, yes, they were burned afterward; they might have been burned before, too.

Q. How long after the sun came out, was it that

you observed that they were burned?

A. I don't know, because I don't remember just what time the sun came out.

Q. That is kind of guess-work, isn't it?

A. Yes, sir.

Q. You don't know when the sun came out?

A. It came out in the afternoon, I know that.

Q. Didn't come out until afternoon?

A. In the afternoon.

10 Q. It wasn't until afternoon that you went down in the orchard?

A. I was there in the morning.

Q. The leaves were not burned then, were they?

A. Oh, yes, they were burned.

Q. Were they burned then?

A. Yes.

Q. Then the coming out of the sun had nothing to do with it, is that so?

A. I don't know.

20 Q. What is an acid fume?

A. Why, it is a fume given off from acid, I suppose.

Q. It is a fume given off from acid; now do you know that?

A. I don't know it.

Q. How do you know then that what you have termed acid fumes were acid fumes—that is only guess-work too, isn't it?

A. I saw them coming from the acid place at the
30 phosphate works, and I have been to the phosphate works in the acid house lots of times.

Q. You know they have an acid house there?

A. Yes, I know they have.

Q. And you think because you saw something coming out of the stack it was acid fumes, is that so?

A. It burned the trees; it must have been acid.

Q. How did you know what you saw coming out of the stack was acid fumes—it is simply a conclusion, is it?

A. They weren't burned before.

Q. No, they weren't burned before; it is simply your judgment that after this time they were burned by acid fumes?

A. Yes, they were burned after the acid fumes came over. 10

Q. You told us you didn't know what an acid fume was.

A. I said an acid fume, I suppose, was a fume given off from an acid.

Q. That would mean given off from free acid, wouldn't it?

A. I suppose so.

Q. And if they had no free acid there, there would be no acid fume, would there?

A. I don't suppose so, but they did have acid there. 20

Q. Whereabouts were you when it occurred to you to run out and see what was going on?

A. To run out? I was outdoors playing, and I noticed this effect in my eye, throat and lips.

Q. Oh, you were outdoors playing and you felt some piercing sensation in your eyes and your throat and your lips, is that it?

A. That is it.

Q. And immediately you thought of the orchard, is that so? 30

A. No, I didn't think of the orchard; no, I was down playing at the hill where I could plainly see the phosphate works. I saw these fumes coming out, and it looked like gray mist in the orchard, so I went up and

told my mother about this mist in the orchard; it was burning.

Q. It was a gray mist you say, was it?

A. It sort of looked kind of gray, a gray effect.

Q. That is the color of any ordinary fog or mist, isn't it?

A. Yes, but there wasn't any around anywhere else.

Q. Now, that dark line around the edge of that
10 map shows the low places, doesn't it, between your father's farm and the Thomas place?

Mr. Avis. You mean the shaded portion or the black line?

Mr. Gaskill. Yes, that is dark.

The Witness. Which does he mean; I don't know what he means.

20

Q. All right; there is a good deal of low ground down there between the fertilizer plant and your orchard, isn't there?

A. Yes, it is a little lowish, but there isn't so much of it.

WALTER C. MIDDLETON, SWORN.

30

By Mr. Avis.

Q. Where do you live, Mr. Middleton?

A. Gibbstown.

Q. What is your occupation?

A. Well, different kinds of work, farming now at present.

Q. At the present time you are a farmer?

A. Yes.

Q. Were you farming in 1909 and 1911?

A. No, sir.

Q. What were you doing in those years?

A. Yes, in 1911.

Q. Whose farm were you on that year, your own farm? 10

A. No, Pittsburg Steel Company.

Q. Where is that located with relation to Mr. Miller's farm?

A. I think it lies about west from Mr. Miller's.

Q. Is that what I would call down the river or up the river?

A. Down the river direct.

Q. And is the farm that you were on along the river bank, or does it adjoin some other farm?

A. No, about half a mile back. 20

Q. Did you have any apple trees on that farm?

A. Some.

Q. In May, 1911, did you go to Mr. Miller's place?

A. 1911?

Q. Yes.

A. In May, yes, the latter part; I don't know what day, particularly.

Q. Do you know what day of the week it was?

A. No, I don't know that either.

Q. How did you come to go there? 30

A. Well, I was on my way from Billingsport up to Paulsboro, and as I went by I saw him out there in the watermelon patch, and I went in there to see how he was making out, and talked with him a little bit; then he drew my attention to these trees.

Mr. Logan Gaskill. Wait a moment; I object, that is not before the Court.

The Court. What is that?

Mr. Gaskill. Well, as long as he stopped testifying, I am satisfied,, but I object to a continuance of that line.

Q. After you say he drew your attention to the
10 trees, what did you do?

A. What did I do? I looked at them.

Q. Do you recollect where you were when you
looked at them, Mr. Middleton?

A. Yes.

Q. Whereabouts was it?

A. What orchard, you mean?

Q. Yes.

A. I looked in all orchards.

Q. Did you look in the pear orchard?

20 A. Yes.

Q. What did you observe in the pear orchard at
that time?

The Court. When was that?

Mr. Avis. 1911.

A. What did I observe?

Q. Yes.

30 A. Well, I noticed that something had been the
matter with the trees.

The Court. What did you see?

The Witness. The leaves were all burned brown with more of a black color.

Q. What about the fruit, if anything?

A. Well, there wasn't much fruit left on them.

Q. Where was the fruit?

A. On the ground.

Q. What have you to say as to the quantity that you saw on the ground?

A. Well, I don't, it was considerable; practically 10 the whole crop.

Q. Now, the apple trees, the orchard, did you inspect any of them or look at any of them and see what condition they were in?

A. I did.

Q. How many, about, did you see—you say you walked through the whole orchard?

A. I was through them all.

Q. Was there anything unusual with relation to any of those trees, unusual to you? 20

A. Well, yes, there was on some of the trees; some of the trees was all right.

Q. What was the unusual situation that you saw?

A. Well, the unusual situation that I seen there was on account of the leaves falling off the trees. The leaves, a good many of them, had fallen off.

Q. Did you examine any of the leaves, look at them, to see what—

A. Yes.

Q. What was their condition? 30

A. Some of them was colored all over and some were spotted.

Q. What have you to say as to the quantity of leaves, as to the appearance of the tree after the leaves came off—was there anything you noticed there?

A. I noticed the leaves, after the leaves had come off.

Q. No, the tree, not the leaves, the appearance of the tree, after the leaves came off?

A. Yes, you could see it on the bark, on the young bark; on the older bark, the bigger limbs, you couldn't see it so much at that time.

Q. What could you see on the young bark?

A. That was spotted the same as the leaves, practically.

Q. What was the general appearance—did you liken it to anything at that time that you had ever seen before?

A. No, I had never saw anything like that before. no.

Q. Can you say about how many trees were affected?

A. Well, no, not exactly.

Q. Well, what is your estimate about it, if you have any?

A. I had at that time, but I forget what it was. I suppose it was fifty or sixty old trees.

Q. Now, this dropping of leaves—what about apples, dropping of apples?

A. Well, there was quite a quantity of apples there

Q. Can you say whether there was any difference as to which side of the trees were most affected?

A. On some trees.

Q. Some trees? Which side was on some trees?

A. Which side was affected?

Q. Yes.

A. The northeastern side.

Q. And that is in the direction of whose property?

A. The phosphate works.

Q. You had an apple orchard that year?

A. I did.

Q. Did you examine or look at any other orchards in the vicinity beside your own that year?

A. Not outside mine and Mr. Miller's, no.

Q. What have you to say as to the comparative condition of your orchard and Mr. Miller's orchard that year?

Mr. Logan Gaskill. I object to that as not a proper basis of comparison. The jury can't reach any estimate 10 as to whether or not these alleged fumes affected that orchard by a comparison of its condition with his.

The Court. Mr. Avis, I don't think that is the test; I think it would be competent to show what the general condition of the apple crop was in that locality.

Mr. Avis. Well, I can only do that—

The Court. Whether it was a good year for apples, 20 I think would be competent.

Mr. Logan Gaskill. Yes, that is a different proposition altogether.

Mr. Avis. I can only do that, if the Court please—it may be that I will have to go around to the different orchards in that vicinity; I can't have this man testify to all of them, I can only go step by step.

30

The Court. I know, but that is the difficulty. I think that the Court has indicated as far as you can go. You can find out from this witness and other witnesses, if you desire, whether it was a favorable year for apple growing; that is as far as you can go. You can't make

a comparison between this man's apple orchard and the plaintiff's apple orchard, because so many things enter into it. It may have been a younger orchard, may have been a different orchard, may have been better located or worse located.

Mr. Avis. Well, that they may cross-examine on, if the Court please, and develop.

10 The Court. No, I don't think that is a correct rule of evidence.

Mr. Avis. My idea is—your Honor may differ with me—my idea is that if there was something in this orchard that was not in any other orchard in that vicinity, that that is some testimony to go to the jury as to the cause of this damage.

The Court. You have a right to show, undoubt-
20 edly, exactly what was the matter with these trees. Now, you can show that directly or you may show it inferentially.

Mr. Avis. It may be a matter of rebuttal, your Honor, and not of my original case.

Q. Do you know, Mr. Middleton, that year, what the prospect was for a good, fair or bad crop of apples in that community?

30

Mr. Logan Gaskill. I object to the witness being called upon to state the prospect; that is too vague, general and indefinite. He is not qualified to state that. In fact, counsel's own statement is to the contrary.

Mr. Avis. I was only following the Court's suggestion.

The Court. Well, he is an apple grower.

By The Court.

Q. Are you an apple grower?

A. Not practically, no.

Q. Do you grow apples? 10

A. No, the trees do; I take care of them.

Q. You are acquainted in the neighborhood, are you?

A. Yes, sir.

Q. Well, do you know whether or not that was a favorable season for apples to grow?

A. Well, it must have been, Judge, for there was a right fair crop of apples afterward.

Cross-Examination. 20

By Mr. Logan Gaskill.

Q. Now Mr. Middleton, on the previous trial of this case you said that you did not know how many trees were affected and that you did not go over the whole orchard, and you did not count the trees; that is still true, isn't it?

A. I didn't know exactly how many trees, no.

Q. And when you say fifty trees were injured, that 30 is only guesswork, isn't it?

A. Well, yes, for I didn't count them.

Q. Now, you are not an expert on growing fruit, are you, Mr. Middleton?

A. I don't claim to be, no, sir.

Q. There are forty-five trees in your orchard, aren't there, about?

A. Yes, sir.

Q. They are rather old trees?

A. Yes, they are.

Q. You do not spray?

A. No, sir.

Q. You do not give special attention to the growth of apples?

10 A. No, sir.

Q. You would not consider yourself qualified to say what turned the color on Miller's trees, would you?

A. Not exactly, no.

By Mr. Avis.

Q. Did you ever see anything like that in your orchard or any other orchards?

A. Well, I have seen the falling of the apples, but
20 I never saw the leaves fall off that way and turn black.

Q. That is what I mean; that is all. When you say apples—you have seen them fall, when have you seen them fall?

A. In the month of June.

Q. The June drop, you mean?

A. Yes.

By Mr. Gaskill.

30 Q. That June drop is as heavy as this drop, wasn't it?

A. Well, that depends, some apples more than others.

By Mr. Avis.

How about that year; was there anything like the June drop like that that year in your place?

A. Not in my place.

Q. As compared with Mr. Miller's?

A. There might be of one certain crop of apples.

At this point a recess was taken until 1.30 o'clock
P. M. 10

Hearing of the cause resumed after recess, pursuant to adjournment, in the presence of counsel for the respective parties.

PERCY LODGE, sworn. 20

By Mr. Avis.

Q. Where do you live, Mr. Lodge?

A. Paulsboro.

Q. How long have you lived there?

A. All my life.

Q. Do you know Howard Miller?

A. I do.

Q. Do you know where his farm is? 30

A. I do.

Q. Do you know where the plant of the I. P. Thomas & Sons Company is?

A. I do.

Q. What is your occupation, Mr. Lodge?

A. Commission merchant and fisherman.

Q. You have been on Mr. Miller's place, his farm?

A. I have.

Q. Well, were you there sometime in 1911?

A. I was.

Q. Do you know about what time it was?

A. Either the latter part of May or early in June, somewhere just about that time.

Q. How did you come to go there, Mr. Lodge?

10 A. Mr. Miller asked me to.

Q. What did you go there for?

A. Well, I did not know at the time I went there. Mr. Miller asked me to come down, he wanted to see me on business; I did not know what it was at the time.

Q. When you got there, what did you do?

A. Mr. Miller took me out through his apple orchard, apple and pear orchard.

Q. What condition did you find them in, the trees of the two orchards?

20 A. I found the leaves on both apple and pear orchard spotted and browned.

Q. What had become of some of the leaves, if any of them? Were they all on the trees?

A. No, some of the leaves had fallen, some of the trees.

Q. And what about the fruit?

A. A good deal of the fruit had fallen, small apples and pears.

Q. Did you see any other orchards that year?

30 A. I did.

Q. Well, first, can you tell as to the quantity or proportion of the fruit that had fallen from the trees—take the pear orchard for instance?

A. The proportion, the total proportion of the fruit?

Q. That had fallen, yes, when you saw it.

A. Well, in the pear orchard there wasn't much fruit left on the trees; it pretty much had all fallen.

Q. When you were there, where was the fruit?

A. On the ground.

Q. About how big were the pears at that time?

A. Well, they were small, say the size of a hickory nut, something of that kind; the fruit was all small.

Q. And what proportion of the leaves on the trees had been affected? 10

A. Well, that varied on different trees. In the pear orchard—

Q. I am speaking of the pear orchard now, exclusively.

A. As a general thing it was affected pretty much all over. I didn't count the trees, or the proportion, but more in the pear orchard considerably than in the apple orchard.

Q. Now, when you went into the apple orchard, what did you find there in relation to the leaves? 20

A. Well, I found that on some trees that a great proportion of the leaves were spotted and browned.

Q. Any fallen there?

A. Yes.

Q. Did you find any trees going through the apple orchard that had not been affected at all?

A. Oh, I think so.

Q. Then this condition that you speak of did not affect the whole orchard as you recollect it?

A. No 30

Q. With relation to the fruit in the apple orchard, what have you to say, the apple trees that you examined—where was the fruit?

A. Well, part of it was on the trees, of course, and part had fallen on the ground.

Q. Was that a small amount on the ground or a large amount?

A. Well, according to my judgment it seemed as if there was a good many apples had fallen.

Q. Did you notice whether or not the twigs—there was anything the matter with the twigs and young growth on the trees?

A. Yes, they were browned similar to the leaves in a great many instances.

10 Q. Did you break any of them or break any of the stems of the apples or the leaves while you were there?

A. I did.

Q. What did you find upon breaking them?

A. Well, the stems of the leaves, they were dead; the twigs, some of them just showed a partial decay and some of them were practically dead, that is, the ends of the twigs.

Q. Do you know whether or not to your recollection this effect that you speak of was more on one side
20 of the tree than the other?

A. It was on a great many trees.

Q. Which side?

A. On the northern and eastern side.

Q. And what direction is the plant of the I. P. Thomas & Sons Company from this orchard?

A. Northerly, northeasterly direction.

Q. Did you go to the hedge that is between the two farms?

A. I did.

30 Q. Did you see anything there?

A. I did.

Q. What did you see there?

A. I saw an appearance very similar to the apple orchard.

Q. On what?

A. On the vines and leaves and trees.

Q. What kind of vines and leaves were there there?

A. Well, I presume the vines running over the trees were grape vines, then there were various kinds of trees, some sassafras, wild cherry and different trees that composed the hedge.

Q. Now, what was their condition?

A. Their condition was just about like the apple orchard, if anything, worse. 10

Q. How about in the field or meadow there, did you examine anything there?

A. I did not.

Q. That same year, did you, either before or after this time take any particular notice of any other apple orchards in that vicinity?

A. I noticed as I went by them; I did go in any orchards.

Q. How many of them did you notice?

A. Why, several, three or four different orchards. 20

Q. Did you see anything like the condition in any of these other orchards that you saw in Mr. Miller's orchard?

A. I did not.

Q. Had you before this time in May that same year seen Mr. Miller's orchard?

A. Before I went down to the farm to see him?

Q. Yes, before, when he sent for you and you went down and saw his condition.

A. If I had, I don't recollect it; I don't think I had. 30

Q. How about since that time, have you examined it at all?

A. I have been there since this occurrence in—

Q. 1911?

A. 1911.

Q. About when was it, Mr. Lodge, more than once?

A. I have been there twice since.

Q. And at either of those times have you made an examination of the orchards, either the pear or apple orchard?

A. I did of the apple orchard.

Q. What condition did you find the trees in that you had examined and seen when you were there in
10 1911?

Mr. Logan Gaskill. I object to that unless the time of these purported two visits is stated.

Q. Can you tell me as near as possible when that was?

A. The time I visited the apple orchard was yesterday.

Q. Oh, yesterday?

20 A. Yes.

Q. What did you find the general condition of the trees yesterday, these trees that you saw before where you explained the burning of the leaves and the apples?

A. Well, I went down one row, I guess it is what they call the roadway through the orchard, and toward the end of the orchard that was most affected I counted nine trees.

The Court. How many?

30

Mr. Avis. Nine trees he counted yesterday.

The Witness. Nine trees in one row, not a double row.

Mr. Avis. No, one row.

The Witness. I examined those trees there on to the end of the orchard, and I found the twigs and limbs—sometimes the limb running clear to the butt was dead, sometimes perhaps there would be a few limbs, three or four feet long dead, and in those nine trees I found the affection of three pretty nearly on either side alike; on the other six the affection was nearly all one side; some of the trees nearly—the eastern side nearly half 10 dead.

Q. That is the side toward what, toward the river and the plant of the I. P. Thomas & Sons Company?

A. Yes.

Q. These trees that you found affected that way, on that side, how were they on the other side?

A. On the westerly side?

Q. On the southerly side?

A. Some were affected a little, but very little. The 20 affection on six of the trees was very little except on one side.

Q. That was marked, was it, so you could notice it?

A. Yes, that was marked, so anybody could notice it.

Cross-Examination.

By Mr. Logan Gaskill.

30

Q. What is your business, Mr. Lodge?

A. Commission merchant and fisherman.

Q. Commission merchant and fisherman?

A. Yes.

Q. How much of the year do you fish and how much do you merchant?

A. About four months and a half commission merchant and about two weeks or two months fishing.

Q. What do you do the rest of the year?

A. Well, I have various businesses to look after. We have a couple of lighters, carry manure or coal or anything that is needed carrying.

Q. What kind of commission business are you engaged in?

A. Fruit and produce.

Q. And with whom are you employed?

A. I am my own boss in the commission business.

Q. Your own business? Whereabouts is it located?

A. No. 14 Callowhill, Philadelphia.

Q. How long have you known the plaintiff, Howard Miller?

A. As long as I can remember; I don't know just how long I can remember.

Q. Are you related to him?

A. I am not.

Q. Do you handle his truck and fruit?

A. I do not.

Q. Have you ever done so?

A. I am not sure that I ever handled a basket; I handled some for his tenant. Mr. Miller left his own stuff in the ground and his tenant last fall wanted to get rid of his and sent it to me, but whether I have ever handled any of Mr. Miller's—I don't remember ever handling any, perhaps I have.

Q. When he sent for you in May, 1911 you thought it was about the produce business, did you?

A. No, sir.

Q. Well, what did you think it was about?

A. Well, Mr. Miller used to have a lighter that he sold to a company and that company had written to me in regard to one I had, and Mr. Miller said he wanted to see me on business. He had already talked about this and I asked my wife at the time why he didn't—

Q. Well, you thought it was about that lighter, did you?

A. I thought it was about that lighter.

Q. And when you got down there he asked you to inspect his orchard, didn't he? 10

A. He did. . . .

Q. Now, isn't it a fact that you just walked casually around through the orchard without making any effort to determine what its condition was?

A. When I was down there in 1911, you mean?

Q. Yes.

A. No, when I went down there I examined it thoroughly.

Q. Did he ask you to examine it thoroughly?

A. Of course he did. 20

Q. How much experience had you had in growing fruit?

A. Never had any.

Q. How much experience had you had in treating various kinds of diseases that attack fruit trees?

A. None whatever, never growed any.

Q. Did you tell him so?

A. Well, he knows that.

Q. He knew that, and he asked you to examine his trees knowing that you did not know anything about the subject of growing fruit? 30

A. Yes.

Q. And you examined them in the same spirit?

A. I did.

Q. You were there to see what you could see superficially?

A. I was there to see what I could see.

Q. But you could not look very deeply into what was the cause of the trouble in his orchard, could you?

A. All I could look at was what I saw.

Q. You live in Paulsboro?

A. I do.

Q. And you did not make any careful examination
10 of any other orchards that year, did you?

A. No more than going by them, walking and driving.

Q. Simply driving by them on the road?

A. That is all.

Q. You did not attempt to go through them and inspect them and determine whether they were healthy or unhealthy?

A. I did not.

Q. Or as to whether they had a large crop or small
20 crop?

A. I did not.

Q. And as to whether the leaves were in perfect condition or whether they were spotted and browned?

A. I could see that from the road.

Q. Now, then, how many trees deep into an orchard you see from the road?

A. How many trees?

Q. Yes, how far into an orchard could you see from the road—you couldn't see many, could you?

30 A. You burn a tree and I can see it anywhere—

Q. I didn't ask you that; how many trees deep into an orchard can you see driving by on the road? The jury want to know what kind of eyes you have.

A. I think I could see anywhere over the orchard some portion of a tree that had an appearance dissimilar

to the rest of the trees; I think I could see over—

Q. Suppose you were driving by an orchard that ran back about forty trees deep; now, how deep into such a row of trees could you see from the highway to determine the condition of the foliage?

A. Well, that would depend on the condition of the foliage.

Q. I am not asking you about any depending; I am asking you a plain, practical proposition, as to how many trees deep into an orchard you could see from the road 10 in order to determine the condition of those trees?

A. Well, if its foliage was brown—

Q. Just answer the question. May I have an answer, if the Court please? I have explained it to the witness and he is bound to know it.

The Court. Just answer the question.

A. In the condition that I saw Mr. Miller's trees I could see— 20

Q. No, I am not asking you about Mr. Miller's trees. (To the stenographer. Read the question to him, please.)

(Question repeated.)

A. Well, a tree, an orchard forty trees deep, I could not see all over the tree; I think I could see the last tree in the orchard.

Q. You think you could see back to the last tree in 30 the orchard? That is all.

CHARLES A. NOTHNAGLE, SWORN.

By Mr. Avis.

Q. Where do you live, Mr. Nothnagle?

A. Just below Paulsboro.

Q. What is your occupation?

A. Well, I am living on a farm there.

Q. Are you farming at present?

A. Trying to, yes, sir.

10 Q. How much of a farm have you got there?

A. 41 acres.

Q. You know Howard W. Miller?

A. Yes, sir.

Q. Do you know where his farm is located?

A. Yes.

Q. Have you been on the farm?

A. Yes, sir.

Q. How often in the last six years?

A. Well, on up until before they moved away from
20 there, I used to drive in there three times a week.

Q. What was the occasion of your going there that often?

A. Well, I was in the butcher business, and I had the butcher wagon, went there three days a week.

Q. Then you had really two businesses—you were running a farm—

A. Not just at that time.

Q. Were you there in May or June of 1911?

A. Yes, sir.

30 Q. Before the 18th of May, did you ever—

Mr. Joseph Gaskill. What year?

Mr. Avis. 1911—(Continuing) examine the orchard there at all or notice it particularly, look at it?

A. Well, I had to drive in his lane, you know, three times a week, and of course, I had to drive part through along the edge of the orchard, and naturally I could see, but never went down in to look through it or anything in particular.

Q. Now, before the 18th of May, had you noticed anything peculiar or unusual about the trees?

A. Oh, no, sir.

Q. After that time, did you at any time examine the trees or notice them for any purpose? 10

A. Yes, I saw them, went in there to look at them.

Q. Where did you go to look at them and what did you see, that is, what did you look at?

A. Well, I went in just at the edge of the turn, there is a driveway down through the orchard, and Mr. Miller told me to go down and look at his trees, and I went down and looked at them, went clear on down through to where the little pear orchard is down in one corner.

Q. As you went down this lane, what did you see 20 with relation to the trees, the foliage, the young twigs and the apples, the fruit?

A. Well, I noticed on parts of the trees they looked sort of browned like, the leaves looked browned like.

Q. Where did you see apples, if you saw any—did you see any apples?

A. Oh, there was lots of apples on the ground, and some few on the trees.

Q. Do you know how many trees that you saw that were affected that way in the apple orchard? 30

A. How many? No, I couldn't say how many there were.

Q. Did you notice at that time whether they were affected all over the same or different?

A. All over the orchard?

Q. No, no; all over these trees that you looked at?

A. No, just sort of on the one side, like down through it like.

Q. Which side was that?

A. On the upper right hand side walking down in.

Q. And that was in the direction of what—what direction was it generally?

A. Well, from over toward the works.

Q. That is, the phosphate works of the I. P. Thomas Company?

A. Yes, sir, over toward the works.

Q. Had any leaves fallen?

A. On to the ground?

Q. Yes.

A. I couldn't say that.

Q. Do you remember what date it was you were there?

A. I was there twice; I was there that day with the butcher wagon on Saturday, then I went down on 20 Sunday.

Q. Did you on both of those days go into the orchard?

A. Yes, both days; the first day I didn't go so far as I did the second day.

Q. What about the second day?

A. I went on down through it; he took me all the way down to the pear orchard, the second day; the first day I did not go that far.

Q. I see; what condition did you find in the pear 30 orchard?

A. The leaves seemed to be a little darker down there; they were more blacker than they were up in the orchard.

Q. What about the fruit, the pears?

A. Well, it was all just about the same.

Q. What do you mean?

A. On the ground, the pears were underneath, on the ground, you know.

Q. Were they in large quantities or small?

A. Oh, they were pretty thick.

Q. Did you that year at or about that time look at any other orchards in that community and the vicinity after you had seen Mr. Miller's?

A. You see, I have quite a few trees on our place; I looked at my own. 10

Q. Did you look at any others?

A. Then on the farm adjoining mine, they have quite a big orchard; I have to pass that every day. I just noticed that as I went along, you know.

Q. You did not go into it to examine it?

A. Only just noticed mine when I went home; I didn't know what caused it, and I looked at mine, and mine didn't appear that way.

Q. What about the other orchard?

A. Next door to me, there didn't seem to be any- 20 thing wrong with it.

Q. Did you look at them particularly for leaves?

A. No, I did not.

Q. Did you look at your own particularly for leaves?

A. Yes, I looked at mine.

Q. How many trees have you got on your place?

A. I think about sixty.

Q. And how far are you away from the plant of the I. P. Thomas & Sons Company? 30

A. How far?

Q. How far is your orchard, yes.

A. Oh, I suppose possibly a mile, just outside of Paulsboro.

Q. Have you looked at these trees, any of them, since, recently?

A. No, I haven't been on Mr. Miller's farm since he moved away.

Cross-Examination.

By Mr. Joseph Gaskill.

10 Q. Mr. Nothnagle, I understand both of these visits of yours were in 1911, is that right, the two visits that you have spoken of to Howard Miller's place?

A. When I went there?

Q. Yes, both in 1911?

A. Yes, one was on Saturday and the other the next day after.

Q. 1911?

A. Yes, I guess it was 1911.

Q. Well, it was in the same year, both visits?

20 A. Oh, yes, yes, sir.

Q. Now, in making the observations that you did, you walked down that driveway, I understand, down the orchard?

A. Yes, sir.

Q. You did not go out into the orchard on either side?

A. Well, possibly a couple of rows on each side going down through.

Q. How many rows are there?

30 A. In his orchard?

Q. Yes.

A. Oh, I couldn't tell you.

Q. Quite a large number, isn't there?

A. Yes, it is a good big orchard.

Q. How near to the piece of low ground were the

hedge and stuff that has grown up between Miller's farm and the I. P. Thomas Company's farm, did you get to, how near that?

A. I guess I went clear down to that.

Q. Now, where was it that you noticed these brown leaves and fallen apples, down there at that place or up nearer the house?

A. Well, clear on up to the barn.

Q. Both sides of that driveway?

A. Not so much I don't think on this side, as there 10 was on this side of the driveway. (Indicating.)

Q. That is on your left, you were motioning with your left hand?

A. Yes; well, I would be on the left going toward the phosphate works. The trees there were bigger trees on that side.

Q. Now, you say toward the phosphate works—you said the sides of the trees toward the phosphate works; that is also toward the Delaware River, isn't it, and the mouth of Mantua Creek? 20

A. It seems to me that is kind of toward the Creek.

Q. Yes, and toward the mouth of the river, isn't it, or the mouth of the creek, I should say, where it empties into the river?

A. Yes, that would point in that direction.

Q. Now, you don't claim to be a fruit grower, an expert fruit grower?

A. No, sir.

Q. Do you do any spraying?

A. No, sir. 30

Q. You know nothing about the diseases of trees or—

A. No, I don't know nothing about diseases.

Q. And nothing about the insects and various things that destroy the fruit and trees?

A. No, I couldn't answer anything about that.

By Mr. Avis.

Q. Just one moment, Mr. Nothnagle; there is a matter I overlooked, if the Court please. What do you know about the average apple crop that year, if anything?

A. Well, you want me to speak for myself?

Q. Yes.

10 A. Well, it was all right, good.

MRS. LAURA W. MILLER, SWORN.

By Mr. Avis.

Q. Mrs. Miller, you are the wife of Howard W. Miller?

20 A. Yes, sir.

Q. Where were you living in the year 1909?

A. On the farm.

Q. In that year was your attention called in any way to the orchard particularly?

A. Yes, sir.

Q. In what way, Mrs. Miller?

A. In the deposit of some kind of vapor or a misty substance coming into the orchard.

Q. What called your attention to it?

30 A. Mr. Miller called my attention to it.

A. And did you see what you call the vapors that year?

A. Yes.

Q. Or just what you thought was the effect of it?

A. No, I went out and saw it.

Q. What did you see that year, 1909?

A. I saw this mist falling, coming into the orchard, and I stood there for a while until I felt the effect of it.

Q. In what way did you feel the effect of it, Mrs. Miller?

A. Well, with me it has a burning sensation, affects the eyes.

Q. Did you see where it came from?

A. Yes.

Q. How could you see that?

10

A. Well, because I just, in noticing it fall—then I looked to see where it was coming from, and I noticed it coming from the direction of the phosphate works.

Q. Did you go to a position where you could see actually where it was coming from?

A. Yes, I did.

Q. Where was it coming from when you saw it?

A. You mean just what part of the building?

Q. Yes, did you see?

A. No, I couldn't tell just exactly that; I could only see that it was coming from that building, but on account of the thickness of the mist, I could not tell just exactly where.

Q. Do you recollect what the effect was, that is, what the condition of the trees was after that time?

A. Yes, sir.

Q. What was it?

A. Well, they were partially destroyed, the leaves and apples, and even the limbs.

Q. Now, come down to 1911. Where were you living then?

A. On the farm.

Q. What occurred, if anything, to your recollection in April, 1911 or May of 1911 with relation to these trees?

30

- Q. Well, the same as happened in 1909.
- Q. What called your attention to it at that time, 1911, Mrs. Miller?
- A. My son came and called my attention to it that morning.
- Q. Now, after he called your attention to it, what did you notice first?
- A. I went out in the orchard and I noticed this mist, just the same as I had other times.
- 10 Q. When you say a mist, just tell us what it looked like to you, what you saw?
- A. I can scarcely describe it; it is not like a fog exactly; it is more like a vapor, and variously tinted.
- Q. It has some tints to it, has it?
- A. Yes.
- Q. Did it have any effect upon you physically, personally?
- A. Oh, yes.
- Q. What was that?
- 20 A. Yes, I could feel it; I could taste it, that is, a sensation of drawing to the lips and a burning sensation to the eyes.
- Q. Well, did you follow that up to see if you could find out where that came from?
- A. Yes.
- Q. Where did you go to do that?
- A. I just stood in the orchard and watched it.
- Q. Could you see where it was coming from?
- A. Yes, I could see that it was coming from the
- 30 works.
- Q. What works?
- A. The Phosphate Works.
- Q. Was there the same kind of mist as you saw all around the orchard and over the creek at that time?
- A. I didn't look over the creek; as far as I could

see through the orchard and over our farm, I could see it; beyond that I didn't look.

Q. Did you go down to the end of the orchard or did you stay up in the house when you looked for it?

A. No, I walked around through different parts of the orchard.

Q. Did you go into the pear orchard?

A. No, I did not go into the pear orchard.

Q. Do you know what portion of the orchard or orchards this mist came through or covered? 10

A. Well, I don't know just how much; I know just where I went first; I went down the lane that leads toward the Phosphate Works and went through the orchard on the left of that road and all around there; I walked around considerable, I couldn't tell how much ground I covered, but everywhere I went I could feel it just the same, could see it.

Q. Now, how long did that keep on coming, to your knowledge?

A. Well, no, I can't tell you that, but it was a long 20 time, or it seemed like a long time to me. I went out different times.

Q. What was the condition of the weather on that day?

A. Well, it was not a very clear day, and it was not cold; it was rather warm.

Q. When afterward did you investigate or look through the orchards?

A. I went out the next morning.

Q. Now, I didn't ask you, but Mr. Miller was 30 away at that time, was he?

A. Yes, Mr. Miller was away.

Q. When did he come home?

A. He came home on the evening that I first went out in the orchard.

Q. And when you went out and looked the next morning, what did you see?

A. Well, I could see that something had affected the trees, both the leaves and the apples.

Q. What was their condition, Mrs. Miller, explain it to us, won't you, as near as you can?

A. Well, the edges of the leaves were turned a very little.

Q. Now, when you say, "turned," do you mean the
10 color?

A. They were curled and the color both, and in two or three hours afterward I went out again, and I found the condition even a little worse, and I made three or four visits that day, and each time the condition was just a little worse.

The Court. Which orchard was affected, Mrs. Miller?

20 Q. Where did you go, Mrs. Miller? I don't know whether you can understand this map or not. Here is the house and barn and here is the pear orchard; here is the plant; now you said one time you went down the lane, is that where you went?

A. Yes, that is about where I went.

Q. Where did you go when you went down here? The Judge wants to know where you saw these curled leaves?

A. I turned to my left then.

30 Q. Down here and across that way?

A. Yes, I went across that way.

The Court. No, what I am trying to discover is which orchard or orchards. I understand from the evidence that there are three orchards; there was a very

old orchard and then there was another orchard that was not as old as the oldest, and then there was an orchard planted by Mr. Miller.

Q. Well, can you, from what the Judge has told you, tell which orchard it was in, the old orchard, the one not as old as the oldest or the one planted by Mr. Miller? Can you tell which orchard it was?

A. No, I can't tell you, because I went through them all, went all through all the apple orchards. 10

Q. Where did you find—if there was any place where it was worse than another—where did you find it the worst, Mrs. Miller, do you recollect?

A. Yes, but whether I can just describe it—

Q. Tell us without this map.

A. Where I thought it the worst was in going to my left from that road leading between the barn and the cribhouse.

Q. How far did you go down the road before you turned to your left? 20

A. Well, I went more than half way down.

Q. Then you turned to your left?

A. Then I turned to my left.

Q. Did you walk all the way through the orchard then?

A. Then I went all the way through the orchard then.

Q. And it was as you turned to your left in there that it was the worst, you say?

A. Yes. 30

Q. Did you take any note of the apples?

A. At what time?

Q. Any time after this?

A. Yes, I did.

Q. When was that?

A. Well, in a few days, I think in a couple of days afterward, I went down to see about the apples.

Q. Then what did you find there?

A. I found the ground covered with them, with young apples.

Q. What about the leaves at that time?

A. Well, they were very much discolored and twisted.

Q. What about the twigs?

10 A. Well, some of them were colored.

Q. Did you notice whether there was any difference as to which side of the tree you examined?

A. Yes, sir, a decided difference.

Q. What was the difference—just tell us what you noticed?

A. The side toward the Phosphate Works was much more affected than the other.

Q. Were any of the leaves fallen or were they all on the tree?

20 A. No, there was some fallen.

Q. Have you examined those trees at any time since with relation to dead limbs or dead twigs?

A. Yes, I have noticed them.

Q. What condition have you found there since that time?

A. Well, I have noticed that this condition has not improved the tree any. The tree is not any better than it was at that time. Damage was done then which was—

30 Q. Well, what is their condition at the present time?

A. Well, I haven't seen them lately, I can't tell you.

Q. Are you living there now?

A. No.

Q. How long have you been away from there?

A. A year last December.

Q. Now, prior to the time that you left the farm, how long was it when you had examined the trees or gone through the orchard to look at them ?

A. Well, I went through the orchard only a short time before I left the farm, but I can't tell you just exactly when.

Q. What condition did you find those trees in that you said had the burned leaves on them at that time?

A. In a bad condition.

Q. Can you explain what you mean by that, Mrs. 10 Miller?

A. Well, they looked as if they were dead on part of the tree.

Q. Now, which part?

A. The part toward the Phosphate Works where I had noticed the damage.

Q. Do you remember the orchard being trimmed after 1911?

A. After 1911?

Q. Or after 1909? 20

A. After 1909, I know we usually have the orchard trimmed.

Q. Do you remember anything about so many loads taken out of there or weren't you around there?

A. No, I don't know anything about that.

Cross-Examination.

By Mr. Logan Gaskill.

30

Q. Mrs. Miller, you really think that a part of each one of these trees is really dead this time do you?

A. No, I don't think that; I don't think anything about it. I don't know about that.

Q. You don't know whether a section is alive or not?

A. I only know how they look.

Q. Well, you really think that a section of each tree looks dead this time?

A. I think that part of them—I can't tell you about their being dead, I don't know that. I think they have a look of being almost worthless, as if they wouldn't bear any fruit, that part of the tree, not all of the tree.

10 Q. Now how big a section of each one of these trees is this?

A. Oh, I can't tell you that.

Q. Is it a third?

A. I can't tell you that, I don't know.

Q. Oh, well, now —

A. No, I never measured that; I can't tell you that. I just looked at it, from one to the other, but I didn't measure it.

Q. I suppose it would depend a good deal upon
20 how the limbs around branched out, wouldn't it? If there happened to be two or three limbs that branched that way, there would be a good deal of it gone and if there was only one limb, it wouldn't be so much?

A. I don't know how that would be; I didn't measure it in any way, simply looked at it.

Q. Didn't even measure it with your eyes, did you?

A. Yes, I measured it with my eye.

Q. Now, measuring with your eye, how much of each tree would you say was dead?

30 A. I can't tell how much, not so much; I noticed it was enough for me to see it, and see it very plainly that is all.

Q. Now, how much experience have you had, Mrs. Miller, in growing apples?

A. I have had no experience, only as I have lived there.

Q. And you don't know anything more about growing apples than your husband and may be not as much?

A. I don't know; I may know more; I can't tell.

Q. Now, your recollection of conditions in 1909 and 1911 is just as fresh to-day as they ever were, I suppose?

A. Well, when I can recall them, have time enough 10 to recall incidents, they are perfectly clear in my mind.

Q. And your mind is just as clear to-day as it was when this case was tried last in October Term, 1913, isn't it?

A. 1913?

Q. Yes, you remember testifying before on the trial of this case?

A. Oh, yes, sure.

Q. Your recollection is just as clear to-day as it was then? 20

A. Well, my recollection is just as clear on what, on this case, do you mean?

Q. Yes.

A. Yes, I think it is.

Q. Now, is it a fact that you didn't know anything about the condition in 1909?

A. No, it is not a fact that I didn't.

Q. You remember testifying in answer to a question from your own counsel upon the previous trial of this case.: "Q. What was that? A. My son came in 30 the house, Howard came in, and called my attention — Objection; don't repeat what he said. Q. I am speaking about 1909. A. Oh, 1909—I don't know anything about 1909. Q. 1909, that you don't recollect? A. No, I don't recollect. Q. Now, 1911? A. Oh, yes

Q. Somebody called your attention? A. Yes." You testified on the previous trial that you didn't know anything about 1909, didn't you?

A. I did because the questions that were asked me then, I though were on 1911 and just—

Q. Wait a minute; after saying, Q. 1909, that you don't recollect? A. No, that I don't recollect. Q.

Now, 1911. A. 1911. Q. Somebody call your attention? A. Yes. Q. What did you do? A. I

10 went right away, went out of doors and I found the fumes were coming over the farm."

A. Yes.

Q. Now, your attention was called specifically to 1911 after you had said that you did not know about 1909, isn't that so?

A. Yes, but if you allow me to explain, I can tell you why.

Q. No, just answer my question. Now, you say that this that you saw in the orchard was not like a fog, 20 it was like a vapor, is that so?

A. I can't describe it.

Q. You can't describe it?

A. No, I wouldn't undertake to; I can't.

Q. You say it wasn't a clear day that day?

A. It seems to me that it was not a clear day.

Q. No, it seemed to you that it wasn't. Do you remember clearly as to whether it was or not?

A. No, I do not. I think the sun came out sometime during the day.

30 Q. Now, you said that this that you saw coming from the fertilizer factory was vapor, is that so?

A. No, I didn't say it was vapor.

Q. Oh, you didn't say it was vapor?

A. No, I did not.

Q. What was it, a mist?

A. I said it looked like a mist.

Q. Oh, it looked like a mist, it did not look like a vapor?

A. I said either a mist or vapor of some kind.

Q. Don't you know that vapors don't have color, you can't see a vapor?

A. I didn't bother thinking anything about that at all; I don't know.

Q. Now, when these mists came over, you immediately went around the orchard to get information as to whether it was having any effect, didn't you? 10

A. Well, I suppose you might call it information.

Q. Yes, you were getting ready to testify in the event that you found later that the crops did not turn out, well, weren't you?

A. No, sir, I was not; that was not my purpose.

Q. You were not thinking about getting evidence at that time?

A. No, sir, I was not.

Q. When did you think of it in the light of evidence? 20

A. I have never thought of it in the light of evidence unless somebody has asked me what I knew about it.

Q. This case has been talked over a good deal at your home, hasn't it?

A. No, not a great deal; when it was necessary it has been talked over.

Q. Yes, when it was necessary, and as often as might be necessary? 30

A. As often as we thought it necessary.

By Mr. Avis.

Q. Now, Mrs. Miller, you may explain, if you

want to in relation to the question Mr. Gaskill asked you about your testimony in the other case as to 1909?

Mr. Logan Gaskill. I object to that form of question, if the Court please; there is nothing called upon for her to explain. She admitted that she gave certain evidence—

The Court. I think she can explain if she desires
10 Do you desire to make any explanation?

The Witness. Well, just to make myself perfectly understood, that is all.

The Court. The objection is over-ruled; answer the question.

A. When this question—when Mr. Avis asked me the question, I thought of course it was for 1911, as I had
20 had nothing said to me prior to that day about 1909, only as I knew that these things had happened, and of course I thought the question was pertaining to 1911 and when he immediately said 1909, I had not time to collect myself; while I fully knew all these things that I have said to-day.

ISAAC JONES, SWORN.

30

By Mr. Avis.

Q. Where do you live, Mr. Jones.

A. Almonesson.

Q. How long have you lived in Almonesson?

A. Four years.

Q. Where did you live before you went to Almon-
esson?

A. Down close to Paulsboro, what they call the
Paradise Farm.

Q. Did you move from there to Almonesson four
years ago?

A. Yes, sir.

Q. That would make it 1911; how long did you
live at Paradise Farm, so called, before you went to Al- 10
monesson, how many years?

A. Seventeen years.

Q. Where is the Paradise Farm located with rela-
tion to Howard Miller's place, his farm there?

A. Right across the creek from the yarn works.

Q. Across the creek from both the I. P. Thomas
& Sons Plant and also Howard Miller's farm?

A. Yes.

Q. You were living on this farm in 1909, and not
in 1911, were you? You left there, you say, in 1911, in 20
the Spring four years ago?

A. Yes.

Q. You were living there in 1909, were you six
years ago?

A. Yes, six years ago I was there.

Q. During the year 1909, did you notice anything
coming out of the stacks of the I. P. Thomas & Sons
Company's plant?

A. Well, I couldn't say that I seen it so often.

Q. Well, what did you see?

30

Mr. Joseph Gaskill. I object; it must be limited to
1909 and this time when the alleged injury was done.

Mr. Avis. Well, I don't think so, if the Court please.

The Court. What is that?

Mr. Avis. I want to show from this witness, if I can, that he saw this—he can't fix the exact time—he saw this fume or whatever it is coming from the stacks or from the plant of I. P. Thomas & Sons Company, the
10 wind blowing it across Mr. Miller's orchard and farm.

The Court. What time does your complaint allege?

Mr. Avis. The complaint says in May, as I recollect it and sundry other times during that year.

Mr. Joseph Gaskill. Specific dates are given.

20 Mr. Avis. Specific dates are given and then it is generalized.

Mr. Joseph Gaskill. May, June and July, the 21st, 22nd, 27th and 28th of May; 5th, 6th, 27th and 30th of June and the 1st, 8th and 10th of July.

The Court. The proof must be confined to the time—

30 Mr. Avis. The second count, if the Court please, of the complaint which alleges the nuisance—the first count alleging negligence—the second count alleging nuisance is on the 21st, 22nd, 27th and 28th of May, 1909, 18th, 19th and 20th day of May, 1911 and on diverse other days and times between the first date afore-

said and the commencement of this suit.

The Court. When was the suit begun?

Mr. Avis. The date of the summons is the 18th of April, 1913. Now, I am asking him with relation to the year 1909.

The Court. I think you are entitled to show what happened in the month of May or after that, May or 10 June or July. Is that set forth in your complaint?

Mr. Avis. Yes, sir, I am speaking now about the month of May in 1909.

Mr. Joseph Gaskill. No, I object to that question; I do not understand that to be the ruling. I understand the ruling to be that he is confined to those dates named in May, June and July.

20

Mr. Avis. I did not understand the Court so, because we have a general allegation, "at diverse other times and days between the date aforesaid and the commencement of this suit."

The Court. "Between the first date aforesaid"—what is the first date?

Mr. Avis. The 18th of May, 1909.

30

The Court. I think you are entitled to show anything from the 18th day of May on.

(Exception noted for the defendant).

Q. Now, after the 18th day of May, 1909, Mr. Jones, did you see anything coming out of the factory of the I. P. Thomas & Sons Company?

A. No, I can't tell the exact day, you know.

Q. I am not asking you to tell the exact day; I am speaking about after the 18th day of May, 1909—anything after that date?

A. I guess I have, pretty often.

10 Mr. Joseph Gaskill. What time in 1909 did you say?

The Witness. I told you I couldn't say exactly; I didn't put the exact date down when I seen it, but I used to see it pretty often.

Q. You moved away from there in February, 1911 didn't you?

20 Mr. Joseph Gaskill. I move to strike that out.

The Court. Yes, strike that out.

Q. Now, after the 18th day of May, 1909, what did you see coming from the Phosphate plant?

A. What did I see?

Q. Yes.

A. Well, out of the acid works I seen a yellowish kind of smoke coming out or fumes of some kind there
30 coming out of the mixing pipe, used to see kind of a light color.

Q. Did you see where any of that smoke or fumes, as you call it, went to?

A. Most of it went over, when I noticed it, the most went over toward Howard's.

Q. Was it up in the air or near the ground?

A. Well, that was according to how the atmosphere was. If it was blowing and damp, pretty damp, it hugged the ground pretty close, and if it was right dry, why, of course it would rise a little more.

Q. Did you ever go over to Mr. Miller's to see any effects in his orchard or on his crops?

A. No, I never did.

Q. Did you ever experience at your place any personal discomfort with relation to this same fume that you saw coming out of this stack and which you saw going across Miller's place? 10

Mr. Joseph Gaskill. I object to that as incompetent and immaterial.

Mr. Avis. Now, if the Court please, it is not immaterial. Here is our situation: The proof is of the witnesses who were on the ground when they say this injury occurred that it smarted the eyes, parched the throat and lips. This witness says he saw this fume or smoke going across Mr. Miller's place. Now, I want to show, if I can, that the same smoke that he saw going there came to his place, and what that effect was on him, to show it was the same kind of stuff. 20

Mr. Joseph Gaskill. He is not a party to the suit.

The Court. No, but it may tend to give character to the fumes. I think it is competent. 30

(Exception noted for the defendant).

Q. Did this fume that you saw or smoke, as you call it, ever come in your direction?

Mr. Joseph Gaskill. I object to that because the time is not fixed.

Q. Well, after May 18th, 1909.

The Court. How can that be material?

Mr. Avis. I am trying to get to the point of just what your Honor has ruled on, to show that this same
10 fume that he saw came across to Miller's and came in his direction. I want to show the physical effect on him.

The Court. I thought you had shown that.

Mr. Avis. No, I haven't got to it.

Q. Did it, after May, 1909—that would be nearly the last two years you were on the place,—come in your direction?

20 A. This here fume, it used to scratch my throat pretty well.

Q. Where did it come?

A. Right across toward the house.

Q. Was or was not that the same style of smoke that you saw going, the same appearance you saw going toward Howard's place?

A. Yes, only a different direction of wind, you know, blowed it different directions; it went with the wind.

30 Q. What effect did that have on you physically?

A. What, on my body?

Q. On your face or body.

A. Why, it stung and scratched; when you would go to breathe it would cut your throat.

Q. How about your eyes, any effect on your eyes?

A. Yes, my eyes and throat; there is where it affected me. Of course, it didn't affect my skin any, didn't burn my skin, but my throat and eyes.

Q. What was the way it affected your eyes?

A. Well, smarted them, you know; of course, it didn't blind me or shut my eyes up.

Q. During 1909, after May 18th or 1910, while you were on this Paradise Farm, were any of your crops affected by this fume?

10

Mr. Joseph Gaskill. I object to that; that is not a question of nuisance.

(Objection sustained).

(Exception noted for the plaintiff).

Q. In the year 1909—I don't know whether you recollect it or not particularly, did you grow apples?

A. Yes.

20

Q. How about pears?

A. Pears, too.

Q. How many acres of pears did you have on your farm, Mr. Jones?

Mr. Joseph Gaskill. I object to that as incompetent, immaterial and irrelevant. He can state his experience in growing fruit.

The Court. I can't tell just now. The objection is 30 over-ruled. What is the relevancy?

Mr. Avis. My desire is to show that his trees—I am going to ask him if the leaves on his pear trees blackened that year or if the leaves on his apple trees

curled up and got spots on them and dropped off.

The Court. Whether that was a condition in the growing of apples or pears that particular year or whether it was something special?

Mr. Avis. That is my idea.

Mr. Joseph Gaskill. We desire an exception.

10

The Court. It is allowed.

Q. How many pear trees did you have, Mr. Jones?

A. Had about, I think it was seven or eight thousand.

Q. What about apple trees, did you have any apple trees?

A. About eight hundred.

Q. You had somewhat of a fruit farm there at
20 that time, a pear farm, hadn't you?

A. Seventy acres.

Q. During the year 1909, did the leaves on your pear trees blacken and the fruit fall off in large quantities?

A. No.

Q. Do you know of anything in your experience as a fruit grower that would blacken generally the leaves on pear trees?

A. Not without there was a blight; blight will
30 darken them.

Q. Blight will do it?

A. Yes.

Q. Did you have anything of that kind in your orchard in 1909?

A. Every year more or less.

Q. Does it attack the whole tree when it does that?

A. No, not always.

Q. How long does it take the blight to work on a pear tree?

A. Well, that is just according to where it blights. There is some twig blight, then there is the regular trunk blight and then there is the limb blight.

Q. From the blight will the leaves turn black on a whole pear tree in a single night?

A. No, not when there is just one big heavy 10 branch blighted, it only turns dark on that one branch.

Q. It goes by branches, does it?

A. Yes.

Q. What is the effect on a limb of a tree or on a pear tree that has blight?

A. Why, I told you the leaves turns dark and finally they drop off.

Q. The leaves do?

A. There is no sap, but the foliage has to have sap, and when the blight is on and it goes around the limb 20 the sap is cut off, and all they have got to feed on is what little sap is left up in the top.

Q. Is there any permanent effect in relation to the limb of that tree—does it get well again and bear the next year?

A. Oh, no, that is gone; when the blight gets a branch clean around, it is gone. Sometimes it just blights on one side and maybe it may last for another year, but when the blight strikes the trunk of a tree and gets clean around it, there is no life there. 30

Q. What about your apple trees that year, in 1909; did you have any condition by which the leaves curled up and got spots on them and dropped off in large quantities, the twigs got burned or burned places on them?

A. No, we didn't have none of that.

Cross-Examination.

By Mr. Logan Gaskill.

- Q. You sprayed, didn't you, Mr. Jones?
- A. Sprayed?
- Q. Yes.
- A. Twice.
- Q. There is a whole lot of difference between an
 10 orchard that is sprayed and one that is not, isn't there?
- A. Well, it is just according to how the scale is on them, if you are spraying for scale; if there is no scale the tree will live all right without spraying.
- Q. Well, you have to spray for the curculio and coddling moth and various other insects, don't you?
- A. I only spray once for the coddling moth.
- Q. But there is, as I say, a great difference between an orchard that is sprayed and one that is not?
- A. Yes, certainly.
- 20 Q. Your attention was not called to the matter of Howard Miller's complaint until several years after this occurrence, was it?
- A. Well, last year—when was it?
- Q. You weren't asked what you knew about his orchard or what had happened to it until within two days of the trial, which took place at the October Term, 1913—-that is so, isn't it?
- A. I wasn't asked nothing until I came here about that.
- 30 Q. Yes, you were not asked anything until you came into Court at that October Term, 1913?
- A. Yes.
- Q. And your recollection of the condition in Miller's orchard at that time, without having given it any thought, was pretty uncertain, wasn't it?

A. Well, yes.

By Mr. Avis.

Q. You did not say anything about the condition in Mr. Miller's orchard at the last trial or this trial either, did you, Mr. Jones?

A. I don't think I did.

The Court. No, I don't think he said anything¹⁰ about it.

Mr. Logan Gaskill. Well, we are satisfied to let it go and save time.

The Witness. Have I got a word or two to speak?

Mr. Logan Gaskill. No, Mr. Jones.

The Witness. I can't speak, eh?²⁰

Mr. Joseph Gaskill. Unfortunately, no.

The Witness. I would like to say a few words, but you shut me off, eh?

Mr. Avis. You can't do that.

By Mr. Avis.³⁰

Q. You said you sprayed twice; what do you mean by twice?

A. In the spring before the leaves come, you know, that was for scale.

Q. Twice a year, do you mean?

- A. Yes.
- Q. You sprayed for scale in the spring?
- A. Yes.
- Q. Then when did you spray again?
- A. Generally spray March or along there, then along the latter part of May.
- Q. What was the May spray for?
- A. Coddling.
- 10 Q. You say you only spray once for coddling?
- A. That is all.
- Q. That is the whole time you were on the farm?
- A. No, every year.
- Q. Oh, once a year?
- A. Yes.
- Q. Once a year and once for the scale?
- A. Yes.

20 ALFRED JONES, SWORN.

By Mr. Avis.

- Q. Where do you live?
- A. Almonesson.
- Q. Are you related to Isaac Jones?
- A. Son.
- Q. Did you or did you not live with him on the farm, known as the Paradise farm near Paulsboro?
- 30 A. Nine years.
- Q. When did you leave there, Mr. Jones?
- A. 1903.
- Q. 1903?
- A. Yes.

Q. You left there, left living with him about twelve years ago?

A. 1909.

Q. Have you been on his place where he lives since that time?

A. Oh, yes.

Q. Were you there in 1909 after May 18th?

A. I couldn't answer.

Q. How is that?

A. I couldn't recall it.

10

Q. You know where Howard Miller's place is?

A. Yes.

Q. Did you make any visit to his place at all during the years 1909 or 1911?

A. No.

Q. You weren't there at all?

A. No.

Q. You didn't see his orchard or anything about the place?

A. Not that previous time, no.

20

No Cross-Examination.

RICHARD WOOD, sworn.

By Mr. Avis.

Q. Mr. Wood, where do you live?

30

A. Mantua.

Q. Did you ever live at Paulsboro?

A. Yes, sir.

Q. What year or years did you live at Paulsboro?

A. 1909.

Q. Where did you live there?

A. I. P. Thomas farm.

Q. On the I. P. Thomas farm?

A. Yes.

Q. You know where Mr. Howard Miller's place was?

A. Yes.

10 Q. After May 18, 1909, did you ever see these fumes that have been spoken of?

Mr. Joseph Gaskill. One moment; we make the same objection and ask an exception if the ruling is the same, as I assume it will be.

Mr. Avis. I understand the Court makes the same ruling. Will you answer the question, Mr. Wood, please?

20 The Court. Well, when?

Mr. Avis. After May 18, 1909, during the year 1909.

The Court. During the growing season of 1909 after May 18th.

A. Yes, sir.

Q. What did you see, Mr. Wood?

30 A. It was kind of whitish color.

Q. Where did it come from?

A. From their plant.

Q. Which direction did you ever see it going in?

A. In various directions, whichever way the wind blew.

Q. Did you see it at all going toward Mr. Miller's place?

A. Yes.

Q. Now, won't you tell us how far you could see this fume that you speak of?

Mr. Joseph Gaskill. One moment, if the Court please, as I understood the ruling before, it admitted this class of testimony on the ground of nuisance, on the second count but not on the question of damage to Mr. Miller. Now, if—

The Court. What do you mean, damage to Mr. Miller, which Mr. Miller?

Mr. Joseph Gaskill. Howard Miller, the plaintiff.

Mr. Avis. That is all we are trying.

Mr. Joseph Gaskill. I say, there are two distinct questions before the Court; one is as to whether Mr. Miller was damaged and the other was as to whether any nuisance was created. Now, your Honor admitted the general testimony from Mr. Jones, Sr., on the question of nuisance. Now, I want to know whether or not the examination here is to be as to nuisance or as to damage; if it is nuisance, then your Honor has already ruled and I simply take my exception; if it is as to damage to Mr. Miller, then it must be as to these specific dates.

30

Mr. Avis. Well, it is all as to damage, if the Court please. We allege two counts, one negligence and the next nuisance; on both of them we say we are damaged, so I think the Judge has gotten the wrong idea of that second count.

The Court. Let me hear the question; I can't rule on the question until I know what it is.

(Question repeated).

The Court. How far?

Mr. Avis. Yes, he said he had seen it come out of the plant and go over toward Mr. Miller's place when
10 the wind was in the right direction.

The Court. Has he said that?

Mr. Avis. Yes, sir.

The Court. The objection is over-ruled.

(Exception noted for the defendant).

20

Q. Just answer that, Mr. Wood.

A. I don't know exactly; you could see it quite a little piece from the plant; I couldn't tell exactly how far you could follow it. You couldn't follow it so awful far with the eye.

Q. You couldn't follow it so awful far with the eye?

A. No.

Q. Were you ever at Mr. Miller's place when it
30 was going over there?

(Objected to).

A. Not as I know of.

Mr. Joseph Gaskill. I object to that as incompetent and uncertain.

The Court. He says he didn't know.

Q. Were you ever there in the year 1909 after the 18th of May on Mr. Miller's place?

A. Yes, sir.

Q. Do you know about when it was?

A. Why, it was the latter part of May, somewhere, 10
the 20th or 25th, along there, something like that.

Q. Was your attention then called to any of the trees on Mr. Miller's place?

A. Yes, sir.

Q. Whereabouts did you see the trees at, Mr. Wood? Can you start and take this map of Mr. Miller's farm—this is the barn and this his house—what trees did you there take any particular notice of?

A. They were trees on the right hand side as I
went toward the house and around the house. 20

Q. Now, what was the condition of the foliage on those trees as you saw them?

A. The trees as I went toward the house were kind of turned brownish, and up around the house a good many had fell off; they were raking them up.

Q. Did you look at the leaves at all?

A. Not particularly, no.

Q. You didn't go through the orchard at that time?

A. No.

Q. That is, to make a special examination? 30

A. No, sir.

Q. You didn't go there for the purpose of testifying at all?

A. No, sir.

No Cross-Examination.

MATTHEW THOMPSON, SWORN.

By Mr. Avis.

Q. Where do you live, Mr. Thompson?

A. Paulsboro.

Q. Where did you live in 1911?

A. On Isaac Thomas' place, I guess, the Isaac
10 Thomas farm.

Q. Is that in or near Paulsboro?

A. It is, I guess, a mile on the other side, three-
quarters of a mile, something of that kind.

Q. During the year 1911, have you ever observed
the I. P. Thomas & Sons plant as to fumes or mist?

A. Oh, yes, I have seen it around there.

Q. What did you see there during that year with
relation to that—1911, this is?

A. Well, I saw the fumes.

20 Q. What were they like, Mr. Thompson?

A. Like kind of light color and one was a yellow
color—two colors there.

Q. Did you ever have during that year any physical
effects from this fume?

A. No.

Q. Did it ever strike you at all, I mean personally?

A. Very little.

Q. Where did you see it going to if at all?

A. Oh, I have often seen it going different courses,
30 according to where the wind is, you know.

Q. Did you ever see it going, during that year,
toward Mr. Miller's place?

A. I saw it going toward his place, yes.

Q. Up high or low?

A. Well, medium down, ordinary height.

Q. Do you know how far toward his place it went?

A. I couldn't say; I didn't go after it. I saw it going that way.

Q. You didn't follow it up?

A. No, sir.

Q. During that year did you see any of the effects or any conditions, unusual conditions on Mr. Miller's place, orchard or crops?

A. No, sir.

Q. You didn't go there?

A. No. 10

Q. How about 1909, were you living on the place that year when you saw anything of this kind?

A. 1909?

Q. Six years ago that is.

A. Yes; no, that is the spring I went away, I guess.

Q. You weren't there in 1909?

A. No.

Cross-Examination. 20

By Mr. Joseph Gaskill.

Q. Mr. Thompson, you said you were living on the I. P. Thomas place—that is, the I. P. Thomas farm, you mean?

A. Yes.

Q. How large a farm is it?

A. I don't know; I suppose eighty or eighty-five acres. 30

Q. You were there in 1911, I understand?

A. I think so.

Q. And during that year you say you saw the fumes or the mist that was there?

A. Yes.

Q. And you also said that it went in different directions as the wind might blow?

A. Yes.

Q. Well, you had crops there on the farm, didn't you?

A. Yes, sir.

Q. And the wind sometimes blew in the direction of your crops, didn't it?

A. Right over the farm.

10 Q. It never did you any harm, did it?

A. None of any account.

By Mr. Avis.

Q. When you say "none of any account," what do you mean?

A. I have saw where it nipped the leaves a little, but it didn't interfere with the crop.

20 Q. What was the appearance of the leaves you saw nipped?

A. They were brown.

Q. Spots sometimes?

A. No, not spots, just all over brown.

Q. Did the end curl up?

A. There might be a little twist, yes.

Q. The end would curl a little when it struck them, would it?

A. Yes.

30 Q. Did it ever come over there on your property in sufficient quantities to pierce your eye or make your throat—

A. Well, very little.

Q. Very little, as far as you are concerned?

A. Yes.

Q. Do you know whether or not you saw larger

quantities going toward Mr. Miller's place than came your way?

A. No, I never saw anymore go his way than came across mine.

Q. But you didn't get this huskiness in the throat or sting in the eye?

A. Oh, a little tickling; I didn't pay any attention to that.

Q. A little tickling? That is all.

10

By Mr. Joseph Gaskill.

Q. Were your crops that we have been speaking of any nearer the plant than the orchard of Howard Miller?

A. Yes.

Q. How much nearer?

A. Oh, a good deal nearer; I am right on the same farm.

Q. Half the distance?

A. Yes, I guess it was.

20

By Mr. Avis.

Q. Which direction?

A. Mine is on the west course.

Q. Yours is on the west and the wind would come from the east when it blew it across your way?

A. Yes, about east.

Q. About east; the wind would blow it your way; and how close to the factory were your crops?

30

A. 250 yards, maybe not quite that far.

Q. The results would be that as the wind blew the fumes in your direction they would go over your crops, wouldn't they? Did you ever see them go over your crops?

A. Not at all times; in damp muggy weather they are bound to settle, would settle.

Q. Yes, but I say, sometimes when the wind was blowing, would it blow the fumes you saw over your crops?

A. Not altogether.

Q. Not altogether, but some?

A. It might be, some of it.

Q. Have you any orchard on your place?

10 A. Yes.

Q. How much?

A. It is not a very large one, I suppose, thirty or forty trees there, about thirty, maybe.

By The Court.

Q. Is that a young orchard or old orchard?

A. An old orchard.

Q. An old orchard?

20 A. Yes.

Q. How long has it been there?

A. That is more than I am able to tell.

Q. Is it a healthy orchard?

A. Well, like all old orchards, when they get old they are bound to decay.

By Mr. Avis.

Q. Which direction would the wind come from to
30 drive any of this fume on to your orchard?

A. About southeast.

Q. Southeast wind?

A. Southeast, yes.

Q. It would come from more of a southerly direction; a northeast wind wouldn't hit you, would it?

- A. A northeast wind?
Q. Yes.
A. No, sir.
-

ANTHONY ASCHENBRENNER, SWORN.

By Mr. Avis.

10

Q. Where do you live, Mr. Aschenbrenner?

A. Paulsboro.

Q. What is your occupation?

A. Engineer.

Q. Where are you employed?

A. DuPont's.

Q. In the powder plant?

A. Yes, sir.

Q. How long have you been employed there?

A. DuPont's?

20

Q. Yes.

A. Five years.

Q. Before you were at DuPont's, where did you work?

A. I. P. Thomas & Sons Company.

Q. And how long had you been employed there?

A. About twelve years off and on, not steady.

Q. You were working then for I. P. Thomas off and on in 1909?

A. Yes.

30

Q. And prior to that time?

A. Yes.

Q. What was your employment there?

A. I was working in the acid house, the sulphuric acid house.

Q. And what were you doing in the sulphuric acid house?

A. I was what you call pump man there.

Q. Pump man?

A. Yes.

Q. Won't you explain what that is, explain to us the conditions?

A. Why, the pump man is supposed to have charge of the plant; he is supposed to look after the plant and
10 keep it in running order.

Q. Under the directions of the superintendent?

A. Yes, sir.

Q. Now, won't you tell this Court and jury how that acid plant was operated there, what the nature of it was in the early part of 1909? This jury don't know anything about it, I imagine, an acid plant; I don't know about it.

A. How it is operated?

Q. Yes, start at the beginning and tell us what
20 there is there first.

A. Well, there is the burner house, chamber room and the pump room.

Q. What is in the burner house?

A. The burner house contains thirty burners or kilns, whichever you might call them.

Q. And what are they used to burn?

A. They are used to burn pyrites or copper ore, whichever you are a mind to call them.

Q. Copper ore pyrites, and what are you making
30 in this factory?

A. Sulphuric acid.

Q. And that sulphuric acid is used in the manufacture of acid phosphate, so called?

A. It is.

Q. Now, these burners you speak of, there were how many of them?

A. Thirty.

Q. How did you start them?

A. That is, starting the plant fresh?

Q. Yes, you are starting right in new; now, what do you do?

A. Start them with coke, wood and coke, of course, to get the fire started; then after you get a hot enough fire started, you start charging with this ore.

10

Q. Charging with this copper ore?

A. Yes

Q. What is the appearance of the copper ore; I mean, can you shovel it up?

A. Oh, yes, it is very heavy stuff and it contains sulphur gas.

Q. And you throw it into these burners?

A. Yes.

Q. And burn it there, do you?

A. Burn the gas off of it.

20

Q. That is, the sulphur gas?

A. Yes.

Q. What is the sulphur gas used for?

A. That is used for making sulphuric acid.

Q. These burners you speak of or ovens, are they closed up?

A. Yes.

Q. And what leads from the burners, if anything?

A. What leads from them?

Q. Yes, for this sulphur gas—how does that get out?

30

A. That leads out through a flue and into an oven, what we call a niter oven, and you have got to pot nitric soda, say, every hour.

Q. When you say "pot nitric soda," what do you mean?

A. That is, charge it; you dump it into the pot; there is a funnel on the top of the oven and you dump your soda into that.

Q. How many pots or soda ovens are there to these thirty—

A. Two, one on each side.

Q. Then there is two lines of pipe leading from 10 these ovens or burners, is that right?

A. No, sir, only one.

Q. Then why did you use two soda places?

A. That is to divide—both sides to be equal.

Q. From these soda places—you dump the soda in --and anything else?

A. Acid.

Q. What kind of acid?

A. Sulphuric acid.

Q. Sulphuric, the same acid you are making?

20 A. And nitric soda.

Q. And what becomes of the fumes or gas from those two different places?

A. They pass in through the tower, what you call a Glover Tower, a hot tower, and the mix in that tower, and pass through a flue into a set of chambers, and the gas is supposed to condense in those chambers.

Q. What is the style of the chamber, Tony?

A. They are about—it is a closed in room like, say about twenty feet wide and about twenty feet high 30 and seventy-five or a hundred feet long, and it is all closed in with lead, sheet lead.

Q. Lined?

A. And there is a pan in the botton; when it condenses that is where the acid runs, in this pan.

Q. These gases, as I understand it, from the burn-

ers and the soda pots get together and go through the pipes and come into this room and there they condense, is that correct?

A. Yes.

Q. Do you know what causes the condensation?

A. What causes it? The heat and the cold; you have got to keep it cold.

Q. The room has to be kept cold, has it?

A. Yes, the cooler you keep it the more you can condense.

10

Q. Is there anything leading out of this chamber or the room you speak of lined with lead?

A. Yes, after the gases pass through there, there is a last chamber, what they call the last chamber or condenser; and when the gas comes to that chamber, all the sulphur gas is supposed to be condensed, nothing but the nitric gases and then it is pumped over into the hot tower posed to go through another tower, what you call a Gay-Lussac or cool tower, and the acid flowing down and distributing over this tower is supposed to take up these 20 nitric gases and these it is pumped over into the hot tower again, and the hot tower throws off these gases again into your chambers; it is just reversed around all the time.

Q. Now, is there any outlet to the open air from any of these chambers?

A. Oh, yes.

Q. What is that?

A. That is the exit.

Q. What is that?

A. That is the outlet of the chambers; that is your 30 draft; that is where you regulate your draft on your chambers.

Q. Do you know what that is made of?

A. It is made of lead.

Q. How big is it?

A. About thirty inches in diameter, something like that; I can't just remember.

Q. Will you look at these figures marked Exhibit P 1 for identification and tell me whether that appears to be a general photograph of the plant from the other side of Mantua Creek?

A. Yes, sir.

Q. Now, can you from that point out the stack that goes to the open air from this acid house?

10 A. It doesn't show the stack here.

Q. Oh, that stack doesn't show on this?

A. I don't see it.

Q. Here appears to be one stack and there another.

A. That is a boiler.

Q. A boiler stack, is it?

A. Yes, but the other stack don't appear to show on here; I don't see it; it ought to be over here. (Indicating).

Q. Oh, way over here to the left hand side of the
20 picture, is it?

A. Yes.

Q. And it doesn't show on that picture?

A. No, sir.

Q. It was there when you were there in 1909, was
it?

A. Yes, sir.

Q. You say it ought to be right back of this tower that you see here, the stack that comes from the acid house?

30 A. Yes.

Q. Now, how about the mixture—you were in charge of charging with pyrites and soda too? Have you ever done that there?

A. I have seen that it was done right.

Q. Under whose instructions?

A. Mr. Stines'.

Q. And you were on duty at what time when you were working there?

A. Well, we were supposed to work from six to six, one week day and one week night.

Q. You worked alternately?

A. Yes.

Q. Now, what about the proportions of soda and sulphur—what were the charging proportions?

A. Well, that all depended on the weather; the colder the weather was in the winter time the more ore you could handle, that is, the copper ore.

Q. That is that from which the sulphur gas came?

A. Yes.

Q. When it got warm what did you have to do?

A. Had to cut down on the ore.

Q. These different proportions, taking into consideration the temperature, were otherwise regular proportions, weren't they?

A. Yes, sir.

20

Q. Taking a given temperature, you could then have a given proportion of copper and a given proportion of soda, is that correct?

A. Yes, sir.

Q. Supposing the proportions were not correct, what was the result as far as this tower going up into the open air was concerned?

A. Well, your plant was liable to have went sour if you didn't watch it in time or know it in time. Of course, your burners would have backed up on you so much you would have too much sulphur gas on and you naturally couldn't condense it.

Q. Couldn't condense the sulphur gas?

A. No, sir.

Q. The nitric acid part of it was used to condense the sulphur gas, is that the idea?

A. What is that?

Q. Was the nitric acid gas used to condense the sulphur gas?

A. No.

Q. What was that used for?

A. That was to separate the oxygen from the sulphur gases.

10 Q. Then the sulphur gas afterward condensed and made the acid, is that correct?

A. That is right.

Q. Now, supposing there was an overcharge of sulphur gas?

A. An overcharge of sulphur gas?

Q. Yes.

A. Why, your plant would have went sour.

Q. Then what would be the result as far as this tower was concerned?

20 A. Why, your nitric gas had left, and there would be a great proportion of sulphur gas that you couldn't condense, would have went out of your exit.

Q. Do you know whether or not during the year 1909 that ever happened there?

A. Oh, yes.

Q. How often?

A. Well, I couldn't say.

Q. Did you ever see any of these gases coming from this tower?

30 A. I have.

Q. In what quantities?

A. Well, sometimes they would be very small; then again they would be great quantities.

Q. What became of them?

A. Went out in the air somewhere.

Q. Did you ever watch it and see how it went?

A. That was my most particular thing, to watch the foxtail, as we call it.

Q. So that you were watching that for the purpose of ascertaining how the plant was running, is that correct?

A. Yes, that is correct.

Q. What did you see about it—which way did you see these fumes or this stuff going? What was the color of it, in the first place? 10

A. Well, it had various colors; if the plant was overcharged with nitric soda, it was a real strong coffee color; then again it was a lightish color; if the plant was soured, there was hardly no color, just could see a light color coming out.

Q. Did you ever see any of this, that smoke or fume, or whatever it was going anywhere from the plant?

A. I seen it going in various directions, yes.

Q. How about when the atmosphere was heavy, did it go up in the air or down on the ground? 20

A. No, dropped, it seemed to drop.

Q. Did you ever see it when the wind was in a north or northeasterly direction?

A. Yes.

Q. Where did it go then?

A. Went that way.

Q. Which way?

A. Northeast.

Q. When the wind was going in a northeasterly direction, do you know toward whose property, if it went toward anybody's property, at that time? 30

A. Oh, yes, it would go right over toward Mr. Miller's property.

Q. Did you ever see it in heavy weather going in that direction?

A. Yes, I have.

Q. What about the mixing plant, do you know anything about that?

A. Nothing at all, never had no experience in mixing acid.

Q. Did you ever see any smoke or fume coming out of the tower from the mixing plant?

A. Oh, yes.

Q. What became of that?

10 A. Went into the atmosphere.

Q. This smoke or fume that came out of the tower of the acid plant, did you at any time watch it and see how far it went?

A. I have.

Q. How far have you seen it go as you have been able to see it?

A. Well, I have noticed it several times as far as my eyes can see, that is, on a muggy day.

Q. Did you at any time during 1909 after the 18th
20 day of May have any talk with Mr. Stines with relation to Mr. Miller's property?

A. When?

Q. After the 18th day of May, 1909, during the year 1909?

Mr. Joseph Gaskill. I object to that as immaterial and incompetent; whether he has or not makes no difference.

30 (Question repeated).

The Court. Now, this is an employee talking with his employer, is that it?

Mr. Joseph Gaskill. No, this man talking with the superintendent.

The Court. The objection is sustained.

Q. Did you see any fumes or smoke, whatever you call it, coming from any other part of the plant, excepting these two stacks.

A. Smoke?

Q. Well, or dust or fume, whatever it is. 10

A. Oh, yes, I have seen smoke coming out of the smoke stack.

Q. I don't mean that; I mean fumes coming from the plant itself, acid fume or from the mixing house or any portion of it?

A. Yes, I have seen fumes coming out of what we call the burner house when they are charging; there is more or less fumes come out when you open the door to charge copper ore in the furnace.

Q. Now, then, did you ever get the effect of any of these fumes in your eyes or mouth or throat? 20

A. Oh, yes.

Q. What was the effect?

A. Kind of a smart.

Cross-Examination.

By Mr. Joseph Gaskill.

Q. Mr. Aschenbrenner, as I understand it, from the time copper pyrites are thrown into this place where it is burned to throw off the sulphuric gas, it is a continuous process up to the time that the sulphuric acid itself is made, isn't it? 30

A. Yes, sir.

Q. There is an inlet where you throw in the copper pyrites, as you have just explained, and then you would get some gas as you open the door, the same as you would from a heater when you opened the heater door with fresh coal in it?

A. Well, I will get more.

Q. You would get more, but in the same way, the same manner?

A. Yes.

10 Q. Now, then, from that inlet, there is no escape until you come to the outlet in the open air in this continuous performance of the manufacture of sulphuric acid?

A. No, there is not.

Q. Now, as a matter of course, while you were there and were in charge of this room, you tried to do the work right?

A. I did.

20 Q. And as far as you know it was done as well as anyone could do it, wasn't it?

A. Yes, sir.

Q. There was no more escape of gas from either the inlet or the outlet than was unavoidable?

A. There was not.

Q. You know of no appliance that is in general use which could be attached to either end that would prevent such an escape as there was, do you?

A. Yes, sir, I do.

Q. At which end?

30 A. At the exit end.

Q. At the outlet, up in the air?

A. No, in the room, before it gets out to the air.

Q. What say?

A. In the room before it gets out to the air.

Q. No, I am not talking about it in the room; I am

talking about the two ends of the performance, the inlet and the outlet; now, do you know of anything else that can be used there at the inlet where the pyrites are thrown in that would keep that gas from coming out in your face?

A. Yes, it could be done by putting a fan there, using a fan.

Q. You never saw a fan used, did you?

A. No, I have heard of them, I never seen one used.

Q. And what could you put at the other end, if anything, up in the air, the outlet? Have you ever seen anything put there different from the I. P. Thomas people have?

A. No.

Q. Now, you say that at times you have seen small quantities of this colored vapor or fumes or smoke come out and at other times you have seen greater quantities?

A. I have.

Q. When you have seen the greater quantity, then it was at once your duty to make some change in the charging, wasn't it?

A. It was, yes.

Q. And that is the reason why you were watching it?

A. Yes.

Q. And that is the only way you had to tell, wasn't it?

A. Well, not just exactly, no.

Q. Well, that was the way that you told whether or not the plant was operating properly, by watching that tail, as you call it?

A. Yes.

By Mr. Avis.

Q. Is that the only way you had to tell, Mr. Aschenbrenner?

A. No.

Q. Is there any other way—what was the other way?

A. Why, you could tell by your temperatures in the chamber room; your temperature would go up; if you
10 start to see them go up and drop you could tell there was something wrong.

Q. Would that indicate to you what was wrong?

A. Yes, it would.

Q. What did it indicate to you was wrong?

A. Indicated we was getting too much sulphur gas; we had to cut down on the ore.

Q. Then when you were getting too much sulphur gas, what kind of fume came out of this tower at the top of the building?

20 A. Well, the regular sulphur fumes, lightish.

Q. You were saying something about, that there was something else that they could have used at this plant inside, not at the end, but to have made it better.

What was that, Mr. Aschenbrenner?

A. That is what they call an intermediate tower.

Q. They didn't have that when you were there?

A. No, sir.

Q. Is that used on some other plants?

A. Yes, sir.

30

By Mr. Joseph Gaskill.

Q. Mr. Aschenbrenner, it was just as much part of your duty to watch the temperature as it was to watch that tail from the stack, wasn't it?

A. Yes, sir.

Q. And that temperature, when it either got too high or too low, it told you what to do?

A. It did.

Q. And you did it?

A. I did.

By Mr. Avis.

Q. When you did what it told you to do, would 10
that have the effect of changing the excess of sulphur at
once?

A. It wouldn't, no, sir; you could not avoid it.

Q. How long would it take if there was an over-
charge of sulphur before you could get it back to the
place where it ought to be?

A. I have seen it go to forty-eight to fifty hours.

Q. And all of that time, what is happening to this
thing out on the roof?

A. Well, you are losing all your sulphur fumes. 20

Q. It is going out, is it?

A. Going out, yes; there is nothing to condense it.

Q. And is or is not that the fume that sometimes
you saw going toward Miller's place?

A. How is that?

Q. Is or is not that the same fume you saw going
toward Mr. Miller's place?

A. Yes, sir.

By Mr. Joseph Gaskill.

30

Q. Now, hold on, that is something new. When
there was this overcharge of sulphur that you speak of,
whose fault was that?

A. It wasn't anybody's fault.

Q. No, it was something that was unavoidable, wasn't it?

A. Yes.

Q. Now, another thing; on these occasions they lost the sulphur fumes?

A. Yes.

Q. Now, that was a dead loss in the operation of the plant, wasn't it?

A. Yes.

10

Mr. Avis. Now, if the Court please, I have got three or four witnesses who are not here this afternoon; I did not anticipate the case would get along so quickly, and they are not here because of a very important engagement that they had. Mr. Earle Miller is a witness, and he is engaged in the other Court; I can't call him, and I was wondering whether Judge Gaskill could put
20 anything on that would take up the rest of your Honor's afternoon, like proving the map or something like that.

Mr. Joseph Gaskill. I could put on two small witnesses, yes, and as far as Earle Miller is concerned, Senator, I am willing he may be called out of turn or I am willing that you may read from his testimony we have here. The other witnesses I want to testify before I go into my main case.

30

EDWARD I. BERRY, SWORN.

By Mr. Joseph Gaskill.

Q. Mr. Berry, you are the Court stenographer for this judicial district, are you not?

A. I am.

Q. I hand you stenographer's transcript of the testimony of the case of Howard W. Miller v I. P. Thomas & Sons Company, tried in the Gloucester County Circuit in October, 1906, or at the October Term before Judge Endicott and a jury,—I hand you the transcript of the testimony taken in that case which you gave me, and call your attention to page twenty-nine of that transcript and to this question and answer: "Q. Well, now, how many of these apple trees were destroyed? A. There is 178 of them burned badly so that they are all shrivelled up, the fruit on them shrivelled and fallen off and the leaves.", and I ask you if that is a correct and true transcript of the answer that was given to that ques- 20
tion on that trial?

A. Yes, sir.

Cross-examination.

By Mr. Avis.

Q. Did you transcribe that, Mr. Berry?

A. Not personally; I dictated it to my operator through the phonograph. 30

Q. And did you afterward compare it with the original notes which you took?

A. Yes, sir.

HENRY J. SHERMAN, SWORN.

By Mr. Joseph Gaskill.

Q. I suppose you will excuse me if I call you Harry?

A. Certainly.

Q. Having known you ever since you were a little chap. Harry, you are one of the partners of the firm
10 of Haines & Sherman, civil engineers and surveyors?

A. Yes, sir.

Q. And how long have you practiced your profession?

A. About twenty-four years.

Q. We are getting along. Did you at my request go to the I. P. Thomas Company and the farm of Howard Miller for the purpose of making a map to illustrate the testimony in this case?

A. I did.

20 Q. You saw Mr. Miller there?

A. Yes, sir.

Q. And he gave you every facility to make the surveys and measurements that you wished to make?

A. Yes, sir.

Q. He treated you courteously?

A. Yes, sir.

Q. Is the map on the easel your work from the surveys and measurements that you made on the ground?

A. Yes, sir.

30 Q. Will you kindly step there, Harry, and generally explain to the Court and jury the map, and from your experience in the past don't say "This represents so and so," but when you point to this, tell the stenographer what the "this" is, so he can get it on his notes.

A. The red spots on the left hand side of the map

adjoining the blue line represent the plant of the I. P. Thomas Company.

Q. Now, before passing from that, will you define the different buildings there as you have them marked?

A. The building on the extreme left of the map, the small building is the office building. Next to that on the right the large building is a storage house.

Q. Point to it.

10

(Witness complies).

A. And on the right side of that just to the right of the word "House" is a tower marked by a small square dot.

Q. That projects above the roof of the building, does it?

A. Yes, sir.

Q. What shape tower is it as it goes through the roof?

20

A. It is a wooden—

Q. Square?

A. Square, yes, sir.

Q. That is the mixing house tower, isn't it?

A. Yes, sir.

Q. Very well; now, proceed.

A. Next to that on the right and above is the rock shed—

Q. Point to it.

30

(Witness complies.)

A. And below is the coal shed, marked "Coal Shed" on the map.

Q. Point to it.

(Witness complies).

A. And to the left of the coal shed is the boiler room, and just below that is the engine room; on the right of it is the smokestack.

Q. Point to that, will you? What are those little buildings to the right and below that?

A. To the left and below, you mean?

Q. Yes.

10 A. To the left and below is the machine and carpenter shop.

Q. Point to it, will you please?

(Witness complies).

A. Then going on over to the right of the main building or storage house, we come to two circular spots which are iron and used for, I believe, some kind of storage. These are shown here. (Indicating).

20 Q. And what is that square place where these circular marks are?

A. That is a wooden building and I think that is used for some storage purpose.

Q. Now, what is the other building still further going to the right along the creek bank?

A. That is the acid house and above the acid house is the Gay-Lussac Tower.

Q. Is that indicated?

A. That is indicated by a small circular dot with
30 a square around it.

Q. That comes through the roof of the building, does it?

A. Yes, sir.

Q. Where are the burners, the burner house?

A. The burners are just to the right of the Gay-

Lussac Tower.

Q. Did you see those furnaces?

A. I was in there, yes, sir.

Q. Does this photograph illustrate the burners?

A. It does.

Q. Kind of large ovens, aren't they?

A. Yes.

Mr. Gaskill. That may be marked for illustration.

10

(Photograph referred to is marked Exhibit P 2).

Q. Are those buildings all drawn to scale, Mr. Sherman?

A. Yes.

Q. And are they located along the creek bank by scale?

A. Yes.

Q. By actual measurement?

A. Yes.

20

Q. Which is the Mantua Creek as you indicated it on the map?

A. Mantua Creek, the lower or westerly side of it is shown by a blue streak running all the way across the map from left to right.

Q. What does the heavy black line that bisects the map irregularly from top to bottom represent?

A. That is the division line between the property of the I. P. Thomas & Sons Company and Howard W. Miller.

30

Q. Is that laid down from actual survey?

A. It was plotted from the deeds.

Q. Now, then, to the right of that heavy black line, what is it that you have illustrated on the map immediately adjoining the heavy black line and shown in

gray? Point to that, will you?

(Witness complies).

A. It is a thicket running approximately along the property line.

Q. What is the character of the ground there as to elevation, where that thicket is indicated on the map?

A. The thicket, I would say is somewhat on a
10 hillside, coming up from a marsh up to the orchard.

Q. You have delineated the orchards on the map, have you?

A. I have.

Q. And have you Mr. Miller's house and buildings and lane?

A. Yes, sir.

Q. Please point them out to the jury.

A. The buildings are shown in red on the right hand side of the map.

20 Q. Which is the house?

A. The house is the one with trees around it and marked with the word "House."

Q. And the barn?

A. The barn has the word "Barn" on it.

Q. What are those other three buildings?

A. Those are outbuildings; I don't know just what the nature of them is. I think one is a corn crib, but I am not sure.

30 Mr. Joseph Gaskill. The upper one, square, is a potato house, and then below that and to the left of the dwelling is a crib-house and chicken house.

Q. Now, Harry, where is the pear orchard?

A. The pear orchard is over near the line between

Miller and Thomas, and about half way up and down on the map, shown by the small circular green spots rather close together.

Q. And what lettering have you put on that?

A. I have put on there the letters "Pear Orchard."

Q. Now, is that the exact size of that orchard on the ground?

A. Yes, sir.

Q. By measurement?

A. Yes, sir.

10

Q. Can you give us that measurement, that size?

A. Well, I can scale it; 260 feet long and about sixty feet wide.

Q. Now, have you delineated also the apple orchard and marked it on the map as an apple orchard?

A. I have.

Q. Was the old orchard and the young orchard and the other orchard pointed out to you, Harry, as distinct one from another?

A. No, it was not.

20

Q. What is that you have along the lane there?

A. Immediately adjoining the lane, running up and down the map and at right angles to the lane are smaller trees about fifteen feet apart.

Q. What kind of trees?

A. Fruit trees.

Q. And what do those dots just to the left of that indicate, the orchard?

A. They represent the orchard, yes, sir.

Q. Something has been said or will be said in this case about a maple tree; have you got that indicated on your map?

A. Yes, sir.

Q. Which is that?

A. That is the tree immediately to the left of the crib-house.

Q. Now, Harry, take the stack from the acid house, the Gay-Lussac stack, and tell me the distance from that stack to Howard Miller's residence in a direct line?

A. 1925 feet.

Q. Not quite a half mile?

A. No.

10 Q. Let's see; there are five thousand—

A. 5,280.

Q. 5280 feet in a mile and 2640 to a half mile.

Now, how far is it from that Gay-Lussac tower first to the center of the pear orchard?

A. 1250 feet.

Q. Now, how far is it to the center of the orchard about the place where that "O" is in "Apple Orchard." Take the word "O" of the word "Orchard."

A. 1350 feet.

20 Q. Now, Harry, one more measurement I think I would like to have, and that is from the Gay-Lussac tower to the edge of the shrubbery here, the thicket which is the boundary of the orchard. The orchard is on a little higher ground than that thicket, isn't it, Harry, do you recall?

A. Yes. One thousand feet, Judge.

Cross-Examination.

30 By Mr. Avis.

Q. Your measurement Mr. Sherman, of the thousand feet is from what has been called the Gay-Lussac tower to the southwesterly side of what you have called the thicket.

A. Yes.

Q. Now, won't you tell me how far it is from the nearest point of the acid house to the nearest point of the property line of Mr. Miller?

A. You mean from the nearest point of the acid house?

A. The nearest point of the acid house to the nearest point of the property line?

A. 777.

Q. That is two or three hundred yards about, isn't 10 it?

A. Yes.

Q. Now, with relation to these trees, did you plot them all by actual measurement?

A. Not all of them, no.

Q. You had to rather estimate where some of them were, I suppose; you looked over and saw them all, did you?

A. I located the pear orchard exactly; I located this bare spot here exactly, and these scattering trees, the 20 outlines of these, these trees exactly as they are on the ground.

Q. Yes; now this orchard here, the main orchard where "Apple Orchard" is marked across it here, you simply took the outlines?

A. Simply took the outlines and about the general spacing between the trees.

Q. Did you count the trees in the rows at all?

A. No.

Q. So you don't know whether this represents ac- 30 tually the trees as they are there now or not? There might be some dead, pulled out and carried away, as far as you know?

A. Yes.

Q. Now, are you sure, Mr. Sherman, from your investigation that there are any trees, except some scattering ones, I mean, to the southerly of the southerly side of the pear orchard at a point opposite the barn where there is a lane goes across there to the westerly side of where the trees are marked on this plan?

A. This is the exact outline of the solid orchard.

Q. Sure of that, are you, as compared with the pear orchard?

10 A. Yes, sir.

Q. How many feet is there, taking the southerly line of the pear orchard as a guide, how far is it from there down to where these four trees are to the right of that line? I am speaking of down here, the pear orchard down to this point?

A. 140 feet.

Q. How far is it from the point you last measured to, in a southerly direction, to the outer line of what you say is the solid orchard?

20 A. 120 feet.

Q. Then going in a westerly direction, I guess a little west, northwest probably, how far is it to the north-westerly corner or it is really the southwesterly corner of what you term as the main orchard?

A. 330 feet.

Q. So that you say from your investigation on the spot that there is a rectangular piece of land there, 120 x 330 feet, to the westwardly of the point where you first commenced or secondly commenced to measure in a

30 westerly direction, is that correct, of solid apple trees?

A. Yes, sir.

Q. Now, to the northerly of that rectangle, however, you can't say whether that is an actual representation of the apple trees there or not?

A. Well, that was practically solid orchard.

Q. Yes, but you didn't go through it and count the trees, whether there was any dead at all?

A. No. I did not; I got the outline.

Q. And you don't know whether this actually represents the number of trees in there or not?

A. No, I can't say.

Q. That is allegorical, almost, isn't it?

A. Well, we measured up the rows, about the way we saw them; plotted the outline and filled the rows in.

Q. The line between Mr. Miller and I. P. Thomas & Sons Company is made how, from actual surveys or from the deeds? 10

A. From plotting, deeds.

Q. Howabout the creek line, was that surveyed at all?

A. That was surveyed, yes.

Q. By you?

A. Yes.

Q. And this, I suppose, you put on here for a street? 20

A. Yes.

Q. That is taken from what, surveys?

A. From maps.

By Mr. Joseph Gaskill.

Q. Harry, take the lower row of trees in the main apple orchard, does the map indicate the number of trees that there is there? Did you count them?

A. No, sir. 30

Q. Now, have you the cardinal points on the map?

A. Yes, sir.

Q. Which is it?

A. It is shown on the lower left hand side of the map, indicated by an arrow.

Q. And that makes the lower left hand corner of the map the north of the map?

A. Yes.

Q. Now, did you notice in what direction from the plant the mouth of Mantua Creek is where it empties into the Delaware River?

A. I would say, yes, approximately, the mouth of Mantua Creek is approximately north of the plant.

Q. Is there a curve or bend in the Creek between
10 its mouth and the plant?

A. Yes, sir.

Q. Now, Harry, I notice that you have got all of these trees on there marked in green. You made your survey in the winter time, didn't you?

A. Yes.

Q. Last week?

A. Last Monday.

Q. So that you could not indicate the brown
splotches on those trees?

20 A. No, sir.

Q. They are all green as you have them there?

A. Yes.

Q. How high is the Gay-Lussac tower, Mr. Sherman?

A. 75.23 feet above the floor. The other tower is 90.1 feet.

30 At this point an adjournment was taken until Tuesday morning, February 16, 1915, at 10 o'clock A. M.

Woodbury ,New Jersey, February 16, 1915.

Trial of the cause resumed at 10 o'clock A. M., on the above date, pursuant to adjournment, in the presence of counsel for the respective parties.

ALBERT M. PITCHER, SWORN.

10

By Mr. Avis.

Q. Where do you live, Mr. Pitcher?

A. Woodbury.

Q. What is your occupation?

A. Chemist.

Q. Where are you employed, Mr. Pitcher?

A. DuPont Powder Company.

Q. How long have you been there?

20

A. Almost three years.

Q. Where did you get your technical education as a chemist?

A. Swarthmore College.

Q. And when were you graduated from Swarthmore?

A. In 1911.

Q. Were you ever employed by the I. P. Thomas & Sons Company?

A. I was.

30

Q. In what capacity there?

A. As chemist.

Q. And when were you employed there?

A. In 1911 and 1912.

Q. In that employment did you have anything to

do with the manufacture of acid?

A. No, nothing to do with it.

Q. Were you acquainted with the acid plant there?

A. Yes.

Q. Did you ever examine it?

A. I have been through the plant.

Q. What was the acid plant that they have there used for?

A. The manufacture of sulphuric acid.

10 Q. Won't you just explain the manufacture of sulphuric acid to the Court and jury, please?

A. The sulphuric acid is derived from pyrites or iron sulphides, by, you might say, cooking those sulphides and getting the sulphurous oxide gas off the sulphides and converting that by the addition of other gases into sulphuric acid in lead chambers.

Q. Now, what other gases are used to convert the sulphur gas into sulphuric acid?

A. Gases derived from the action of sulphuric acid
20 on sodium nitrate or potassium nitrate, either one.

Q. That makes the second gas, which mixed with the sulphur gas and going through the process eventually makes sulphuric acid, is that correct?

A. That is the idea.

Q. In making sulphuric acid, is there any rule as to the proportion of the different gases?

A. A set rule?

Q. Well, a set rule or reasonable set one, yes.

A. Why, yes.

30 Q. What is it—will you tell the jury that?

A. I can't tell that right off hand, no, sir. It is worked out by chemical equation.

Q. I don't mean to tell me the exact proportions; you couldn't tell the proportions, is that the idea?

A. I could if I had some paper and a pencil here.

Q. But there is a fixed proportion of each of these gases to get the best results, that is what I mean?

A. Exactly.

Q. Now, supposing that the quantity of soda gas mixed with sulphur gas is not up to that fixed proportion, what is the result? Do you catch my—

A. It is not up to that fixed proportion?

Q. Yes. Supposing the soda gas falls down, and is not up to the proportion, what is the result as far as the sulphur gas is concerned? 10

A. The sulphur gas would probably not be all converted into sulphuric acid.

Q. What would become of it in this plant, I. P. Thomas & Sons Company's plant?

A. That all depends.

Q. Well, tell us what it depends on and what alternatives there are, if there are any.

A. It would probably be absorbed in the sulphuric acid in the tower, in the last tower.

Q. And if not absorbed in the last tower, what 20 would become of it?

A. It would go out the tower.

Q. Supposing the sulphuric gases fall down and the soda gases are in excess, what would be the result of that in this plant?

A. The opposite would take place, if it was not caught in the last tower.

Q. If it was not absorbed in the last tower, then the nitric gas would escape, is that it?

A. That is the idea, yes. 30

Q. Did you ever see, while you were there in 1911 and 1912, any escape of gases from the tower of the acid house?

A. I have.

Q. Can you tell what kind of gases escape?

A. The only gas that I noticed escaping there is this reddish brown gas.

Q. What is that? Do you know what that is from, whether that is from the excess of sulphur or nitrate?

A. Nitrate.

Q. Did you ever notice what became of that gas or fume?

A. What eventually became of it? No, sir.

Q. No, what became of it as it left the tower.

10 A. It was carried in which ever direction the wind was blowing. If there was no wind, it sort of settled there.

Q. How about if the condition of the atmosphere was heavy and foggy and the wind was blowing, would it then be carried up in the air or down?

A. It would be hard to say where it went in a foggy atmosphere.

Q. You mean, you could not see it very well?

A. It would be so highly dissipated it would be
20 hard to say where it went.

Q. Have you ever noticed how far this gas that you speak of went from the plant? Have you ever seen it go from the tower and seen how far it went?

A. I could not say how far it went, no, sir; I have seen it go some distance.

Q. Well, you can't tell how far it goes?

A. No.

Q. But, I mean, how far have you seen it go that you have observed it from the plant?

30 A. I wouldn't say that I have observed it from the plant, because I haven't been looking for that.

Q. How far from the stack have you noticed it, if at all, as near as you can say, of course?

A. Well, maybe a hundred feet.

Cross-Examination.

By Mr. Joseph Gaskill.

Q. You say that you can notice it or have noticed it a hundred feet from the stack?

A. Yes, as near as I can judge.

Q. Then if it is a thousand feet from the stack to the nearest point of Mr. Miller's property line, it is dissipated before it reaches there under ordinary circumstances, isn't it? 10

A. That I couldn't say; I haven't noticed it that distance.

Q. Well, you said that it was dissipated in foggy weather.

A. Dissipated in foggy weather.

Q. What do you mean by "dissipated"? Explain to the jury.

A. I mean it has become highly diluted, you might say. 20

Q. Yes, spreads out?

A. Spreads out, exactly.

Q. And becomes attenuated, thinner?

A. Yes.

Q. Mixed more with the air?

A. Yes.

Q. And the further it goes from the stack the more it becomes dissipated and attenuated?

A. Quite true.

Q. Now what was it you said that came out from 30 the stack?

A. Nitrous oxide gas, very probably.

Q. Well, didn't you say something about sulphuric acid?

A. I said if that wasn't absorbed it would proba-

bly come from the stack, yes, sir.

Q. Now, that is plant food, isn't it?

A. No, it is not.

Q. You say that?

A. I say that as far as I know it is not.

Q. Now, do you know whether it is or not?

A. Not absolutely, no, sir.

Q. That is a better answer, then. Now, every effort is made and was made while you were there to con-
10 serve or preserve and to use these different gases that you have spoken of?

A. Yes, sir.

Q. And the whole machinery of the plant is contrived for that purpose, isn't it?

A. Exactly.

OTTO J. BONIN, sworn.

20

By Mr. Avis.

Q. Mr. Bonin, where do you live?

A. Near Paulsboro.

Q. How long have you lived in that vicinity?

A. About eighteen years.

Q. Were you living there in 1911?

A. Yes, sir.

Q. Do you know Howard W. Miller?

30 A. Yes sir.

Q. Did you at that time know where his farm was along Mantua Creek?

A. Yes sir.

Q. Were you called to his place at any time during the year 1911, Mr. Bonin?

A. Yes sir.

Q. Do you remember what day of the week you went there?

A. On a Sunday.

Q. Anybody else there that day that you saw?

A. Yes; sir.

Q. Who else, do you recollect?

A. William Wilson, Percy Lodge, Charles Nothnagle, William Miller, Howard W. Miller, Earle Miller and I guess that was all that I—

10

Q. That is all right; that is as near as you recollect?

A. Yes.

Q. Now, what did you do there that day?

A. Well, we went through his orchard and viewed the fumes that escaped from the I. P. Thomas fertilizer works on the trees.

Q. Well, what did you actually find there, that is what I want to know, what you saw?

A. Well, we saw great damage done to the trees, 20 to the foliage and to the fruit.

Q. Will you just explain the nature of that damage, what you observed? Take the apple trees for instance.

A. Well, the nature of the fumes was something similar to the—

Mr. Joseph Gaskill. One moment, now; did you see the fumes come over?

30

The Witness. No.

Mr. Joseph Gaskill. Then don't speak about what fumes did.

Mr. Avis. No, I don't want that, Mr. Bonin; tell us the nature of the leaves and apples, that is what I mean.

The Witness. Well, it looked something like a slight fire under a tree; it would buckle the leaves, sort of curl them up, and put them of a brownish cast, and the little fruit that had formed there, the size of the end of your finger and some larger, it caused them to wither and
10 drop.

Q. What have you to say as to the quantity of leaves affected and fruit that dropped?

A. Well, at that time it appeared to be heavier on the side toward the fertilizer factory.

Q. How about the quantity?

A. Well, some trees seemed to be more than others; some acted as if they were all going to drop. Fully half had dropped at that time.

20 Q. Did you make any test with relation to the apples that were on the tree by taking hold of the branches at all?

A. Yes, sir, you could move a twig and they would apparently all drop if you gave a right good shake.

Q. Would that have occurred from your experience on a healthy tree?

A. No, sir.

Q. Now, what did you find in the pear orchard? Did you go into the pear orchard?

30 A. Well, they seemed to be affected principally the same way.

Q. What about the fruit?

A. Well, the fruit seemed to have principally the same appearance.

Q. How about the dropping?

A. Well, they were commencing to drop, but I don't think quite as hard as the apples was at that time yet.

Q. And the trees themselves, what appearance did the leaves and foliage have?

A. Well, they seemed to have a brown cast on them.

Q. How about the twigs; did you examine any of the twigs, the new growth?

A. No, sir, not so much at that day. 10

Q. Are you an apple grower, Mr. Bonin, and were you that year?

A. Yes, sir.

Q. How many trees on your farm that year?

A. Well, there is about eighteen acres in fruit altogether, the biggest part are apples?

Q. Now, what, about, is the age of your orchard?

A. Well, about thirty-five years?

Q. Up to the year 1911, have you sprayed your orchard? 20

A. Up to the 1911?

Q. Yes, prior, before 1911?

A. No, sir.

Q. After you had been to Mr. Miller's place, did you examine your orchard?

A. Yes, sir.

Q. Did you find any condition in your orchard similar to that of Mr. Miller's?

A. No, sir.

Q. Have you examined Mr. Miller's orchard since that time? 30

A. Yes, sir.

Q. When?

A. I was there in the fall of 1911.

Q. Do you recollect what you noticed at that time

or what the condition of the orchard was?

A. Yes, sir.

Q. Will you tell the Court and jury, please.

A. Well, the leaves of the trees had mostly all fallen on the one side, more so than on the other side, the opposite side from the fertilizer factory.

Q. Which was the side they had fallen the most on?

A. On the side next to the factory.

10 Q. And how about the twigs or the limbs at that time; did you notice any of them?

A. The young twigs that had made their growth that season seemed to be dried up, the life taken away from them, the twig that had started.

Q. Can you say how many trees you examined that you found more or less in this condition?

A. Well, I judge at that time it looked to be between forty and fifty trees that I noticed at that time.

Q. Have you been at Mr. Miller's farm since and
20 in his orchard?

A. Yes.

Q. When?

A. About a week ago.

Q. What condition do you find there now, Mr.
Bonin?

A. Well, I find them in a serious condition.

Q. Well, just explain what you call serious.

A. Well, what I mean, that they don't look as if
30 there will be a tree in the orchard more than two or three more years.

Q. Well, why?

A. Well, it has affected the trees so hard that it is going all through the tree; it is going to naturally kill the tree out in my opinion, the way they look now.

Q. What is the appearance that brings you to that

conclusion? That is a conclusion; what did you see?

A. Well, the tree, when you look at a tree, it is dead, it has no live appearance about it, but you can get into some parts of the limbs and twigs and find life there, but never to produce any amount of good fruit no more, perfect fruit, the way the tree looks at the present, in my opinion.

Q. How long have you been a fruit grower?

A. Well, about six years.

10

Cross-Examination.

By Mr. Joseph Gaskill.

Q. What are you, a farmer or carpenter?

A. A farmer at present.

Q. How long have you been a farmer?

A. About eight years.

Q. What were you before that?

A. A carpenter.

20

Q. Do you own the farm that you have been speaking of or rent it

A. I farm on shares.

Q. During the eight years you have been a farmer, have you been on the same farm all the time?

A. No, sir.

Q. How many farms have you been on during the eight years?

A. Three.

Q. How many apple trees were on the first farm that you were on? 30

A. About twenty-five.

Q. How many were on the second farm?

A. About the same.

Q. And how many are on your present farm?

A. There was about eighteen acres of fruit there, more or less apples.

Q. What say?

A. More or less apples.

Q. Well, I am asking you how much in apples?

A. How many in apples?

Q. Yes.

A. Well, there is about ten or twelve acres in apples.

10 Q. Have you made any study of the diseases of fruit trees?

A. No sir.

Q. Have you made any study of the diseases and of the insects, &c. that attack fruit?

A. Not particularly, no, sir.

Q. You are not a member of any horticultural society?

A. No, sir.

20 Q. You haven't made it a point to attend any of the meetings of the horticultural societies?

A. No, sir.

Q. What do you call yourself an apple grower for then?

A. Because there is apples on the farm and I have got to take care of them, haven't it?

Q. That is it exactly, and you are a potato grower in the same sense, and a corn grower?

A. Yes.

30 Q. Now, up to 1911, as I understand you to say, you had never sprayed your orchard at all?

A. No, sir.

Q. Have you trimmed your orchard?

A. Yes, sir.

Q. How many dead trees have you taken out of the orchard of the farm that you are now on?

- A. About four.
 Q. Is that all?
 A. Yes, sir.
 Q. Sure?
 A. Yes, sir.
 Q. And how many have you cut back and trimmed
 very severely?
 A. Not over four.
 Q. Not over four more?
 A. No, sir. 10
 Q. And how many apple trees are there there?
 A. I don't know, I never counted them up.
 Q. Now, when you went there and looked around
 through the orchard, Howard, as a matter of course,
 told you all about these fumes coming over?
 A. Yes.
 Q. And you had that in your mind when you were
 looking?
 A. Yes, sir.

20

 WILLIAM WILSON, SWORN.

- By Mr. Avis.
 Q. Where do you live, Mr. Wilson?
 A. Gibbstown, Greenwich Township?
 Q. That is adjoining Paulsboro?
 A. Right along the line.
 Q. And how long have you lived in that vicinity? 30
 A. About twenty years, twenty-two or three years.
 Q. What is your occupation?
 A. Farmer.
 Q. Have you been a farmer during that period?
 A. All the time.

Q. During that period have you grown any fruit, apples or pears?

A. Well, not so many, no.

Q. You have had some?

A. Some.

Q. Do you know Howard W. Miller?

A. I do.

Q. Do you know where his farm is located?

A. Yes.

10 Q. Did you in 1911 at any time go to his place?

A. I did.

Q. Do you remember what day you went there, what day of the week?

A. I think it was on a Sunday.

Q. What did you do there, Mr. Wilson?

A. Well, we went down in the orchard, four or five of us.

Q. And what did you see?

A. Well, we seen the leaves had burned brown on 20 one side of the trees next to the river, one side.

Q. Yes.

A. Burned brown; the apples on that side also had fallen off.

Q. Did you examine any of the twigs on the trees?

A. We did.

Q. What did you find in relation to them?

A. Well, we found some of them had shrivelled up, some of them.

Q. Can you tell whether the apples you saw that 30 had fallen off were a large or a small quantity?

A. Well, the ground was covered.

Q. What about the pear orchard, did you go into that?

A. Yes.

Q. What did you find there?

A. The same thing.

Q. Where were you living at that time, Mr. Wilson?

A. The same place I am living now.

Q. In Greenwich Township.

A. Yes.

Q. Have you any fruit trees on that farm?

A. Yes.

Q. About how many?

A. Oh, I haven't got many trees, maybe fifty. 10

Q. After you went back from Mr. Miller's, did you examine your trees?

A. Well, not particularly that day; I did in two or three days after by going by them.

Q. Did you find any condition in your orchard similar to that which existed in Mr. Miller's?

A. I did not.

Q. Did you in going by any other orchards that year look at them after you had visited Miller's?

A. Yes. 20

Q. How long a time afterward, within what period of time?

A. Oh, might have been three or four days, the same as I did my own.

Q. Did you in any of those other orchards in that vicinity see the same condition as in Mr. Miller's orchard?

A. I did not.

Q. Have you been to Mr. Miller's orchard since?

A. I have. 30

Q. When?

A. During that fall I think I went down there again.

Q. Tell us what condition you found then in relation to these trees you saw in May?

A. That side was burned. Now, the leaves had all fallen off of that side; the other side had some green leaves on.

Q. Was that before or after the fruit was gathered?

A. Well, there was some fruit on the trees at that time.

Q. Did you go into the pear orchard at that time too?

10 A. Yes.

Q. What was the condition there?

A. The same thing.

Q. Were the leaves on or off of the trees?

A. On the side next to the river, the works, they was off.

Q. Have you been there since?

A. I have.

Q. When?

A. I think it was last Sunday.

20 Q. What condition were those trees in then that you had seen when you were there the other time?

A. What, last Sunday?

Q. Yes.

A. Well, in pretty bad shape.

Q. Just explain what you mean by that.

A. Well, the twigs on nearly every tree was dead; you could go along and break off handfuls right off the ends of them.

30 Q. Did you notice at that time whether the dead twigs were more on one side of the tree than another?

A. Yes.

Q. Which side?

A. Next to the works or the river.

Q. What about the spraying of the trees on your farm?

A. I never done any.

Q. You didn't in 1911?

A. Never sprayed in my life.

Cross-Examination.

By Mr. Joseph Gaskill.

Q. Mr. Wilson, you have never sprayed?

A. No, sir. 10

Q. And you know nothing about the diseases of fruit trees?

A. I do not; never studied it.

Q. Nor of fruit itself?

A. No, sir.

Q. Now when you went there in 1911, you did not expect to find a very healthy condition of the trees on the side next to the works, did you?

A. Well, I did not go down there for that purpose, to see, but I seen after I got there. 20

Q. Well, I say, you did not expect to find them when you were walking down there—when you were asked to go down to look, you did not expect to see anything very nice down there, did you?

A. Well, no, I didn't expect to see anything—

Q. Because you had already testified in 1906 that the trees were all dead on one side, hadn't you?

A. Well, I might, yes.

Q. So that you knew before you went there, and you knew before 1911, according to your idea, that the trees were all dead on the side next to the works? 30

A. I did not say they were all dead.

Q. Well, so badly burned that they would never come up to be healthy trees again?

A. That is not dead.

Q. Well, I say, that is what you said, is it not, in 1906?

A. I might have said they were burned, yes.

Q. In 1906 that the trees had been so badly burned, dead on one side, that you did not think they would ever come up and be healthy trees again?

A. I might have said that, but I didn't say dead.

Q. That was the truth, as a matter of course, as you testified in 1906?

10 A. Sure, yes.

Q. And consequently you did not expect to find the trees in any different condition when you went there in 1911, did you?

A. They could grow out of that.

Q. What say?

A. They could grow out of a burn, maybe.

Q. But you gave it as your opinion then that they would never come up and be healthy trees again?

A. Well, they ain't.

20 Q. No, that is right; so that the opinion you formed at that time has turned out to be correct, hasn't it, according to your notion?

A. Well, it might be.

Q. So that you did not find the trees any worse in 1911 than when you were there prior to the trial in 1906, did you?

A. Well, I don't know as I did, no.

By Mr. Avis.

30

Q. Had you seen the trees in the meantime, between 1906 and 1911?

A. Oh, I often go down to Mr. Miller's farm; I go to lots of farms.

Q. Had these trees come out after 1906 better than you expected?

A. No.

Q. They were still somewhat injured, were they?

A. Sure, and are yet.

A. J. TRUMBULL, SWORN.

10

By Mr. Avis.

Q. Where do you live Mr. Trumbull?

A. About a mile this side of Paulsboro.

Q. Whereabouts do you live, on the Crown Point road or—

A. No, I live on the Mansion Grove road, between the Crown Point and the Salem road.

Q. How long have you lived there?

20

A. Going on two years.

Q. And where did you live before that time?

A. On the Hartman property, about half a mile below Paulsboro.

Q. How long did you live there?

A. Two years.

Q. And where before that?

A. On the W. D. Gill property.

Q. Where is that at?

A. That is adjoining the Howard W. Miller property. 30

Q. How long did you live there?

A. One year.

Mr. Joseph Gaskill. What year was that?

The Witness. That was 1910.

Q. During 1910, have you ever observed anything coming from the I. P. Thomas & Sons Company factory?

(Objected to as immaterial).

Mr. Avis. The allegation in our complaint, if the Court please, refers—

10

The Court. What is the question?

(Question repeated).

The Court. During 1910?

Mr. Avis. This complaint says at various times after the first date mentioned.

20 The Court. I supposed the issue was confined—the proof so far has been confined to 1909 and 1911.

Mr. Avis. Those are the dates that we claim the damage occurred.

The Court. That is the only time Mr. Miller has said anything about.

Mr. Avis. Well, he has said in a general way that
30 they came over there.

The Court. But he has made no claim for damage.

Mr. Avis. No specific time.

The Court. You are not trying to recover any damages for 1910, are you?

Mr. Avis. I should say not, except the general damage to the orchard.

The Court. Then how can it be material?

Mr. Avis. Except the permanent damage to the orchard, if the Court please, and also to show that during this time, two years, first that these fumes were escaping from the factory in 1910, which is between the two times we claim our damage, and the second proposition is to show that these fumes which he has seen have the same effect physically upon the eyes, throat and lips that we have described. 10

The Court. Let me see your complaint. (After reading the same.) The objection is over-ruled. 20

(Exception noted for the defendant).

Q. Now, answer that question, will you, Mr. Trumbull, please?

(Question repeated).

A. Well, I can't say that I did, and I don't know in what respect you are asking, in what way.

Q. Well, in the nature of fumes, or anything of that kind? 30

A. Well, now, on one or two occasions while I lived on Mr. Gill's on a foggy morning or foggy day I have felt a stinging sensation in my eyes and also—

The Court. When was that?

The Witness. That was in 1910.

Q. In which direction was the wind blowing from at that time?

A. I think from a northerly direction, I couldn't say positive.

Q. Where is your farm from Mr. Miller's?

A. Where?

Q. Yes, with relation to the I. P. Thomas Plant?

A. That would be near a southerly direction, I
10 judge.

Q. Are you up the creek?

A. Yes, sir.

Q. From Mr. Miller?

A. Yes.

Q. And did that farm border on the creek at that
time?

A. Yes.

Q. Did you in 1909, 1910 or 1911 see anything in
Mr. Miller's orchard? Were you in his orchard at all?

A. I saw lots of apples, that is about all in 1910.
20

Q. 1909 or 1911, did you go into his orchard at
all to examine it?

A. I was at his place, never examined it, no.

Q. You lived on the Hartman farm in 1911?

A. Yes.

Q. That was how far from Mr. Miller's?

A. I judge two miles.

Q. Have you any apple trees on that farm?

A. Yes.

Q. Were they in any way affected by anything
30 that year?

A. Nothing that I ever saw, no.

Q. That was 1911?

A. Yes.

No Cross-Examination.

DANIEL CARSON, SWORN.

By Mr. Avis.

Q. Where do you live, Mr. Carson?

A. Paulsboro.

Q. What is your occupation?

A. Oh, farmer and general jobber, do anything most that is honest.

Q. Do you know Mr. Miller? 10

A. I do.

Q. In 1911, did you visit Mr. Miller's place?

A. Yes, sir.

Q. Do you remember about when it was?

A. I think about the middle of May or a little later than that in May.

Q. Did you at that time make any examination of his orchard?

A. Well, not particularly; Mr. Miller called my attention to it is all. 20

Q. What did you see there?

A. Well, we saw some dead trees, dead limbs, you know, only leaves dried up and so forth.

Q. What about the fruit?

A. Well the little fruit was dropping off, some.

Q. You don't remember just what date or day of the week it was?

A. I do not, no, sir.

Q. Did you go into the pear orchard?

A. No, sir, I had a little business with Mr. Miller 30 for myself, and I went down there—he didn't call me down—I was down there for business; in fact, I didn't have much time, and he showed me some special trees that he said fumes from the acid house killed or hurt.

Mr. Joseph Gaskill. I object to that.

The Court. Strike it out.

Q. How many trees did you see?

A. Oh, I suppose—I couldn't tell you how many I did see.

Q. Well, estimate it.

A. We didn't go through the orchard, see, and he
10 showed me one near to the barn, I remember that.

Q. What kind of tree was that?

A. An apple tree, I believe.

Q. What appearance did that have?

A. Well, principally dead, I thought, the leaves
pretty much all dead. I don't know how the tree ever
came out.

Q. Did you see the leaves to notice what had hap-
pened to them? You say they were dead—did you ex-
amine any of them?

20 A. I could not tell what had happened to them, you
know.

Q. No, I don't mean what caused it, I mean what
appearance did the leaves themselves have?

A. Well, some was pretty well dried up. It wasn't
the whole tree. You see a limb, possibly, on some of
these would be in that shape and some trees you could not
discover anything, you know.

Q. That is, some of the trees on his farm?

A. Yes.

30 Q. Some of the trees you could not discover any-
thing?

A. Yes.

Q. Other trees had it?

A. Yes.

Q. Did you notice whether the same trouble was

more on one side of the trees than the other?

A. I couldn't say. You see, I didn't take any notice.

Q. What was your employment that year, Mr. Carson?

A. Farmer.

Q. You were a farmer then—where were you living?

A. Right up the creek.

Q. That is, toward Woodbury or toward Paulsboro?

A. Right above Paulsboro.

Q. Did you have any fruit trees, an apple orchard on your farm then?

A. Oh, there is some apple trees there.

Q. About how many?

A. Oh, I suppose twenty, maybe.

Q. Did you spray your trees at that time?

A. No.

Q. Did you examine your orchard after you went 20 back, or look at it at all?

A. No, I didn't bother about that.

Q. Well, did you go through your orchard at all within a short time after you were at Mr. Miller's?

A. No, we never noticed it; never looked for anything like that.

Q. Well, I didn't ask you that.

A. Oh, I was around by the trees every day.

Q. That is what I mean. Well, was there anything in your orchard like you found in Mr. Miller's? 30

A. Well, I couldn't say there was or there wasn't. I never took that much notice of the thing.

Cross-Examination.

By Mr. Joseph Gaskill.

Q. You do not claim to be an expert fruit grower, do you, Mr. Carson?

A. No, sir, I do not.

Q. Never studied the diseases of fruits nor of trees?

A. No; I can tell a good apple if I eat it.

Q. Yes. Now, you said something about an apple
10 tree near the barn, didn't you?

A. Yes.

Q. Did you examine that tree at all?

A. No, I didn't make no examination of it, for the simple reason was I didn't think I could have told much if I had.

Q. Did Miller have any apples on his trees when you were there?

A. Why, no, they hadn't come to perfection yet. You see, it was too early. He had a good many apples on
20 the trees.

Q. He had a well fruited orchard, didn't he, when you were there?

A. Well, as far as my judgment would say, yes, sir, at that time of year. I don't know what the result was afterward.

Q. No, but from what you saw then everything looked as though he was going to have a good crop of fruit?

A. Well, in fact, I wasn't there for that business,
30 you know, and I had to go away, for I had other business.

Q. In other words you didn't want to get into this quarrel?

A. I saw what Mr. Miller showed me and some of his trees didn't look very good I didn't think, of course.

WILLIAM H. MILLER, SWORN.

By Mr. Avis.

Q. Mr. Miller, where do you live? 10

A. At Paulsboro.

Q. And what is your occupation?

A. Commission business part of the year, fishing part. Just at this time doing nothing.

Q. You are a brother of Howard W. Miller, are you?

A. I am.

Q. And of course, you know where his farm is at Paulsboro?

A. Been there quite often. 20

Q. Now, in the spring of 1911 were you there?

A. I was.

Q. How often did you go down there that spring?

A. Well, I generally go pretty much every Sunday.

Q. Did you have any occasion to look at his apple orchard?

A. We walked down through the orchard.

Q. This is 1911 now that I am speaking about?

A. Yes.

Q. What did you find in the orchard? 30

A. Well, I found the orchard looked as though a fire had been through it.

Q. Just tell the Court and jury what you saw, will you?

A. Well, the trees were badly burned, looked as

though they had been badly burned on one side; the leaves were all browned and curled, that is, on the northeast side, worse on that side; on the southwest side they were not quite so bad.

Q. What about the fruit?

A. The fruit on the northeast side was falling a great deal worse than what it was on the other, in fact, the ground was well covered.

Q. And were those leaves falling at all?

10 A. Some of them, yes.

Q. Do you know how many trees were affected in the way that you speak of?

A. No, I couldn't tell you; I should suppose, though, that there was fully one-third to one-half of the orchard.

Q. How about the other trees; were there any trees that were not affected at all in the orchard?

A. Quite a good many that were not touched at all.

Q. How about the pear orchard?

20 A. The pear orchard was in the same condition; they were all that way.

Q. Now, had you seen these trees before that year?

A. Yes.

Q. I mean this day when you saw them in this condition?

A. I had saw them the Sunday before.

Q. And what condition were they in at that time?

A. Fairly good, that is, no brown leaves on them.

30 Q. Any apples commencing on them at that time?

A. Oh, some few.

Q. How about the comparative proportions? You say on the first Sunday some few; now, the next Sunday, what have you got to say about the quantity?

A. Well, I suppose there was fully five or six times as many.

Q. Did you take hold of any of the limbs and shake them to see how tight the apples were on them?

A. Yes.

Q. And what was the result of that?

A. Well, they would pretty much all fall.

Q. Have you been there since that time, Mr. Miller?

A. Frequently. 10

Q. What has been the general condition of these trees that were affected as you saw them, since that time?

A. I was down there last Sunday; I hadn't been down there in the last year of any account, probably down there two or three times during the year. as he didn't live there last year.

Q. Your brother had moved off the farm?

A. He had moved off; I was down there probably two or three times, but I wasn't down through the orchard at any time until last Sunday, I was down there 20 again; we went down through it and I was surprised at the looks of the orchard.

Q. Well, what were you surprised about?

A. Well, the orchard didn't look to be worth anything, practically.

Q. What was the condition that induced you to come to that conclusion?

A. The condition of the trees were on the north and east sides the worst; they were so you could take and break them all off, pretty much, practically dead. 30

Q. Was that with relation to all the trees in the orchard?

A. No, not all; there were some on the west side that were not affected at all.

Q. And they are all right yet?

A. They are all right yet.

Q. Now, how about 1909? Just tell the Court and jury what you know about occurrences down there in that year.

A. Well, that year it burned the peppers and corn badly; the trees also.

Q. Was the condition in 1909 similar to 1911 or not?

A. Pretty much so.

10 Q. I am speaking about the appearance now, what you saw.

A. Yes, not quite so bad in 1909.

Q. What was the appearance of the leaves as compared with 1911?

A. Brown.

Q. How about the fruit that year?

A. The fruit fell badly too.

Q. What about the pepper field—what did you notice there?

20 A. They were spotted.

Q. What proportion of them, can you say?

A. Oh, I should suppose half of them, probably.

Q. When you saw them, were there any of them that had died?

A. Well, I wouldn't say that they were dead, no.

Q. Did you notice that pepper patch at all when the time came for peppers to come to maturity?

A. Yes.

Q. What have you to say about its condition then?

30 A. It wasn't but very little account.

Q. Did the pepper plants that you saw spotted bear any fruit in normal quantities?

A. No.

Q. Was there any portion of the pepper patch that did bear good fruit?

A. Yes.

Q. Were they the ones that were spotted or not spotted?

A. No.

Q. What did you say?

A. I said no, they were not spotted.

Cross-Examination.

By Mr. Joseph Gaskill.

10

Q. Were you there in 1910, William?

A. I was there pretty much every Sunday while they lived on the place.

Q. They had good fruit there in 1910, didn't they?

A. Not exceptionally, no.

Q. A little better than what you expected to find, wasn't it, after what you had seen in 1909?

A. Oh, that frequently happens, that it is better than what you look for.

20

Q. Are you a fruit grower?

A. I am not.

Q. Are you a farmer?

A. I am not.

Q. What is your business?

A. I am in the produce business part of the year; part of the year I fish; at present I am like a good many others, I am loafing.

Q. Well, we will say resting in between seasons.

A. No, there ain't much rest about it.

30

Q. Well, William, as a matter of course you have never studied the diseases of trees at all?

A. I have not.

Q. And you do not know whether the condition in

that orchard was due to disease or to some other cause, do you?

A. If it was due to disease—

Q. No, no, wait one moment. I am asking you if you know, that will be yes or no.

A. No.

Q. You don't know, no, and you don't know whether there was scale in that orchard, do you?

A. I should suppose there was some scale in there
10 like there was in every other orchard.

Q. And the trees were diseased, too, weren't they?

A. Not more than other orchards.

Q. But about the same as in other orchards where they don't spray them and take care of them?

A. I presume about that way.

Q. Well, you did not expect to find a very good orchard there in 1909, William, did you?

A. Oh, I didn't let my thoughts run on it at all.

Q. You did not?

20 A. No.

Q. Well, you had been a witness in the previous case, hadn't you?

A. Probably I had.

Q. You were a witness in the case that was brought here in 1906.

A. Probably I was.

Q. And you described the condition of the orchard as it was prior to that trial in October of 1906, didn't you?

30 A. I suppose if I was asked I did.

Q. And you described it about the same as you are describing the orchard in 1909, isn't that so?

A. Is that similar?

Q. Is that so?

A. Is that true?

Q. I say, isn't that true?

A. I can't remember, only I testified at one time.

Q. No, I am not asking you what you testified—we may have to come to that—but what I am asking you now is whether or not the condition you saw in 1909 was not the same condition that you testified about as seeing prior to 1906?

A. You mean—

Q. Wasn't the orchard the same in 1909 as it was in 1906? 10

A. No, it was not the same in 1909 as it was in 1906.

Q. What say?

A. It was not the same in 1909 as it was in 1906.

Q. It wasn't? Now, didn't you say in 1906 that you had noticed that the leaves had turned and that the fruit was falling off very fast in the month of May prior to that trial?

A. If you have it there, that is what I said.

Q. Well, it is here if you would like to see it. 20

A. No, I can take your word for it.

Q. Well, then, that is just what you saw in May of 1909, isn't it?

A. That is what I saw in 1909, but you didn't ask that; you asked if it was in the same condition.

Q. Well, that is what I mean by "condition"; perhaps we didn't understand each other as to the word 'condition'. Now, you said at that time when you were a witness here in 1906 that you had tramped all over the farm on Sundays? 30

A. Generally went over it, yes.

Q. Now, then, in 1906, you testified you had been there several times prior to that trial and noticed the condition of the orchard?

A. I had; I suppose I had. I am there every Sunday.

Q. And didn't you say on that trial that every time you went there the orchard looked worse than it did the prior time?

A. Probably I did; if I did, that was true.

Q. Just listen to this, whether or not you weren't asked this question and made this answer speaking about the orchard: "Q. Could you still see the difference
10 between the trees that had been hit and the trees that had not been hit?" Your answer was, "You can see it now, lots of it, if you will go there." "Q. Still see it? A. Yes, you can see it to-day. Q. Then the condition has not changed from the time you first saw it practically in the way those trees looked?" And you made this answer, "Oh, yes, it kept getting worse; every once in a while there would be another turn. Q. It has gotten worse and worse, has it? A. Yes, kept getting worse. Q. Then these injured trees really look worse now than they
20 did early in the year? A. As a matter of course they will; all trees look worse now than they did in the early part of the year, but as a matter of fact you can see it in the leaves, and some of the trees are nearly burned off now." Now, that is what you testified to in 1906, wasn't it?

A. That is what I saw at the time, I presume.

Q. Well, I guess that is enough then.

30 W. EARLE MILLER, ESQ., SWORN.

By Mr. Avis.

Q. Mr. Miller, you are a son of Howard W. Miller?

A. Yes.

Q. Were you living on the farm on Mantua Creek in 1911?

A. I was.

Q. What do you know about the condition of the apple trees in your father's orchard at that time?

A. Prior to the 18th, 19th and 20th days of May, 1911, the orchard was in apparently a healthy condition. There were no noticeable defects at that time.

10

Mr. Joseph Gaskill. When was that you said it was healthy?

Mr. Avis. Prior to the 18th and 19th.

Mr. Joseph Gaskill. Prior to the 18th of May, 1909?

The Witness. 1911.

20

Q. Well, now what happened on the 18th and 19th that you recollect?

A. Well, on the 19th of May I was at home and I noticed these fumes and gases coming over through the orchard in different streaks.

Q. What is the appearance of them, Mr. Miller?

A. Well, it came over there in sort of a fog like, apparently a gray color, probably a little yellow. It was noticeable, plainly noticeable.

Q. Were there any physical effects as far as you were concerned?

A. Oh, yes, the fumes would very distinctly burn your eyes; they would pierce the eye. You would feel them very plainly in your nostrils and you could taste them.

Q. Did you follow it up in any way to find out where they were coming from?

A. Oh, yes, I immediately went down to the orchard at that time.

Q. What did you find out as to the origin of these fumes?

A. Well, they were coming from the plant of the I. P. Thomas Company.

Q. Did you see them all the way from the plant?

10 A. I could see them coming all the way from the factory, as I have on several other occasions.

Mr. Joseph Gaskill. I ask that that last be stricken out as not responsive and not what happened.

The Court. Strike it out.

Q. After these fumes came over there, did you notice anything with relation to the orchard?

20 A. Well, I noticed a few days later the condition of the orchard, that the leaves, the foliage of the trees were terribly burned, and especially on the side next to the factory.

Q. What was the condition of the leaves?

A. The leaves were burned a brown color and would curl up from the end; some of the leaves would almost roll completely up.

Q. Did any of them fall on the ground at that time?

30 A. I suppose two or three days after the 19th of May the ground was literally covered with leaves and young apples. The young apples were shrivelled, especially near the stem; a section of the apple seemed to be drawn toward the stem and shrivelled, and the ground at that time was literally full of apples, and I suppose it is

safe to say that you could not walk around under some of these trees on the side next to the factory without stepping on several apples.

Q. What about the condition of the trees at the present time—have you examined them for that purpose?

A. Well, I went down on Sunday afternoon for the purpose of examining the trees, walked down the orchard together with some of the gentlemen who have testified here, and broke off ends of the twigs. I broke off twigs from—Oh, I suppose probably fifteen trees; 10 I didn't break off twigs from every tree that I came to, but the twigs were brittle, and you could just snap them off, and they were black, that is dead, absolutely dead.

Q. Did you make any test to find out on which side of the trees they were in that condition?

A. That was mostly on the side next to the factory. I could go right around and break off twigs on the other side of the tree and there they would be alive.

Q. Between the 20th of May 1909, and May 1911, did you experience or see anything with relation to these 20 fumes?

A. Oh, I have seen fumes there on several different occasions; as a matter of fact, I can—

Mr. Joseph Gaskill. Wait one moment.

Q. During that time, did you? During that period you say you have seen them?

A. I am testifying to that period, and I have seen—

30

Mr. Joseph Gaskill. I object.

Q. Tell us what you have seen during that period with relation to the fumes.

A. I have seen fumes during that period come

from the I. P. Thomas Company.

Mr. Joseph Gaskill. I object to this for the same reason as before, if the Court please, because it does not relate to the dates.

The Court. What is the period of time?

Mr. Avis. The question is with relation to the times
10 between May, 1909, and May, 1911, the same question practically that was put to Mr. Trumbull on which your Honor over-ruled the objection.

The Court. For the purpose of showing the effect, if any, the fumes had upon him physically?

Mr. Avis. Yes.

The Court. The objection is over-ruled.

20

(Exception noted for the defendant).

Q. You say you have seen them, Mr. Miller?

A. I have seen them frequently.

Q. Coming from where?

The Court. Now, what time?

The Witness. I am testifying to between May of
30 1909, and May of 1911, at various times between those dates.

Q. Did you investigate as to where those fumes came from at that time?

A. Yes.

Q. Where were they coming from?

A. They were coming from the factory of the I. P. Thomas Company.

Q. What effect did they have upon you physically, if any?

A. They had the same effect upon me at that time as I described here a few minutes ago, that they pierced the eye and any delicate members of the body, inside of the nostrils, and you could taste them.

10

Cross-Examination.

By Mr. Joseph Gaskill.

Q. Howard, you are a member of the bar, a lawyer?

A. I am, yes.

Q. Or Earle—and an attorney in this case for your father?

A. I am the attorney of record in this case. 20

Q. And you live at home?

A. I live at home, yes.

Q. And did live at home in 1909 and 1911?

A. I have lived at home all my life.

Q. And you also testified at the prior trial of this case, the former trial of this case?

A. In 1913, yes.

Q. And you found then the same condition that you have testified to now as existing prior to that time, didn't you? 30

A. Oh, yes.

Q. And then you say the trees were healthy?

A. I didn't say that they were healthy; I said they were in an apparently healthy condition as compared with the damage.

Q. Wait now, Howard, you can make your speech after we get the testimony in, but just answer questions now, please.

A. I am not going to make a speech in this case.

Q. Didn't you say the trees were healthy or apparently healthy prior to 1911?

A. Yes.

Q. Then what had happened in 1909 that you speak of had not so far as appearance went changed the
10 healthy condition of the orchard up to 1911?

A. Will you repeat that question, please?

Q. Before 1911 or up to 1911, or as it was before
1911?

A. I can explain that.

Q. No, I don't want any explanation; I want an answer.

A. It had not, no.

Q. In other words, then, the orchard had come up to an apparently healthy condition between 1909 and
20 1911?

A. Oh, I can't testify to that.

Q. Well, I ask you, is that a fact or not?

A. I don't know.

Q. Apparently so?

A. I can't testify to that.

Q. Well, didn't you a moment ago say that apparently it was healthy in 1911?

A. I did, but I didn't say that it had come up to that.

30 Q. Well, was it apparently healthy in 1909?

A. Yes, as compared with the damage that was done after May 19, 1911.

Q. Well, but how could damage of 1911 affect the apparent condition in 1909?

A. But I am not testifying as to the condition in

1909; the damage in 1911 is what I am testifying to. I have not given any testimony as to the 1909 damage.

Mr. Joseph Gaskill. Wait a moment; I ask that all that be stricken out as not responsive and simply a speech.

The Court. Strike it out.

Q. Now, then, Howard, in your testimony before, in speaking about May of the preceding year—I beg 10 your pardon, it is Earle—you were asked, “What was their condition?” by your counsel or the counsel of your father, and your answer was: “The trees before the injury were full of leaves, apparently in a healthy condition and they were full of fruit, young apples.”

A. That is correct.

Q. And then you were asked, “What was the condition afterward?” And the answer, “I think that the first that I noticed afterward was on Sunday. On Sunday the leaves were terribly burned, mostly on the side 20 of the trees next to the factory and the apples had fallen.” Is that right?

A. That is right.

Q. Then you were asked this question, “What have you to say as to the quantity of apples; was it small or great?” And the answer, “Well, I suppose the ground was literally filled with apples; as a matter of fact, there was no place at some spots under the trees where you could put your foot down without touching apples, and that condition was also true as to the leaves.” You 30 made that answer?

A. That is right.

Q. And that is just about the way you found things in 1909 and 1911, is it?

A. 1911 I am speaking of, yes.

Q. Very well, that is the way you found things in 1911?

A. That is right.

By Mr. Avis.

Q. You have not testified to anything with relation to 1909?

A. Nothing at all as to 1909.

PLAINTIFF RESTS.

THE CASE FOR THE DEFENDANT.

JOHN J. GESSELMAN, SWORN.

By Mr. Joseph Gaskill.

10

Q. Mr. Gesselman, what is your business or profession?

A. Mechanical engineer.

Q. And what particular line are you following now and have been in the last few years?

A. In the steam jet line.

Q. Are you acquainted with the—Cross that out. With whom are you employed?

A. Schutte & Korting Company. 20

Q. How long have you been connected with them?

A. Over thirty years.

Q. And does this firm manufacture machinery and implements used in factories for the manufacture of fertilizer?

A. They do.

Q. Have you been in various factories throughout the United States?

A. I have.

Q. And sold machinery for them?

30

A. Yes, sir.

Q. Are you somewhat acquainted with the manner in which these factories are conducted with respect to the machinery that they use?

A. Some part of the machinery.

Q. Have you been through the plant of the I. P. Thomas Company?

A. I have.

Q. When were you there?

A. I was there last fall.

Q. Had you been there before?

A. Yes, sir.

Q. Have you examined their plant and methods of manufacture?

10 A. The acidulating plant, the mixing plant.

Q. Well, you have been through their plant, haven't you?

A. Yes.

Q. As you have been through other plants?

A. Yes.

Q. Now, then, is there any more modern or up-to-date machinery or appliances that you know of than that which they have in their plant at Paulsboro?

A. They have the same, about the same as they 20 have in other modern plants.

Q. Theirs is a modern plant then?

A. Yes, sir.

Cross-Examination.

By Mr. Avis.

Q. When were you there before that time, Mr. Gesselman, last?

30 A. Before last fall?

Q. Before last fall.

A. I have been there two or three times; I don't just remember the year; 1907 was about the first.

Q. From 1907 on you have been there at different times?

A. Yes.

Q. Do you know whether or not after 1911 any improved methods were used at that plant, since 1911? The mixing plant is all you know anything about, as I understand?

A. That is all I know anything about, yes.

Q. Do you know whether or not they have introduced any improved method of caring for the fume from the mixing plant of acid—well, acid fume from the mixing plant than they had before that time?

10

A. I do not.

Q. Do you know whether or not any new appliances have been put in on the mixing plant since 1911?

A. No, I don't know.

Q. You don't know whether there has or not?

A. No.

Q. You are in the fertilizing business?

A. Well, we make machinery for that business.

Q. Oh, you make machinery; you are not actually in the business of making fertilizer?

20

A. No.

Q. You don't know whether any changes have been made since 1909 in this mixing plant of the I. P. Thomas & Sons Company or not?

A. I do not.

Q. Do you know what method they use there for conserving the acid fumes arising in the mixing plant?

A. Yes.

Q. What is the method?

A. The method is to condense it with water through an apparatus or condenser which is called an obnoxious vapor condenser.

Q. That is supposed to take up these fumes that go into a tower of some character or pipe?

A. No, they draw the fumes—the condenser is

operated by water, and under pressure sprays water through this condenser; that creates a vacuum which draws the gases from the mixer and dens and washes it and condenses it.

Q. Yes; now, do you know whether or not over the mixing plant they have a stack of any character which goes out to the open air?

A. There is an air duct from the condenser.

Q. What is that for?

10 A. That is to get rid of the non-condensable gases.

Q. So that there is a non-condensable gas that goes out of this stack above the mixing tank?

A. That is the air that goes in with these fumes.

Q. Supposing this water jet on the condenser is not working, then what is the result?

A. You couldn't work the plant.

Q. Couldn't the fumes then go out of the stack or chimney above the plant?

A. There would be no draught to draw them
20 down; they would have to come down through the condenser and then pass up again, and there would be no natural draught for them to go up.

Q. So for the time being the plant could not operate; the gases would go into the plant itself?

A. Yes, it would be the same thing as taking down your stove-pipe in the house and lighting a fire.

Q. I see. But there are gases, you say, which go through this condenser which are not all condensed and go out of the top of the pipe?

30 A. Well, that would practically be air, non-condensable air.

Q. Wouldnt' there be any gases?

Mr. Joseph Gaskill. I have not objected up to this point because I thought we would get through quicker,

but this is not cross-examination. I asked him nothing about gases; my whole examination was as to whether or not the I. P. Thomas people had a modern up-to-date plant with modern machinery; that is all I asked him about; that is all I called him for.

Mr. Avis. I guess that is right; if the Judge objects I won't press the matter any further.

10

RALPH C. GARDNER, SWORN.

By Mr. Joseph Gaskill.

Q. Mr. Gardner, where do you live?

A. York, Pennsylvania.

Q. And what is your business or profession?

A. I am superintendent of the York Chemical works.

20

Q. What do they manufacture?

A. Sulphuric acid and fertilizer.

Q. The same as is manufactured at the plant of the I. P. Thomas Company?

A. Yes, sir.

Q. Have you been through the plant of the I. P. Thomas Company?

A. Yes, sir.

Q. Have you been through other plants in the United States?

30

A. Yes, sir, quite a great many.

Q. Have you made a study of the process of the manufacture of acid and of fertilizer?

A. Yes, sir.

Q. What have you to say with reference to the

plant of the I. P. Thomas Company with reference to its being up-to-date, using modern machinery or otherwise?

A. It is very up-to-date; it is for that reason I went down there. They had a system of unloading material called a Telford system that I wished to see, with the probable thought of installation in our plant sometime.

Q. In other words the I. P. Thomas plant if anything is ahead of some of the other plants in the United States, is it?

10 A. Yes, sir.

Cross-Examination.

By Mr. Avis.

Q. You went down to see about the unloading part of it, is that it?

A. Yes, sir.

Q. Did you examine the acid plant?

20 A. Yes, sir.

Q. What part of that is up-to-date?

A. Why, all of it.

Q. Gone all through it, haven't you?

A. Yes, it wasn't working when I was there, though.

Q. You examined the entire system?

A. Yes, sir, it is similar to ours.

Q. Well, being similar to yours, do you say that when you examined it it was up-to-date in every particular?

30 A. As far as I could see, but I say, it was not working.

Q. Oh, it was not working; you never saw the plant working at all?

A. I never saw the plant working.

Q. Oh, I see: you don't know anything about then the working of this particular plant?

A. No, they were closed down when I was there.

By Mr. Joseph Gaskill.

Q. As I understand, Mr. Gardner, the acid chambers were not in operation when you were there?

A. Yes, sir.

Q. All the rest of the plant was being operated ? 10

A. Yes.

By Mr. Avis.

Q. Well, that acid chamber means the acid house, doesn't it, the burners and all those things were not in operation?

A. The whole thing, nothing in the acid plant was working.

20

By Mr. Joseph Gaskill.

Q. You examined the acid plant, did you?

A. Yes.

Q. And have compared it with the acid plant at York and with these other plants throughout the United States?

A. Yes.

Q. Now, then, in order to be sure we get it, how does that acid plant in its construction and method of 30 operation compare with the other plants that you examined?

Mr. Avis. I object to the method of operation. This man never saw the operation, he said. I haven't

the slightest objection to his testifying to what he saw there.

Mr. Joseph Gaskill. Well, I didn't mean by that what he saw in actual operation but what he saw from the plant and the method in which the plant would be operated.

Mr. Avis. Well, that is too speculative, it seems to
10 me, if the Court please.

Mr. Joseph Gaskill. By that machinery, that is to say, the appliances there.

The Court. Is he familiar with the operation of that sort of machinery?

The Witness. Put up by the same man, A. C. Johnson.

20

Q. Do you know anything about how it works?

A. The same man built both plants.

The Court. I think that is all right.

Mr. Avis. Well, as to the efficiency of the plant I haven't any objection; my only objection is his testifying to its operation when he didn't see it.

30 By Mr. Joseph Gaskill.

Q. You run a plant, don't you, where they manufacture acids—you yourself run it?

A. Yes.

Q. And is the plant that you run, the acid plant,

the acid house, &c., the same as this plant down at Paulsboro?

A. Except for the difference in size, exactly the same.

Q. Which is the larger?

A. I. P. Thomas is larger.

HORACE ROBERTS, affirmed. 10

By Mr. Joseph Gaskill.

Q. Horace, where do you live?

A. Near Moorestown, New Jersey.

Q. May we ask how old you are?

A. Forty-seven.

Q. Forty-seven years of age?

A. Yes.

Q. What is your business? 20

A. Farmer and fruit grower.

Q. How many farms do you own and operate?

A. Why, in the neighborhood of twenty. I don't operate quite as many as I did; I divided it up with my boys. I have started three sons.

Q. Well, you and your three sons together then own and operate how many?

A. Why, I suppose in the neighborhood of a dozen as farms.

Q. And the others as what? 30

A. Real estate operations.

Q. Now, what do you grow?

A. Apples, pear, peaches, all kinds of fruits and general vegetables.

Q. Have you made a study of the growth and diseases of trees, fruit trees?

A. I have.

Q. Have you made a study of the diseases of fruits?

A. I have.

Q. And the insects which attack fruits?

A. Yes.

Q. And have you also made a study of the method
10 of treating diseased trees?

A. I have.

Q. And of preventing injury to fruit?

A. I have.

Q. How many acres have you in fruit, you and
the two boys?

A. Something over six hundred.

Q. Six hundred acres?

A. In fruit, yes.

Q. How much of that is in apples?

20 A. Why, probably two hundred and fifty.

Q. And the rest is in—

A. Peaches, cherries and pears.

Q. How many apple trees have you?

A. Why, I couldn't tell thee, something over sixty
thousand fruit trees all together.

Q. Something over sixty thousand fruit trees?
Horace, for the purpose of showing the extent of your
knowledge and business transactions, I want to ask you
a question if it is not impertinent: What do your sales
30 amount to a year?

A. Last year before I divided the farm with the
boys, my sales clear of commission were something over
\$95,000. Fruit alone something over \$60,000. That is
clear of commission.

Q. Are you a member of any horticultural societies?

A. I am.

Q. And do you hold now or have you held any official position in any of them?

A. Why, I was president of the New Jersey Horticultural Society the allotted term of two years; I am still chairman of the Executive Committee of that organization.

Q. Do you belong to any other associations? 10

A. The American Pomological Society, vice-president of that, representing New Jersey.

By the Court.

Q. You say your sales, the gross, were \$95,000?

Mr. Joseph Gaskill. Clear of commissions.

The Witness. That was two or three years ago before I divided up with my boys. I didn't count it up this last year, because I didn't add theirs on to mine.

By the Court.

Q. You don't say what the profits were, do you?

A. No, I haven't got it with me, but I don't object to giving you--

Q. Approximately.

30

Mr. Joseph Gaskill. Well, tell the Judge approximately what your profits were.

The Witness. For that \$95,000 sales less commission, I think that year it was about \$18,000.

By Mr. Joseph Gaskill.

Q. In the first place, Horace, you are a stockholder of the I. P. Thomas Company, aren't you, the Fertilizer Company?

A. I am, yes.

Q. Are you interested in any other fertilizer company?

A. No.

10 Q. Have you at our request gone to the I. P. Thomas Company or to Mr. Miller's farm to look over a claim of damage by him?

A. I have.

Q. Did you keep a diary of your visits?

A. Yes, the first visit.

Q. Now, when was the first visit after the claim of damage for May of 1909?

A. June 25, 1909.

Q. Who went with you?

20 A. Arthur Collins, Elmer Clement and James and Mr. Stines.

Q. What examination did you make on that day?

A. We went all over the place thoroughly. There was no representative of Mr. Miller to show us just what was hurt so we had to do it even more thoroughly than we otherwise would do.

Q. In other words, you looked all over the whole place to find out if you could if there was anything hurt?

A. Yes.

30 Q. Now, tell us first what you noticed with reference to the peppers he claimed were damaged that year.

A. The peppers looked very well; we saw nothing the matter with the peppers; they looked healthy and ripe as far as we could see.

Q. And that was the 19th of June, do I understand you?

A. The 25th of June.

Q. The 25th of June of 1909?

A. Yes, my memorandum in my diary simply says, "Peppers looked well." We saw nothing remarkable about them; they looked all right.

Q. Well, what if anything, did you notice with reference to the apple orchard on that occasion?

A. The apples were dropping; it was very dry 10 weather and they were very much troubled with fungus disease.

Q. Was there anything unusual in the dropping of the apples as you noticed them on that occasion?

A. No.

Q. Was it the ordinary June drop from an orchard of that character?

A. We thought so.

Q. Now, you say they were suffering from fungus diseases. Will you please tell us what and how they af- 20 fect the trees or the fruit?

A. Why, the nature of fungus diseases that were there? You see, they hadn't been sprayed at all; there had been nothing at all to combat them, and there was the frog-eye fungus and the leaf spots and the cedar rust fungus.

Q. Now, would proper treatment have prevented in a measure any ravages that would come from those fungus diseases?

A. Oh, yes, they can all be checked.

30

Q. All be checked?

A. Yes.

Q. And do you check them in your operations?

A. Yes.

Q. How?

A. By spraying.

Q. And right here let me ask you, how many times a year do you find it necessary or essential to spray your apples?

A. Why, we do it at least three times, and commonly more; I should say at least four times we do it and even more.

Q. And when do you commence?

10 A. Why, we spray in winter time with something for fungus and for the scale, usually lime and sulphur; sometimes oils; then just before they bloom we spray with something to hit the curculio, and just as soon as the bloom falls we spray with something for the curculio and the coddling moth and fungus diseases; a couple of weeks later we go at them again for the coddling moth—not the coddling moth—yes, the coddling moth that time and fungus diseases, and we like to do it later in the summer for the fungus diseases.

20 Q. Now, then, the result of that effort is what, with reference to the quality and quantity of the crop?

A. Why, it is improved in both quantity and quality.

Q. And the absence of that spraying in your experience would result in what?

A. Why, like we saw it there, we would expect to see at that time of year, see the apples coming off, and see the trees looking as we saw them.

30 Q. Then the condition that you saw that orchard in was the result of failure to spray and properly care for it?

A. That is what we reported to the company.

Q. What else, if anything, did you notice?

A. We noticed the hedge rows and poison vines, and the fungus was very bad that year and it even affected the chestnut oaks; we saw the fungus on them, saw it on the poison vines.

Q. In June, June 25th, the early apples are pretty well matured by that time, aren't they, pretty well along?

A. Well, yes, they begin to show very well.

Q. How did the crop that Howard had on his orchard strike you?

A. Why, it was better than the average for the year; it was better than we had at home with all my care; it is better than Elmer Clement had. We went over and looked at his orchard the same day; it was better than he had. 10

Q. Did you notice anything the matter with the twigs or the branches in the orchard on that occasion?

A. That year it was more the fungus troubles; it was 1911 when the leaf blight and all the blights were so bad. This year there was more fungus troubles than blight troubles.

Q. Seasons or years vary in that respect, do they?

A. Oh, yes.

Q. Did you notice any twig blight that year?

A. Not very much, no. 20

Q. What was it in your judgment—I will cross that out. What was it, if you know, that caused the dropping of the apples that were on the ground when you were there in June of 1909?

A. These fungus troubles, fungus diseases.

Q. Did you examine the leaves on the trees or any of the apples on the ground?

A. Yes.

Q. And what did you ascertain from that examination? 30

A. We were willing to say it was the fungus troubles, also helped out by insects; the codling moth and curculio all had their share in it too.

Q. Was that apparent on the fruit that was on the ground?

A. Oh, yes, it all shows there; it was the combination that threw them off.

Q. You say you walked all around the place, then you went in what is called the young orchard and the old orchard, did you?

A. Yes, we even felt the hot bed sash.

Q. For what purpose?

A. Well, if there was any acid or anything of that kind I have been told it would show first on glass; glass
10 is very sensitive.

Q. And was there any indication?

A. Absolutely clean, that is, just touched it, and it all wiped off clear.

Q. And the affect of acid on glass it to cloud it?

A. Yes.

Q. Make it obscure?

A. Yes.

Q. What did you notice if anything in what is called the old orchard, the oldest trees there, with ref-
20 erence to any dead limbs and so forth?

A. Well, the old orchard is very old, the limbs there, they looked as if they had been dead for a good while. I don't think he had made an effort to cut out the old dead limbs off of that orchard.

Q. What do you call the old orchard?

A. Right up next to the house, the part nearest to the house.

Mr. Avis. You don't mean over here (indicating on
30 map)?

The Witness. Oh, no.

Q. Now, did the fruit trees in May or June of 1909 show that they had been recently trimmed?

A. No, there wasn't much evidence of trimming there.

Q. Was there much or little old or dead wood in the trees?

A. That larger orchard, the one nearest the factory there wasn't very much dead wood in there; it hadn't made much growth. You see, it hadn't been fertilized, hadn't been manured, there hadn't been much growth, there wasn't very much there to trim out.

10

Mr. Avis. I object to the answer and ask that it be stricken out with relation to the fertilizer and so forth.

Q. I was just going to ask about that; is it necessary in addition to spraying trees to fertilize the orchard to feed the trees?

Mr. Avis. Now, if the Court please, my application is to strike it out because there is nothing in this case to show whether the orchard had been fertilized, whether it had been properly taken care of. You are trying to find out whether it was necessary or not, but there is nothing to show it had not been done.

Mr. Joseph Gaskill. I am going to show it had not been done.

Mr. Avis. Well, I ask to have it stricken out.

The Court. The motion will be denied.

30

(Exception noted for the plaintiff).

(Question repeated.)

A. It is necessary if you want to get the full quantity and full quality of fruit.

Q. Do you fertilize your orchards?

A. Oh, yes.

Q. What fertilizer do you use; what character of fertilizer, I don't mean the make?

A. Why, it varies with year to year a little bit. We give them an abundance of lime, an abundance of phosphoric acid, and an abundance of potash and ammonia.

10 We regulate that a little better with the quantity of fruit we have.

Q. Do you make any effort by chemical analysis or otherwise to ascertain what the soil needs or what the tree needs in the orchards?

A. Why, we get that by watching the trees and watching the fruit, the way they mature their fruit.

Q. That tells you the kind of fertilizer to apply for another year, does it?

A. That is a guide to us.

20 Q. Now, then, was there any evidence that this orchard had been fertilized at all?

A. It looked like a starved orchard, and Mr. Miller told me that he hadn't fertilized or manured it, that is, the main part of the orchard, next to the factory.

Q. You learned that as a fact, that they had not been fertilized or manured, from Mr. Miller?

A. Yes.

Q. Consequently you say that there would be little if any growth on that account?

30 A. Very little growth.

Q. How old, Horace, would you say that oldest orchard was or the oldest part of the orchard?

A. Next to the house? Oh, I suppose they are sixty years old.

By the Court.

Q. What is the life, the ordinary life of an apple orchard?

A. Why, something generally happens to them, but I have trees at home that my father gathered apples from when I was a little boy, and he would be close to eighty-five years old if he was living now, and they are still healthy and strong.

10

By Mr. Joseph Gaskill.

Q. It depends on the care and the treatment of the trees, doesn't it?

A. Yes.

Q. Now, did you see in the orchards there any evidence of the trees being burned or injured on one side any more than on another?

A. No, I didn't see that.

Q. Did you see anything in the orchard like a burn- 20
ing of the leaves and twigs all on one side of the trees toward the factory or the mouth of the creek, more so than on any other part of the tree?

A. No.

Q. Horace, what effect on young fruit or blossoms does a northeast storm or wind have?

A. Why, it is very serious; it is not at all unusual if we have a big storm at that season of the year for us to lose our fruit crop.

Q. And suppose the northeast winds bring in a 30
fog and a mist from the river and the creek, blowing over the orchard, what effect would that have?

A. The fog and mist would be a protection rather than otherwise.

Q. The fog and mist would be a protection from

the effects of a northeast wind unaccompanied by fog or mist, is that right?

A. I think so.

Q. Do apple trees as a general rule bear uniformly each year?

A. The natural way in the orchards, what we used to always expect before we got to spraying would be a full crop and then a few, have a crop and then a few. They have their on years and off years.

10 Q. Alternate years?

A. Alternate years, yes.

Q. Were 1909 and 1911 the fruit years or off years?

A. They were off years.

Q. 1908, 1910 and 1912 were the fruit years, were they, at that period?

A. Yes, and 1914.

Q. That is your experience, is it, in growing and marketing apples?

20 A. Yes.

Q. Mr. Miller has testified that within I forget just what period or how recent—the testimony will show—that he trimmed his orchard and took out forty cart loads of limbs and dead wood and stuff from the trees. What have you to say as to that quantity from the observation that you made there in 1906?

A. Well, he could trim those old apple trees next to the house and fill a great many cart without making much mark on the orchard.

30

Mr. Avis. Did you say 1906?

The Witness. If I said 1906 I meant 1909.

(Question repeated as amended).

A. It don't take much big apple tree wood to fill a cart and those are very large apple trees and a good many dead limbs in them. I don't doubt but what he got that many.

Q. And you were a witness at the former trial in 1906?

A. Yes.

Q. I think you testified at that time that there was no evidence that the orchard had been recently trimmed?

A. No, there wasn't; you see, the old orchard he 10 had not trimmed and this orchard next to the factory where there wasn't much growth, there wasn't any particular need of trimming.

Q. Now, when did you go there again, Horace?

A. I was there in July in 1909.

Q. The same year?

A. No, 1911.

Q. Oh, in July of 1911?

A. Yes.

Q. That was after the second damage had been 20 complained of?

A. Yes.

Q. Going back for a moment, you said there wasn't much growth in the young orchard there toward the phosphate works; why was that?

A. Well, it was bearing very heavily, a great orchard to bear, and it wasn't half farmed and it wasn't fertilized at all; the trees were not making the growth they should.

Q. Did you notice anything about the cultivation 30 of the soil, the plowing in 1909—I am going back to that?

A. In 1909 it had just been plowed just before we had gotten there, just a few days; it was a very, very dry time and it helped—the plowing then would help throw

off those leaves, because any farmer will know that going in when soil is very dry and plowing, it is impossible to plow shallow; you can plow deep or you can't plow at all, and they had gone through in that dry weather and plowed that way.

Q. And was it plowed deep or shallow?

A. Deeper than it should be.

Q. What was the effect of that deep plowing?

A. They made the trees look worse; they showed
10 the drouth; they were suffering from drouth.

Q. Did it cut any roots?

A. Yes, it cut roots.

Q. What effect does that have?

A. Well, it stunts the tree, helps check the tree, helps retard the growth, especially at that season of the year.

Q. Let's go on to 1911; you went there you say in July of 1911? Who was with you then?

A. Arthur Collins, Mr. Miller, I think Mr. Lippin-
20 cott, Mr. Stines; Mr. Avis was there.

Q. Senator Avis, the counsel?

A. Yes, Senator Avis.

Q. Now, then, did Mr. Miller take you around over the orchard at that time?

A. Mr. Miller went around all over it and showed us the trees.

Q. Pointed out that which he claimed was injured?

A. Yes, we went around with him all over.

Q. Now, then, as a matter of course, he was point-
30 ing out that which he claimed was injured by fumes from the phosphate works?

A. He was showing us the damaged places.

Q. That he claimed?

A. Yes.

Q. Now, then, just tell us what you saw at this

place, and what if anything was the matter with the trees that he pointed out to you in July of 1911?

A. Why, there were all kinds of things; there was the fire blight and the leaf blight, the twig blight and all these fungus diseases. 1911 was the worst epidemic of blights we have had for a long time, and it didn't seem to make much difference what was the matter with the tree, he would show us that tree.

Q. And those things that you have described, were they evidenced by the appearance of the tree and the examination that you made? 10

A. Oh, yes, we could look in the trees but there was nothing unusual that I saw, nothing that I could not trace to natural causes.

Q. That is what I was going to ask you, those trees that Howard Miller pointed out to you, the parts of the trees in July, 1911, did you see anything that could not be traced to natural causes?

A. No.

Q. Those various blights and fungus diseases? 20

A. No.

By the Court.

Q. Did you see anything in the appearance of these trees that would indicate that they had been hurt by the fumes from this factory?

A. No, not at all.

Q. Did you see any evidence that fumes had come in contact with the trees? 30

A. No. I would like to explain a little the effects of some of these.

Mr. Joseph Gaskill. Yes, do so, please; explain the effect of these blights and these diseases.

The Witness. May I quote from authorities on it?

Q. If you have any authorities there and any illustrations I will ask you to show them to the Court and jury. What is it you have in your hand?

A. I have a bulletin by W. M. Scott; he is one of the best known authorities of the United States. He was with the Department of Agriculture a good many years, but he was taken out and he was one of the best known
10 authorities on this there is in the United States.

Q. And what is the date of the pamphlet you have?

A. It don't seem to be dated.

Q. Very well.

A. 1912. Now, one of the fungus diseases that we can recognize there easily is the frog-eye, that is one of the commonest, "Leaf spot, also known as frog-eye, is perhaps the most common fungus disease affecting the foliage of the apple. It occurs in all humid sections of America where the apple is grown and in unsprayed or-
20 chards causes considerable damage, even defoliating the trees by mid-summer. This loss of foliage not only prevents the proper development of the fruit, much of which drops prematurely, but also weakens the trees and fruit buds for the following year's crop."

Q. Is there any illustration in that book that indicates this disease or—

A. Yes, they are in here; I would be glad to hand it in.

Q. Does this book illustrate leaf spot and the frog-
30 eye?

A. It does.

Q. Will you just show that illustration to the jury? Step down here, Horace, please.

Mr. Avis. I think that ought to be marked as an exhibit so we may have the benefit of it later on.

Mr. Joseph Gaskill. Yes, I will have that done. This upper one is what?

The Witness. That is frog-eye.

Q. And this particular foliage, leaf spot?

A. No, frog-eye.

Q. Is this one the natural size or magnified?

A. No, it is all natural size, it grows, it develops.

Mr. Avis. It is only the one, Judge, I understand, you are referring to, the frog-eye on the top?

Mr. Joseph Gaskill. Yes. This is it on the leaves and on the apples?

The Witness. Now, this is cedar rust.

20

Mr. Joseph Gaskill. That is Plate 2.

Q. Now, then, Mr. Roberts, did you find that frog-eye disease in the orchard on the trees that Howard Miller pointed out to you in July of 1911?

A. Yes, also 1909.

Q. Now, then, what else; you spoke about a cedar rust, I think. Have you got an illustration of that here?

30

Mr. Avis. He didn't see any cedar rust down there that I recollect.

The Witness. I found that on the apples in 1912.

Q. Now, show that to the jury, that cedar rust.

A. That is the common thing you see on an apple.

Q. Point to the illustration of Plate 12.

(Witness complies).

Q. Is this the leaf as it is affected with cedar rust?

A. Yes.

10 Q. Now, then, Mr. Roberts, the description, just give us that please.

A. "The disease first appears as small purplish specks which rapidly enlarge and finally reach a diameter of from one-eighth to one-half inch, and become reddish brown in color. The spots are usually circular but after mid-summer they may become irregular or lobed in outline, the central portion changing to a gray color. This lobe extension of the disease is apparently due to a secondary growth of the fungus from two or more points on the margin of the original spot. A large number of 20 spots may occur on a single leaf, which in such cases will usually turn yellow and drop. The fungus causing leaf spot also causes the black rot or ring rot on the fruit and twigs, especially those killed by pear blight. Fungus growing in these dead twigs produces spores in great abundance and the leaves become affected principally from this source. The fungus passes the winter in dead cankers on the trunks and branches, and it grows on dead twigs, in limb and trunk cankers and in old leaves. During the early spring spores are produced in great 30 numbers and those that find lodgment on the young leaves germinate if moisture is present. The resulting fungus threads enter the tissues producing characteristic leaf spot. The disease begins to appear in early spring soon after the young leaves unfold and infection continues to take place until mid-summer or somewhat later. The

principal infection period is early in the season while the leaves are young, as the fungus does not seriously attack more mature leaves." Now, treatment—

The Court. We can't have all that.

Q. I don't want to unnecessarily encumber the record. I think we have got all we want.

The Witness. It is very easily controlled by spray-
ing. 10

Q. It is very easily controlled by spraying?

A. Yes, most easily of apple diseases, the same authority says.

Q. When Howard was showing you those trees in his orchard in July of 1911, did he attempt to call your attention to the fact that they were fruited better on one side of the tree than on another?

A. Yes. 20

Q. And what was your observation of that?

A. Some had more fruit on one side and some on another side. There were trees in the orchard that the fruit was only on one side, but I couldn't say that it was toward the factory always. They are one way or the other.

Q. Sometimes it was toward the factory and sometimes it was the other way?

A. Sometimes it was the other way.

Q. And were there times when there was the most
fruit on the tree on the side toward the factory? 30

A. Sometimes; possibly right out on the exposed edge where the winds hit it, possibly for two or three rows in, that is, right on the edge, it might be a little less on

the side of the factory, but taking the orchard generally it wasn't so.

Q. Now, when you were there in July of 1911, did you also go in the pear orchard?

A. Yes.

Q. And what did you observe there?

A. Well, they—

Q. First—cross that question out—there is one thing that I ought to ask: What was the indication of a
10 crop of apples when you went through the apple orchard with Howard in July of 1911?

A. Why, a very fair prospect for a crop for that year.

Q. For that year was it as large a crop as could reasonably be expected in your experience and from your study?

A. Yes.

Q. From the character of the orchard you saw there and the treatment it had?

20 A. It was quite as good as the country over, even where they had good care.

Q. Now, let's go into the pear orchard, July of 1911.

A. The pear orchard showed signs of blight, leaf blight, and it was on a very poor piece of ground, and it hadn't had any care.

Q. What was the evidence that that pear orchard hadn't had any care?

A. Why, there were briars in it.

30 Q. Whereabouts were the briars?

A. Right in there among the pear trees, briars and bushes.

Q. How big?

A. Why, as high as this table.

Q. Well—

A. And they hadn't been trimmed.

Q. They had not been trimmed?

A. No.

Q. Was there any fruit there?

A. Yes, I think so.

Q. Was there as much fruit as you from your knowledge, experience and study would estimate trees in that condition and without care and cultivation could produce?

A. Oh, they didn't have half a chance. Some of 10 those trees had apparently never grown very much since they were first put out; some were comparatively large trees. Some were missing; there was some peach trees there instead of pear trees, and the poorest piece of ground on the farm, I think.

Q. Was there anything else that you observed at that time?

A. I observed these blights very carefully at that time.

Q. Which blights now do you refer to—this is 20 July of 1911—what you have already spoken about?

A. The blights in the apple orchard, yes. May I read from the authorities a little on blights?

The Court. Oh, no, no.

Mr. Joseph Gaskill. I don't think we will cumber the record with that.

By the Court.

30

Q. Did you say, Mr. Roberts, you made a careful observation for the purpose of determining what the causes of the deterioration of these trees was and the loss of crops—I assume you went there for that purpose?

A. Yes.

Q. Now, when you looked at that pear orchard, did you see where fumes had caused any trouble?

A. Not at all, but may I correct your Honor a little on this? We were sent there to examine those conditions and report back to the factory what we found; if we found there had been any damage, anything burned at all, to report back to them, and if we found there had been nothing done at all, why, report back to them. We
10 were sent there to investigate it.

The Court. That is the only point in the case.

By Mr. Joseph Gaskill.

Q. You were sent there to investigate the true conditions?

A. Yes, and report back.

Q. And you reported the conditions as you found
20 them?

A. We reported back that after careful investigation we found nothing there that could not be assigned to natural causes.

Q. Now, were you on the farm after that, Horace?

A. We were on the farm on the 1st day of November, 1912.

Q. That is the year following the year when they claimed there was damage?

A. Yes.

30 Q. Now, then, in what condition did you find the trees in November, 1912, as compared with their condition in the preceding year?

A. Not unlike; they gave evidence of having had a very good crop; of some kinds there would be a remnant laid on the ground. The limbs and the foliage had

the evidence of being trimmed and showed—led us to think there had been a very good crop of fruit in 1912. A fair crop of pears were still on the ground under these pear trees, very pretty pears.

Q. Now, tell the jury what there is in the limbs of a tree after the fruit has been gathered that enables you to determine that there had been a fair crop?

A. Why, the bending, and then the soil, and the relics of the crop are nearly always left there a little. An experienced fruit man can go out at that time of year, 10 November 1st, and say whether they had been gathering apples or whether it had been barren or not; but we were particularly looking at the trees. The trees looked generally in a good thrifty condition at that time and symmetrical and all right as far as we could see.

Q. You say the bending of the limbs—what do you mean by that?

A. Well, the fruit crops brings the limbs down more or less, and it takes them a little while to go up; they don't go up immediately. 20

Q. Were these limbs down?

A. They showed evidence of having had a crop.

At this point a recess was taken until 1.30 P. M.

Trial of cause resumed after recess, pursuant to adjournment, in the presence of counsel for the respective parties. 30

HORACE ROBERTS, recalled.

By Mr. Joseph Gaskill.

Q. The same day that you visited the orchard of Mr. Miller, after he had pointed out what he claimed as to damage, did you visit any other orchards in the neighborhood?

A. It was in 1909.

10 Q. Oh, it as 1909, not 1911?

A. After I examined the orchard in 1909, we went over to Elmer Clement's orchard and found the same conditions there, the apples dropping, the leaves dropping; the leaves held some frog-eye fungus and along the hedge rows we saw some fungus troubles that were bothering the chestnut oaks and poison vines on Mr. Miller's farm.

Q. Another question I wanted to ask you and that is this: Will an orchard of Keiffer pears, without any
20 other variety mixed with them or any other variety near them, fruit well?

A. The Keiffer is given as one of the self-sterile varieties.

Q. What do you mean by that?

A. That is, an orchard by itself, no other pear tree there wouldn't give much fruit unless the bees carried in pollen from some distant place; that is, the pollen from one pear or one blossom won't pollenize the next bloom.

Q. What in your experience did you find it neces-
30 sary to do in order to overcome that difficulty?

A. Why, we overcome that by planting other varieties blooming at the same time.

Q. In the same orchard?

A. Yes. It depends more on the year. A year when storms are bad the bees can't work and there is

more lack of pollen than there is when everything is favorable.

Q. In this orchard of Howard Miller's, did you find any other pear trees there, any other varieties?

A. No, it is a block of Keiffers.

Cross-Examination.

By Mr. Avis.

10

Q. Mr. Roberts, you went down to the place first--

Mr. Joseph Gaskill. Oh, Senator, I am offering that book that he used there as an illustration.

(Said book is marked Exhibit D 3).

Q. You went there first in 1909, did you?

A. I had been there before, but I went in 1909.

Q. For the investigation in relation to this case, at 20 least, you went in 1909?

A. Yes.

Q. That was, as I understand it, the latter part of June, June 25th?

A. June 25th.

Q. And that was after the period or in the midst of the period when what is now known as the June drop sometimes occurs to apple trees, is it?

A. The apples were dropping freely, then, yes.

Q. When is the period of what you call the June 30 drop?

A. Why, they keep on dropping up until the middle of July, I should say.

Q. When do they start?

A. Oh, they start just as soon as the blossoms fall.

Q. Why is it called a June drop?

A. Why, I don't know any other reason except it is really generally applied to peaches, the June drop, that is more in June, but apples drop from the time the bloom drops up until the middle of July.

Q. But it is called the June drop, isn't it, with relation to apples too?

A. Yes, sometimes, but it is more a peach term.

Q. What is the condition of the weather that
10 causes the June drop generally? In other words, has the dryness anything to do with it?

A. If it is dry enough to weaken the trees; anything that will weaken a tree will help throw off the fruit.

Q. Isn't it a fact that the June drop won't occur if the weather has been reasonably damp?

A. Well, where you have fungus troubles and curculio stings them and the coddling moth there will be drops anyhow, unless they are cared for.

Q. Have you ever had anything in your experi-
20 ence to do with fruit trees that have been affected by acid fumes?

A. No.

Q. So that you are not attempting to testify as an expert with relation to acid fumes, are you, Mr. Roberts?

A. No.

Q. Did you ever see any orchards affected by acid fumes?

A. Never did, no.

Q. How long does it take this fungus growth, the
30 frog-eye, to develop?

A. Why, it begins to throw off—this June drop, that is one of the things that causes it, largely.

Q. No, how long does it take to develop from your experience, how long before you can see the first fungus of the frog-eye before it will develop to a point of

destroying the leaves and causing the leaves and fruit to drop?

A. Oh, it begins early in June, you begin to see it.

Q. And how long does it take before they commence to drop?

A. Oh, they begin then. You see, there can be a good many infestations on one leaf.

Q. I understand that, but how long does it take this fungus or whatever it is, this microbe, to develop to such an extent that it will cause the leaves to drop? 10

A. By the first of June or sooner, I should think.

Q. That is, they would begin to drop by the first of June?

A. Yes, or sooner.

Q. How long before that in your experience would you have been able to have noticed this trouble on the leaves if you had been carefully watching your trees?

A. If I remember right, the expert tells us it takes about two weeks to develop, and it comes out on the earliest leaves, almost, and the leaves come out about the first of May, so any time after the first of May you are liable to find evidence of frog-eye, I should think, after the middle of May. 20

Q. Did you ever know it in your experience to develop in a single night?

A. No, I never did.

Q. Or in two days?

A. Well, it keeps developing steadily.

Q. But I am speaking now, suppose you examined your trees to-day and they were apparently healthy, 30 without this trouble on them at all, you, as an expert, examining the trees, would the frog-eye develop within three days so as to cause the fruit and leaves to drop?

A. I would not look for it to develop quite that much in three days.

Q. Does the frog-eye fungus cause the leaves to curl at the ends?

A. Yes, I think so.

Q. Is there any indication in the plates which you have offered in the pamphlet which you have in your hand which shows a curling of the leaf?

A. I will just take this. (Referring to Exhibit P 3).

Q. Well, just look at it, please.

10 A. It speaks more of them turning yellow and dropping.

Q. I am speaking now of the illustrations which you have there; is there any illustration of the curling of the edges of the leaf in these illustrations?

A. Why, I rather think there is.

Q. Now, will you show me where you see evidence of curling?

A. Those aren't exactly—

Q. Curling of the edges, I mean, turning over.

20 A. Isn't that curling? (Referring to illustration).

Q. You pick out this one down here; I will now mark that with the letter A on plate 2.

A. Isn't that beginning to curl up there a little? (Referring to another illustration).

Q. Another down here, you say?

A. Yes.

Q. Which I will now mark with the letter B. Now, is there any other place on that plate that you say the leaves are curling, that or any other plate which you have
30 offered in evidence?

A. It does not show there.

Q. Are there any of the leaves from a frog-eye growth or any other fungus growth that in three days gets brown all over and drops to the ground, in your experience, that you know of?

A. Several of these fungus troubles start with a spot which develops and turns brown.

Q. How long does it take it to develop and turn brown? I am asking you this from your own knowledge if you have it, Mr. Roberts, if you can do it without referring to the book?

A. Why, I could hardly tell you that.

Q. All right. You say that when you were there in June the apples were dropping. Can you say in what quantities you saw them dropping or saw the effects of 10 it under the trees?

A. Why, I should think mostly more dropped than what stayed on.

Q. More had dropped than what had stayed on?

A. Yes, we usually expect in a good orchard, nine-tenths of a drop, nearly.

The Court. What is that, nine-tenths.

The Witness. Nine-tenths of an apple drop, yes. 20

By the Court.

Q. You wouldn't have any crop unless there was a drop, would you?

A. No, it would be too thick by half.

By Mr. Avis.

Q. So you say in most instances even where you 30 spray your orchards that nine-tenths of the crop drops off?

A. I think so.

Q. And you say that as an expert, Mr. Roberts, do you, in your expert view of things, that nine-tenths of

the apples drop off an apple tree each year even where it gets the best of care?

A. I think so, or else the trees would all be broken to pieces: I think that is a conservative estimate.

Q. Now, you showed us some growth or something on the chestnut oaks and poison vines; where were those chestnut oaks and poison vines?

A. We saw it midway between Elmer Clements—

Q. No, I am speaking about Mr. Miller' place now.

10 A. We saw some in the hedge row at the edge of the orchard,, and we saw some oaks up toward the farm.

Q. Now, what do you mean, toward the farm?

A. I mean, toward the Thomas farm, the Thomas house more.

Q. Oh, up this way?

A. Yes, away off there.

Q. Up in that direction you saw it too?

A. Yes.

Q. Now, you can understand this map generally,
20 can't you, as to the general location?

A. Yes.

Q. Commencing at this line running down to here, did you see any of them effected in that line?

A. Yes, we saw some chestnut oaks there with fungus on them.

Q. This is where there were quite a lot of chestnut oaks and some thicket down there, wasn't there?

A. A sort of thicket, yes.

Q. A hedge row, as we sometimes call it, it hadn't
30 been cleared up carefully, and can you say how far you walked down along this line for the purpose of examining it, and where you found this effect, as you say, this fungus growth?

A. Why—well, it was pretty plenty, you could see

see it anywhere on shrubbery that year. It was a fungus year.

Q. What was the appearance of the trees and thicket down along this part of the farm?

A. It wasn't a thicket; it was simply those varieties. It was the chestnut oaks especially and the poison vines.

Q. What as the effect on them, what did you notice?

A. They had a brown rust on them.

Q. And had the leaves of those trees curled at all? 10

A. I don't think they had curled.

Q. Then the leaves don't curl with the rust?

A. I don't think they had curled very much.

Q. Had they some?

A. I don't think so; I just think they were full size, but had this brown fungus growth on them.

Q. Did you notice any wild cherry trees?

A. I don't recall the wild cherry trees.

Q. Did you notice whether any of the leaves had dropped off of these chestnut oaks and poison vines? 20

A. No, I think as I remember now the poison vine leaves were all there, only simply showed the fungus trouble.

Q. Do you know what kind of fungus trouble that was?

A. I do not.

Q. Are you in a position to say that it was not caused by acid fumes?

A. It was the same that I saw over the country generally that year; I had no reason to think it was different from the same thing that caused it half way between Elmer Clement's and Woodbury. 30

Q. I understand that, but as an expert are you in a position to say that what you saw there was not caused by acid fumes?

A. No, I couldn't say that.

Q. As I understand you, you said that both of these years Mr. Miller's orchard had had a good set of apples?

A. I think so.

Q. And that the orchard was in good condition?

A. In generally good condition.

Q. And you said, I think, with relation to one of the years that it had a better chance for a good crop of
10 apples than the orchards which you had which had been regularly sprayed and taken care of?

A. 1909, yes.

Q. 1909?

A. I think that was 1909.

Q. Then the fungus growth and cooling moth and all these other things, frog-eyes, were not doing it much harm that year, were they?

A. Yes, they were doing harm.

Q. And yet they were doing harm and yet the set
20 was greater than the orchards that had had the best of care taken of them and the probabilities of a crop was better than on orchards that had had the best of care taken of them, is that correct?

A. I can't put it that strong?

Q. How do you put it?

A. That the set was better, but I think one-tenth that many with proper care will come out with better satisfaction than all those apples treated as he was treating them.

30 Q. Come out to better satisfaction?

A. Yes.

Q. But the set and probabilities of a crop, as I understand you to say, that year were better than they were in the orchards that you say that had the best of care?

A. The start was better.

Q. Now, how do you account for this sixty year old orchard living that long, having such bad care as it had had, and in the year 1909 having a set of apples better than in orchards that had been taken care of?

A. Excuse me; the good set of apples was applying more to that business orchard next to the factory, not that old orchard; that has passed its usefulness quite a long time. The rest of us don't keep them when they get as old as that.

A. Yes, we don't have to account for that, 10

A. I think it is past its profitable age.

Q. How do you account for the rest of the orchard living thirty-five or forty years with the devastating effects of the fungus you found there and having no care?

A. Well, that is hard to account for.

Q. It is hard to account for it?

A. Yes, we don't have to account for that.

Q. With the fungus and different growth that you found there that orchard ought to have been dead before this? 20

A. We don't say a fungus would kill a tree, it will threaten the crop.

Q. Will it kill the limbs at all?

A. I don't think so, seriously.

Q. You don't think they would or the twigs and young growth?

A. The blights will.

Q. Yes, the blights will, but the fungus growth won't. How about frog-eye?

A. The bulletin says it will after a while weaken 30 it, but it won't kill it.

Q. How about your experience?

A. We cut it out, we don't raise it, Senator, that is, we have very little of it. It is the easiest thing there is to control.

Q. Then you are not much of an expert on the question of the effect of fungus growth, are you, Mr. Roberts? You are an expert on treating it and getting rid of it, isn't that it?

A. Well, they may claim I am an expert; I did not claim I was an expert.

Q. I know, but you are really put up as an expert at this time?

A. Well, I don't make the claim.

10 Q. You are really then not an expert; you can't give us an opinion, can you, on the effect of fungus growths, because you don't have any of it?

A. It has been my privilege to take run down orchards in various places and they have responded to treatment quickly.

Q. Yes, they have responded to treatment?

A. Yes.

Q. But I say, you are not much of an expert on the question of the effect of fungus; you are more of an expert on how to get rid of it?

A. I don't nurse it along from year to year.

Q. You have not studied it very much?

A. Yes, I have studied it.

Q. But you have studied the method of getting rid of it?

A. That is the idea.

Q. You haven't studied the effects of fungus growth on orchards very much except as you have gone into them and seen them, and then you started to get it

30 out of the way?

A. I have had a good chance to see the effects where I have been treating them and my neighbor alongside would not treat them; I have had object lessons of that kind right along.

Q. I understand; you are not a bacteriologist or

anything of that kind?

A. No.

Q. You haven't examined these things microscopically; you don't know what they are, do you, or what form this fungus growth takes except as you see it with the naked eye?

A. It is perfectly visible to the naked eye.

Q. I say, except as you see it with the naked eye?

A. Yes.

Q. What is a fungus? What is the basis of it? 10

A. It is simply one vegetable growth on top of another.

Q. Is there any parasite or microbe about it?

A. Oh, no.

Q. Sure of that?

A. It is simply—that is, fungus is simply one vegetable growth on top of another.

Q. Isn't it a parasitic growth?

A. Yes, it would be a parasitic whether it was vegetable or animal or what. 20

Q. Yes, that is what I thought. Now, how many trees did you find affected in the main orchard as you say with frog-eye or fungus growths?

A. Why, it was general there.

Q. All over the orchard?

A. Practically all over the orchard.

Q. So that—would there be any difference in the effect of that fungus growth on all of these trees so far as your expert opinion would go?

A. The more vigorous trees would withstand it 30 better than some others, but they were all affected.

Q. Well, wouldn't they all show the effects of it?

A. Yes.

Q. Materially?

A. Yes, it was general there.

Q. I think you said that on the three rows nearest the I. P. Thomas & Sons Company plant that there was less fruit on the side next to the plant than there was on the other side?

A. A little more exposed; I would lay that to the winds rather than anything else, though, I should think.

Q. It would all depend on which way the winds came there, wouldn't it?

A. Well, that would make a difference.

10 Q. You weren't down there watching the winds for weeks before you went down there to make this investigation?

A. Oh, no.

Q. You don't know whether the prevailing winds were from the north, northeast, west or south, do you?

A. No, but I know it is the cold east wind that hurts the fruit buds.

Q. True, but you don't know where the prevailing winds were from during that period?

20 A. No.

Q. You said that 1909 and 1911 were off years. Is that so with relation to all apples?

A. No, there are trees that alternate; there are trees that don't go with the general crop. An old orchard will have a tree that will bear half one year and half the next year.

Q. So that when you say that 1909 and 1911 were off years, were you speaking from experience with these orchards?

30 A. Yes, and of my neighbors and the country generally.

Q. Isn't it a fact—do they always alternate in the same years? Don't some trees alternate and bear in 1910 and others in 1912?

A. Yes, but it is a pretty well established fact—

Q. Answer the question, Mr. Roberts.

A. Yes.

Q. You were down there once in 1911, weren't you?

A. Yes.

Q. And that was when you were asked to go there by somebody from the I. P. Thomas & Sons Company?

A. Yes.

Q. And Mr. Miller was there and received you and showed you around the place? 10

A. Yes, and you were there.

Q. Yes, I was there too, with a number of other people; and you understood that that arrangement had been made for you ahead of time, didn't you?

A. Yes.

Q. Now, you said in answer to a question from your counsel that there was nothing in that orchard that you could not trace to natural causes; that is correct, isn't it?

A. That is correct. 20

Q. But I understand you now to say that you don't know what the effect of acid fumes is on trees, and therefore you are not in a position to say whether you saw anything there which was caused by acid fumes or not:

A. I saw nothing there but what looked perfectly natural to me.

Q. Yes, can you say that what you saw there, the damages and injury that you saw there might not have been caused by acid fumes, some of it?

A. I saw nothing to suspect acid fumes. 30

Q. Well, you don't know anything about acid fumes, do you, that is, about their effect upon foliage? You don't want to say to this Court and jury—and I think the question was put so that you wouldn't, but I want to bring it out more specifically—you don't mean

to say to this Court and jury that you are in a position to say that acid fumes might not have done the damage there, although so far as you saw it might have been caused by natural causes?

A. I know enough about the business to know that they don't cause the blight; it don't cause this fungus troubles, and there was nothing there but what I could account for.

Q. Will you say that any of the damage you saw
10 there was not caused by acid fumes?

A. There was nothing there but what I understood, and nothing to suspect anything outside.

Q. Will you say as an expert that there was no damage in that orchard caused by acid fumes?

A. I saw no evidence of it.

Mr. Avis. Will you repeat the questoin, Mr. Stenographer?

20 Mr. Joseph Gaskill. I submit it is answered.

The Court. He said he saw no evidence.

Mr. Avis. But he said in answer to the question before, if the Court please, that he did not know anything about acid damage. Now, I want him to tell this jury—he is testifying as an expert—

The Court. Well, can the witness go any further
30 than he has?

Mr. Avis. I wish he would answer my question; he has not answered it. I am entitled to an aswer to my question.

The Court. He said what he did see he could assign a reason—

Mr. Avis. Yes, which is the nicest way of getting around, if the Court, please, answering the question directly.

The Court. What is the question?

(Former question and answer repeated). 10

Mr. Avis. I do not think that is an answer, if the Court please.

The Court. I do not see how he could make it any stronger.

Mr. Avis. I think I am entitled to an answer to my question as to whether or not he is willing to say as an expert that there was no damage in that orchard from his examination from acid fumes. If he says he can't answer it— 20

The Court. I think that is a proper question.

The Witness. I reported back to the Company at once that there was no damage, there was nothing there but what I could trace to natural causes. We made that report to the company.

Q. Will you say as an expert that there was no damage in that orchard caused by acid fumes? 30

A. We saw no evidences of it; just the same—

Mr. Avis. I ask for an answer to the question, if the Court please.

Mr. Joseph Gaskill. I submit the question is fully answered.

The Court. Just repeat the question, Mr. Stenographer, please.

(Question repeated).

The Witness. We reported back at once after that
10 visit—

The Court. Now, Mr. Roberts, yes or no to that question.

The Witness. Well, I will say yes, I reported back to the Company that same thing, that there was no damage—

Q. You are willing to say now as an expert that
20 there was no damage done there by acid fumes?

A. I believe that is correct.

Q. Well, that is the best you will say, is it?

A. Well, I reported back at once that there was no damage done.

Q. And you reported back to the company in which you were a stockholder?

A. Yes, I am a stockholder.

Q. And you said in your direct examination that
30 "We were willing to report to the company that there was no damage done by acid fumes," didn't you?

A. Yes, 'We' included Arthur Collins.

Q. And did the fact that you were a stockholder have anything to do with the style of the report that you made?

A. It did not; we simply reported as honest men.

Q. When you went into the pear orchard in 1911, what was the appearance of the orchard, Mr. Roberts?

A. It had a good deal of fungus trouble in there.

Q. Yes, but what was the appearance of the leaves on the trees?

A. Well, some leaf blight.

Q. I didn't ask you that; what was the appearance of it?

A. The leaf blight turns them dark.

Q. They were dark in color, were they? 10

A. Dark, yes.

Q. A great many of them?

A. Yes, a good many of them. I have a proposition on leaf blight here, if I can offer it.

Q. And what about the fruit on these trees, the pears?

A. I don't remember so much about the pears in that year, but the blight was on the trees and I have no doubt but what they showed the effect of their lack of care. 20

Q. Does a blight hit a whole tree at once?

A. That varies; it may hit just a limb; it may hit the trunk anywhere; it may hit the leaf. There are several forms of leaf blight.

Q. Did you ever know a tree that blighted all over in a single night?

A. They strike very quickly.

Q. Did you ever know a tree that blighted all over in a single night, a pear tree?

A. Why, they show the effects of it maybe in a 30 single night.

Q. All over?

A. I see no reason why it should not.

Q. I am asking for your experience.

A. Why, one day you see it is looks all right and

the next day it looks all wrong; you might say it comes that night.

Q. All over?

A. If the blight strikes the trunk and it girdles it there at once, it will show all over at once, yes.

Q. How many have you had that did that in your experience?

A. We have had them to do it, not very many. We don't lose many by blight.

10 Q. You don't lose many?

A. Not very many, no.

Mr. Joseph Gaskill. By blight, he says.

Q. By blight; so your experience in your own orchard is not very extensive as far as blight is concerned?

A. Yes, it is.

Q. What has been the effect upon your trees from the blight?

20 A. The pear trees?

Q. Yes, the pear trees.

A. We have lost limbs rather than trees, ordinarily.

Q. Usually it strikes the limb, doesn't it?

A. Usually it strikes the limb, but it can strike anywhere. If it strikes the butt and goes around it, the whole tree will die, and you will just see it in one day.

Q. But that is very unusual?

A. That is unusual, yes.

30

By Mr. Joseph Gaskill.

Q. Horace, have you any illustrations there of curled leaf other than in the book that has already been shown?

A. I have a text book of Cornell that shows that more or less.

Q. Well, will you just put a marker in that and I will offer it without taking the time.

A. It shows the pear blight and trees with it. It is one of the Cornell text books.

JOHN J. ALBERTSON, affirmed.

10

By Mr. Joseph Gaskill.

Q. Where do you live, Mr. Albertson?

A. Magnolia, Camden County.

Q. What is your business or profession?

A. I am the County Engineer for Camden County.

Q. Are you also engaged in the growing of fruit?

A. Yes, sir.

Q. To what extent?

20

A. I have a half interest in three fruit farms.

Q. How large?

A. I suppose maybe two hundred acres altogether.

Q. Are you interested in the farm on the other side of Mantua Creek from the plant of the I. P. Thomas Company, known as the Paradise farm?

A. Yes, sir.

Q. How long have you been an owner in that farm?

A. About twenty years.

30

Q. Have you as owner of that farm noticed whether or not fumes from the phosphate works came over the creek on the land and in the trees in the orchards there?

A. I have never noticed it, no, sir.

Q. What is the character of the fruit you gather from those trees in the orchards on that farm?

A. It is much better than on either our other farms.

Q. In what respect is it better?

A. The crop is better and it is a better color, brighter color, and sells at much higher prices.

Q. Do you do as much spraying in the orchard on that side of the creek as you do in your other orchards
10 in the fruit farms distant from this factory?

A. About the same, but we didn't start to spray at this farm until about five or six years ago; we never sprayed at all up until that time.

By The Court.

Q. How near did you say your farm was to Mr. Miller's farm?

A. Our farm is directly across the creek. The
20 creek borders our farm, about two hundred feet away from the creek.

Q. Are you nearer the works than he is?

A. Yes, we have land adjoining within two hundred feet of that factory, but that isn't in fruit; that is meadow land.

By Mr. Joseph Gaskill.

Q. John, that is just what I was going to ask you;
30 how near is the fruit or the orchards on your farm as compared with the orchards on the Miller farm, how near to the factory?

A. I was never on that side of the creek; I was never on the Miller farm that I know of.

Q. Well, how far are your orchards or any of them there from the factory?

A. I suppose we are about one thousand feet; I never measured it. I should imagine about one thousand feet.

Q. From your experience and observation, can you say whether or not any fumes that come across the creek from this factory in your orchard are destructive or not?

A. I can say they are not to our trees.

Q. Not destructive?

10

A. Not at all

Q. Or to the crop?

A. No, nor to the crop.

Q. Are they beneficial than otherwise?

A. Well, we have gotten very satisfactory crops from that farm and very satisfactory prices, more so than either of the other farms.

By The Court.

20

Q. You think you can get your farm fertilized free?

Mr. Avis. I was telling the Judge he ought to have recoupment here.

Cross-Examination.

By Mr. Avis.

30

Q. Your farm, Mr. Albertson, is in an entirely different direction than Mr. Miller's farm, isn't it, from the plant?

A. Our farm is about east, I should think, from that plant.

Q. Pretty nearly southeast, isn't it? This being north, your farm is over in this direction?

A. No, we ain't right out there in front; carry it around the creek; the creek is our line.

Q. I understand that, but you are across the creek on the other side?

A. We are right east.

Q. And the buildings on your farm are pretty near opposite Mr. Miller's buildings, aren't they, across the
10 creek?

A. Oh, my, no.

Q. You are nearer the river than we?

A. We are nearer the river.

Q. Then you are pretty nearly east?

A. Pretty nearly east from the factory.

Q. So the winds must be in a westerly direction for them to carry any fumes across to your place?

A. Yes.

Q. Mr. Jones lived on that farm in 1909 and 1911,
20 didn't he, Mr. Isaac Jones?

A. About that time, I think. We have never had but two tenants on the farm; I think the present man—I think this is his fourth year.

Q. And prior to that time Mr. Jones had been there for about seventeen years?

A. Something, sixteen or seventeen years, yes.

Q. And did you ever collect anything from the I. P. Thomas & Sons Company for damages that their fumes had done your crops?

30

Mr. Joseph Gaskill. One moment, I object. You mean the present company since Mr. Lippincott has had charge of it?

Mr. Avis. I don't care anything about that; I mean the I. P. Thomas & Sons Company. The question asked by Judge Gaskill, if the Court please, was whether he had ever seen any fumes come over there, whether he had ever had any damage.

The Court. It seems to me that is proper cross-examination.

A. Yes.

10

Mr. Joseph Gaskill. I ask the benefit of an exception.

The Witness. I don't know who was the owner, but a good many years ago we had a corn crop in that meadow that was damaged.

Q. Wasn't that in 1905?

A. I don't know when it was; I suppose may be it 20 was. I can't answer how long ago.

Q. That is about ten years ago, 1905 is; was it about ten years ago?

A. I don't think it is as recent as that. Please don't commit me to that, because I don't know.

Q. I don't care about that, it was some where about that time; might have been before probably, I don't know. The fumes came over there and damaged your crops, did they, your corn crop?

A. Yes.

30

Q. And I. P. Thomas & Sons Company paid you for the damage?

A. They did without question. Came over and saw it and paid us for it.

By Mr. Joseph Gaskill.

Q. Now, was that before or after the fire, John?

A. Oh, I think it as before the fire.

Q. And that was before the present management?

A. I know very little about the management over there.

Q. Well, it was the old gentleman controlled the matter at that time, didn't he, I. P. Thomas?

10 A. I wouldn't like to say. I know very little about the management; I have never been over on the plant and know nothing about them at all.

Q. But you remember it was before the fire?

A. I am pretty sure that is was; I don't know how long ago the fire was there.

Q. The plant has been entirely rebuilt since that time, hasn't it?

A. I don't know, because I never go over there; I am not interested in them at all.

20

By Mr. Avis.

Q. You don't know when the fire was, Mr. Albertson?

A. I remember the fire very well.

Q. You remember the fact there was a fire and the plant burned down, do you mean?

A. But what part of the buildings it burned, I don't know.

30 Q. You don't know which portion?

A. No, I never went over to see it at all.

Q. And you can't recollect positively whether your damage was before or after the fire, do I understand that?

A. Oh, yes, our damage was before the fire.

Q. You are sure of that?

A. I am reasonable sure of that because the fire was more recent than when we were paid.

Q. Did you deal directly for the payment or at least the allowance or whatever it was for this damage you got?

A. No, John Parry settled the matter.

Q. You don't know with whom he settled as far as the I. P. Thomas Company was concerned—you had no conversation about that? 10

A. No, I had nothing to do with it at all. All I can say, the crop while Jones was there was very satisfactory, which was shown by his prosperity.

Q. Yes, you didn't have any fumes come over to do you any injury in that time?

A. Well, it was twenty years, about seventeen years he was there.

By Mr. Joseph Gaskill.

20

Q. What is the prevailing wind in the neighborhood of your farm, if you can tell—is it a westerly, northwesterly, northeasterly or what?

A. I suppose it is about the same there as anywhere else.

Q. You can't say?

A. No, I might say as far as the fruit is concerned we have had better fruit on the side next to the factory than we had on the east side.

Q. Oh, yes, I omitted to ask you that. 30

A. Because we have been very much troubled there by not having the fruit properly pollenized, and the east winds interfere with the proper fertilization of the blossoms.

By Mr. Avis.

Q. Do you think the acid fumes help that any?

A. Not at all.

ARTHUR J. COLLINS, affirmed.

10 By Mr. Joseph Gaskill.

Q. Where do you live?

A. Moorestown, New Jersey.

Q. And what is your business?

A. I am in the nursery business and fruit grower.

Q. To what extent are you a grower of fruit?

A. Personally I have three hundred acres and I am interested in one farm of 120 acres and one farm of 160 acres.

20 Q. How many trees in all?

A. Well, I personally have forty thousand trees and I am interested in about twenty-six thousand trees.

Q. You cultivate and market your fruit yourself, you and your men?

A. Yes.

Q. How long have you been engaged in the fruit business?

A. I have been in the fruit business all my life, about forty-six years.

30 Q. Have you made it a study, the growing of fruit, the diseases of fruit trees and that which attacks fruit itself?

A. Yes, we have to to get along.

Q. Are you a stockholder in the I. P. Thomas Company?

A. No.

Q. In no way interested?

A. No.

Q. Did you at my request or the request of the plaintiff go down to the farm of Howard Miller at any time to make an examination?

A. Yes.

Q. When was it you first went, since the other case?

A. Well, I was down in the year of 1909. 10

Q. That is what I referred to, 1909. What time in 1909 were you there?

A. June 25.

Q. The same time Horace Roberts was there?

A. I went along with Horace Roberts.

Q. Did you make an examination of the farm and of the fruit orchards?

A. Roberts and I went over the farm together.

Q. Mr. Miller was not there that day?

A. No. 20

Q. First tell us about the crops on the farm, not the fruit, but the crops. Did you see the patch of peppers?

A. We saw a patch of peppers; looked pretty even and pretty regular.

Q. That was in June?

A. That was in June, June 25th.

Q. Did you see anything in that pepper patch at that time which indicated that half of the plants or hills were killed or destroyed?

A. I think I told Roberts it looked like a very fine 30 stand of peppers.

Q. And that is what you saw there that day, was it, a fine stand of peppers?

A. I think it was the nicest patch of peppers I ever saw.

Q. From what you saw there on that day in your judgment, as a grower of truck and fruit, would there be any damage to the crop from anything that had occurred prior to your visit?

A. The peppers were very well formed. The weather was quite dry that season. They had a good color and I thought they looked like making a good crop a little latter.

Q. That was the prospect?

10 A. That was our observation.

Q. Now, then, what about the apple orchard?

A. That is pretty general; what do you want to know about it?

Q. Did you go through the apple orchard?

A. Yes, sir, I went through the apple orchard.

Q. Did you examine the trees for the purpose of detecting whether or not there was any injury to them?

A. That is what we went down for, to look them over and see.

20 Q. You had been informed, had you not, before you went that there was a claim for damages on account of fumes from the phosphate works?

A. That was it.

Q. Now, then, tell us what you saw in that orchard in that month of June, 1909?

A. Well, as we entered the orchard from along the creek, we first came to the small pear orchard of Keiffer pears. That orchard was very much neglected; there was quite some old sod up around the trunks of the trees, and
30 there were quite a number of briars, long briars in between the strips of the trees, in the strips, we call it, in between the rows of the trees.

Q. That would indicate what?

A. That would indicate that the trees had not been farmed.

Q. For how long, would you say?

A. Oh, I think that sod there was probably three or four years old.

Q. And how about the length of those vines?

A. The vines were several feet long; the only way you could get that sod away would be to take a grubbing hoe; you could never plow it away without injury to the tree, it had been there so long. Then we passed on to the orchard; we noticed quite a great many water suckers up in the trees. There was more or less old bark around the butts of the trees, scaly bark, and there was some bad wood in the limbs of the trees; they should have been removed the previous year in winter time. We noticed quite a number of apples on the ground which is the case in most every man's orchard. Orchards that are well taken care of have less than those which are neglected. That is what we call the June drop or the apples which come off the tree in June.

Q. What diseases, if any, did you notice either in the trees, or in what manner was the crop itself affected? 20

A. Well, the crop didn't look so bad for the orchard; it looked like as though if it didn't keep on dropping altogether they would have quite a number of apples there.

Q. What were the indications at that time as to a crop when you were there in June?

A. Well, the indications were that the orchard had not put on much new wood, growth on the ends of the limbs.

Q. Is that where the apples come from? 30

A. That is where the apples come from. Now, if the orchard had been well cultivated and well fed it would naturally put on a little wood growth on the end of the limbs.

Q. Each year?

A. Each year; some varieties will put on much more wood growth than others.

Q. And is that where the fruit comes the following year?

A. That is where the fruit comes the following year, on the second year's growth.

Q. Now, come back to my question; what diseases if any did you notice in the trees?

A. We noticed there was quite a great deal of fungus on the leaves, and on the little ends of the water suckers there would be some little dead branches, kind of. A water sucker is a very quick, sappy growth, and the ends sometimes will die, right from the tip end.

Q. What did you notice about the fruit that was on the ground? What was the matter with it, if anything?

A. There was no doubt but what the fruit fell off from the lack of spraying in the main, I should say.

Q. Did you see any diseased apples there or anything that indicated insect ravages?

20 A. Well, we saw the effects of the curculio and the coddling moth.

Q. No, on that occasion, in June 1909, did you see anything in that orchard which would not be attributable to natural causes with which you are acquainted?

A. Well, we came to the conclusion that all the things which we saw were those which are natural in most any man's orchard.

Q. Did you see these same conditions in other orchards that were cared for in that same manner that
30 year?

A. Orchards that were cared for were not nearly as much affected as that orchard was, but orchards which were neglected would have probably that same appearance.

Mr. Avis. I don't understand that was the question; I ask that that be stricken out.

Q. No, did you examine any other orchards in 1909 to see whether or not you could see the same conditions?

A. That I don't remember.

Q. You don't remember. Well, when did you go there again?

A. I went again in July of 1911. 10

Q. With Horace Roberts?

A. Horace Roberts, the Honorable Senator and others.

Q. Well, tell us, Arthur, what you observed on that occasion, with reference to the apple and the pear crop.

A. That year was the year we had a great deal of blight; it prevailed all over the country; on such varieties of soft wood, you might say, like Smith Ciders and the Star apples and others, it was very bad. There was 20 some on the Miller farm. If the Miller farm had put on a long growth, like other orchards which have been well-fed, it would, of course, have had much more blight on the ends of the twigs. Sometimes the blight comes while the apples are in blossom, while the little apples are in blossom, and that will have a tendency to blight the whole cluster of apples; it will turn the leaves black, or brown rather, and they will curl, get off on the ground; they will gradually wither up and go. If I remember rightly that was the case with some on Mr. Miller's orchard that 30 year.

Q. Did you see the twig blight there?

A. Not much twig blight, because the trees had not made much growth, but the suckers in the tree would have the blight on.

Q. Did you see the scale?

A. Not much scale.

Q. What was the matter with his orchard?

A. I would say lack of food and lack of proper cultivation and lack of spraying.

Q. Now, did you go in the pear orchard?

A. Yes, we saw this same Keiffer pear orchard we saw before, and it had a light crop of pears on that year. Of course, the trees had made a very irregular growth,
10 and there was not such a large crop of pears set.

Q. What if anything was the matter with the trees in the pear orchard?

A. The same as the previous season; they had never been farmed and cultivated as they should, or pruned either.

Q. The same as the two years previous, you mean?

A. Two years, in 1909.

Q. Now, then, did you go there in 1912 for the purpose of ascertaining whether any injury had been
20 done to the trees?

A. We went again November 1, 1912 for the same —to see the same complaints, if possible, or other complaints and we found the orchard a little older, but it looked as though it had had a pretty good crop of apples on it. We entered in the back way; we entered the pear orchard first, the Keiffer pear orchard, and there was a fine crop of pears lying on the ground, yellow, with red cheeks, and they were very pretty.

Q. Did that indicate that there had been any un-
30 usual injury done to the trees on the previous year?

A. Why, it was remarkable how they put the pears up; even under the neglect, they were bound to produce.

Q. Would that little orchard of pear trees have produced the crop that you saw there if the trees had been injured the previous year as has been testified here?

A. No.

Q. They would not?

A. No.

Q. Is it considered the proper method of growing pears to plant a solid orchard of Keiffers, isolated from other varieties?

A. No, it is considered proper to plant some other varieties with the Keiffer pears, possibly ten per cent.

Q. That is, every tenth row?

A. Well, I don't like them in every tenth row; I 10 like them distributed around so it doesn't make any difference which way the wind blows you are apt to get some pollen from one tree or the other.

Q. Have you had any experience in that line?

A. We have had a lot of it.

Q. Had you originally started with solid orchards of Keiffers?

A. My father planted a hundred acres of Keiffers that way once, and he lost his entire crop where the Keiffers were pure each year; occasionally by mistake there 20 was a Le Conte put in with the Keiffers; every ten or twelve trees around that Le Conte pear the Keiffers bore well and when they got beyond that the Keiffers would blossom each season as pretty as you would want them, and the blossoms fell to the ground and our trees would have no fruit on them.

Q. Now, then, with regard to that observation in connection with the Le Conte tree and the Keiffers around it, what did you do with your hundred acre orchard?

30

A. We grafted the Keiffers with Le Contes or occasionally we would put in a Le Conte or take out a Keiffer. Now, I had a Le Conte orchard that was fifteen years old, trees probably as large as your leg; I sold them to my father to set in his orchard so that when they blos-

somed the bees would carry the pollen to the Keiffers, and it made his orchard.

Q. What effect, if any, does a northeast wind have on the young fruit or blossoms?

A. If we have a northeast wind we are apt to look for a poor crop of fruit. The bees can't work during that cold storm to carry the pollen from one variety to the other, and if that is the case the blossoms drop on the ground and we wait another year for our crop.

10 Q. Do you make it a practice to have hives of bees in your orchard?

A. Where I live I do not, because we have our pears well mixed, and the bees come from Moorestown to my orchard. My brother Lester spends a hundred dollars each year to get bees from people who keep them and put out in his orchard during the blossoming period; he hires the bees.

Q. Arthur, you spoke about seeing such nice pears there in 1912 lying on the ground; in what quantities did
20 you see them?

A. Per tree?

Q. Well, the orchard generally.

A. Well, the orchard is very small; I don't believe there are over thirty trees in that orchard; I don't suppose there was over an average of a basket and a half to a tree there.

Q. And in a well-fertilized and well cared-for orchard, properly pruned and sprayed, trees of the age of them, what would you expect to get?

30 A. Well, now, those trees had grown so poorly—they were very irregular, and those trees are not to be compared with trees that have had proper care covering the same period, covering the same age.

Q. How do you account for the fact that notwithstanding the condition in which you described that pear

orchard that there was this quantity of nice pears that you have spoken of there that year?

A. Well, I think Mr. Miller's farm as well as a quite a great deal of land in his section is well adapted to the growth of fruit. Some land will produce fruit trees and fruit much better than others, even though it has not had as much attention.

Q. In other words, a neglected orchard on suitable soil will beat a cared-for orchard on soil not so suitable for the growth of fruit?

A. Well, you are putting it a little bit strong I think on that. 10

Q. Put it your way then.

A. You know that oft times the weeds and leaves from the tree and so forth will help fertilize that tree, even though you don't do anything with it. You can see that by a tree along a fence. These Keiffers produce this fruit in spite of poor care, but they would have been finer if they had had good care.

Q. They would have been finer if they had had 20 good care?

A. Sure.

Q. And a larger quantity?

A. Sure.

Cross-Examination.

By Mr. Avis.

Q. There is no possibility of their being worse if 30 they had had good care, Mr. Collins, in your opinion, expert opinion? Might they have been worse if they had had good care?

A. Worse than they were if they had had good care?

Q. Yes.

A. Well, I hardly think so.

Q. Now, then, you said a while ago that if these trees had been injured the year before they would not have produced this quantity of fine fruit?

A. Did I say that?

Q. Yes, that is what you said in reply to a question of Judge Gaskill. Did you mean to say that?

A. Now, you repeat your question again.

10

(Question repeated).

Mr. Joseph Gaskill. That is not the question I put; I put it if they had been injured in the way described here.

Q. Put it that way, in the way described by Mr. Miller. Now, then, do you say that now?

A. I believe I don't quite get what you want yet.

20 Q. The question was put to you—I want to find out if this is a fact; I want to find if you understood the question—that if these trees had been injured in 1911 or the year before you were there in 1912 in the manner that Mr. Miller claims they had been, would they have produced the fine fruit and the quantity that you saw there in 1912?

A. Why, no.

Q. So that this yield in 1912 you consider a very fine yield, do you?

30 A. It had every appearance from the way the trees looked that he had a good crop of fruit.

Q. Now, how about when you were there in 1911, what kind of crop did he have that year?

A. 1911—that was a little early that year, in July, I don't know.

Q. What was the appearance of the crop; did you examine the trees to find out what the prospects were?

A. Some varieties looked pretty fair.

Q. Were there any blackened leaves on the trees?

A. In 1911?

Q. Yes.

A. That was the year of the blight.

Q. I am asking you about these particular trees, Mr. Collins, whether there were any blackened leaves on the trees? 10

A. On the apples, yes.

Q. On the pears?

A. Not so much.

Q. Not very much on the pear trees that you saw?

How do you account for any crop at all in 1912 if there was no mixture of other pear trees there at all?

A. Some authorities say that the pollen from an apple will fertilize a pear.

Q. So the apple trees might have fertilized them?

Q. And then the orchard was very small. 20

Q. The pear orchard?

A. Yes. Now, wait a minute; no, there might have been some wild pears or other blossoms close to that pear orchard where the bees could have gone and come back to the Keiffer pear orchard which would have fertilized the Keiffers.

Q. Do you know whether there was or not?

A. No, I didn't examine it, but I know that is often the case.

Q. Why did you go up the back way, Mr. Collins? 30

A. We went to the fertilizer works first.

Q. But someone told you you had better not go up to the house?

A. Well, we were of age. That was the nearest way in.

Q. Did you see Mr. Miller there any time you were there?

A. I saw Mr. Miller there the day you were there.

Q. Yes, at any other time?

A. And in 1909, and saw Mr. Miller there in 1912.

Q. Where did you see him?

A. Well, shall I tell you?

Q. Yes, I wish you would tell us.

A. We started up the creek, up the back side way
10—I have to say that.

Mr. Joseph Gaskill. That is what they are getting at all the time, Arthur. You said "back side" instead of "back way."

A. We got into the pear orchard, and then we passed on into the apple orchard. We thought best to see Mr. Miller before we went all over the farm out of courtesy, so we went back to the fertilizer plant and got
20 the automobile and went up to his house and saw Mrs. Miller. Mrs. Miller said Mr. Miller was at the blacksmith shop and would soon be home. At the same time she telephoned to him and he came home. We asked Mr. Miller if he would let us go out and look at these trees. Nothing doing. Mr. Miller had a young orchard along the lane as we drove in on the right, apples, very fine, a nice crop on them, and he took us out and I ventured to pick one up and eat it. I thought I would go that far; if I had got shot I would be full of apples.

30 Q. So you didn't get there?

A. I had got full of apples. That was in 1912.

Q. So that time you went over the orchard first and then came up and asked Mr. Miller whether you could afterward?

A. We went down over the apple end of the orchard.

Q. Very well, didn't you, that is, that part where they couldn't see you from the house?

A. Oh, well, until we got tired.

Q. Now, what condition did you find these trees in, the apple trees when you went there in 1909?

A. What condition?

Q. Yes.

A. The apple trees, possibly for their age, it looked 10 as though they were doing pretty fair. You take an apple orchard as old as that is—

Q. The orchard was not being injured very much by moth and curculio and all these other things, was it?

A. Well, every orchard is injured by curculio if you don't spray.

Q. I am asking you whether that orchard was as you saw it there injured very much by any of these insects or fungus diseases?

A. It had quite a good deal of fungus disease, but 20 in spite of everything it was a pretty good orchard.

Q. It was still bearing pretty good stuff that year?

A. It looked so.

Q. Put out pretty good fruit?

A. It looked so.

Q. In other words, although they had this disease and that disease they were not doing any very great harm?

A. Well, unless you have got a pretty bad disease it won't kill anybody; it will weaken you down somewhat. 30

Q. As far as you could see this disease wasn't had enough to kill anybody?

A. Oh, no, wouldn't kill anybody.

Q. You say the orchard was not putting on much growth; do you know the effect of acid fumes on apple

trees as to new growth?

A. No, sir.

Q. Did you ever examine an orchard that had been effected by acid fumes?

A. No, sir.

Q. So that you don't know anything about what the effect of acid fumes is on an orchard? Your orchards are not anywhere near a phosphate plant, are they, either one of them?

10 A. Unfortunately not.

Q. Unfortunately not?

A. I believe it is a great benefit to it as far as the insects are concerned.

Q. Oh, in other words, you think that the acid fumes would do you lots of good?

A. By keeping away the insects, and that is what costs us a great deal of money, to fight the insects.

Q. If it killed the insects and apples at the same time, then you wouldn't think it was very much benefit,
20 would you?

A. It wouldn't do that.

Q. You know sometimes they give medicine which kills the patient and the disease too. Now, as far as you will go, as I understand it, in your statement in relation to what you saw in this orchard is that you came to the conclusion, "we" meaning yourself and Mr. Roberts, I suppose?

A. Yes.

Q. "Came to the conclusion that all we saw was
30 natural to other orchards." Now, is that as far as you will go in stating the causes of what you saw, of the injury that you saw there?

A. That is it. We had Mr. Clement with us too, Mr. Elmer Clement.

Q. Will you say that the orchard had not, both in

1909 and 1911 been damaged by acid fumes?

A. I will say not.

Q. You say as an expert that it had not been?

A. I would say not.

Q. Now, that you mean as your opinion or you say it absolutely?

A. No, I absolutely say not.

Q. Although you have no experience at all with the effect of acid fumes, you are willing to say that there was nothing in that orchard that had been injured by 10 acid fumes, are you?

A. Well, if you will permit me, this is the only way I can answer that.

Q. I think you ought to answer me yes or no to that, Mr. Collins.

A. Well, that orchard had fungus diseases in it &c.

Q. Of course it had.

A. Now, there was nothing else in it. Now, then, I can't say that it had acid fumes in it too.

Q. Did you examine the trees on the side next to 20 the phosphate plant?

A. Oh, yes, that is where we went.

Q. Did you find that the side of the trees next to the phosphate plant did not have as many apples on as the other and not as much new growth?

A. There was no difference about that. Once in a while there might have been a dead limb; I don't know whether it was next to the acid phosphate works or the other side. Now, that dead limb might come from the blight or—

30

Q. Oh, yes, it might come from lots of things?

A. Yes.

Q. But I am speaking now about the new growth; did you find there wasn't as much new growth and that there were less apples on the side of the trees next to the

phosphate plant, on the three rows in the direction of the phosphate plant, than there was anywhere else?

A. There wasn't enough difference in it to call my attention to it.

Q. You did not notice that at all?

A. No, sir.

Q. Did you notice any brown leaves on the trees when you were there in 1909?

A. What do you mean by brown leaves—do you
10 mean blighted leaves, dead leaves?

Q. Dead leaves, all over brown.

A. Oh, no.

Q. You did not find any?

A. Found some getting brown, not all brown.

Q. Did you find any leaves curled up on the ends?

A. No, it takes lice to curl up the ends.

Q. Have you ever seen the effect of a fire in an orchard, a light fire—I don't mean a heavy fire—a fire on trees, fruit trees?

20 A. You mean fire blight?

Q. No, I am not talking about blight, I am talking about fire, real fire and brimstone.

Mr. Joseph Gaskill. Or without the brimstone.

Mr. Avis. Either one.

A. You mean where a fire has been started?

Q. Where a fire has gone through an orchard.

30 A. Oh, sure.

Q. What is the effect of that on the leaves?

A. It would burn them brown, very black.

Q. Will they curl?

A. If it was hot enough, they would have to curl
up.

Q. And what is the effect of it on the twigs, the new growth?

A. With sap in them?

Q. Yes, with sap in them.

A. Dry them up.

Q. You are not a stockholder in the I. P. Thomas & Sons Company?

A. No.

Q. You buy your fertilizers from them?

A. No.

10

Q. Are you paid as an expert to go down and examine this orchard?

A. No.

Q. A pure volunteer?

A. Furnish my own conveyance.

Q. Pay your own carfare, and you are a pure volunteer all the way through, aren't you, Mr. Collins?

A. That is it.

By Mr. Joseph Gaskill.

20

Q. That is to say, as a volunteer you have been requested to go and have gone as a neighborly act?

A. That is the idea.

By Mr. Avis.

Q. A neighborly act to whom, to Mr. Miller?

Mr. Joseph Gaskill. To just whoever asked him. 30

A. Mr. Miller didn't ask me.

Q. Who asked you?

A. Word came from the I. P. Thomas Company.

Q. Came from the plant, did it?

A. It came from the company, I don't know where the fellow telephoned from, I am sure. I would be pleased to go down for Mr. Miller any time he wants me to.

By Mr. Joseph Gaskill.

Q. One moment; I don't know whether it was a joke or whether it was founded on something that had
10 been said, but when you spoke about eating that apple you already had said that you had been refused permission then by Mr. Miller to make any further examination, and you said something about being shot.

A. Back in 1909 Mr. Miller came across Mr. Roberts, Mr. Cole, Mr. Stines and Mr. Clement.

Mr. Avis. Were you there then?

The Witness. Oh, sure, and he—I don't know what
20 he did threaten to do to us, but he prohibited us from going on his farm, and you would naturally think it was a dangerous thing to go on his farm if he saw you there.

Q. Did he say anything about shooting?

A. He never threatened to shoot me.

Q. But you didn't think it was safe on that day when you and Horace were in the automobile when he refused you permission to examine the trees to get out and go around and examine the trees?

A. Under no consideration would we do it if we
30 thought he would come home, but he treated us very nicely after he met us.

By Mr. Avis.

Q. And you were invited there, or not invited but

permission given for quite a large party to go on there in 1912, or when was it you and I were there together?

A. 1911.

Q. At that time there was quite a large party there and in a personally conducted tour by Mr. Miller we went over his farm, didn't we?

A. I am not quite so sure but you helped to get the party up, I don't know about that.

Q. No.

A. You were there.

10

Q. No, I only furnished some of the entertainment.
I. P. Thomas got it up, I merely furnished the entertainment, I believe.

THOMAS C. LEFEVRE, SWORN.

By Mr. Joseph Gaskill.

20

Q. Mr. LeFevre, where do you live?

A. West Chester, Pennsylvania.

Q. What is your business?

A. Consulting horticulturist.

Q. With whom are you connected?

A. Scientific Spraying Company.

Q. Have you given any special study to the subject matter of diseases of fruit trees and the method of overcoming that by spraying and other treatments?

A. About fifteen years.

30

Q. Did you take a course on that subject?

A. Yes.

Q. Where?

A. Pennsylvania State College, graduated in 1904.

Q. The Department of Agriculture—have you worked there?

A. Worked there two years and a half.

Q. That is, at Washington?

A. No, at Harrisburg.

Q. Oh, at Harrisburg, the State Department?

A. Yes.

Q. Did you make any examination of the orchard of Howard Miller in 1911?

10 A. Yes, sir.

Q. How many times were you there?

A. Three.

Q. Three times?

A. Yes.

Q. What were the dates?

A. May 22nd, I think, the first was May 22nd, then June 19th and July—I don't know the exact date in July.

Q. What examination of the orchard did you make
20 in 1911 in May and in June—tell us generally, will you?

A. Well, the I. P. Thomas people called up our office and said they wanted—I don't know whether they asked for me or one of the other men to go down to look at some trees at Paulsboro. They didn't say what the trouble was or anything. So I went down with Mr. Barclay, we went over to the factory, and they told us that there had been a complaint from this man Miller that there was some acid fumes.

Q. Then did you make an examination of the fruit
30 trees for the purpose of determining whether or not there had been damage by acid fumes there?

A. Yes, sir, I went over there looking for acid fume damage, and I could not find any.

Q. What did you find?

A. The first orchard we went into was a young

pear orchard—I judge it is young—and we found the blight there. The leaves some of the leaves were black, due principally to twig blight. Then on the apple trees we found some of the leaves affected with the leaf spot.

Q. While you were there, did you meet Howard Miller?

A. No, sir, not that time.

Q. Did you at any time meet him there?

A. The last time I was there.

Q. When was that?

10

A. In July.

Q. In 1911?

A. Yes.

Q. On that occasion did he show you an apple tree up near the barn that he complained had been injured by the fumes?

A. Yes, a young apple tree there.

Q. Did you examine that tree?

A. Yes, we dug around the roots, found the tree had woolly apis on the roots.

20

Q. Woolly apis on the roots?

A. Yes.

Q. What did that indicate as to the length of life of that tree?

A. Very short if it was not taken care of. As a matter of fact woolly apis is hard to take care of.

Q. Do you know whether or not that tree is dead since?

A. I don't know.

Q. You haven't been there?

30

A. No.

Q. Did you call Howard Miller's attention to this woolly apis?

A. No, I think I was talking to Mr. Lippincott at that time; I don't think Mr. Miller called my attention to

it; I think Mr. Lippincott called my attention to that tree.

Q. On any of these three visits that you made there, did you see any effect of acid gas on the foliage?

A. I did not.

Q. Or on the trees themselves?

A. No, sir.

Q. What did you, if anything, find to be the matter with the trees?

A. I think the main trouble with the trees is they
10 are run down and needed care; that is the principal trouble.

Q. Was there any San Jose scale there?

A. Very little, none to hurt.

Q. Was there any blight?

A. I didn't notice any particularly, only on the pears. Some twig blight on the pears and also some stem blight on the pears.

Cross-Examination.

20

By Mr. Avis.

Q. What day of the week did you go there the first time, Mr. LeFevre?

A. Monday.

Q. You have testified in this case when it was tried before?

A. Yes.

Q. Didn't you say then, the first time you went
30 there was in May, 1913?

A. No, sir, I haven't been on the place since July of 1911.

Q. When did you first get the word to go there?

A. Monday morning, the morning of the day I went down.

Q. You got word on Monday morning, the 22nd?

A. Yes.

Q. When you got over to the orchard, was there any large dropping of apples there?

A. Why, there was a few, not what I would call large, not nearly so many then as what there was on my second visit.

Q. More on your second visit?

A. Yes.

Q. When were you there the second time? 10

A. About a month after the first time.

Q. Were there any leaves dropping when you were there the first time?

A. No, they hadn't started to drop.

Q. Had leaves curled or turned brown at that time?

A. Some of them were spotted and I think where the spot would come near the top of the leaf the leaf would curl a little bit.

Q. Did you examine the hedge row between the 20 orchard and the I. P. Thomas Plant?

A. I think we went down and looked there; I didn't pay any particular attention.

Q. You didn't examine the hedge row at all?

A. No, I don't think I did.

Q. You examined the pear trees?

A. Yes.

Q. Were they black all over?

A. The leaves black.

Q. Were they blackened all over? 30

A. Do you mean a few leaves on each tree?

Q. No, I mean all the leaves on the tree, practically?

A. Oh, no, no.

- Q. What about the fruit on the pear trees as you saw it?
- A. The fruit was small; I think there was a few of the small fruit dried up on the tree, too.
- Q. Fallen off of the pear trees?
- A. No, still hanging on.
- Q. None had fallen on the pear trees when you were there?
- A. I didn't notice any; I couldn't see very well.
- 10 Q. Have you ever seen the effect of acid gas on trees?
- A. Yes.
- Q. What is that effect as far as the leaves are concerned?
- A. Dry them up, shrivel them.
- Q. Curl them?
- A. If it is severe enough.
- Q. If it is severe enough?
- A. Yes.
- 20 Q. And they drop off, do they?
- A. In time.
- Q. What effect does it have upon the young apples, if it came on say three or four days before you were there?
- A. I never saw it on fruit.
- Q. You never saw it on fruit? Do the leaves get brown?
- A. They look brown, yes, depending on the light; they look to be brown or black.
- 30 Q. Have you seen the effect on pear trees?
- A. Yes, on pears and apples.
- Q. Acid gases or fumes will destroy leaves on trees, won't they and apples?
- A. If it is strong enough; it has to be confined.
- Q. Didn't you say in your testimony in the other

case that it would burn the foliage if there was any moisture?

A. If there was enough there to keep it there; if there was enough there and there was moisture and something to keep the gas there.

Q. Would the moisture keep the gas?

A. Well, it might in time after it went in solution.

Q. You mean to say then there would be no effect upon foliage in the open air of any quantity of acid gas?

A. No, I don't think there would. 10

Q. Have you ever had any experience in that?

A. I have generated gases in an orchard, never had any trouble with them.

Q. What kind of gases?

A. Hydro-cyannic gas.

Q. What is that for?

A. We use it for fumigating.

Q. Do you know anything about sulphuric gas, sulphur gas?

A. What do you mean by "sulphur gas"? 20

Q. Sulphur gas, the gas that comes off the burning of pyrites or copper ore?

A. Well, that wouldn't hurt anything.

Q. Do you know anything about that?

A. Sure.

Q. How about nitric acid gas?

A. Not in free air, it wouldn't hurt anything.

Q. So that no acid gas in free air, from your idea, would do any harm to foliage, is that correct?

A. No, sir, I don't believe it would. 30

Q. You are paid for giving your testimony here today and making the examination?

A. I suppose I will be; I haven't made any arrangements yet.

Q. You have been paid before when you testified?

- A. Only my expenses.
Q. You come here as an expert on the matter?
A. I don't know; they asked me to come.
Q. Do you own any stock in the I. P. Thomas
& Sons Company?
A. No, sir.
Q. Do any business with them?
A. No.
Q. Except this?
10 A. No.
-

ELMER E. CLEMENT, affirmed.

By Mr. Joseph Gaskill.

- Q. Where do you live, Mr. Clement?
A. Thorofare.
20 Q. And what is your business?
A. Farmer.
Q. How long have you been a farmer?
A. All my life.
Q. Did you at my request go to the Howard Miller
farm for the purpose of looking over his crops and fruit
in September of 1911?
A. I did.
Q. What did you notice then with reference to the
apples or the pears?
30 A. On September 7, 1911, I wasn't in the pear
orchard, unfortunately I could not find that pear orchard.
I was looking more to the apples. We went through the
apple orchard, and I thought everything was about as
good as I had at home; I couldn't see any difference on
his trees than any other trees.

Q. What about the prospects for a crop at that time?

A. Well, that was an off year for a crop, but I thought he had a very good crop. There was better apples at that time in his orchard than I had on my own.

Q. You raise apples as part of your ordinary farming work?

A. Yes.

Q. Did you examine any of the apples to determine whether or not there was any disease prevalent or any injuries by insects? ¹⁰

A. We did.

Q. What?

A. Well, we found some apples that had been stung a little, and we found some that was right fair apples, there was lots of them; I thought that, as Howard had told me before he never had sprayed any at all, I thought it was very good.

Q. How did the trees in that orchard look in comparison with yours and with the other orchards in the same vicinity? ²⁰

A. I thought they looked very good.

Q. About the same?

A. About the same.

Q. Did you notice any leaves that were in any way discolored?

A. I saw some, what we call the leaf blight.

Q. And what indicated that—what was the color?

A. Yellowish spots, the leaves all looked yellow.

Q. Did you see any brown spots or brown leaves? ³⁰

A. Yes, brown spots, brown leaves.

Q. Now, after that, did you go there again?

A. I did.

Q. When?

A. November 1, 1912.

Q. Who went with you?

A. Horace Roberts and Arthur Collins.

Q. Did you see what kind of crop had been borne on the trees?

A. We seen where it looked as if there had been a good crop of apples there.

Q. Were there any on the ground?

A. Yes.

Q. Were those the same trees that had been pointed
10 out to you as trees that had been injured?

A. They were.

Q. How about the pear orchard?

A. Well, that day we was in the pear orchard. I told Mr. Collins and Mr. Roberts that I wanted to see that pear orchard, so we went in that first. There were some very nice pears there, better than I had on my own orchards?

The Court. The question is did you find any dam-
20 age caused by acid fumes from the fertilizer works?

The Witness. No, sir.

Q. On any of these occasions?

A. No, sir.

Cross-Examination.

By Mr. Avis.

30 Q. The first time you were there, Mr. Clement, was September, 1911, wasn't it, that is, with relation to this matter?

A. Yes.

Q. September, 1911?

A. Yes.

Q. And the evidence so far as the leaves or apples were concerned, if there had been any acid burns in May of that year would have disappeared, wouldn't they?

A. They might on the leaves, but I think you should have seen it on the trees.

Q. How many did you ever examine that you saw acid fume trouble on, how many did you ever see?

A. Never seen any.

Q. Then you don't know whether you saw it when you went there this time?

10

A. I didn't see any.

Q. How do you know you didn't if you had never seen it before or never seen it since?

A. There was nothing there, I don't think, except what I have seen in other orchards.

A. And it is because there was nothing there except what you have seen in other orchards you are willing to say that there was no acid burn in that orchard?

A. If there was, we had them in our own orchard.

Q. I say, you are willing to say there was no acid burn that you saw there?

A. No.

Q. What do you know about an acid burn?

A. I don't know anything; I am willing to say—

Q. That is all; you don't know anything, you say, about it? Now, why did you say there had been a good crop of apples in the year 1912?

A. Why do I say there had been a good crop?

Q. Yes.

A. Why, because the limbs was bent down, and we could see where the apples had been, an indication of the apples, and there was also quite a good many apples on the ground.

Q. There were a good many apples on the ground then?

A. Yes, and some on the trees.

Q. Well, your idea of that must be entirely an estimate isn't it? You can't tell anything about the quantity by what you saw there, can you?

A. I don't think there was any question but what you could tell, a man that has ever raised apples.

Q. You can tell by going through an apple orchard when the apples are all off approximately how many apples had been grown in that orchard that year, could
10 you?

A. You could tell whether there had been a good crop or a poor one.

Q. Where were the trees Howard pointed out to you that had been damaged or injured?

A. Howard didn't point any out to me.

Q. A few moments ago, you said Howard—

Mr. Joseph Gaskill. No, that they were pointed out to him.

20

Q. Where were the trees that were pointed out to you as having been injured?

A. We didn't see none that had been injured any more than the blight.

Q. Did anybody point out any trees to you that they claimed had been injured?

A. No more than I seen myself.

Q. Nobody pointed them out to you then?

A. Well, we all together pointed out trees.

30 Q. Where were they located, these trees that you say your attention was called to as having been injured?

A. These trees, I suppose pretty near south or southwest from the pear orchards.

Q. South or southwest from the pear orchard; well, now, if this is the pear orchard, this is south; then

it would be over here back of the house?

A. No, it is up there, you might say, toward the road more.

Q. Toward here?

A. Yes, off that way from the pear orchard?

Q. Well, you understand this map, don't you?

A. Not hardly, I don't, if that is the pear orchard?

Q. Well, here is the house; here is the barn; here is the I. P. Thomas & Sons Company plant; here is the pear orchard. 10

A. That black line is the creek?

Q. This line is the creek; this is north.

A. Then they would be pretty near southwest.

Q. Pretty near southwest from what?

A. The pear orchard.

Q. Then it was across this way (indicating)?

A. Across that way from the pear orchard.

Q. Toward the barn?

A. Well, we came out this way a little further, then went up toward the barn. 20

Q. Did you go down here and examine the trees down here next to the line of the I. P. Thomas Company?

A. We came down kind of that way first, then took across back toward the barn.

Q. Now, where were the trees located—how many trees rather were shown you as having been damaged, claimed as having been damaged?

A. Well, on September 7th I didn't know there was any claim showed to me that they claimed had been damaged. 30

Q. Then you didn't look specifically at any of the trees that had been claimed to have been damaged on that day?

A. We looked at quite a good many trees; whether

there was something wrong in the leaf or anything, we examined the trees.

Q. Who showed you—who called your attention to it?

A. Oh, there was Mr. Wynne and myself was together most of the time going through the orchard.

Q. Did anybody especially call your attention to any particular trees which had been claimed were damaged?

10 A. I couldn't say they did.

Q. Then why did you say that when you went back there the next time in November of 1912 that they were the same trees that your attention had been called to before?

A. Because Mr. Wynne and I, we had two or three trees there that had this leaf blight on.

Q. And those are the only two or three trees that you specifically remember as having examined?

A. They were the two or three trees that had the
20 worst.

Q. Where were they at?

A. They were right off a little ways from the pear orchard.

Q. Which direction?

A. I should say right toward the road, that is the road that goes by the hedge row to the factory.

Q. And those were the only ones that you noticed especially on that day or that you were particularly careful about?

30 A. Oh, no, there was others we examined.

Q. Were there any dead twigs in the orchard when you went there the first time?

A. There was a few, yes.

Q. Were there any leaves that had dropped?

A. Some few.

Q. Did you notice whether or not the ground had been plowed before you went there in September?

A. Yes.

Q. It had been plowed?

A. It had been plowed that summer, I think, sometime.

Q. Sometime during the summer? Then you couldn't see very much evidence of a fall that occurred in May or June, could you?

A. Not after it was plowed, no. 10

By Mr. Joseph Gaskill.

Q. One question I omitted: Why didn't you go there in 1909?

A. I think we started there in 1909, but Mr. Miller forbade us going on.

Q. You were one of the witnesses at the former trial or the trial of the former case in 1906?

A. I was. 20

Q. How did you start to go on there in 1909—in what conveyance?

A. I think it was in 1909, if I ain't mistaken, we took a coach and went around up Mr. Miller's lane, quite a party of us, and we stopped there and asked—Mr. Stine or some of them asked Mr. Miller if we could go on his place. He said, "No, sir."

Q. Did he make any threats if you did?

A. I don't think he did that day.

Q. You afterward went on the place? 30

A. Yes.

Q. Did you hear any threats made by him?

A. He made some threats we were standing back there or started on the place, we didn't go on—we was coming in from the factory up the creek way and in,

and he met us down there and stopped us, told us we could not go on.

Q. Were you arrested or sued?

A. Not for that time; for September 7th, we was, 1911.

Q. For September, 1911, by Howard for the trespass on the place?

A. Yes.

10 By Mr. Avis.

Q. You had gone on then after he had told you to keep off, hadn't you?

A. He never told us to keep off, only told us we could not go on that day.

Q. He told you you could not go on, didn't he?

A. Yes, the whole bunch.

Q. And you did go on one time with his consent later on in 1911, didn't you?

20 A. No.

Q. Weren't you there in 1911?

A. No.

Q. 1912?

A. I was there in 1912 when Howard had this personally conducted tour around the farm that time.

Q. You were there, weren't you?

A. No, we were up in the yard. We was on the place that time, that is, on this young orchard down along the lane.

30 Q. You didn't send Howard any word you were coming before you came in that day in a big coach with a great big crowd?

A. I don't know.

Q. As far as you know, no word had been sent to him—you hadn't sent any word to him?

- A. That is, in 1909?
- Q. Yes.
- A. No.
- Q. How many times have you testified for the I. P. Thomas Company in trials as a witness?
- A. Two or three.
- Q. Each time testified for the company?
- A. I couldn't do anything else.
- Q. You had gone there for the purpose of making testimony for the company, hadn't you? 10
- A. I don't know about making it.
- Q. I didn't mean that, but for the purpose of finding out?
- A. I was told to go down there to find if there was any damage.
- Q. By the I. P. Thomas Company?
- A. Yes, and if we did they were willing to pay for it.
- Q. Each time you were told to go by the I. P. Thomas Company? 20
- A. Yes.

The Court. No, he says he went down there at the request of the company to ascertain if Mr. Miller had been injured.

Mr. Avis. Surely.

The Court. And if so to report back and report whatever he found. Now, did he go there for the purpose of making testimony for the defendant or did he go there for the purpose of finding out what the truth was? 30

Mr. Avis. That, I presume, the jury will have to decide.

The Court. Yes, but you are putting it into his mouth to say that he went there to make testimony for the defendant.

Mr. Avis. No, I didn't mean that. I don't want to be understood that way.

Q. But you went there at the request of the I. P. Thomas Company?

10 A. I did.

Q. For the purpose of testifying for them if you did not find anything there that was detrimental to them—is that correct?

A. I hardly understand the question.

Mr. Joseph Gaskill. Well, tell us what you went there for, then.

The Witness. I went there to find out whether there
20 was any damage done by the I. P. Thomas plant. If Mr. Miller had asked me I would have went there for him just the same thing.

Q. Didn't Mr. Miller ask you at one time to come there and look over his place?

A. No, sir, never.

Q. Never did do that?

A. Only 1912 he told us we could go into that orchard.

30 Q. I know, but he never asked you to come there and look over it?

A. No, sir.

Q. Are you a stockholder in the I. P. Thomas Company?

A. No, sir.

Q. You buy fertilizers from them?

A. Sometimes.

By Mr. Joseph Gaskill.

A. Yes, sir.

Q. Do you buy of other folks?

A. Yes.

Q. Do you get any discount?

10

A. No indeed.

Q. After you made your investigation there on the place, did you honestly report what you had discovered, and have you testified in each of these cases to what you discovered there?

A. We did.

BENJAMIN P. SHUSTER, SWORN.

20

By Mr. Joseph Gaskill.

Q. Where do you live, Mr. Shuster?

A. In West Deptford Township.

Q. And what is your business?

A. Farming?

Q. How long have you been a farmer?

A. All my life.

Q. Have you raised fruit on your farm?

30

A. Not so very much, a few old trees.

Q. Are you a grower of truck?

A. Yes, sir.

Q. Did you at the request of the I. P. Thomas Company go on the farm of Mr. Miller?

A. I did.

Q. For what purpose did you go there?

A. Well, they asked me to go there, and if I saw any trouble for Mr. Miller to report so, and if I didn't, why, in their favor, that is all.

Q. In other words, you went there to ascertain what the situation was, did you?

A. That is all I went there for; I didn't have nothing against Mr. Miller in going there at all.

Q. You weren't a partisan of either party?

10 A. No.

Q. And did you report what you had noticed as a farmer there?

A. As near as I could.

Q. And have you testified to that same thing in this court before?

A. I have.

Q. Now, then, tell the court and jury what it was very briefly—let's try to get through this evidence—very briefly what it was you found there in 1911 in September
20 when you went there with others?

A. Well, we came across the pear orchard there, but I don't know really whether there was many there or not at the time, but the pear orchard didn't look as though it was very well taken care of.

The Court. Can you say from what you saw whether or not the pear orchard or the apple orchard were affected by any fumes from the phosphate plant?

30 The Witness. Not that I could see.

Q. Did you see anything in the orchard there that was not traceable to natural causes?

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

Cross-Examination.

By Mr. Avis.

Q. Do you know the effect of acid fumes on apple trees or pear trees?

A. No, I've never taken any notice of them.

Q. Never saw any burned by them? Did Mr. Miller ever ask you to come to his place and look over—

A. I believe he did. 10

Q. Claiming he had been damaged?

A. One time he did.

Q. Did you go?

A. No, I didn't go.

Q. Didn't he do it several times?

A. Only once that I know of.

Q. Why didn't you go for him when he asked you?

A. Well, he didn't set no particular time and I didn't go, that is all.

Q. But you are ready to go when the I. P. Thomas 20 Company asks you to go?

A. I had been there before for them.

Q. How many times have you testified for them in cases in this court?

A. About twice, I guess.

Q. Hasn't it been more than that?

A. Might have been.

Q. Three or four, hasn't it?

A. Well, the first trial they had.

Q. Do you buy fertilizers from them? 30

A. Sometimes I get some there.

By Mr. Joseph Gaskill.

Q. Do you pay for them?

A. Yes.

Q. Do you get any discount?

A. I never have yet, only when I paid in cash; generally get it then.

Q. Was there any threat made by Mr. Miller against you or to you coming on there?

A. Not exactly to me.

Q. In your presence?

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

10 Q. You didn't hear it yourself?

A. He made a little remark.

Q. What was the little remark he made?

A. He said if that gang came there he would knock them down with clubs and drag them off with a horse; that is all I know, that gang of liars.

Q. He called you all liars? That is all.

20 JOSEPH E. WRIGHT, sworn.

By Mr. Joseph Gaskill.

Q. Where do you live?

A. Clarksboro.

Q. And are you a tenant of the farm of I. P. Thomas & Company?

A. Not at present.

Q. Were you in the year 1909?

30 A. Yes, sir.

Q. Did the fumes from the factory have any deleterious effect on your crops that year?

A. Not at all.

Cross-Examination.

By Mr. Avis.

Q. Do you know what year it was, Mr. Wright, that you lived there?

A. 1909, 1910, 1911—excuse me—1910, 1911 and 1912; lived there three years.

Q. Then you weren't there in 1909 at all?

A. No, 1910, 1911 and 1912. 10

Q. Did you ever see these acid fumes coming out of the factory?

A. I didn't notice any.

Q. Never smelled them or felt them in your eyes?

A. No, sir.

Q. They never came your way?

A. No, never seen anything to affect me whatever.

20

JOSEPH LOW, affirmed.

By Mr. Joseph Gaskill.

Q. Where do you live, Mr. Low?

A. Paulsboro.

Q. What is your business?

A. Well, up until the last two years I have always farmed.

Q. And how old a man are you? 30

A. I am past sixty-one.

Q. Did you, in September of 1911 with a party of other gentlemen or with a party of gentlemen, go on the farm of Mr. Miller's for the purpose of examining the fruit?

A. I did.

Q. Did you—I will ask his Honor's question—did you on that occasion in either the pear orchard or in the apple orchard see any injury that had been done by acid fumes from the phosphate works?

A. I didn't see any that I could not attribute to natural causes.

Q. Have you raised fruit yourself?

A. Some, yes, sir.

10 Q. And all that you saw there—I don't want to lead you—did you see the same thing in any other orchard?

A. Yes, I saw the same in my own.

Q. And how far from the phosphate works are you?

A. It is, I judge, a quarter of a mile or a little over, on a straight course.

Q. Do the fumes come over on your place?

A. Well, I have smelled the phosphate, before in
20 one season particularly.

Q. What condition did you find the fruit trees in on the occasion of your visit there with these others?

A. Well, the early crop, the early apples had mostly been gathered, but we saw quite a number of very fine apples lying on the ground.

Q. Under those trees?

A. Under some of those trees, yes, the later varieties.

Q. And what about the later apples?

30 A. Well, it was the later apples that we saw. You see by the 7th of September most of the early apples are gathered.

Q. What was there to indicate the character of crop that there was there?

A. Well, that we couldn't tell.

Q. What say?

A. We couldn't tell much about the crop.

Q. You couldn't tell much about that?

A. Only on the later trees, the later varieties.

Q. How did the trees look?

A. They looked as good as mine or other trees around, as far as I could see.

Cross-Examination.

10

By Mr. Avis.

Q. Have you ever seen any foliage or fruit trees injured by acid fumes?

A. I don't know that I did.

Q. After this damage that Mr. Miller claims, did he ask you if you would not come to his place and look over his orchard for him?

A. Yes.

Q. You didn't come there, did you?

20

A. He didn't say for what purpose he asked me to come over.

Q. Did he tell you about claiming damage or injury?

A. Oh, I have heard him speak of that a number of times.

Q. And when he asked you to come over and examine them you didn't come, did you?

A. No, I didn't feel I had to come.

Q. When the I. P. Thomas & Sons Company asked you, you went gladly?

A. Well, I really don't know that I went so gladly.

Q. How often have you testified for the I. P. Thomas Company?

A. I think this is the third time.

By Mr. Joseph Gaskill.

Q. Did they fix the time for you to go?

A. The I. P. Thomas Company?

Q. Yes.

A. Yes.

Q. Mr. Miller never did fix the time for you to come?

A. No.

10 Q. Just a general invitation to come any time?

A. I have had invitations many places that I never went.

Q. Only one question, Mr. Low:—I think probably you have been very wise—did you report the condition as you found it in the orchards there on Mr. Miller's place without any favoritism or partiality or prejudice?

A. I sure did.

20

JESSE MULLEN, sworn.

By Mr. Joseph Gaskill.

Q. Where do you live, Mr. Mullen?

A. Near Paulsboro.

Q. And what is your business?

A. Farmer.

30 Q. How long have you been a farmer?

A. Oh, all my life, practically.

Q. May we ask how old you are?

A. I don't like to give my age much, about sixty, not quite sixty-one yet.

Q. Have you ever grown fruit?

A. Some little.

Q. And truck?

A. Yes, sir.

Q. How many apple trees have you on your place?

A. About seventy-five, I should think.

Q. Did you at our request join some other farmers and go on the place of Mr. Miller for the purpose of ascertaining whether or not there had been any damage done him?

A. I did.

10

Q. You did that prior to the former trial that I conducted in 1906, didn't you, and testified at that trial?

A. Yes, I testified at that trial.

Q. Then when this new suit was brought for a new damage, you went again at our request, did you?

A. Yes.

Q. Now, then, were you one of the party that they sent a constable after because you went there in September?

A. Yes, the constable did serve a paper on me.

20

Q. Now, what did you find to be the condition of affairs there?

A. When was that, in 1911?

Q. Yes.

A. Why, I found the conditions was pretty favorable when I saw it there, the apples; there were several places in his orchard, the trees looked better than a good many I had saw.

Q. How about the pear orchard?

A. The pear orchard I don't remember much about, the pear orchard; I don't think I was to the pear orchard that day.

Q. How did the trees look in the apple orchard?

A. They looked fairly good at that time; I thought they looked remarkably well.

Q. Now, Howard asked you to come there, didn't he?

A. He did.

Q. Did you go?

A. I did.

Q. When was that?

A. That was the 17th of June, 1911.

Q. On that occasion did Howard show you any trees and fruit that he claimed had been injured by acid
10 fumes?

A. Yes, lots of them.

Q. And point out fruit to you that he said was injured?

A. He did.

Q. What did you tell him?

A. I told him I thought it would come out. He pointed out some trees in particular, one in particular—I know where it stood—he said that tree was killed, it would never come to, and I told him I thought it would.

20 Q. What kind of apple tree was it?

A. That was a Maiden Blush.

Q. Do you remember seeing that same Maiden Blush tree when you were there the following September?

A. Oh, yes, and ate apples off of it.

Q. The same tree he said was dead and wouldn't come to?

A. The same tree.

Q. Had it a crop on it?

30 A. It hadn't so many on it, had a few right nice apples on. Of course, most of the apples was off at that time.

Q. What was the indication as to the crop it had had on it?

A. I couldn't tell, the apples had gone. That was

in the pepper patch and I couldn't see much there; it had some nice apples on it at that time.

Q. You didn't see the pepper patch in 1909?

A. No, sir.

Q. The pepper patch you are speaking about was in 1911?

A. No, I didn't see the pepper patch in 1909.

Q. Now, when you were there in June at Howard's request, did you go through the orchard with him?

A. Yes, walked all through the orchard pretty 10 much.

Q. Did you see where they had been plowing?

A. I did.

Q. Did you call Howard's attention to the plowing?

A. Howard called my attention to it and said, 'At the other trial they said I plowed the ground'—I don't know how deep he did say—"so deep; now," he said, "you see I haven't plowed too deep." "Howard," I said, "you plowed pretty deep there." He said, "I guess the 20 plow got away from the boy," which I guess it did, for he had plowed very deep there.

Q. Were there any roots cut?

A. Some roots cut off there.

Q. Did you call Howard's attention to them?

A. I don't know that I did, any more than I said that; "Howard," I said, "it is plowed pretty deep there," and he said, 'I guess the plow got away from the boy.'

Q. Now, when you were there in June, did you afterward go to any other orchards, yours or others? 30

A. Yes.

Q. What orchards did you go to?

A. I visited Mr. Clement's orchard, Elmer Clement, the same afternoon I was to Howard's.

Q. And what did you see there?

A. Saw leaves that looked the same as Howard's did in Howard's orchard, kind of brown.

Q. And how about your own trees at home?

A. I saw some on my own trees the next day, one tree that stood out by itself in the light land, that was burned very bad; that stood by itself.

Q. In the same manner that you saw?

A. Yes, the same color, the leaves looked the same color, and I saw it in my own brother-in-law's orchard
10 the next day.

Q. Were you one of the parties that Howard sued?

A. Oh, yes.

Q. Even though he had asked you to come on there?

A. Oh, yes, sir.

Cross-Examination.

By Mr. Avis.

20

Q. Did he sue you for coming on there the day he had asked you to?

A. Oh, no, no; that wouldn't have been healthy.

Q. It was another time, wasn't it, when you hadn't sent him word you were coming on, after he had told you to stay off—that was after he had told you to stay off. wasn't it?

A. I don't know whether Howard ever told me or not to stay off.

30 Q. Well, wasn't there one day you tried to go on the place and he told you to stay off and get out?

A. I didn't go on that day.

Q. You were there with the party?

A. I was there with the party.

Q. Now, then, did you, at the other case, say

that when you were at Howard's place in June that his leaves and twigs and fruit was burned with something you didn't know what?

A. I said the leaves looked as though they were burned with something; I couldn't tell what.

Q. You couldn't tell what?

A. Yes, that is what I said.

By Mr. Joseph Gaskill.

10

Q. It is the same thing you couldn't tell what in your own home?

A. I found it in the same orchards, looked just like it.

Q. And you couldn't tell what is was there?

A. No, I couldn't tell what is was.

Q. You are not a fruit expert?

A. No.

By Mr. Avis.

20

Q. Did you see it in the same quantities in your own orchard as you did in Howard's?

A. Not in my orchard; I saw it on one tree, one tree out by itself.

Q. It was pretty well scattered in Howard's orchard, a great deal of it?

A. Quite a bit of it.

Q. And wasn't it mainly on the side of the I. P. Thomas & Sons' plant?

30

A. I don't know that it was; there was maybe one tree on that side and maybe the next tree would be affected on the other side and maybe the next tree would not be hit at all.

Q. There was a great deal of it in there, wasn't

there?

A. There was a great deal of it in there.

Q. Were the apples dropping when you were there?

A. Yes, some had been dropping.

Q. How about the leaves?

A. I don't know whether the leaves were dropping much or no. Some of them had dropped, I know.

Q. And were they curled?

10 A. Now, I couldn't say whether the leaves were curled or not.

HARRY LEACH, SWORN.

By Mr. Joseph Gaskill.

Q. Mr. Leach, where do you live?

20 A. Paulsboro.

Q. And what is your business?

A. Farmer.

Q. How long have you been a farmer?

A. All my life.

Q. How old are you?

A. About forty-eight.

Q. Where was your farm—where is your farm?

A. About a mile and a half out of Paulsboro.

Q. Have you lived in that vicinity all your life?

30 A. Right around there.

Q. You know the plant of the I. P. Thomas Company?

A. I do.

Q. Do you know when this plant was rebuilt after the fire?

A. I remember it being rebuilt; I don't know just the year, no.

Q. Can you approximate, give us your best recollection? Compare it with the Centennial Exhibition, if you can.

A. When the factory was first built, you mean?

Q. No, when it was rebuilt—yes, when it was first built or when it was rebuilt, either.

A. To the best of my knowledge, the year of 1882 the factory was started, was built by Cohen Richman. 10

Q. Do you remember its being burned down?

A. I remember it being burned down.

Q. And being rebuilt?

A. Yes.

Q. When was that?

A. I can't tell just the dates, I don't know; I remember it.

Q. Now, then, Mr. Leach, you are not a stockholder of the I. P. Thomas Company?

A. No, sir. 20

Q. Are you in any way interested in the Company or in its product?

A. No, sir.

Q. Were you requested by them, you with other farmers, to ascertain whether damage had been done to Howard Miller by acid fumes?

A. Yes, sir.

Q. Did you receive that request prior to the former trial, that is, the trial of the other case in 1906?

A. They asked me to come down there. 30

Q. And you testified then?

A. Yes.

Q. In 1906?

A. Yes.

Q. And since then and since this new suit has

been brought for new damages, have you been there at our request again?

A. Yes.

Q. For what purpose did you go—what were your instructions, if any?

A. They asked me to go down there to the plant and I went.

Q. Yes.

A. Then they told me they wanted me to go over
10 Miller's orchard and look and see if I could see any damage done to it. I went along and looked at the orchard.

Q. Now, then, did you see anything in that orchard which indicated that the trees or the leaves or twigs or the fruit had been damaged by acid fumes?

A. I know nothing about acid fumes.

Q. Well, what did you see there, what damage, if any?

A. I saw no damage there, no more than I saw in
20 my own orchard.

Q. And in other orchards?

A. And in other orchards.

Q. You saw the same character of brown leaf and curled leaf and dead twigs?

A. Saw spotted leaves and dead twigs and such like, yes.

Q. Now, did you go there any time at Howard's request?

A. No, sir.

30 Q. What generally would you say was the condition of the orchard?

A. Why, I called it fairly good.

Q. How did it compare with other orchards in the vicinity?

A. I thought it was a good bit better than mine.

I thought it was better than some of my neighbors that I had been in.

Q. Do you remember the day—let's cross that out. On the day that you went there with these gentlemen, did you stay longer than they or go back?

A. I went back to the factory with them.

Q. Did you go back on the farm that day?

A. Miller's farm?

Q. Yes.

A. Yes, sir.

10

Q. Howard asked you to come back?

A. He did.

Q. And you had a talk with him there?

A. I did.

Q. What did he show you on that occasion?

A. Oh, he showed me various trees around there

Q. The same trees that you had looked at with the party?

A. Yes, sir.

Q. And as to which you have testified?

20

A. Yes.

Q. Now, then did he point out in particular a tree near the barn?

A. He did.

Q. What was that, an apple tree?

A. An apple tree.

Q. What was its condition?

A. Well, I thought it had the blight, what I have been told was the blight.

Q. And Howard asked you, didn't he, if you had ever seen a condition like that before?

A. I think he did.

Q. And didn't you say that you never did, "for it ain't a tree blight; I can't tell what it is."?

A. I believe I said something to that effect.

Q. Do you know what the matter with that tree?

A. No, sir.

Q. Did they dig around the root of it while you were there?

A. No digging done that I know of.

Q. You didn't see this root disease, the wooly apis that they were speaking of?

A. No, sir.

10 Cross-Examination.

By Mr. Avis.

Q. Now, Mr. Leach, you were there the first time when, on September 7, 1911—I mean that year?

A. Yes, sir.

Q. Yes, on September 7th, and the biggest part of the early crop had been gathered then, hadn't it, all gone?

A. Yes.

20 Q. You say you saw something the matter with this tree near the barn. Now, what was the actual appearance of it, Mr. Leach?

A. Why, it looked to me—

Q. I don't mean your conclusions; what did you see— what was the condition of the leaves and twigs?

A. The twigs was dead on it, the blight, I think.

Q. Well, I am not asking you that, you are not an expert, are you, Mr. Leach, in the growing of apples— you don't pretend to be an expert, do you?

30 A. Now, you know whether I do or not, don't you?

Q. I don't believe you are; that is the reason I don't want you to tell what this is. You may be anxious to do it.

A. No, I ain't anxious to do it.

Q. I want to know what you saw there; you saw

leaves— what color were they?

A. What color were the leaves?

Q. Yes.

A. Why, they were—some of them were brown. I think. Now, I didn't take particular notice to the leaves as I did to the twigs; for I broke the twigs off, that is all I can tell you.

Q. A lot of them were dead, weren't they?

A. Yes.

Q. Now, did you break twigs off all the way 10 around the tree, more or less?

A. No, I stood on the one side of the tree.

Q. How far did you go around it?

A. Oh, I should judge maybe half way; I wouldn't like to say positive.

Q. Now, maybe half way around the tree—were those dead twigs that you speak of half way around the tree?

A. I don't think so, I don't know.

Q. Which side of the tree was that? 20

A. The side next to the factory—well, hardly next to the factory either.

Q. Well, which direction then?

A. I will say northeast, I don't just know, I think I am right, I don't know; I want to be right.

Q. Yes, I know you do. Now, had Mr. Miller asked you to come to his place before that time?

A. Yes, sir.

Q. What did you tell him, Mr. Leach?

A. I don't know what I told him. 30

Q. Did you tell him you did not want to come because you wanted to keep out of it?

A. I don't know whether I did or not.

Q. You went there when the I. P. Thomas & Sons Company asked you to go?

A. I did.

Q. Did you on September 7th, did you say to Mr. Miller, in the presence of his son, W. Earle Miller, words to this effect after you looked at the tree, that it wasn't tree blight and it was something that you had never seen in any other orchard, and you did not know what it was or words to that effect?

A. I don't remember.

Q. You may have said that?

10 A. I won't say; I don't remember saying anything of the kind.

Q. Will you say that you didn't say it?

A. I won't say one way or the other.

WILLIAM R. GIBBS, SWORN.

By Mr. Joseph Gaskill.

20 Q. Mr. Gibbs, where do you live?

A. I live at Thorofare, West Deptford Township.

Q. And what is your business?

A. Farmer.

Q. How long have been a farmer?

A. All my life.

Q. What is that, thirty or forty years?

A. Fifty-five years.

Q. That is, you mean you are that old?

A. Yes, that is what they say.

30 Q. I supposed you commenced with the milk business?

A. I guess so.

Q. Now, then, did you in company with some other gentlemen go on the Miller farm in September, 1911?

A. Yes.

Q. Had you gone there before?

A. I think so.

Q. You had been a witness at the trial of the other case, hadn't you?

A. Yes.

Q. In 1906, and then your attention being called to a new claim of damage or a later claim of damage you went there again, did you?

A. Yes, sir.

10

Q. Now, then, on that occasion, did you see anything in the orchard which indicated that the trees or the foliage had been burned or blighted by acid fumes?

A. I didn't see anything more in the orchard than what I saw around my own apples and trees.

Q. Yes, and how far is your own place away?

A. About two mile in a direct line from the phosphate works.

Q. There is no acid fumes coming over there, is there?

20

A. No.

Q. How did the trees look generally?

A. Well, there were some brown leaves on some of the trees and dead twigs, otherwise they looked as well as any trees I saw anywhere.

Q. And what was the prospect of a crop?

A. Well, the crop had been pretty well taken off when we were there; there were some few trees had quite a good many apples on, but the bulk of the crop had been taken away.

30

Cross-Examination.

By Mr. Avis.

Q. You didn't go there until September, did you, Mr. Gibbs?

A. No, sir.

Q. How many times have you testified for the I. P. Thomas & Sons Company, Mr. Gibbs?

A. I guess this is about the third time.

By Mr. Joseph Gaskill.

10 Q. Did you faithfully and honestly report what you had discovered there on the premises?

A. I did.

Q. Did you go there for the purpose of making testimony for one side or the other?

A. No, sir.

By Mr. Avis.

Q. Do you know anything about an acid burn on 20 leaves or foliage or trees?

A. No, I do not.

THOMAS WOOD WYNE, SWORN.

By Mr. Joseph Gaskill.

30 Q. Where do you live, Mr. Wyne?

A. Thorofare.

Q. And how long have you lived there?

A. All my life.

Q. What is your business?

A. Fruit grower and farmer.

Q. How much fruit have you?

A. I have about forty-four to forty-five hundred trees, maybe forty-two hundred, right around there.

Q. Are you more or less acquainted with the growth of fruit?

A. I am.

Q. Made it a study in a small way?

A. I have.

Q. You know something about the diseases of trees?

A. Somewhat. 10

Q. And do you spray your orchard?

A. I certainly do.

Q. And treat your trees for diseases?

A. I do.

Q. Now, did you go on this farm of Howard Miller's in September, 1911?

A. September 7th, I think I went on.

Q. September 7th, and what—cross that out—did you see there that day any injury to the trees or the foliage attributable to the acid fumes from the phosphate works? 20

O. No.

Q. What did you notice.

A. Well, I noticed various fungus diseases and quite a lot of blight, especially in the pears.

Q. Did you see anything in that orchard different from what was in your own?

A. No.

Q. How far is your orchard from there?

A. I suppose two mile on a direct line. 30

Q. No acid fumes come there?

A. No, sir, not that I know of.

Q. What was the general condition of the trees as to foliage or otherwise?

A. Well, the general condition for that season was

about on a par with the leaves on other trees in the neighborhood.

A. Well, the general condition for that season was about on a par with the leaves on other trees in the neighborhood.

Cross-Examination.

By Mr. Avis.

10

Q. Did you ever see a foliage that was acid burned or burned with acid fumes?

A. No, sir.

Q. How many times have you testified, Mr. Wyne, for the I. P. Thomas Company?

A. Once before this.

Q. Once before?

A. Once before.

20

HENRY H. LIPPINCOTT, affirmed.

By Mr. Joseph Gaskill.

Q. Henry, you are the president of the I. P. Thomas Company, are you?

A. Yes.

Q. When did you become connected with the Com-
30 pany?

A. I went in in '95.

Mr. Avis. 1895?

The Witness. 1895.

Q. Who had the works before that?

A. Who had the works?

Q. Yes, who was running the works before that?

A. Oh, the I. P. Thomas Company?

Q. Yes.

A. Well, I. P. Thomas & Sons.

Q. Now, when was the plant burned down, do you remember?

A. Yes.

Q. When?

10

A. Burned down on the 22nd day of August, 1897.

Q. August 22, 1897?

A. Yes.

Q. That is, after you became connected with the Company?

A. Yes.

Q. Rebuilt to the present plant?

A. In 1898.

Q. Now, is the method of operating that plant—
First,—cross that out—is the plant the same as the old 20
one or is it improved?

A. It is very much improved, that is, the fertilizer plant.

Q. Is it operated in the same way that the old plant was?

A. Well, now, what do you mean, Judge?

Q. Well, let us take, for instance, the method of mixing the rock and the acid, &c.

A. The mixing machinery and the mixing pan itself is about the same, but in the old plant we made no 30
effort at all to condense any fumes coming from the mixer,, the mixer gases, as we call them, but we immediately installed a tower, and after that we heard of this Schutte & Korting machine—it was a German machine—and we were the first to put that in.

Q. Now, then, right there, during the time I. P. Thomas & Sons had it, had they this condensing machine to prevent the escape of the fumes?

A. No, they didn't try to gather in the fumes or gases, let them all go.

Q. How did they do their mixing, on what or in what?

A. They had a platform up above the dumping pan, and that platform had windows on four sides of it
10 and this mixing pan set right down flush with the level of the platform.

Q. Would fumes come off from that?

A. Oh, my yes; yes, they would go everywhere then, would go whichever way the wind blew then.

Q. After you got there and rebuilt and put in this improved machinery, did the fumes go out the same as they did before?

A. No, sir, they did not.

Q. Mr. Albertson has said something about his be-
20 ing paid for some tomatoes and corn; was that since you have been connected with the company or before?

A. In eighteen hundred and —

Q. Just answer it quickly, Henry, can't you?

A. I will have to explain it, Judge. In 1897, we bought Mr. Thomas out.

Q. In 1897?

A. Yes, sir.

Q. When you say "we," you mean the company?

A. I mean the new company bought Mr. Thomas
30 out, and we turned over to him as a dividend about \$112,000 in old and doubtful accounts.

Q. That had accumulated during his time?

A. That had accumulated during his time, old accounts and doubtful accounts, and that Parry and Albertson account we saw trouble in and we turned that

over to him.

Q. There was an account on the books against Parry and Albertson?

A. Yes, Parry and Albertson had a claim against us for damages, and we threw that thing over to I. P. Thomas, and we had nothing more to do with it after turning that over to him.

Cross-Examination.

10

By Mr. Avis.

Q. What burned, Mr. Lippincott, when you had the fire?

A. The entire factory.

Q. When you say the factory, you mean acid plant and everything?

A. No, they are two separate propositions.

Q. Then the acid plant didn't burn?

A. That didn't burn.

Q. You say you put a condenser in; does that at all times condense all the fumes from the mixing plant?

A. In the months of December, January and the middle of February, we have not been running the water over that condenser; at all other times we condense all the fumes.

Q. All of them.

A. Yes.

Q. Supposing the water doesn't work, then what is the—

A. But the water does work.

30

Q. There never has been a time—

A. Never has been a time when we haven't had water.

DEFENDANT RESTS.

PLAINTIFF'S REBUTTAL.

HOWARD W. MILLER, recalled.

By Mr. Avis.

Q. Mr. Miller, you heard Mr. Leach say that he
10 did not remember yes or no whether or not he had said
to you that he did not know what this trouble was, it
wasn't blight, and he couldn't tell what it was or words
to that effect. Did he or did he not say that to you?

A. He did say it to me.

Q. And was that—did he also say that he had not
seen this same trouble in other orchards?

A. Yes, he said he had never seen this in other
orchards.

20 Cross-Examination.

By Mr. Joseph Gaskill.

Q. Howard, isn't this a question put to you at the
last trial and isn't this the answer you made with refer-
ence to that matter: "Q. Did you ask him this question,
if he had ever seen a condition like that relating to your
trees, and did he answer, 'I never did, it ain't tree blight
and I can't tell what it is,' or words to that effect." Is
30 that what he said?

A. Yes.

At this point a recess was taken until Wednesday
morning, February 17, 1915, at 9.30 o'clock A. M.

Woodbury, New Jersey, February 17, 1915.

Trial of the cause resumed at 9.30 a. m., pursuant to adjournment, in the presence of counsel for the respective parties.

CHARGE OF THE COURT.

CARROW, J.:

Gentlemen: The plaintiff owns a farm situate in the 10
the locality of Paulsboro in this County and adjacent to
the manufacturing works of the defendant company.
The defendant company owns and operates a plant for
the manufacture and production of chemical fertilizer,
a lawful business. Plaintiff's farm and the land upon
which the defendant's works are situate adjoin. De-
fendant's plant and a part of the plaintiff's orchard are,
I think, about the same age. This fact may be significant
or not, according as you shall view the evidence. It is
the law ordinarily that a person must use his property in 20
such a way as not to injure the property of his neighbor.
The plaintiff's contention is that during the growing sea-
sons of 1909 and 1911 the defendant permitted certain
deleterious and destructive fumes or gases which were
injurious to vegetation to flow from its plant to and upon
plaintiff's farm, causing damage to his growing apple,
pear and pepper crop, as well as damage to the apple and
pear trees. What I have just said relates to plaintiff's
contention; whether or not plaintiff's contention is sus-
tained by a preponderance of evidence is a jury question 30
calling for intelligent and impartial consideration as
well as sound judgment.

Plaintiff having made the charge that defendant
maintained a nuisance, causing him damage, he must
make out his case by a preponderance of evidence. It is

not a matter which you can guess at; you can't take money out of one man's pocket and give it to another, except by virtue of the law and the convincing force of the evidence as it has come from the mouths of the witnesses. If the evidence is equally balanced, plaintiff cannot succeed; he has not carried the burden of proof successfully unless he convinces you by a preponderance of evidence.

Now, there are two sides to his case; you can't decide in favor of the plaintiff without first considering
10 what the defendant's witnesses have said, because each side is entitled to a fair and impartial hearing. The defendant denies that it maintained a nuisance; it says that it is not liable because it did not operate its plant in such a way as to cause the plaintiff any damage; that no deleterious or destructive gases emanated from its plant whatever; that if there was a failure of crops on the plaintiff's farm as claimed, it was due either to natural and inherent causes existing in the trees and peppers themselves, or it was due to plaintiff's own neglect in not
20 properly caring for his trees and crops; at any rate, defendant says it did not cause plaintiff any damage.

Now, if plaintiff's crops and trees were not damaged by reason of the nuisance sought to be established in this case, you are bound to decide for the defendant, but if, on the other hand, you are convinced by the greater weight of the evidence after giving the case due consideration that plaintiff has been damaged in the way claimed by him—I mean, if you find the defendant maintained a nuisance, that is, allowed poisonous fumes
30 to flow from its plant which damaged plaintiff's crops and trees, he would be entitled to fair and reasonable compensation, nothing more and nothing less. He would not be entitled to exorbitant or speculative damages, only compensatory damages for the actual injuries shown by the evidence which defendant alone caused should be

allowed, if you find that the plaintiff is entitled to recover at all.

The plaintiff cannot recover damages for anything not caused by the defendant; in other words, the damages must be directly traceable to the alleged nuisance in question and not to any other cause. In deciding the foundation question of fact whether the defendant maintained a nuisance or not, you will be guided exclusively by the facts and such reasonable inferences as may be legitimately deduced therefrom; in other words, you must disregard everything except the law and evidence, because the value of a verdict is to be determined by its consistency with truth and justice. ¹⁰

The request of the defendant is denied. You may retire.

DEFENDANT'S EXCEPTIONS

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The defendant by its counsel prays an exception to the refusal of the Court to charge as requested by the defendant.

DEFENDANT'S REQUEST REFUSED.

The injury must be clear, direct and positive. It must be the legitimate and natural result of the nuisance charged, and in no essential degree the result of other artificial causes. If the injury is in part the result of other causes, the action must fail unless it be clearly established that the injury would not have resulted except for the vapors. So, too, the injury must be of a tangible ³⁰

character, it must be a sensible injury, discernible to an ordinary person and nowise dependent upon scientific tests or microscopic examination to discover. The injury must be such as is apparent to the eye and its ordinary condition, and must be actual, substantial, and not contingent, prospective or remote, and must be clearly traceable to the nuisance charged. If there is a reasonable doubt as to the cause of the injury, the benefit of the doubt will be given to the defendant, if his trade is a
10 lawful one, and the injury is not the necessary and natural consequence of the act, as, in all actions of this nature, the burden of proof is upon the plaintiff.