

New Jersey Court of Errors and Appeals

Between	} On Bill for Injunction.
ELLEN E. HARRIGAN, Complainant-Respondent,	
and	
SINCLAIR & VALENTINE COM- PANY,	
Defendant-Appellant.	

BRIEF FOR RESPONDENT.

The Borough of Edgewater is four miles long and at the premises in question is about 750 feet wide between the River Road and the foot of the cliff. The manufacturing plants are mainly situated at the southerly end of the Borough and practically all are upon the River Road, chiefly between that road and the river. Of the plants named in the brief of counsel for the appellant, it may be said that the Valvoline Oil Company is half a mile from the factory of the appellant; the Midland Linseed Products Company is more than a half a mile away; the American Corn Products Company is a mile distant; the General Chemical Company is a mile and a quarter away, while the Spencer Kellogg Company is a mile and a half south of the factory

of the appellant. West of the property fronting on the River Road are fine streets, well kept and shaded with trees, with suburban homes of good appearance, some of which are shown on the photographs now in possession of the sergeant-at-arms. Looking at these photographs will convince an observer of the residential character of the neighborhood in which the complainant has her home.

The amendment to the bill which counsel discussed at the outset of his argument will be referred to later in this brief.

Argument on the Facts.

The respondent admits Point I and denies Points II and III of appellant's brief.

The appellant does not completely burn all the fumes from the linseed oil boiled by it.

It should be observed that by the admissions of the appellant, respondent is entitled to have the decree affirmed.

The respondent filed her bill July 22, 1912, against the appellant company to restrain it from polluting the atmosphere with noxious odors. At this time, it appears from the testimony, the company was using coke to heat the combustion chamber. Oil fuel was not used until August 27, 1912, which is the date of the shipment of the first fuel

oil (p. 511). It appears by their own admissions through the case that while they were re-coking the fire, acrolein would escape for want of the high temperature to consume such gas. This re-coking was, of course, a matter of frequent occurrence. Oil was consequently substituted for the coke. The complainant is consequently entitled to an affirmation of the decree, as the nuisance is thus admittedly shown to exist at the time of filing the bill.

The appellant is a New York corporation engaged in the manufacture of printers' ink, and has its main place of business at 619 West 129th Street, in New York City (462). It did not boil oil in New York, but bought its varnish. It came over to New Jersey and began to boil its own oil. The place it selected for this purpose was a plot in the Borough of Edgewater on the west side of River Road, running back 190 feet to a high embankment. Against this embankment they later built a small brick building, the roof of which was about on a level with the top of the embankment. A small stack rose about fifteen feet above the embankment. The chief damage in this case has been done by the emission from this small chimney of these noxious vapors and their distribution in the atmosphere around the dwellings in the immediate neighborhood. The residence of the respondent is situated on Edgewater Place, 295 feet from this stack. She lives on the third story of the house, so that the top of this stack is below the windows of her apartments. The photographs show the general situation.

The appellant company had no experience whatever in boiling linseed oil when they began their work. So uninformed were they that they began to boil the oil in open kettles in the rear of their lot. Linseed oil in the process of boiling gives out a gas with a foul odor which is known as acrolein. It is irritating to the throat and eyes, and most offensive to the sense of smell. Upon several of the witnesses it produced vomiting. The effect upon the neighborhood was such that the company was indicted (457). The indictment was found June 19th, 1912, but this did not bring relief. The long story, to which reference in detail will be made hereafter, of the witnesses for the complainant was so complete, so exhaustive as to the injury done to them and their families in the deprivation of the ordinary comforts of life, that a perusal of it forces conviction.

The appellant seeks to answer this charge by its statement that it constructed a brick chamber in which at a high temperature these gases are consumed. The complainant says, I know nothing about your apparatus and appliances, I know only that I suffer. We shall discuss the testimony of the witnesses in the neighborhood.

The Testimony for the Respondent.

Mrs. Harrigan, the complainant below, has been subjected to attacks by counsel for the defendant company which are utterly unfair. Counsel cannot

restrain himself even in the cold type of his brief. And yet all this woman has done, has been to apply to the law to protect her in the common enjoyment of her home. She says that every brick in the building was earned by her own hands (852). She was there before the defendant company came from New York to boil oil near her windows, a thing that would not be tolerated for a minute by the health authorities of that city. Her story is supported by the occupants of the neighboring property. It is overwhelmingly shown to be true. But counsel seeks to heap upon her the mountain of his vituperation.

A synopsis of the testimony may properly be inserted here as an aid to the Court.

MRS. HARRIGAN states that the offensive odors began after the operation of the plant; that they came out of the chimney of defendant's plant (28, 35). She complained to the superintendent (29). The fumes affected her nostrils and throat; made her sick at her stomach; could not sit on her porch; kept her from sleeping at night; on hot nights had to keep her windows closed; her palate had been down several times; it gave her a dry throat and nostrils (35). She vomited three or four times a week when the real bad stench came (48). She appealed to the Board of Health (35). The fumes some mornings begin at 5.30 and continue as late as 1 o'clock at night. She gives in detail the days and hours (38). On rainy and foggy days the odor is worse (59), and if the wind blows from the south she gets it more than at any other time (59). She points out in the

photograph the chimney of the defendant from which these noxious vapors come (36). At the request of counsel she was asked to keep a record of days. When recalled she gives a long list of the days when this foul odor poisoned the air (357). On her rebuttal testimony, too (879), she gives another list of the days when she was affected by the fumes, beginning September 8th, 1914, to April 29th, 1915. This last testimony was given on the 4th of May, 1915, and embraces 89 days between the dates last aforesaid. These dates show that sometimes for a week or ten days the odors would not be noticed. Much depended upon the force and direction of the wind. The complainant was so seriously affected in health that she had to call in physicians to attend her (50).

JOHN MCGARRY, her brother, lives in the same house. He said that the odor made your throat dry and caused you to cough. He noticed the fumes two or three times a week and that they came out of the defendant's chimney (64-65).

MRS. HARRIET SMITH lives on the River Road in the nearest house south of the factory and marked 87 on the map. The smell nauseates, chokes her and affects her chest; bothers her two or three times a week (72). She noticed the smell for a year and a half and most every one of the boarders complained about it (74). She keeps the windows closed on account of the smell (72). She can see the chimney of defendant's plant from her house and the blue fumes coming out of it.

JOSEPH AFRITSCH lives on the west side of Edgewater Place. He saw the fumes coming out of the defendant's chimney, which were so bad

that he had to stop eating supper; the smell came from the small chimney; he went out to look; the smell was like burnt oil; he had noticed it a couple of times a week (80). He closed the sleeping window at times on account of the smell (81).

MRS. ALFRITSCH, the wife of the last witness, says that the bad smell gives her stomach trouble; that it makes her sick and she cannot eat. She says the smell comes from the Sinclair and Valentine Ink Factory. She points out the chimney. She says she first noticed it a year or a year and a half ago. She gets it four or five times a week (86).

JOSEPH CONNELL lives on the east side of Undercliff Avenue; he passes the factory of the defendant six days a week and twice a day; you could smell these offensive odors coming out of the chimney; his first experience in passing by the chimney was while smoking his pipe; he tasted his pipe, he says, down his throat; he cleaned it out and refilled it, and the same thing happened. He looked up at the chimney and knew then where it came from. He describes the smell as that of an old dead horse. He says the smells are from two to four times a week at least (93); that they are not as frequent as formerly and are not so long at one time (94).

JOSEPH SHUBAUER lives at Undercliff Avenue and Columbia Terrace; says that when he passes the chimney in the morning he has to hold his nose close, so that he can breathe (97). He passes the place at twelve and in the evening—four times a day. He says the smell is rotten (97). This occurs several times a week (98).

He points the chimney out in the photograph (97).

FERDINAND PFETZNER lives at Undercliff Avenue; he says the smell is such that it chokes you when you pass. On one occasion he walked down to the factory where the chimney was, and looked into the yard. The smell was suffocating; he gets this smell every time the wind comes his way (102).

WILLIAM POPP lives at Edgewater Place, and his house is nearer the defendant's factory than that of the complainant. He has to keep his windows on the south side of his house closed, in consequence. This occurred two or three times a week since the February proceeding, but on the 26th of May, 1913, it was something horrible (107). This testimony was given a few days after this last date. At this time no man could stand it. It came that day from the small stack. He identified the stack in the photograph (106).

FRANCIS HARRIGAN, a son of the complainant, noticed it three or four times a week, since the chimney was built. It catches your throat and makes you gag and hawk, and makes you sick at your stomach (112). His throat was dry and there was a burning sensation in his nose (113).

EDWARD G. KAUFER has a grain elevator at Edgewater about 100 feet north of the factory. He says the smell came from "the little ink factory south of me." He thought it was some one burning axle grease. It was very dry and very suffocating and made you feel miserable (116). This witness lives at Fort Lee.

ELIZABETH REVERE lives on the west side of the lane between River Road and Edgewater Place. She noticed the smell on an average of six days a week. It would last half an hour or twenty-five minutes on the average. She has noticed it every other morning at 1 o'clock for the last year and a half (119). The more you smell it the worse it is and the more you hate it (120). It makes her sick in the throat and head. She indicates defendant's chimney as the place where the fumes comes from (118).

MARY BURNS lives at 63 Edgewater Place; she identifies the chimney (124) from which the smoke and fumes come. She said she used to smell it about four times a week; that last October it was something awful and on Tuesday and Wednesday preceding her testimony it was something terrible and past describing (125). The smell was like old varnish or old rotten fish. At 7.30 in the morning they had to close their windows. At night she has to get up at 11.30 and close the windows (125).

MAY BURNS is a school teacher and a daughter of the preceding witness, and resides with her mother. She identifies the chimney from which the fumes come. She says her throat was parched, that it caused nausea, noticed it at breakfast in the morning, in the evening and at night when she would have to shut the windows because the odors were so intense (129). She said that the membrane of her nostrils was shrivelled up, and, upon cross-examining her, she said it is no better. "We call it the 'stink-pot'" (130).

JOSEPH REVESE lives at 386 Undercliff Avenue, says the smell makes him feel like vomiting. It

gave him a weak stomach; last summer he smelled it pretty nearly all the time, but last week he only smelled it once (134). He says the smell comes from the ink factory (133).

ELLEN SCANALAN lives on the north side of Bergen Place; she noticed the smell three times a week; the odor from the chimney smells awful (137). It dries up your throat; two nights the preceding week her little girl's throat was raw. It affected the child so that she could not eat (138). She identifies the photographs Nos. 10 and 17 and points out the chimney of defendant's plant where the fumes come out.

SUSAN VAN GELDER lives at Garden Place, and identifies the chimney from which the offensive odor comes. It smarts her throat and nostrils and causes a little coughing and is very unpleasant. On the north side she closes her windows as much as she possibly can, to avoid the smell (143). There has been no change for the better.

AGNES GOTTHOLD lives also in Garden Place, and identifies the chimney from which these noxious fumes come. She says the bad smell affects her nose and throat; she noticed it four or five times a week; she cannot keep her windows open at times. It affects her nose and throat, and makes her sick to her stomach (147). Three weeks ago she vomited from the smell (150).

JOSEPH F. KEHOE, policeman, lives at 7 Hilliard Avenue, says he noticed the fumes as if they were burning fish oil come out of the chimney. It smells like rotten fish, and during the last

year and a half preceding his testimony he smelt it over fifty times easily. It made him hawk and spit and cough all the time.

MAY CONKLIN lives on the east side of Edgewater Place. She noticed a sort of blue fume from this small chimney and the unpleasant odor coming therefrom which affects your throat and nostrils (155).

WILLIAM D. DOBBS painted a house for Mr. Popp, in June, 1913, which was the month in which his testimony was taken. He noticed the chimney from which this offensive smell came. He had to leave the side of the house on which he was painting on account of the smell (161).

LEON GLASSON worked with Dobbs on the Popp house; he noticed the smell on several days while working. It is a kind of gas and tarry sort of a burnt varnish odor. He choked a little at the odor (166).

GEORGE T. HOLM lives north of the ferry at Edgewater and formerly lived at Undercliff Avenue (172). He identifies the chimney from which he smelled the odor which to him was like burning oil. The odor was very disagreeable and he did not care to smell it. He moved to get away from it (171, 172).

HELEN BURNS lives at 63 Edgewater Place; she identified the chimney and described the fumes therefrom. She said that it parched your throat and caused you to cough; she coughed for fifteen or twenty minutes at a time; it causes nausea; this occurs about three times a week; in the morning she has to close the windows (176).

MIRIAM BROCK lives on Edgewater Place, next to the house of the last witness. She identifies the chimney in photograph No. 10. She says it gives a terrible odor; it makes her sick at her stomach and she gets a headache and it scratches her throat; she cannot stay in the house; her little girl, five years old, gets sick and vomits. She has noticed the smell two or three times a week. She says the smell is so terrible that even if she shuts down her window it is just like a cloud in the room; she cannot get the odor out (182, 183).

MRS. JAMES MURPHY lives at Garden Place; she identifies the chimney from which the bad smell comes by photograph No. 10. It turns her stomach and the effect is to make her dizzy. She notices it about twice a week (189).

CATHARINE POPP lives at Edgewater Place, identifies the small chimney in photograph No. 11; a very nasty odor comes out of this chimney two or three times a week; a gassy, acid, sickly smell affecting her nose and throat and sometimes her stomach (199). The month she testified she marked the calendar, which she produced; she gives the dates in detail: June 11, 12, 13, 16, 17, 18, 19, 20, 24, 25, 26, 27. She noticed the chimney each time and saw the blue fumes.

MAY MOONEY lives at Undercliff Avenue; she identifies the chimney where the fumes are emitted in photograph No. 10. It is a very sickly and nauseating odor, which makes her sick (209, 210).

CATHARINE GRAY lives at 373 Undercliff Avenue; noticed very bad smell from the small chimney. She has never smelt anything like it. She smelled it two and three times a week sometimes, and other times there have been months when she did not smell it. It is like very rotten fish getting burned up (218, 219).

ORVILLE V. SWIFT lives on the east side of Undercliff Avenue; he describes the smell from the ink factory as a sort of an acid, oily burning oil odor; that it did not affect him except that it was nauseating. During last summer he was forced to leave his porch and go into his house (225).

CHARLES VAN GELDER lives at Garden Place, noticed numerous times a vapor coming from the small chimney, that was very offensive (231).

FREDERICK L. ACKERSON is a civil engineer and gives the distance from the west side of the River Road to the beginning of the steep rock as 750 feet and the top of the Palisades 250 feet from the River Road (237, 238).

JULIA KEHOE identifies the chimney, says she noticed the smoke coming out of the small chimney, giving a disagreeable odor; she said it was a terrible smell; that if she got it around meal-time that she could not eat, and if at bed-time she had to shut the windows. She noticed it two or three times a week (243).

JAMES DINAN, a policeman, lives at Undercliff Avenue, identifies the small stack in photograph No. 11. The odor is something like burning fish; it makes you cough and gives you a dry taste in the throat; he noticed it two or three

times a week. He is occasionally by the factory on post duty (254); on cross-examination he said there is no doubt where it came from (256).

JOHN J. GOULD, also a policeman, lives at Valley Place, at Undercliff Avenue; he formerly lived at 379 Undercliff Avenue; he noticed a very bad smell from the ink factory, which he identifies by the photograph. It was so bad that it made his baby sick in November. This officer gets his turn on post duty in this vicinity every six weeks (260). He could not tell from which chimney the odor came, but it was from the property of Sinclair and Valentine. He said that the smell affected him so that his stomach got out of order and he vomited. He first noticed the odor about June, July, August and September of the preceding year. This witness is the person who thought the smell came from the large stack, but was specific in his statement that it came from the property of Sinclair and Valentine.

SADIE CUNNINGHAM lives two and one-half city blocks from the factory. She identifies the small chimney on the photograph from which the smoke came, which has a bad odor. It gets down her throat and gives her a very tight feeling and makes her kind of sick. It comes from this small chimney and smells like burning oil. It put her in mind of the smell of iodine. She had it three or four times a week. It was about fifteen or twenty minutes at a time. She noticed it two weeks before her testimony, and particularly on the Wednesday, Thursday and Friday preceding (267, 268).

CATHARINE DINAN is the wife of Police Officer Dinan and identifies the small chimney on Photograph No. 11. She noticed the odor three times a week; it made her cough and her throat very dry. The smell was so bad that she could not describe it (273, 274).

ANNIE PFITZLER lives at 331 Undercliff Avenue. She identifies the chimney on Photograph No. 11. Has observed the smoke coming out of this chimney and noticed the offensive odor was like bad oil burning. She noticed this two or three times a week since the factory was there (279, 280).

MARGARET RYAN lives at 366 Undercliff Avenue; she identifies the stack from which the smoke comes out with an awful odor from it which smells like burnt paint and oil, fishy; it affects her throat. She gives certain dates, June 11, from 8.30 in the morning until 12 o'clock at night; June 16, 19, 20, 24.

GEORGE HARLEN lives on Undercliff Avenue; he identifies the chimney on the photograph; noticed fumes coming from the chimney, which were yellow and looked like acid fumes. The odor smelled pretty strong—like hardening oil. He got away from it as soon as he could. Noticed the smell from the time the factory started (297) and at different times of the day (298). The odor was offensive. This witness was asked by counsel on cross-examination whether the atmosphere at Edgewater was as pure as the atmosphere on Fifth Avenue, which question he said he did not understand. The question was read to him. The witness answered: "That is a wide comparison to make."

"Q. Answer it as best you can. A. Well, comparatively speaking, I should say Edgewater was just as clean as Fifth Avenue" (303).

Counsel has referred to this answer, but when the context is read with it it is seen to be substantially accurate.

GEORGE W. ALLISON resides at 26 Hilliard Avenue and is a member of the Board of Health. He identified the small chimney and describes the gas and fumes coming therefrom, which made him feel in his home 600 feet away as if he wanted to vomit (310). November 22, 1913, he visited the ink factory, which date was marked in his diary, and stood on the wall right by where they were boiling (311) and noticed some men with handkerchiefs over their mouths. It made him feel like vomiting and his eyes smarted. Tuesday, January 6, 1914, between 9 and 10 P. M., he noticed very bad odors. January 19th, between 9 and 10, very bad smell. February 12th, about 11 or 12 o'clock, the smell was bad. Upon some of these visits he went down to the place. February 25th, March 9th, 14th, 27th, April 1st, 10th (314, 315). A letter from the Board of Health January 12, 1914, was sent to the defendant company in reference to the odors. Their answer was that they would not appear as the matter was pending in court (Exhibits, 924, 925).

EDITH JULIA PETERSON lives at 63 Edgewater Place in the house formerly occupied by Mrs. Burns; she identifies the small chimney on the photograph and said: "This is the chimney where the smell comes from. It is like rotten fish."

It made her feel like vomiting. She moved in the 31st of July, and on August 1st she could not imagine where the smell came from, so she walked down to the chimney (329). She gives a list of dates—January 8, 9, 12, 15, 16, 19, 23, 30; February 2, 4, 12, 18, 19, 23, 25; March 2, 14, 18, 25; April 1, on which day she vomited, 3, 7, 8, 9, 10, 11, 14, 18, 19, which was the day before she testified, when she got the offensive smell all day (331-332).

KATE CAMPBELL lives at 10 Hilliard Avenue; she identifies the small chimney on Photograph No. 11; she noticed the smoke come out brown, then blue, then an acid color; the odor takes her breath away and makes her cough and affects her eyes. She also produced some dates and said: "When I was down here before on the trial I saw it was necessary to have dates; so I marked it down as I felt it" (340). June 11, 30; July 9, 23, 28; August 1, 9, 12, 15; September 4, 8, 26, 29; October 13, 23, 29; November 3, 10, 20, which was a terrible day, all day long; 25th; December 12, 15, 19, 26; January 7, 1914, 8, 15, which was a terrible morning; 16, 21, 30; February 17, 25; March 23, 25, 27; April 1, 3, 10, 20. Cannot open her windows. She said: "Even yesterday it was something terrible" (340, 341).

JACOB BROCK lives at Edgewater Place; he identifies the chimney in Photograph No. 11; speaks of the various colored smoke; has been as near as ten feet to the chimney; felt a headache sickness from it. On January 16th he was standing at his store and smelled the odor when he walked down to the factory and watched two men boiling something in pots;

spoke to the men at work; the two pots were under a shed. He asked the men "if they were trying to stink us out." He gives further dates, January 29, February 17, March 9, 25, a terrible day; April 1, 3, made him sick in the head and dizzy; April 11, 14, 20 (346, 347, 348).

DR. SAMUEL T. HUBBARD treated the complainant for vomiting July 29th and 30th, 1912, and also July 9th and September 13th, 1913. In his opinion the cause was the odor from the ink factory. This physician noticed the odor himself which caused a slight nausea and while sitting in Mrs. Harrigan's house his head began to ache and his eyes to smart. He prescribed a change of residence (367, 368).

DR. CHARLES FREDERICK BUCKLEY prescribed for complainant "yesterday" for a very severe headache; her face was extremely flushed and her voice dry. He visited her a number of times (380). He noticed the waves of heat March 25, 1914, and smelled the distinct odor of burning oil. It was a very irritating odor (381).

This great mass of testimony is overwhelming as to the escape of these noxious fumes. It is gathered from the whole neighborhood and tells vividly of the great discomfort these families in their homes have been obliged to endure. The ordinary comforts of life have been taken away from them by this defendant company in the pursuit of gain.

The case is reduced to a very narrow compass. The appellant admits it boils linseed oil. It admits acrolein escapes from this oil and if inhaled will produce the effects stated. It admits that this peculiar penetrating and offensive odor, if once smelled, can readily be detected again. The appellant's testimony itself shows that no other concern in the whole Borough of Edgewater boils oil to the temperature required to release this deleterious gas. The answer it seeks to make is that all this is true, but that it burns this gas and consequently the atmosphere is innocuous. The complainant replies that the evidence aforesaid shows that the gas is not consumed. Both these stories cannot be true. The complainant says that if confirmation were needed, which it is not, it can be found in the evidence about the combustion chamber.

The Combustion Chamber and the Testimony of the Experts.

The complainant's counsel did not have an opportunity to examine either Mr. Sinclair or Mr. Valentine. The only officer of the company who offered himself as a witness was Augustus Eldrige, who is assistant secretary and treasurer. He admitted that the company never manufactured its varnish or printing ink in New York City (462). He said that the company bought their varnish (473) and it was not necessary to heat the varnish in order to mix the pigments; that the company bought its varnish from different patrons, and he

gave the New Jersey source as that of Sherwin-Williams Company which has a place on the Meadows.

“Q. Then the burning of the oil had nothing to do with your coming? A. I could not say.

Q. Is it not true that you went to Edgewater because it was a good place to boil your oil? A. I don't know” (474).

Here it may be proper to say that this witness said that the smokestack at their New York plant where no oil was boiled was 150 feet high (473). If the stack at Edgewater had been constructed to this height in all probability this case would never have been brought. As to the condition which existed before the combustion chamber was constructed, this witness says in answer to a question to describe what was done in the way of boiling linseed oil on the plant: “We put up a little shed in the middle of the lots and had two open kettles there in which we started to boil linseed oil until such time as we found we were making a nuisance of ourselves there by the odors,” etc. (466). Before the combustion chamber was constructed, he admits, on page 471: “Different people told me that the odor was terrible down there.”

John S. Klein, the chemist of the company, said that he made experiments and found that the burning of fumes was the best method of disposing of them. He was asked why the company built the interior of the heated chamber just as was done—so many square feet. The counsel for the com-

pany objected to this on the ground that the witness did not build or design it. The two persons responsible for this particular chamber were Charles M. Hilliker, who was an engineer at the company's works, and the superintendent, Seymour Barrett.

Charles M. Hilliker was the designer of the chamber (481). He stated that the present chamber was an improvement over the first one. The second chamber was made a little higher and had a different piping system. They began with coke for fuel, but found there were times when the fire was re-cooked that for some time—five or ten minutes—or until the newly applied coke became thoroughly heated, or in an incandescent condition, a small tracing of fumes passed through the bed of fire (484, 490). He says, upon cross-examination, that he never constructed any chamber of this kind to consume gases before (486, 489). Therefore, the capacity of the chamber was not made to conform to any known rule for the consumption of gases. It was a rough and ready experiment. The experiment in New York was as to the best method of consuming such gases by water, fire, and so forth, but no model of this chamber was made based on any known rule. No man connected with the company or otherwise appears to give any satisfactory reason for the capacity of this chamber in reference to the test to which it was put.

An examination of the diagram will show, for example, that part of the fumes pass up through the grate at the point furthest from the flame and

immediately escape into the smokestack without being exposed for any appreciable length of time to the heat, while gases at the farther side of the chamber have a longer time after their arrival in the combustion chamber before they pass into the chimney to come in contact with the heated walls. There was a simple method of ascertaining whether these gases were consumed, and that was by the use of what is called a C O-2 Machine. This machine registers automatically the degree of the consumption of the gases. The tape which it automatically marks would be conclusive proof of the combustion of the gases. No such machine was used (492).

Seymour Barrett was the superintendent of the defendant company. He describes the apparatus and the construction of the combustion chamber. It will be noted that the burner projects to a needle point; that the oil is atomized in order to make the flame. Any imperfection, therefore, in the burner, in the fire, in the failure to atomize, of the compressed air, would make imperfect the consumption of the gases, independently of the point aforesaid of the incapacity of the chamber. He admits during the time the coke fire was used that when such fire was brisk, "There was nothing got out of there at all, but if the fire was re-coked or dead then there would be a little coming out of this opening here into the main stack" (509). Fuel oil was used on August 27th, 1912, for the first time, more than a month after the filing of the bill in this case.

He described the operation. He admitted that he did not know what degree of heat was required

in the consuming chamber to consume a certain quantity of gas, yet he is the man who constructed the chamber in the haphazard way as to its dimensions and power of destroying gas. He is asked concerning the flame inside of the combustion chamber. The questions and answers on this point were as follows (542, 543) :

“Q. How near are the pipes together? A. I don't know.

Q. Now, then, in your judgment, the air was used for this flame only, is that right? A. I don't know; I am only a practical man.

Q. Did you know that more air was needed than merely to have the flame burned? A. I know there must be a sufficient quantity of air to blow through that to atomize those interparticles so it will burn; that is all I know.

Q. You do not know, then, that any more air was needed than that, just to give the proper degree of heat? A. Twenty-five pound pressure, I know it requires that.

Q. You say twenty-five pound pressure? A. Yes, sir.

Q. What significance has that if there is only a needle hole in the pipe? A. Well, you are coming to a detail that I could not answer.

Mr. McCarter: This witness does not pretend to know anything more about the maximum of that burner than I do.

The Witness: All I can answer is that it takes twenty-five pounds pressure to keep that chamber in the condition that I wanted it for burning these fumes.

Q. By that you mean the force at which this air goes through these small holes? A. I could not answer that question.”

He had heard the word "oxygen" used and supposed it meant air.

He states that the fire under the kettles is lit at 6 o'clock in the mornings except on Monday, and on that day at 7.30. A reference to the defendant's factory record printed at the end of the case will show how irregular are the times at which the fire was started.

He said he had not the slightest record of the degree of heat in the consuming chamber. To the best of his knowledge and belief he said the temperature in the chamber was 1,500 degrees (551).

It has been pointed out that the plaintiff is not of necessity bound to make an investigation of the defendant's premises nor to engage experts to investigate their machinery and appliances. It was felt, however, that if defendant offered such evidence the complainant should have an opportunity to present testimony on her part. Accordingly, application was made by the complainant to the Court after the hearing on the first day, June 10th, 1913, for such investigation. The complainant engaged two of the best experts which she could obtain, Dr. ~~Oster~~^{Olson} and Dr. McKenna.

^{Olson}
Dr. ~~Oster~~ is professor of analytical chemistry at the Polytechnic Institute, Brooklyn, the author of a text book on Quantitative Chemical Analyses, the editor of *Der Van Ostrand's Chemical Annual*, and also editor of the *Transactions of the American Institute of Chemical Engineers*. With such qualifications he was as competent an expert as he could

engage. On the day appointed for his visit, June 11th, 1913, he found on his arrival at 10.40 that the fires had already been started; that the temperature recorded at the time he reached the works was 400 degrees under one kettle and 370 degrees under the other kettle. This is a very significant fact. Here there was a difference of 30 degrees between the two temperatures. If the lower temperature had been taken at the time of lighting the fire in the chamber, then the kettle with the higher temperature would have been 30 degrees—or whatever the difference then was—casting off acrolein before the other. It has been observed very largely that the prevailing time of the escape of noxious fumes was in the morning and at night. There was evidence at various times in the day of the escape of this gas, but the general escape of these noxious vapors was as stated. If it be argued that the chamber would consume when it was heated to its highest point all the noxious gases, yet apparently the irregularity of starting and shutting off the fuel oil burner is the cause of much of this nuisance. His record shows that at 11 o'clock the temperatures of the two kettles were 460 degrees and 415 degrees, respectively. At 11.10 the temperatures were 490 degrees and 440 degrees, respectively, and at that time, "there developed a rather strong odor in the yard, and a few minutes later this odor became quite irritating so that it affected the throat and it apparently affected Dr. McKenna, as he sneezed and complained of irritation in the nose and in the throat" (391, 392).

The doctor noticed the dry feeling in the throat at 11.40; it was more noticeable away from the kettles than by the kettles, and he noticed when there was a gust of wind that the fumes would be blown down into the yard.

This witness was perfectly fair in his statement and showed no desire in any degree to overstate his evidence.

The complainant produced another expert, Dr. McKenna, whose standing as an expert must be known to many members of the Court. After a number of years' practice as a chemist in various branches of technology, he became a consulting chemist, which he has practiced for twenty years. He was an officer for many years of the American Chemical Society and chairman of the New York section of that society (413). He had made tests and analyses of linseed oil as a material for varnish-making.

This witness visited the plant at Edgewater on June 11th, 1913, and he gives us the result of his observation. He states that the fire was started under two kettles at 8.54. At 9.56 the first odor suggestive of hot linseed oil was observed by him. In walking about there was an odor which, at that stage, was offensive.

We have here, therefore, the important fact that in one hour and two minutes from the time the fire was lighted, the offensive odors were apparent, yet the gas jet was not lighted until 10.12.

At 10 o'clock the thermometer registered 265 degrees. This is a complete answer to the statement of the defendant. In actual practice it is found that in one hour and two minutes, at a temperature of less than 265 degrees, offensive odors escaped into the atmosphere. The defendant says they turn on the burners when the thermometer reaches 250 degrees. A variation, therefore, as pointed out *supra*, of some degrees in the two kettles would, if the operator started the flame at 250 degrees exactly under one kettle, be the cause of disseminating through the air the acrolein which had been escaping for some time from the kettle with the higher degree of temperature; but it is quite evident that if offensive odors are given off at 265 degrees, there is no margin of safety in the method of operation. It is said the flame is started at 250 degrees. This is near the danger line, according to this evidence. An inattentive workman could cause these offensive gases to escape to the great annoyance of the people immediately near to the stack. If noxious gases are emitted in one hour and two minutes, then the defense collapses by its own admission, because in the schedule of figures offered by it, the starting of the fires and the starting of the fuel oil burner varies from thirty-five minutes to three hours and a half. We annex to this brief a schedule of these variations taken from the "record" offered by the defendant. No temperature is given in this schedule of the defendant company when the fuel oil was ignited. The time only is given. This is very significant. It is just these periods of fifteen minutes and half

an hour each day that make this long record of offenses. Sometimes, of course, from other causes the period of time which these gases escape is longer, but it is this almost daily feature to observe the proper safeguard which causes much of this trouble to arise.

At 10.35, Dr. McKenna continues, the temperature was 385 degrees; at 10.45, he went up to the top of the chimney, detecting odors, and had a suggestion of headache. At 11.05 his eyes were smarting; at 11.07 he detected a fish-smell odor; 11.15 felt smarting of the eyes quite decidedly, and he sneezed. At this time it should be remembered he was down on the level of the yard of the work.

The temperatures of the test given by him is the average of the two kettles. Dr. Olsen gave the separate temperatures.

Dr. McKenna was of opinion that it would take only one hour to heat the kettles to 325 degrees (428).

He condemned the construction of the chamber and said: "I think there has been a misapprehension of the condition, and that the design and construction are not adequate for the purpose intended, namely, of complete combustion and disposition of the innocuous fumes—of the acrolein fumes" (430).

"Q. You may state why. A. For such proper disposition a very large area of contact should be provided, and an amount of the oxygen of the air so well disposed in

quantity that the temperature would not be lowered by an excess, and yet the combustion proceed by reason of high temperature, actually mixing in contact of the oxygen and the acrolein.

Q. Now, then, suppose there were four kettles going instead of two at a time, with this flame lighted as it was, what effect, if any, would that have upon the destruction of the acrolein? A. I think it would have been out of proportion defective; its ineffectiveness is more than half as great.

Q. In other words, you think, in describing the two kettles, the operation of two kettles—you think the oil flame and the surface exposed was not sufficient to make a complete destruction of the fumes? A. Yes, sir.

Q. And you think this would be twice as great? A. The effect would be more than twice as great" (431).

It was stated for the defendant that as a regular thing they used two kettles only in which to boil oil but from time to time four kettles were used. This, of course, made it more unlikely that the combustion chamber could consume this double quantity of gas.

Dr. McKenna says that the design is so crude that the temperature continues to rise for some time after the drawing of the fires (432).

He points out, on page 447, the apparatus he would construct to consume these noxious fumes.

He explained on cross-examination why the apparatus was inadequate for two kettles (452). He

denies giving any instruction about lighting the gas. Obviously he would give no such instructions if he was there to observe what they were doing (455).

He said he did not know a single place in this country that has a small stack like that of the defendant (456).

Instead of the company which is creating these nauseating odors discharging them by means of a large stack into the upper atmosphere so as to become aerated and innocuous they are discharged in great volumes on a line below the complainant's windows.

Dr. Allen Rogers was one of the two experts offered for the defense.

This is the expert who said that acrolein "has that odor similar to when you fry a nice juicy steak and it is burned on the stove and gives you a nice appetite" (576). This statement stamps the value of his testimony.

All this alleged expert knows about this subject is that he took students on trips or excursions to different places without giving any professional study to the method of disposing of the acrolein. This is seen on pages 587, 591.

He says that if acrolein vapor escapes from the stack in such quantities as to cause the neighborhood very largely to be seriously affected by it, that it is due to an inadequate chamber or to defective workmanship.

A decided admission concerning the odors which escaped on Saturdays was had from this very witness for the defendant. Throughout the case it appeared that on some Saturdays acrolein escaped. The answer of the defendant to this charge, through the witness Barrett, was that on Saturday they did not operate, but that they did light the flame in the combustion chamber for the purpose of cleaning it out (556). He said that they took the pipes down and scraped the soot out, which would be an eighth or a sixteenth of an inch thick; they cleaned also the inside of the combustion chamber and also cleaned the hoods (555). They put a kerosene blaze underneath to burn out any accumulation in that chamber (556). This was Barrett's statement. It was apparent that the offensive odors were released from the apparatus, pipes and chimney upon heating up anew on Saturdays these parts of the plant. This view is confirmed by their own expert, on page 612, as follows:

"Q. I assume your view is, from this starting the chamber on fire on Saturday to clean it out, would not give out any odors in such a cleaning? A. No, sir.

Q. But you have no experience on that? A. When any organic substance burns there is no odor from it.

Q. But if it does not all burn, you would find it there? A. Yes, sir.

Q. And if it was not wholly consumed during the week, and a fire was started and heated up on Saturday, it would give out that noxious vapor if they existed? A. Yes, sir."

See also the admission of the expert Thompson on this point. He says that acrolein "is a liquid at ordinary temperature, but changes very very rapidly into a solid substance" (690).

Another expert produced by the defendant was Gustave W. Thompson, a type of witness which serves to shake confidence in this class of testimony. He did not know any plants in Manhattan or the Bronx (701), but did know some in Brooklyn and Long Island. He said it was no part of his professional duty to do with the destruction of noxious vapors arising from boiling oil (704). He gave a list of the places he visited, but such visits were not made in reference to boiling oil. He could not tell how regular was the boiling of J. W. Masurey & Son, nor the diameter of their stack. He visited, incidentally, Mollen and Schuman's place five years ago (721). Pratt & Lambert's place he visited six or eight years preceding. They boiled thirty gallons to a kettle. He visited Roberts & Company eight years before; the Keystone Varnish Company about ten years before. This is his whole list. He gives no information of the surrounding property or of anything in this respect of value. It is most significant that the defendant did not call a single operator of any oil factory to give information to the Court upon this important branch of its case. He says that if acrolein escapes it would be through the opening of the doors covering the kettles (718).

But, perhaps, the value of this expert's testimony can be drawn from his efforts to avoid an answer

to the simple question whether a high stack was not better for the dissemination of these odors than a small stack. If the Court will turn to pages 708 and 709, the effort of the witness to evade an answer will be seen. Finally, after a long effort, counsel put the question again at the very close of his recross-examination (725), and got the admission at last:

“Q. Is a small stack as good as a high stack, if the gases were not all consumed, yes or no? A. No, sir, of course not.”

Testimony for the Defendant Company.

If the testimony offered for the defendant below be examined, it will be found to support in many instances the charge of the complainant. The extracts given below show this. This list includes nearly all the witnesses, but does not include those to whose testimony reference has been previously made.

CHARLES BRANDT, the night watchman, said that he turned the flame off at night before Mr. Klein was there, but now he calls Mr. Klein out of his sleep to do it. We are asked to believe that the night watchman wakes up Klein to turn the valves when he could do it just as well (560). The irregularity of doing this will account for much of the night odors.

FREDERICK KLEIN said that the temperature will drop in an hour from 20 to 25 degrees. A glance at the record on page 927, etc., will show how this statement varies from the rec-

ord. It shows how inconclusive these statements of defendant's witnesses are. He admits that there was nothing that he did in shutting off the flame that the night watchman could not do as well.

JOHN CLAHAN, JR., was Mayor of the Borough and lives a half mile south of the defendant's factory. It is only necessary to read the testimony of this witness (620) to see how prejudiced he is in the statements that he gives. When pressed closely, his admissions are very favorable to the complainant. The General Chemical Company, he admits, is a mile and a quarter away. The Corn Products or Glucose Company is a mile away. The Kellogg people do not boil linseed oil.

EDWARD FITZGERALD lives about a mile and an eighth north of the premises in question. When he was asked if he was familiar with the plant of Sinclair and Valentine, his answer was: "I will not say that. I have seen a part of it." This witness passed the factory on the River Road. It will be noticed that where the oil is boiled is 190 feet from the River Road, and this road is protected from these smells by the fact that the fumes cannot easily reach the street for the reason that the high building, the five-story brick building of the defendant company, occupies a great part of that space.

JOHN E. MULLIGAN has a sense of smell so exquisitely keen that he recognized the odor of which he speaks as the combined odors of the factories, the General Chemical Company, the Midland Linseed Oil Company (637), and he was about to continue further when counsel quickly put another question. He did not

think that up on the embankment was a better place than in the yard to notice the odor, but, he adds, "we often get it worse in the yard than at other points" (648).

JOSEPH A. SKELLEY said the smells were so bad at one time that people could not open their windows on the south side of the house.

EDWARD D. WALSH testified that he had not noticed the smell for at least a year (661). His testimony was taken April 24th, 1914 (596). This would go back only to April, 1913, whereas the bill was filed in July, 1912. His testimony is an admission that ten months after the filing of the bill he noticed the offensive odors.

OLIVER E. SMITH admits saying to Mrs. Harrigan that she ought to send an affidavit to his wife, who was then visiting in Ohio and who had theretofore stated that the odor was disagreeable (666).

WILLIAM F. INGOLD is chief of the Fire Department. He went down to the premises once about a fire and was not looking for anything about smells (668).

JOHN A. KERR testified that he never smelled anything in the evening, but formerly did so in the morning. He was away all day attending to his work (669).

SARAH JACKSON said she had noticed a change in the smell coming apparently from the Sinclair & Valentine factory, and that it is very much better; that it was a pretty bad smell which you could distinguish and recognize. In answer to a question put by the Vice-Chancellor

as to what it was like, she answered that she could not describe it. He further asked her: "Had you ever smelled it anywhere else?" Her answer was: "No, sir." Counsel for the complainant asked if it was indescribable. The witness repeated that she could not answer. She could not tell whether the smell was twice a week (676). She said it was always unpleasant when she smelled it. She admitted that she smelled it occasionally. She said that she smelled it now occasionally for a moment, and then it would be gone (678).

JENNIE SOUTHARD admitted that she smelled the odors one day when Mrs. Ryan called her attention to it. Her cross-examination will show the apparent reluctance with which she answered questions on the subject, showing an unfair condition of mind (686).

THOMAS W. BRADLEY lives about a mile and a quarter from the property (737). One morning he got "a terrific odor" when they had the kettles on the outside burning the linseed oil.

MRS. WINIFRED PEEVERS had not detected any odors from the sugar factory and the factories further south (752). She admitted that the odor from the Sinclair & Valentine factory, when she smelled it, was distinct from any other odor. She and her husband, Thomas Peevers, rarely got down near the factory (752, 754).

JOHN PAUL BOLTON lives at Hilliard Avenue. He said he did not smell the odors since "somewhere around the end of 1912" (759). He then smelled it "twice a week or three times or four times." This contradicts the statement of de-

fendant that there has been no offensive fumes since August 27, 1912. States that he heard complaints every once in a while (761).

JOHN M. LOWE is superintendent of the Midland Linseed Products Company, which is on the River Road, about three-quarters of a mile below the ferry and about half a mile south of the Sinclair & Valentine factory (777). He says that that company does boil to some extent, that is, they heat it up, but not to any high degree of temperature.

“Q. Not enough to give the fumes out?

A. No, sir.

Q. No offensive odors? A. No, sir” (781).

This confirms what has already been stated, that there is no oil boiled in the Borough, except what is done by the defendant company.

EMIL KESTENHOLZ keeps a restaurant on the River Road south of the Sinclair & Valentine property (782). He seems to be very friendly with Barrett, the superintendent, who called him in several times to look at the place (786). He thinks the smallest chimney in question is only twelve feet above the building.

ROYAL L. SIDMAN lives about 1,000 feet north of the factory (790). At this distance, of course, across the whole business center of Edgewater, it would be difficult to notice the odors in question. During his visits to the plant he had made no examination in relation to the boiling of oil (793).

FRANCIS C. TEMPLETON is superintendent of the Valvoline Oil Company (801). He was not familiar with the plant of the defendant com-

pany; was at the plant about twenty minutes one morning but paid no special attention to the boiling; he was very seldom near the factory. His house is possibly 2,000 feet away or more (802).

GEORGE A. CARLETON (806) said that the smell from the Sinclair & Valentine factory is much different from other odors; the odor from the dye works is that of sulphur. He had noticed originally the peculiar odor arising from the boiling of oil on his own veranda which was about 800 feet to 1,000 feet south; he noticed that every night for a week or so (807). This was the same odor that he had known when he was on Edgewater Place, only it was more distinct. He got away as soon as he could. He never had any smells from the Valvoline Works, the Midland Linseed Oil Works or from the Sugar Factory.

The witness LOUIS GRAESE (827) lived at the corner of River Road and Hilliard Avenue, about 700 or 800 feet away. He is another witness whose only experience was obtained in walking along the River Road.

HARRY R. GAUL said that he had not been around the plant during the daytime in two years (831); that when he visited the pots they were boiling at that time and he got the smell, and that was the only time he could actually distinguish the odor.

"Q. That odor is in some degree still in the neighborhood? A. The same odor exists now as it did at that time" (833).

WILLIAM C. HIGHAM was police commissioner of Edgewater and employed in the Valvoline Oil Works and was in charge of the filter oils (834). He said that when the Sinclair & Valentine people first started work in Edgewater he got a very strong smell. It affected his eyes and was very cutting. Counsel for the defendant asked him whether he still got the smell, and his answer was "once in a while," but not as often as formerly. He said the last time he got it was the 1st of September, 1914. This testimony was given September 11, 1914 (p. 800) so that this witness noticed the smell ten days preceding; he also noticed it on the 10th of August, 1914. He smelled it also in June, August and September. He says that when he smelled it on the 1st of September he was 800 feet away, and that he knew the smell came from the "ink works" (837). This is very strong confirmation of the complainant's case.

FRANK B. SIMONSON lives on the River Road about a mile and a half north of the factory (840).

GEORGE H. MERRILL formerly lived at 386 Undercliff Avenue; now he lives at 412. He testified: "I had to move on account of the stink," which was in May, 1914. He moved further away from the ink factory. In answer to the suggestion that he knew in which direction to move from the ink factory, he said: "I certainly did" (844).

This, in substance, is the case of the appellant. In many instances, as indicated, it supports the charge of the complainant. The complainant and her sister, Mrs. Popp, are the nearest residents to

this factory and consequently were more likely to be affected by it. Their suffering would depend on the volume escaping and upon the direction of the wind. If the wind was from the south they were bound to feel its effects.

Since, in the progress of the case, much time had elapsed, testimony was offered to show whether or not gas was escaping while the matter was pending in court. The complainant had, at the request of counsel, kept a record since the last preceding hearing and she gives this list on page 850 in rebuttal.

MRS. KENNEDY and MRS. POPP testified to the offensiveness of the odor and its frequent repetition.

MRS. BARNOLD (858) is to the same effect. During the last spring and summer she noticed it quite frequently, sometimes two and three times a week; sometimes the odor was stronger and sometimes it was lighter (859).

MRS. POPP again at the last adjournment gives a whole series of days in the months of September, October, November and December, 1914, and in January, February, March and April, 1915 (871). The date of taking this testimony was May 4, 1915 (868).

MRS. KENNEDY (876) produces a long record of dates covering the same period.

The complainant herself (879) gives a list of days in these various months. She says that she got the varnish smell, the linseed oil and an acid

smell from these premises; that she got different smells from there, but the same original smell is there that was there the first day. She gives in great detail where the odor came from.

MRS. SCANLON (883) noticed the odors twice a week, every time the wind came that way she would get it good and strong. She said the rosin smell comes out of the pot, and she went and saw it boil.

MRS. ELIZABETH KNAGGS describes the effect of the odor upon her; she noticed it three or four times a week (889). The testimony of this witness was quite clear.

The testimony of ANNIE PHITZNER (893) and of MARIE MUSTER (895) are to the same effect.

The Alleged "Fake Runs."

Barrett, the superintendent, testified that after the trouble arose with Mrs. Harrigan he conducted what he called "fake runs," which he defined as runs in which the kettles were entirely emptied of oil and in which no fire was "underneath the kettles" at the time, meanwhile starting "the fuel-oil burner going to let a little puff of white smoke go out, to let them think I was boiling the oil" (526). He further stated that these "fake runs" were six or seven in all, and that among them were January 20th, 28th, and February 3rd, 1914. Turning to the factory record of January, 1914 (934), we find that on January 20th the fires were started under the kettles at 8 A. M. and the fuel-oil burner

started at 9.45 A. M.; on January 28th the fires were started under the kettles at 7.50 A. M. and the fuel-oil burner started at 9.30 A. M.; on February 3rd the fires were started under the kettles at 8 A. M. and the fuel-oil burner started at 9.45 A. M. This factory record of the defendant below contradicts the defendant's chief witness. The witness Grant testified that during a "fake run" "They had a fire under the kettles" (813); while the witness Kestenholz testified that a "fake run" consisted of "no fire and no oil in the kettles" (785). All of which tends to discredit the defendant's witnesses as to the nature of these "fake runs."

Barrett did not testify to the alleged "fake run" of January 13, 1914, but their witnesses Murray (822) and Grant (813) did. They say of this run that they called Barrett's attention to the bad smell (814). Murray and Grant called there between 12 and 1 o'clock at the noon hour and only remained fifteen minutes (812). Not certainly long enough to determine whether the company boiled oil during the day.

Barrett does not agree with Murray and Grant upon these dates. Barrett gives January 28th and February 3rd, 1914, in his statement, which are not in Murray's and Grant's. See Murray's list, printed at page 921, which he says he copied from Grant (823). If we take the dates on which they agree, they are found to be June 6th, 9th and 26th, 1913, and January 20th, 1914, or four in all. If the dates of January 28th and February 3rd are added, according to the testimony of Kesterholz, we have six

in all. Three of the last alleged runs are shown *supra* by their own records not to be accurate. As to the June runs, the record they offer is incomplete (927). Of course, if the combustion chamber was heated as previously explained, acrolein would be released in the pipes and chimney. Nothing, too, is said whether on these days the pots in the open were in use.

Amendment to the Bill.

Counsel interposes in his brief objection to the amendment of the bill. This amendment was scarcely needed, and the matter can be disposed of very readily. The bill of complaint describes the lot of the defendant company carefully by courses and distances (1 and 2), and charges that the defendant has erected a large five-story brick building and a small brick building one story in height thereon. At the bottom of page 3 the allegation is as follows:

“Your oratrix further shows that the noxious, noisome and vile smells, gases, odors, fumes and vapors emitted from the said buildings and chimney,” etc.

The word “premises” by the amendment was added in this paragraph before the words “the said buildings” so as to make the clause read:

“Vapors emitted from the said premises, buildings and chimney,” etc.

It is scarcely worth while to discuss the point how this could, in any degree, embarrass the de-

fendant. The testimony shows that at the beginning the oil was boiled in the rear of the yard in open kettles. After the erection of the small brick building, and in the extreme rear of the yard, kettles were still maintained on the original spot close to the small brick building. Over these pots was a roof supported by some upright posts. There were no sides from the roof to the ground. The charge of the complainant was that they used these open kettles in such a way as to corrupt the atmosphere.

Mr. Allison (311) visited the premises as an official of the Board of Health. He watched them boiling oil. "There were some gentlemen there with handkerchiefs over their mouths, they said there was some trouble there that caused the fumes to be so bad that day," and on page 234 he said that he looked over the top of the wall where they were boiling, and that he could see all the pots outside boiling.

Mrs. Popp (872) said that she saw them boil outside and also on this spot. The oil was boiling on a concrete walk. She looked under the shed and could see the boiling. She said it was the same odor and the same smell. Her throat was affected and her nose. She felt like vomiting, as it caught her in the throat (872).

Mrs. Scanlon (883) speaks of a choking and a rosin smell sometimes and different smells. She said the rosin smell came out of a pot; that she went and saw it boiling. She saw the pot on a hook after being taken from the fire. She got a choking smell.

Mrs. Harrigan (358) said: "I also got it from the back of the tanks down there on Valentine & Sinclair's property."

"Q. What can you see on the property?

A. I can see it fuming from that little shed where they have those little pots. There was blue fumes back of the tank."

Complainant's testimony (880) is to the same effect.

Mrs. Scanlon's testimony on page 883 is the same. On page 884 this witness says that she saw the same old pot on the fire and that they were cooking it with a wood and coke fire under it. She got a choking smell.

No objection was made by counsel to this testimony.

This and other testimony showed that the defendant company was using these outside vats from time to time in a manner that was a nuisance to the neighborhood.

It will be seen that testimony on this point was presented on the direct case of the complainant. It could, therefore, be no surprise to the defendant.

Dr. McKenna, on page 421, states in answer to a question about varnish fires in the yard: "These are low open fires started below kettles containing oil or varnish gum or oil and varnish gum."

"Q. What is the effect of that? A. If they were operating you would have had a free discharge into the air of the fumes.

Q. In other words, if they were operated, would there be acrolein rising in the air? A. If the temperatures were high enough decidedly so" (422).

Then, for the first time, objection was made by counsel for the defendant company that no evidence could be introduced as to these pots in the yard. They, it will be remembered, were close to the brick building and on the site on which the original boiling in the open was done. It was a matter of inquiry whether the defendant was still using the open kettle for the boiling of oil or rosin in such a way as to be offensive to the neighborhood. The Court permitted the question to be put, and the Vice-Chancellor stated that he would deal with it later in the case. On page 900 suggestion was made about adding the word "premises" to the bill, as stated above. Counsel shifted his position and stated that he objected to the amendment on the ground that the smells which came from the rosin in the open pots were not within the compass of the bill. The question to which he originally objected, on page 422, was that the discharge of acrolein from open pots was not within the compass of the bill. The Court allowed the amendment. It would certainly be a narrow view of the case that a bill which charges (3) that the defendant company was operating this plant as an ink, varnish and glue factory, and that "by reason of the method, form and manner of manufacturing such ink, varnish and glue, unusual, noxious, noisome and vile smells, odors, gases, vapors, smokes, fumes and soot are emitted from the chimney connected with said

buildings *on the above described premises,*" and later, on the same page, that those gases, etc., are emitted "from the said buildings and chimney," and testimony on the direct case of complainant is offered in support of this charge, to say that the defendant is surprised by showing that some of the fumes came from this shed immediately contiguous to the small brick building and a necessary part of the appliances for the production of varnish. Gases and noxious vapors of all kinds are within the compass of this charge. To make the matter still clearer, the word "premises" was put into the description. These are, of course, the identical premises described in the bill. There was no new territory added to the charge.

It will be observed that this peculiar pungent and offensive odor comes only from the premises of defendant. Counsel in their brief suggest that these nauseous fumes may come from other sources, yet with all their efforts they have not produced one single witness who states this for a fact.

Hilliker, the company's own engineer, says that once in the middle of the summer of 1912—this was two years before the day he testified—one Saturday morning or afternoon he smelled linseed oil vapors when their plant was shut down (497). The witness Bolton for the defendant said he could not tell whether the odor came from Sinclair and Valentine works or elsewhere (758). There is not a witness in the case for the defendant after taking testimony in court for two years who points to a single place in Edgewater which emits this noisome

smell. To breathe it once is to know it forever. They referred frequently in the case to the Midland Linseed Products Company, which is three-quarters of a mile distant (777), and to the Valvoline Oil Company, which is immediately north of the last-named plant. Yet when they called a witness, John M. Lowe, the superintendent of the Midland Linseed Products Company, he stated that at his plant they did not heat linseed oil to any high degree of temperature—not enough to give out fumes (781), and when they called Francis C. Templeton, the superintendent of the Valvoline Oil Company, they did not ask him a single question about boiling oil at his plant.

Counsel urge upon the Court that the witnesses for the complainant did not indicate the source of the odors. About every one of those witnesses, as shown in the extract of their testimony in this brief, points out the small chimney from which these nauseating odors are emitted. It is said that the witnesses describe it in various ways. We have high authority for saying that words are weak. From the mouths of the unlettered the precise and distinctive word may not readily fall. The complainant and Miss May Burns and some of the other witnesses fittingly named this stench and the place from which it proceeded, and counsel, in consequence, has called them vulgar. Counsel is hard to please. All the witnesses can tell the effect on the throat, nostrils, eyes and stomach.

The vapors arising from the oil passed through the chamber into the stack and these mingled with

the smoke from the kettles, underneath which were coke and wood fires which, on Dr. McKenna's visit, were started with oiled rags. Black smoke, then fumes yellow and blue, then heat waves issued from this small chimney from all this combustion, or, indeed, failure of combustion, and these witnesses are expected to describe the variation of the smells. As these facts would indicate, there were other odors, but there still remained the one old dominating, unforgettable stench.

If the defendant company will just abate this nuisance, there will be no quarrel about the words.

Counsel say that some of the witnesses spoke of an acid smell as an indication that it did not come from this property. Yet we find their own superintendent, Barrett (505), stating that the "pipes would become clogged up with the accumulation of those acids from the oil." Again, he speaks of the pipes accumulating "a substance from these fatty acids of the oils" (541), and again, "a certain high temperature has got to be given to all grades of varnish to eliminate those fatty acids" (565). The expert Thompson speaks of "the fatty acids which are present in the oil" (690).

In all probability a proper stack would end this nuisance. We have pointed out the reluctance with which the expert Thompson admitted the truth of this simple proposition. Barrett, the superintendent, is less reluctant:

“Q. Could you have put your large stack at the west end of the building ‘A’ on this diagram and used it for both purposes? A. If the architect had made the plans accordingly, it could have been done.

Q. Now if these fumes were carried up this chimney, it would materially help the situation? A. Yes, sir.

Q. It would lift them higher in the air and give the air waves a chance to carry it away? A. Yes, sir.

Q. That was not done and you used this small stack? A. Yes, sir” (541).

At first they considered, according to the testimony of their treasurer, “putting up a special stack for that purpose” (496).

It is said that in the affidavits to the bill some of the affiants stated that the defendant was making glue. What was said was concerning the escape of noxious and foul odors from these premises, which were operated as an ink, varnish and glue factory. The *gravamen* was the vile odors. The complainant was not bound to inform the defendant as to what it was manufacturing. It was the odor and not its business with which the complainant and neighborhood was concerned. It appears, however, that defendant did manufacture ink and varnish, as alleged. If they did not make glue, the smell at least was bad enough to suspect it.

See allegations in bill (3).

Schedule A of the defendant’s brief sets forth a table since June 1, 1913, of days on which the de-

defendant claims that it was not burning oil, and on which days the complainant and some of her witnesses claim to have noticed an objectionable smell. A careful examination of this Schedule A discloses that of the fifty-six days set forth in the schedule twenty-four of those days were Saturdays; on these days, according to the testimony of the witness Barrett, the hoods were cleaned and burned out with kerosene, which as already explained, would cause a perceptible smell. See discussion of this point, *supra*. By comparing some of the remaining days set forth in Schedule A with the defendant's factory record for November, 1913 (932) it will be observed that while it is stated in the former that oil was not boiled on November 12th, 13th and 14th, 1913, yet, according to the latter, oil was in fact boiled on each of those days. What reliance can be placed therefore on this alleged "record"?

It will be observed also upon the defendant's factory record the very large number of days in which four kettles were in use. For example in the month of December, 1914 (945), there were no less than fifteen days when they thus boiled oil. This record will be found in the column marked "High Heat." Every month has a number of such days. Upon such days the combustion chamber had to consume twice the quantity of this deleterious gas than upon other days.

The Law.

In 1852 Chancellor Williamson held that a mill grinding drugs which caused offensive odors was a nuisance and approved the following language of Lord Mansfield: "It is not necessary that the smell should be unwholesome. It is enough if it renders the enjoyment of life and property uncomfortable.

Davidson v. Islam, 1 *Stockt.*, 186.

"When the prosecution of a business of itself lawful in the neighborhood of a dwelling house renders the enjoyment of it materially uncomfortable by the smoke and cinders, or noise or offensive odors produced by such business, although not in any degree injurious to health, the carrying on such business there is a nuisance and will be restrained by injunction."

"A clear unmistakable nuisance which it is intended to commit periodically will not be permitted on the ground that it recurs only occasionally and continues but a short time."

"Because a certain part of a town is occupied by tradesmen and mechanics for residences and carrying on trades which occasion some degree of noise, smoke and cinders and contains no elegant or costly dwellings, and is not inhabited by the wealthy and luxurious, it is not therefore a proper and convenient place for carrying on a business which renders the dwellings there uncomfortable to the owners and their families by offensive smells, smoke, cinders or intolerable noises."

Ross v. Butler, 19 *N. J. Eq.* (4 *C. E. Gr.*), 294.

The Court will prevent the prosecution of a legal trade so carried on as to injure an adjoining tenement or to affect the air with noisome smells, gases or smoke injurious to health or rendering life in the neighboring dwelling-houses uncomfortable.

Holman v. Boiling Spring Bleaching Co.,
14 N. J. Eq. (1 McCart.), 335.

Wolcott v. Melick, 11 N. J. Eq. (3
Stockt.), 204.

Cleveland v. Citizens Gas Light Co., 20
N. J. Eq. (5 C. E. Gr.), 201.

Atty.-Gen. v. Steward et al., 20 N. J. Eq.
(5 C. E. Gr.), 415.

Duncan v. Hayes et al., 22 N. J. Eq. (7
C. E. Gr.), 25.

Meigs v. Trister et al., 23 N. J. Eq. (8 C.
E. Gr.), 199.

Cronin v. Bloemecke, 58 N. J. Eq. (13
Dick, Ch.), 313.

Board of Health v. Lederer, 52 N. J. Eq.
(7 Dick Ch.), 675.

Roessler, etc. v. Doyle, 73 N. J. L. (44
Vr.), 521.

In *Laird v. Atl. Coast Sanitary Co.*, 73 N. J. Eq.
(3 Buch.), 49, Advisory Master Pitney said: "In
all these cases the evidence satisfies me that the de-
gree of intensity was such that ordinary plain
people would be rendered uncomfortable by it."

In *Rausch v. Glazer*, 74 Atl., 39, the question was
whether stenches emanated from a rendering estab-
lishment. Chancellor Walker observed that the
nuisance, being established by satisfactory testi-

mony, was not overcome by testimony of the negative kind; that testimony of some of the neighbors that they were not annoyed did not disprove that the complainant and his family were annoyed.

In *Reilley v. Curley*, 75 N. J. Eq. (5 Buch.), 57, which was a suit to abate a nuisance created by noises only, V. C. Garrison, speaking of the principle to be applied, quoted V. C. Leaming in *First M. E. Church of Cape May v. Cape May Grain and Coal Co.*, 73 Eq., 257, as follows:

“While defendant is entitled to the enjoyment of its property in the pursuit of a lawful business, that business must be conducted with due regard to the well-recognized rights of surrounding property owners. When such business becomes creative of conditions which clearly render the appropriate enjoyment of surrounding properties impossible, the rights of others are invaded and equity will restrain the persistent pursuit of such injury.”

This language is also quoted by Chancellor Walker in *Kroecker v. Camden Coke Co.*, thirty-two persons (five of whom were doctors) described the physical effects of the fumes and vapors generated in defendant's plant. Their evidence was that in certain conditions of the atmosphere and direction of the wind and in warm weather the odor was very unpleasant, so much so they were compelled to close their windows. The Chancellor said that the complainants have the right to have the air come to them in a state of ordinary purity. Defendants sought to escape from effect of complainant's proof

by offering testimony that the company has constructed screens; also that more or less smoke came from other factories (as in the present case), and also offered the testimony of other persons to whom it was not unpleasant or disagreeable. Chancellor Walker on this last point said:

“But such testimony on the part of the defendant utterly ignores the rule that the charge of a nuisance, if it be of things offensive to persons generally, cannot be escaped by showing that to some persons such things are not at all unpleasant or disagreeable, and such testimony is wholly opposed to the criterion established in *Cleveland v. Citizens Gas Light Co.*, 20 Eq., 201, where it is said that the thing charged to be a nuisance ‘is not the less so because there may be persons whose habits and occupations have brought them to endure the same annoyances without discomfort,’ and which was acted on in *Laird v. Atl. Coast Sanitary Co.*, 73 Eq., 49; *Ross v. Butler*, 4 C. E. G., 294; *Seligen v. Victor Talking Mach. Co.*, 71 Eq., 697, and *Rausch v. Glazer*, 74 Atl., 39.”

The last case decided is that of *Board of Health of Irvington v. Schmidt*, 90 Atl., 239, in which an injunction was granted by **U** C. Stevens restraining the operation of a piggery. The odor was perceptible 1,000 feet under certain conditions of wind, etc., and stronger nearer the pen. The odor was noticeable at times on the public street. It was clearly a nuisance, even though some neighbors said they did not smell it.

It was located in the neighborhood of dwelling houses, and the odors at times were noticeable on a public street. It was held to be a public nuisance which might be enjoined though some of the neighbors testified that they did not notice the odor.

We shall not attempt to follow counsel in their characterization of the witnesses. All their experts are "exceptionally well qualified" (30)—their grocers "substantial," their superintendent "honest and conscientious" (36), the members of the Board of Health "conscientious" (26), while the witnesses on the other side are vindictive and unreasonable (37).

We shall content ourselves by referring to the evidence before the Court as establishing the complainant's case.

We respectfully submit that the decree should be affirmed.

WILLIAM E. ELLIS,
WILLIAM B. GOURLEY,
of Counsel with Respondent.

Extracts from the "Record" offered by the defendant company as to starting fires, burner, etc., showing how irregular is their practice:

Date	Fires Started	Fuel Oil Burner Started	Interval Hr. Min.	Fuel Oil Burner Shut Off
July				
Wed.	2/13	5.15 A.M.	9 A.M.	1 45 10.30 P.M.
Tues.	22/13	5 A.M.	7.30 A.M.	2 30 1 A.M.
Mon.	28/13	7.30 A.M.	8.30 A.M.	1 4.45 P.M.
Wed.	30/13	5.15 A.M.	7.15 A.M.	2 9.30 P.M.

(Case, page 928.)

August				
Fri.	1/13	6.30 A.M.	8 A.M.	1 30 4.45 P.M.
Mon.	4/13	7 A.M.	8.45 A.M.	1 45 4.30 P.M.
Tues.	5/13	6 A.M.	8 A.M.	2 4 P.M.
Tues.	12/13	5 A.M.	7 A.M.	2 4.30 P.M.
Wed.	13/13	6 A.M.	7.30 A.M.	1 30 4.45 P.M.
Tues.	26/13	6 A.M.	7.15 A.M.	1 15 1 A.M.

(Case, page 929.)

September				
Thurs.	4/13	6 A.M.	7.30 A.M.	1 30 11 P.M.
Wed.	10/13	6 A.M.	7.15 A.M.	1 15 10 P.M.
Thurs.	11/13	5.50 A.M.	7 A.M.	1 10 11 P.M.
Tues.	16/13	6 A.M.	7.30 A.M.	1 30 11 P.M.
Fri.	26/13	6 A.M.	7.15 A.M.	1 15 12 P.M.

(Case, page 930.)

October				
Wed.	1/13	6 A.M.	7.30 A.M.	1 30 12.30 P.M.
Fri.	3/13	6 A.M.	7.15 A.M.	1 15 12.30 P.M.
Fri.	17/13	7 A.M.	8.45 A.M.	1 45 10.30 P.M.
Wed.	29/13	6 A.M.	7.40 A.M.	1 40 11.30 P.M.

(Case, page 931.)

November				
Mon.	3/13	7.30 A.M.	9.15 A.M.	1 45 12.30 P.M.
Fri.	21/13	6 A.M.	7.15 A.M.	1 15 12 P.M.
Mon.	24/13	7.30 A.M.	9 A.M.	1 30 12 P.M.

(Case, page 932.)

Date	Fires Started	Fuel Oil Burner Started	Interval Hr. Min.	Fuel Oil Burner Shut Off
December				
Wed.	3/13	6 A.M.	7.15 A.M.	1 15 10 P.M.
Mon.	8/13	7.30 A.M.	9 A.M.	1 30 12 P.M.
Mon.	15/13	7.30 A.M.	9.30 A.M.	2 12 P.M.
Fri.	26/13	6.30 A.M.	9.15 A.M.	2 45 10.30 P.M.
Tues.	30/13	6 A.M.	7.15 A.M.	1 15 9 P.M.

(Case, page 933.)

January				
Thurs.	8/14	6 A.M.	8 A.M.	2 12 P.M.
Tues.	13/14	6 A.M.	9 A.M.	3 11 P.M.
Wed.	21/14	6 A.M.	8.30 A.M.	2 30 12.15 A.M.
Fri.	23/14	6 A.M.	8 A.M.	2 12.30 P.M.
Tues.	27/14	6 A.M.	9.30 A.M.	3 30 1.30 A.M.
Fri.	30/14	6 A.M.	7.45 A.M.	1 45 12 P.M.

(Case, page 934.)

February				
Fri.	6/14	6 A.M.	7.45 A.M.	1 45 1 A.M.
Thurs.	12/14	6 A.M.	9.50 A.M.	3 50 12 P.M.
Fri.	13/14	7.45 A.M.	9 A.M.	1 15 12 P.M.
Tues.	24/14	6 A.M.	8.15 A.M.	2 15 12.30 P.M.

(Case, page 935.)

March				
Thurs.	5/14	6 A.M.	8.15 A.M.	2 15 10.30 P.M.
Thurs.	12/14	6.45 A.M.	7.20 A.M.	35 1 P.M.
Thurs.	19/14	6.30 A.M.	7.15 A.M.	45 1 P.M.
Wed.	25/14	7 A.M.	8.30 A.M.	1 30 11.45 P.M.

(Case, page 936.)

April				
Mon.	6/14	7.30 A.M.	9 A.M.	1 30 12.15
Tues.	7/14	6.45 A.M.	7.30 A.M.	45 10 P.M.
Fri.	10/14	6 A.M.	8 A.M.	2 2.15 A.M.
Mon.	20/14	7.30 A.M.	9.15 A.M.	1 45 3 A.M.
Fri.	24/14	6 A.M.	7 A.M.	1 3 A.M.

(Case, page 937.)

Date	Fires Started	Fuel Oil Burner Started	Interval Hr. Min.	Fuel Oil Burner Shut Off
May				
Fri.	1/14	6.15 A.M.	7.45 A.M.	1 30 2
Tues.	5/14	6.15 A.M.	7 A.M.	45 1.30
Mon.	11/14	7.30 A.M.	9 A.M.	1 30 3
Thurs.	21/14	4 A.M.	5.50 A.M.	1 50 10.30
(Case, page 938.)				
June				
Fri.	5/14	5.05 A.M.	6.05 A.M.	1 4.30 P.M.
Fri.	12/14	4.30 A.M.	6.10 A.M.	1 40 4.30
Thurs.	18/14	7.30 A.M.	9.30 A.M.	2 4.30 P.M.
Mon.	22/14	7.30 A.M.	9 A.M.	1 30 12.35
(Case, page 939.)				
July				
Wed.	1/14	4.20 A.M.	6.20 A.M.	2 11.15
Mon.	13/14	7.30 A.M.	9 A.M.	1 30 2.30 A.M.
Wed.	15/14	5.30 A.M.	6.45 A.M.	1 15 1 o'clock
Tues.	28/14	5 A.M.	6.55 A.M.	1 55 11.15 P.M.
(Case, page 940.)				
August				
Mon.	3/14	7.30 A.M.	9 A.M.	1 30 2.25 A.M.
Tues.	11/14	4.50 A.M.	6.45 A.M.	1 55 1.45
Wed.	19/14	5 A.M.	7 A.M.	2 1.15
Mon.	24/14	7.30 A.M.	8.45 A.M.	1 15 2.10
(Case, page 941.)				
September				
Tues.	1/14	8 A.M.	10 A.M.	2 3 A.M.
Wed.	9/14	6.45 A.M.	7.10 A.M.	25 12.10
Thurs.	17/14	6 A.M.	7.45 A.M.	1 45 1.30
Tues.	22/14	5.45 A.M.	7.10 A.M.	1 35 1.45
(Case, page 942.)				
October				
Thurs.	1/14	6 A.M.	7.10 A.M.	1 10 12.10
Mon.	5/14	7.30 A.M.	9.30 A.M.	2 1.30
Fri.	23/14	6 A.M.	6.15 A.M.	15 11.30
Mon.	26/14	7.30 A.M.	9.30 A.M.	2 3 A.M.
Fri.	30/14	8.15 A.M.	9.45 A.M.	1 30 11.30 P.M.
(Case, page 943.)				

Date	Fires Started	Fuel Oil Burner Started	Interval Hr. Min.	Fuel Oil Burner Shut Off
November				
Wed. 4/14	8 A.M.	9.30 A.M.	1 30	2
Tues. 10/14	7.45 A.M.	9 A.M.	1 15	1.30
Wed. 25/14	5.55 A.M.	8.40 A.M.	2 45	12
Mon. 30/14	7.30 A.M.	8.30 A.M.	1	12
(Case, page 944.)				

December				
Tues. 8/14	6 A.M.	7.30 A.M.	1 30	12
Tues. 15/14	6.05 A.M.	8 A.M.	1 55	1
Wed. 23/14	7.45 A.M.	9.30 A.M.	1 45	2.30
(Case, page 945.)				

January				
Wed. 6/15	8 A.M.	9.30 A.M.	1 30	1.30
Thurs. 14/15	6.30 A.M.	8.45 A.M.	2 15	1 A.M.
Thurs. 28/15	6.45 A.M.	7.35 A.M.	50	2.10
(Case, page 946.)				

February				
Wed. 10/15	6.45 A.M.	9 A.M.	2 15	1.30
Thurs. 11/15	8 A.M.	8.55 A.M.	55	12 P.M.
Wed. 24/15	6.30 A.M.	8.15 A.M.	1 45	2 A.M.
(Case, page 947.)				

March				
Mon. 1/15	7.30 A.M.	9.15 A.M.	1 45	12 A.M.
Tues. 2/15	6.30 A.M.	9 A.M.	2 30	12 A.M.
Wed. 10/15	8.30 A.M.	9.15 A.M.	45	6.45 P.M.
Tues. 16/15	6.15 A.M.	7.45 A.M.	1 30	12.30
Fri. 19/15	6.10 A.M.	8 A.M.	1 50	10.30
(Case, page 948.)				

April				
Thurs. 1/15	6.30 A.M.	7.45 A.M.	1 15	12.30
Fri. 9/15	6.15 A.M.	8 A.M.	1 45	11.30
Wed. 14/15	5.15 A.M.	7.15 A.M.	2	12.30
Thurs. 15/15	6.30 A.M.	7.45 A.M.	1 15	12.25
(Case, page 949.)				

New Jersey Court of Errors and Appeals

Between

ELLEN E. HARRIGAN,
Complainant-Respondent,

and

SINCLAIR & VALENTINE COM-
PANY,

Defendant-Appellant.

*On Bill for
Injunction.*

Brief for Appellant.

This is an appeal from a final decree in Chancery, advised by Vice Chancellor Lewis. The complainant charges that the defendant maintains a nuisance by emitting from its factory noxious fumes and gases. The complainant lives, and the defendant's plant, which is complained of, is situated in the Borough of Edgewater in Bergen County. Edgewater is a narrow strip between the base of the Palisades and the Hudson River several miles in length and approximately 1200 feet in width from the very base of the cliffs to the bulk head line on the river. The defendant's factory property lies on the west side of River Road, the street nearest the river, a little less than a quarter of a mile south of the landing place of the Fort Lee ferry. To the northeast and south of it are factories of various descriptions and sizes. Immediately to the west are some vacant lots. Next adjoining on the south is a building used as a restaurant and boarding house. Westerly and northwesterly beyond the vacant lots are the dwellings of the

complainant and others, a number of which have been built since the commencement of this suit. Southwesterly are fewer dwellings and also a large new public school building. The places of business between the defendant's factory and the ferry include: McGarry's stables, Kaufer's Grain Elevator, Higgins' Dye Works, a refrigerator plant and Edgewater Terminal and Warehouse Company. Directly to the east lies the very large establishment of the Warner Sugar Refining Company, south of which the marble yard is found. Next, to the south, comes a succession of very large plants, including Valvoline Oil Company and Midland Linseed Products Company, and further down some railroad coal pockets, the large plants of the General Chemical Company, the American Corn Products Company, Spencer, Kellog Company and Bulls Ferry Chemical Company. The land slopes gradually from the very base of the cliffs to the River Road, Undercliff Avenue, the street nearest the base of the Palisades being about 46 feet higher than the River Road.

The defendant, a New York corporation, manufactures printers' ink and fine dry colors. It has never manufactured glue. Its principal office and factory are located directly across the Hudson river at No. 611 West 129th Street, New York City. In July or August, 1911, having purchased and graded the tract in Edgewater, the defendant began to boil linseed oil in kettles over a coal fire in the open yard, pending the erection of the brick building now standing in the northwest corner of the lot. In this building four copper kettles, each of six barrels capacity, were bricked in in a row over the grates. The tops of the kettles were covered and iron pipes were led from them to the chimney which thus car-

ried off the gases both from the kettles themselves and the coke fires under them. This chimney rose thirty feet above the surface of the ground. The plant was in this condition in September, 1911, at which time the boiling of linseed oil in the open ceased, and was continued in the brick building.

Linseed oil is boiled to make printer's ink varnish. When the oil is heated to a temperature between 325 and 350 degrees Fahrenheit, it gives off by decomposition, a gas called acrolein. This gas is produced whenever any substance containing glycerine is sufficiently heated. Lard and other animal fats contain glycerine. The Court will therefore most readily recognize the smell of acrolein by calling to mind the pungent odor noticed when some fat or lard has, in the process of domestic cooking, fallen upon a hot stove or fire. Acrolein can be burned and when consumed is transformed into carbon dioxide and water, neither of which is offensive or harmful.

The next change was the construction of a brick combustion chamber in front of the base of the stack and between and above the level of the kettles which were arranged two on either side. (See the sketch, exhibit D-9.) As then constructed, this chamber measured inside thirty inches by twenty-seven inches by five feet high. One ten-inch iron pipe ran from each of the hoods over each kettle to the lower part of the chamber in which, above the entrance of these pipes, stretched grate bars on which a coke fire burned. Since the outlet from the chamber of the stack was at the top and rear of the chamber, the gases from the kettles had to pass through the burning fire and were thus consumed. This plan was in operation from February or March 1912.

The complainant, and there is but one, filed her bill on the 22d of July, 1912. On the 29th of that same July, a motion for a preliminary injunction was argued before Howell, V. C., and denied. Shortly thereafter, and on or about August 15th, 1912, an improvement was made in the combustion chamber by substituting fuel oil for coke. The chamber now has in its face an opening approximately three by five inches. In the middle of this, there projects into the chamber a burner of about one inch diameter tapering to a needle point. The fuel oil is forced out under pressure produced either by compressed air or live steam, so that it leaves the burner in a fine spray as from an atomizer. This, when ignited, produces a long conical flame intensely hot. Various pieces of fire brick are arranged inside the chamber on the old grate bars for the purpose of breaking up the flame and gases. The great advantage of this improvement in addition to the very intense heat produced, is found in there being no break in the intensity of the heat as there was when the old fires were from time to time re-coked. The arrangement continued practically without change down to the date of the final decree.

The case was tried piecemeal by Vice Chancellor Lewis on June 10th and June 27th, 1913; April 21st, 22d, 23d, and 24th and September 10th and 11th, 1914; and May 4th, 1915. The complainant's case consumed all of the days of the trial up to and including the first half of April 22d, 1914, then the defendant's case occupied the time until and including part of September 10th, 1914. The complainant in rebuttal took the rest of September 10th, all of September 11th and most of May 4th, 1915, the defendant on that day closing the testimony with one witness in sur-rebuttal. Argument was had on

May 5th, 1915, the Vice Chancellor immediately delivering his opinion (Case, page 956).

The original bill alleges that the defendant operated an ink varnish and glue factory (Case, page 3) and "that by reason of the method, form and manner of manufacturing said ink varnish and glue unusually noxious, noisome and vile smells, odors, gases, vapors, smoke, fumes and soot which emitted *from the chimney connected with said buildings* on said above described premises." At the very close of the complainant's rebuttal on May 4th, 1915, the complainant asked leave to amend the bill so as to read "premises, buildings and chimney." After argument and objection, the Vice Chancellor decided to allow the amendment (Case, page 902). The amendment accordingly was filed May 20th, 1915 (Case, page 11). The purpose of this amendment was to cover some testimony adduced by the complainant in rebuttal after the defense had been closed for months, and after the case had been tried on the theory that the complaint was only of the *emission of acrolein from the chimney* of the varnish boiling house. This testimony was to the effect that objectionable odors came from some pots in the open yard in which the defendant was boiling rosin. The final decree (Case, page 950) after reciting that the defendant owned the buildings described in the bill where it carried on the business of boiling linseed oil to make printers ink varnish, wherein and whereby it polluted the air in the neighborhood with foul and noxious odors and gases, thereby creating a nuisance, adjudged that the defendant's business was so conducted as to create a nuisance and enjoined the defendant from further maintaining and continuing its business in such a manner as to suffer the escape of noxious and offensive

odors and gases from defendant's *premises*, buildings and chimneys and from doing any acts to pollute the air in the neighborhood of the complainant's residence, and render it noxious, unwholesome, unsanitary and uncomfortable to the complainant, or interfere with or diminish the comforts and joy of the life of the family of complainant in and about the residence, giving the defendant forty days to make necessary changes,—the most sweeping kind of a decree possible in such a suit. The defendant duly appealed from the whole and every part of the final decree.

Ground of Appeal.

The Court should not have adjudged that the defendant maintained a nuisance and therefore should not have awarded an injunction.

Argument on the Facts.

The respective contentions of the parties may very briefly be summarized. The complainant and her witnesses say that the defendant's factory at Edgewater sends out noxious fumes. The defendant admits that it boils linseed oil, a process productive of annoying fumes, though not of the character described by some of the complainant's witnesses. Nothing else that the defendant does can or possibly could produce any annoyance or nuisance. Furthermore, it has, since a time anterior to the filing of the bill of complaint herein, maintained a device which almost completely destroys all fumes from boiling linseed oil, and did, shortly after the commencement of the suit, so improve that device that since

then all of such fumes have been completely destroyed. The defendant insists, therefore, that such of the complainant's witnesses as are honestly annoyed by offensive odors have to blame some other of the various plants in Edgewater, and not the defendant.

I.

IF THE FUMES OF THE LINSEED OIL ARE BURNED, ANY SMELL OR OBNOXIOUS FUME IS DESTROYED.

II.

THE DEFENDANT COMPLETELY BURNS ALL THE FUMES FROM THE LINSEED OIL BOILED BY IT.

III.

NONE OF THE OTHER WORK DONE BY THE DEFENDANT PRODUCES ANY OBJECTIONABLE SMELL OR FUME.

THEREFORE THE DEFENDANT COM-
MITS NO NUISANCE.

I.

If the fumes of the linseed oil are burned, any smell or obnoxious fume is destroyed.

There is really no dispute about this. Dr. Olsen, one of the complainant's experts, testified on his direct examination (Case, p. 390) that the fumes from boiling linseed oil are combustible, and can by suitable temperature be changed into carbon, dioxide and water, which are unob-

jectionable when breathed. The complainant's other expert, Dr. McKenna (Case, p. 449), testified practically to the same effect. Dr. Olsen said he know of no other offensive effluvium from boiling linseed oil except acrolein (Case, p. 405). Acrolein burns to the same products as alcohol (Case, p. 691).

Point I, therefore, is established beyond peradventure.

II.

The defendant completely burns all the fumes from the linseed oil boiled by it.

It is true that the complainant has produced a considerable number of witnesses who testify that they are greatly annoyed by noxious fumes, and further testify that these fumes come from the chimney of the boiling house on the defendant's plant. To make a case against the defendant the complainant must prove, of course, not only that she and her witnesses are annoyed by a vile smell, but that this smell, and the gases which produce it, come from the defendant's factory. It is in the second step of the proof that the weakness of the complainant's lay witnesses is found. Any human being's sense of smell is, perhaps, the most unreliable of all the senses, and when in the midst of a manufacturing district people claim that a particular plant is responsible for annoying fumes, the testimony of such witnesses must be closely scrutinized; for they are testifying to a conclusion about which they may be honestly mistaken. We must examine the testimony of the complainant's lay witnesses, therefore, and see what leads them to conclude that the defendant is the source of the alleged nuisance.

Mrs. Harrigan, the complainant, a middle aged widow, is her own principal witness. Not even cold type can conceal her vulgarity and her vindictiveness. She continually refers to the "stink" the "stink pots" and "the same old stink from the same old stack." Justly annoyed by the smells given out by the defendant, when its plant was at first operated without any disposal, and being at a time of life when she was subject to headaches and various disorders, as her own doctor testified (Case, p. 371), she put two and two together and thoroughly convinced herself that the defendant was responsible for all her ill health. Being in that state of mind she not only readily, but zealously swore to an affidavit upon the application for a preliminary injunction, that the defendant was manufacturing glue, just because "the stink of it was so terrible" (Case, p. 43). She gets the smell, she says, at 5:30 in the morning (Case, p. 27) and indeed—"All hours of the night and all hours of the day" (Case, p. 358). She gets a variety of smells, she says, sometimes acid smells (Case, pp. 357, 879);—and right here it may be remembered that none of the effluvia from boiling linseed oil have what a layman would call an acid smell (Case, pp. 608, 700). In spite of which she testified (Case, p. 357), "Saturday nights I get an acid smell."

"Q Did you see where the acid smell came from?"

A It came from there. I do not get any smells from the south but from there.

Q How do you know it comes from there?

A Because there is no other factory to the south of me that smells; it is not Mrs. Smith's boarding house."

But she and most of her witnesses overdo it, by swearing just as positively to other smells

coming from the defendant upon occasions when the defendant was not boiling linseed oil. A tabular list of such occasions appears at the end of this brief, headed Schedule A. For example, on page 850, she testified that on September 1, 1914, from 6:10 A. M. to 8 A. M., she suffered terribly from the smells, so that she left town, when, as a matter of fact, the defendant's servants did not light the fires under the oil kettles on that day until 8 A. M., and the oil did not reach 250 degrees until 10 A. M. (Case, p. 904), at which point, as will appear below, the fire in the consuming chamber was started according to the regular custom, providing for a large margin of safety, the oil not beginning to give off acrolein at the very earliest until 325 degrees. Instances like this could be multiplied, but nothing can do this woman justice short of a complete reproduction of her testimony. She complained to the Mayor of the borough, according to his own testimony (Case, p. 617), as a result of which the borough communicated with the defendant (Case, p. 921), and then took the stand and denied having made such a complaint (Case, p. 853). And when in the spring of 1912 she telephoned one Saturday morning to the defendant's plant, requesting that the superintendent come to her house and talk with her, Mr. Barrett immediately called, and on being shown by her that her furniture was all over soot, he showed that they did not burn soft coal, and when she asked him if he could not then smell the defendant's plant, and on his replying he could not, and inviting her to return with him to the plant and see for herself that they were then boiling no oil, it being Saturday morning, she said (Case, p. 532):

“You are driving us out of our homes.
We cannot live here; we cannot exist. Either

you have got to get out, or you have got to buy me out. How would you like to come some day and see a pile of bricks in River Road?"

So much for the complainant herself.

Her brother, Mr. McGarry, also signed an affidavit that the defendant was manufacturing glue. As to this point see Case, page 70:

"Q At any rate, so far as you are personally concerned, you swore that they were making glue there, because of the character of the smell.

A Yes, sir."

He, also, is in the position of swearing to the existence of the smell on a number of days on which the defendant could not have been responsible.

Mrs. Ryan, the complainant's sister, exposes the character of her testimony, by being one of a number to testify to having been annoyed by a tarry smell at 8:30 A. M. on the morning of June 11, 1913 (Case, p. 285). On that day, as appears from the testimony of the complainant's own experts, who then visited the defendant's plant to make an inspection, the fires were not started under the kettles until 8:45 (Dr. McKenna, Case, p. 417), and the pots in the yard were empty (Case, p. 443). (These pots in the yard are of importance only by reason of the complainant's eleventh hour effort, after the defendant had closed its testimony, to bring them into the case. They will be specially considered hereafter.)

Mrs. Popp, another sister of the complainant, also accused the defendant of being responsible for an acid smell (Case, pp. 201, 205).

Now, some of the complainant's witnesses do complain of a linseed oil smell, not only by that name, but as an oily smell, a burning fish smell, a burning oil smell. We do not expect scientific accuracy from the ordinary lay witness, and all of the last mentioned descriptions are what might be expected from a layman in describing the odor of acrolein, which, as we have seen, is the smell experienced whenever fats are fried—a dry, pungent, irritating smell, but this is not at all the kind of odor which a layman would describe as an acid smell, and none of the effluvia of boiling linseed oil have what a layman would call an acid smell (Case, pp. 608, 700). So, when Mrs. Popp swears that an acid smell comes from the defendant, she is not only mistaken, but she is letting her enthusiasm for her sister, and her antagonism to the defendant, at whom the finger of accusation has been pointed, run away with her conscience and with the truth.

Her husband, Mr. Popp, is another of the careless affiants, who swore directly and positively that the defendant was making glue, when he had no other ground for it than the smell he received (Case, p. 109).

Another witness, Mrs. Conklin, described the smell which annoys her as an acid smell (Case, pp. 154, 156).

Patrolman Gould, after identifying the defendant's ink factory and being asked if he had noticed anything about it, testified (page 259):

“A Yes, sir. I noticed there is a very bad smell there all the time which caused us to move away from the factory, and I had a baby sick last November.

Q When did you move away from there?

A After it died in December.

Q Have you noticed anything come out of the chimney in the ink factory? * * *

A It was black smoke, blue smoke, all kinds of smoke. * * *

A The odor was of the black fumes that come from there and we had to close the windows down. * * *

Q Can you describe the odor of this? Does it resemble anything that you know of?

A Nothing more than like fumes from soft coal like.

Q What did it smell like?

A The smell smelled to me like stagnated water and acids and tar."

Now nothing of his descriptions in any way fits fumes from boiling linseed oil. The tar and acids we have already discussed. The smell of decaying vegetation which one associates with stagnant water cannot by the widest stretch of imagination be said to resemble the dry, pungent, irritating odor of frying lard, which, as we have seen, is exactly the smell of acrolein. Acrolein is a white vapor. There is no dispute about this. Dr. McKenna, the complainant's principal expert, himself said (Case, p. 453) that the vapors arising from the surface of the boiling oil were white. Dr. McKenna also said that the black smoke which for a while came from the chimney of the boiling house during his visit, was due to the oiled rags with which the fires under the kettles were started (Case, p. 417). It must be remembered that the smoke and gases from the fires under the kettles lead directly to the stack, while the effluvia from the boiling oil pass through the disposing chamber before reaching that stack. Dr. McKenna also testified that yellow smoke and fumes coming out of the stack are due to imperfect combustion of the fuel under the kettles

(Case, p. 455). And yet this witness, Officer Gould, swears that the defendant emitted black smoke like soft coal. Not only does he say this, but when asked to identify the chimney which was the source of the smoke he complained of, he identifies the chimney on photograph No. 10, marked with an "X" (Case, p. 262). An inspection of this photograph will show that the chimney identified is not even on the defendant's property, but is one of the chimneys of the Warner Sugar Refining Company on the other side of River Road. True it is that on re-direct examination, the complainant's counsel had this witness say that the chimney to which he referred was on the west side of River Road on the defendant's property. But on his direct examination, he had said that the smoke came from the big chimney of the ink works. This big chimney leads only from the boiler in the main building, in which they burn hard coal (Case, pp. 532, 848). Even the complainant charges the soot to the sugar factory. Nobody but Officer Gould charges the defendant with a nuisance consisting of soot. The fact that he accuses the defendant in that, and then is so uncertain from what chimney it really comes, shows the worthlessness of his testimony.

The fairness and accuracy of Patrolman Dinan's testimony can be seen from his statement that he saw blue smoke come from the defendant's chimney on several occasions at midnight (Case, p. 254, 258). His wife, Mrs. Dinan, also saw light blue smoke at night and noticed a tarry smell (Case, p. 272 to 274). Now a night may have been light enough for smoke to be seen, but the Court well knows that no moonlight however bright will permit the observation of colors. We also know that the defendant does not operate at

night at all, except to keep the fuel oil burner going, the fires under the kettles being raked when the oil reaches the desired heat which is some time in the forenoon (Case, p. 517). We have seen from the testimony of the complainant's own experts that anything other than transparent heat waves, except white vapors, must be due to the fires under the kettles (Case, pp. 399, 400, 417, 455), and these admittedly do not produce any smell.

Patrolman Kehoe and his wife unite in complaining that it smelled as if something was decayed or rotting. He says so, Case, pp. 152, 153; her testimony appears at Case, p. 243. She says (Case, p. 242) that she noticed heavy dark brown smoke come from the defendant's small chimney, and at that time smelled a disagreeable smell and "of course I thought it was from there when I saw the smoke coming from there." We again repeat that the complainant's own experts show that the dark brown heavy smoke is due to incomplete combustion of the coke fires under the kettles (Case, pp. 399, 400, 417, 455). No smells arise therefrom.

Mrs. Burns and her two daughters, May and Helen, were very vigorous and bitter witnesses. The mother swore to a smell of old rotten fish at night (Case, p. 125). The daughter May said (Case, p. 129) that the smell would be so bad at night that it would wake her up and force her to shut the windows and equally as bad at 7:15 in the morning. And we have seen that there isn't possibly time for the oil to get hot enough by 7:15 A. M. for smells to come off. Helen Burns corroborated her mother and sister and said that on Tuesday, June 24th, 1913, at 11 P. M. she noticed the same very objectionable

smell (Case, pp. 178 and 179). On this day, defendant was not boiling oil (Case, p. 927).

Mrs. Afritsch is another witness who accuses the defendant because upon her noticing a bad smell, she looked out and saw smoke come from defendant's chimney, and this was so satisfactory to her, although we have seen the admission of the complainant's expert, that this witness says that the defendant's is the only factory in Edgewater that smells (Case, p. 86). !!!

The witness Connell is another witness who puts the smell at such an early hour of the morning that the oil has not had time to get hot enough (Case, pp. 93 and 512). The odor which he complains of, he says, smelled like an old dead horse in the month of September (Case, p. 92). There is nothing in the smell of frying fat or lard that could possibly be said to resemble the smell of putrid animal matter.

Mrs. Cunningham, another witness, noticed a smell of iodine and assumed that it came from the ink factory, when she could not even see smoke at the time (Case, p. 269, l. 20). And on June 11th, 1913, she noticed an "awful smell" at 8:30 in the morning (Case, p. 270), and that was the day that Dr. McKenna visited at the defendant's plant and saw the fires lighted under the kettles at 8:45 A. M. (Case, p. 417). So the smell at 8:30, if there was any, could not have been caused by the defendant.

Mrs. Gotthold is another early morning witness, 7 to 7:30 being the times that she complained of (Case, p. 148).

Messrs. Dobbs & Glasson were painting the house of Mrs. Popp, the complainant's sister, and noticed a smell, and were told by her that this smell came from the defendant's ink factory

(Case, pp. 164, 165 and 168), although Mrs. Popp of course denied having so told them (Case, p. 204). This little bit of testimony is significant of how this case has probably grown, and how the defendant, like a dog, has been given a bad name in the community and has been blamed by many of the residents merely because that is the defendant's reputation.

The worth of the witness Haslem's testimony can be appreciated from his statement (Case, p. 303) that Edgewater, except for the defendant's odor, is as free from smells and as clean as Fifth Avenue, New York.

Mrs. Peterson once noticed a smell like rotten fish. She couldn't imagine whence it came. She saw smoke coming from the defendant's chimney and so knew that the smell came from there (Case, p. 329). She said the smell was awful; nevertheless, she moved nearer to the source of the alleged nuisance after she knew of it (Case, p. 332). Actions speak louder than words.

Mr. Allison also moved into the nuisance (Case, pp. 308, 318) and from over a mile to the north. He is a very positive gentleman. He was down at the plant one day when there was smoke coming out from all sides and openings of the boiling house when one of the workmen had a handkerchief over his nose. He made no memorandum of this date, and yet, when testifying on April 21st, 1914, he remembered that this was on Wednesday, the 22d day of November, 1913. Now, November 22d, 1913, was a Saturday on which the defendant, in accordance with its regular custom was not boiling any oil (Case, p. 932). It was on December 3d, 1913, that there was a fire due to the accidental flashing of one of the kettles, when no doubt some obnoxious fumes did escape, and when the defendant's superintendent

saw a stranger standing on the wall, as Allison testified he had done. This was December 3d (Case, p. 525), as Barrett, the superintendent, testified from a contemporaneously made record; and yet Allison was as cock sure that his date was right as he was that the smell was not due to any breakdown or accident, but to the several pots he saw boiling in the open yard (Case, p. 324). These were, of course, the perfectly innocent rosin pots.

Another witness, Mrs. Campbell, couldn't see the defendant's chimney at any of the thirty-nine distinct occasions when she took the trouble to make a note of the smell, and yet she says that the ink works is the only place in Edgewater that she gets a smell from (Case, p. 343).

Mr. Brock complained of a smell like rotten fish and on January 16th, 1914, and saw pots boiling outside. (The same rosin pots whose innocence we shall conclusively establish.) He made a memorandum because he felt it was his duty to help the complainant with whom he had business relations. On most of the occasions he could not see the defendant's chimney when he noticed the objectionable smell (Case, p. 253). He was ably seconded by his wife, Miriam, who outdid the complainant. The complainant said she had to shut her windows and keep them shut on account of the smell. Mrs. Brock said that though she shut her windows, the smoke was like a cloud in the room (Case, p. 183), driving her to seek relief in moving picture shows in New York (Case, p. 184).

Mrs. Mooney says that on June 24th, 1913, she got "a bad smell from the other small chimney on the defendant's property" (Case, pp. 210, 213). This chimney, of course, leads from the ordinary hard coal fire under the rosin still and

has absolutely no objectionable odors (Case, p. 919).

The witness, Mrs. Scanlon, was a very enthusiastic supporter of the complainant whose testimony, if believed, made the neighborhood almost unbearable; and yet, she induced her friend, Mrs. Murphy, the mother of six children, to buy a house near hers, and in inducing Mrs. Murphy to do so, said nothing about the alleged awful smell (Case, p. 193).

The complainant produced two physicians who had attended her and who testified corroborating the various symptoms she complained of. Dr. Hubbard, one of them who had been her family doctor, had to admit on cross examination (Case, p. 371), that every one of her symptoms might be attributed to her condition, namely, change of life.

The testimony of three of the complainant's witnesses must have been distinctly unsatisfactory to her. Joseph Ravese, a substantial grocer of Edgewater, testified that he received the smell but once in 1913, and that he was out of town just about as much in 1912 as he had been in 1913 (Case, pp. 134, 135). He, therefore, would have noticed the smell in 1913 had it existed in that year as it did in 1912.

Mr. Kaufer, proprietor of a hay, grain and hardware business in Edgewater near the defendant's plant noticed the smell in the summer of 1912, and said he thought that it was someone burning axel grease (Case, p. 116), a very good description of the odor of acrolein. When asked when he had noticed it last (Case, p. 116) he said: "Not since last summer, you might say."

Mr. Swift, a divinity student, living in one of a row of brick houses directly to the west of the defendant's factory, about 275 feet distant there-

from, with nothing between them, gave some very significant testimony on page 224. (He testified in June, 1913):

“Q Have you noticed any odor?

A Edgewater is a town with odors. I have noticed odors, yes, but I cannot say that it came from that chimney absolutely.”

and again on page 227:

“Q And this study of yours looks out on the chimney?

A Yes, sir.

Q Now, I understand you to say that during the summer months that you were home last year (1912) you did get a bad odor from the ink works.

A We did, yes, sir.

Q And you had that odor in mind, did it have a distinctive character?

A Yes, sir.

Q What was it?

A It was like burning oil or boiling oil.

Q How much time have you been home this year since the weather warmed up?

A I have been practically home all the time, that is, with an occasional trip to the city.

Q Your custom is to be home now?

A Yes, sir. * * *

Q Have you observed smoke coming from the chimney this year?

A Yes, sir.

Q Have you observed that smell this year?

A I cannot say that I have observed the same smell, that is, as it was last summer.”

The testimony of these three witnesses, particularly the last, is very strong, and resembles that of the many impartial and substantial residents produced as witnesses on the part of the

defendant. The testimony of some of them will now be briefly summarized.

John Clahan, Jr., Mayor of the Borough of Edgewater (Case, p. 616), used to get a pretty strong linseed oil smell when the defendant first began to operate at Edgewater, and although he still had, at the time of testifying, equal opportunity, he had not noticed the smell in eighteen months (Case, p. 617).

Edward M. Fitzgerald, President of the local Board of Health (Case, p. 622), formerly was able to detect the smell at his house, a mile and an eighth to the north (Case, p. 624), but for more than two years before testifying (Case, p. 625), he had not noticed the smell, although he passed the defendant's factory two or three times a week.

John E. Mulligan, a member of the local Board of Health (Case, p. 624), lived about eight hundred feet from the factory of the defendant and found the smell very bad at first, but at the time of his testifying, it was about eighteen months since he had the smell, and he was in the habit of passing the defendant's factory eight or ten times a day (Case, p. 634).

John Skelly, the Borough Clerk (Case, p. 655), living at 387 Undercliff Avenue, and around Edgewater all day, used to get a very bad smell from the defendant, but had not for the last two years before testifying (Case, p. 656).

Edward D. Walsh, who lived and worked on the south corner of Hilliard Avenue and River Road (Case, p. 660), used to get a very sickening odor as late as the summer of 1912, but had not since then.

Oliver E. Smith, an electrical inspector, who lived at 335 Undercliff Avenue, directly west of

the defendant, got a smell when the defendant began to operate (Case, p. 662), but subsequently did not.

John A. Kerr, a manufacturer of metallic belting (Case, p. 670), lived at 72 Edgewater Place and before that at 329 Undercliff Avenue directly west of the defendant, used to get, shortly after the defendant began to operate, an offensive odor which you would recognize, but which he has not had in the last sixteen or eighteen months before testifying (Case, p. 670).

Mrs. Jackson, who lived on Undercliff Avenue, next door to the complainant's sister, Mrs. Ryan (Case, p. 672), used to get a pretty bad smell apparently from the defendant (Case, p. 673), and was around the house generally during the day. She dated the improvement in the smell at about eighteen months before testifying (Case, pp. 673, 674).

Mrs. Rich, living on Undercliff Avenue about four hundred feet west of the defendant, got a very bad odor when the defendant began to operate (Case, p. 680), but had not had it since one occasion in June, 1912, which she remembered very well (Case, p. 680).

Mrs. Southard, who occupied another apartment in the same house with Mrs. Jackson (Case, p. 684), used to get a boiled linseed oil smell which people told her came from the defendant when it smelled "quite some," but not more than three times in the last year and a half before testifying (Case, p. 685).

Mr. Nygren, living at 66 Edgewater Place and prior to that at No. 75 on the same street, knew the smell of linseed oil, and before September, 1912, when he lived further away and north of the factory, used to get the smell, but had not

done so since September 1st, 1912, which day he fixed as the day when he moved into the Edgewater Place house (Case, p. 728). His wife, who was, of course, home all day in their apartment, 75 Edgewater Place, which was in the rear, and, therefore, exposed to any fumes produced by the defendant, also formerly got the smell, but had not done so since living at Edgewater Place.

Mr. and Mrs. Norlander, who used to visit the factory occasionally to see their kinsman, the night watchman, used to notice the objectionable smell, but had not for the last two or three years before testifying (Case, pp. 746, 747, 749).

Mrs. Peevers, living at 75 Edgewater Place, used to get a smell from the defendant before she went away on a trip in August, 1912, but not since her return in September of that year (Case, p. 751). This was a distinctive choking smell. Her husband, Thomas Peevers, fully corroborated her (Case, p. 754).

John P. Bolton, who worked in the Warner Sugar Refining Company directly across the street from the defendant, used to get a burning oil smell which people said was from the defendant, but had not since somewhere near the end of 1912 (Case, p. 757).

William F. Besselman, an oil refiner, testified that about three years before there was a disagreeable smell at the defendant's plant (Case, p. 759), but that he had not noticed any smell since defendant put in the consuming furnace (Case, p. 769).

John A. Lowe, superintendent of the Midland Linseed Products Company, who, up to March, 1914, boarded in Mrs. Smith's boarding house (she, it will be remembered, testified for the complainant) formerly noticed smells from defend-

ant's plant, but not since the latter part of 1912 (Case, p. 777), although at the time of testifying he passed the defendant's plant four times a day going along Edgewater Place.

Emil Kestenholz lived and kept a restaurant and boarding house next door to the defendant, having five or six steady boarders and feeding twenty or thirty people in winter and a few less in summer. He had the place before the defendant came there. When it first started he got a choking smell which he had not had since the fall of 1912 (Case, p. 783).

Roy E. Sidman worked about one thousand feet away from the defendant's factory. He visited the factory on an average of twice a week, and frequently went on the high land directly back of the plant to inspect that land for his company. His connection with Edgewater began in March, 1912, and he never got a bad smell from the defendant (Case, p. 790).

Guy E. Conder, who lived on Undercliff Avenue directly west of the defendant, got a very unpleasant smell during 1911. He had not experienced it since some time in the spring of 1912 (Case, p. 796). For about six weeks beginning July, 1912, he worked on the defendant's property installing an elevator, and commonly went home by way of the high ground at the rear of the plant (Case, p. 798). His wife remembered the oil smell and also remembered that it stopped around June, 1912 (Case, p. 798).

George A. Carleton, formerly Mayor of the Borough of Edgewater, lived on River Road about eight hundred feet south of defendant's factory which he was in the habit of passing every day going to and coming from the ferry. He remembered when the defendant first came, and that then he got some very offensive smells down at

his house, but for the past two years before testifying he had not received them (Case, p. 804), except once.

David Grant lived on Undercliff Avenue directly west of the defendant, and was a foreman for the Warner Sugar Refining Company and was around the factory all day. He said that when the defendant first started there, the smell was bad, but that he has not had it for two years anyway (Case, p. 811), except on one occasion, when there was a breakdown in January, 1913 (Case, p. 814). He is directly corroborated by Mr. Murray, in whose house he boards (Case, p. 819, 820). Mrs. Murray's testimony is to the same effect (Case, p. 827).

William G. Brooks is another witness who used to get the smells, but not since before the summer of 1912 (Case, p. 838), although he was also working on the elevator in the defendant's building.

The strength of the testimony of these and the other witnesses for the defendant lies in the fact that all of those quoted and most of the others, thirty-nine in all, used to notice the smell, but can say positively that it has ceased. There can be no question, therefore, of the defendant having produced people with defective sense of smell, as might possibly be the case had all the defendant's witnesses simply testified that they never were annoyed. Another noticeable fact is that these witnesses are honest enough to say that other factories smelled, including General Chemical Company, Midland Linseed Oil Company, Barrett Mfg. Company, New York Glucose Company, and Spencer Kellogg Company to the south of the defendant, and Higgins' Dye Works to the north. The witnesses who testified to this are Clahan (Case, pp. 617, 618), Mrs. Southard

(Case, p. 686), Mr. Bradley, a member of the Board of Health (Case, p. 741), Mr. Bolton (Case, p. 758), Mrs. Conger (Case, p. 799), Mr. Carleton (Case, p. 804), Mr. Nygren (Case, p. 627). Added to this we have the testimony of Barrett, the defendant's superintendent, that on several occasions he noticed a distinct linseed oil smell when the defendant was not boiling oil (Case, p. 526). Mr. Hilliker also testified that when working on the roof of the defendant's large building, he noticed the same sort of smell from linseed oil vapors at a time when defendant was not boiling oil (Case, p. 497). Mr. Mulligan, a conscientious member of the Board of Health, on the evening of Saturday, April 18th, 1914, noticed a bad smell in the town, went to the defendant's plant and ascertained that they were not then operating (Case, pp. 635 and 636). This odor, he said, he recognized as being a combination of smells of several different factories including General Chemical Company and Midland Linseed Oil Company (Case, p. 637).

The defendant never before having boiled linseed oil, and its officers knowing of many other places where such boiling is done without any artificial disposal of the fumes, began, as has been said, to boil in the open in Edgewater without any disposal whatsoever. As soon as they realized they were annoying their neighbors they immediately started to experiment with disposal devices. Their chemist, Klein, experimented in the laboratory with condensing the fumes (Case, pp. 477, 478) and with burning them, and found the former unsatisfactory and the latter successful. The defendant's engineer, Hilliker, worked with Mr. Klein, the chemist, and with Mr. Barrett, the superintendent of the Edgewater plant, continually making experiments from November,

1911, until February or March, 1912. During this time, ten or twelve different sized consuming chambers were tried, and the one finally installed, was determined upon by actual experiment, to be the best. The sketch (Exhibit D-9) shows the chamber. While they were making their experiments they would climb to the top of the chimney in their search for fumes, and go round to different parts of the town. The chamber as finally installed and improved by the substitution of fuel oil for coke, was found absolutely to consume all noxious or unpleasant smell or fumes coming from the boiling linseed oil. (Hilliker, Case, pp. 480, 496; Barrett, Case, pp. 499, 511.)

The daily course of business was to start fires under the kettles at about 6 A. M. (the actual time each day appears on the defendant's factory record, Case, pp. 927 to 949). The fire was started with wood, on which kerosine oil was thrown. The linseed oil had been pumped into the kettles the day before when the other two of the four kettles were being boiled, only two kettles being boiled at a time, except on special occasions. A workman named Kline, constantly attended in the boiling house and called Mr. Barrett when the thermometer in the linseed oil showed that the oil had attained a temperature of 250 degrees. (No noxious fumes go off before a temperature of 350 degrees is reached.) This heat is reached generally at about one and a half hours after the lighting of the fires. At this temperature (250 degrees) Barrett invariably lighted the burner in the consuming chamber (Case, pp. 926, 949). In about one hour's time after the burner is started, fumes are perceptibly coming from the oil (Case, p. 518), that is, when the oil has reached from 325 degrees to 350 de-

degrees. The interior of the chamber had attained a white heat within fifteen minutes from the lighting of the fuel oil burner (Case, p. 516). When the oil is boiled to the heat desired from 550 degrees to 575 degrees, the fires are drawn and after the lapse of about a half hour, the oil begins to cool at a rate depending upon the thickness to which it has been boiled. When the temperature gets down to 250 degrees, that is 100 degrees below the point at which it ceases to give off acrolein, the fuel oil burner is shut off. This takes place late at night from 10 P. M. to 2 A. M. The night watchman, Brandt, would look at the thermometer on his rounds, the oil dropping a little over 25 degrees per hour. When it had cooled down to 250 degrees he would call Kline who slept on the premises (Case, pp. 559, 561). The latter would then go and shut off the fuel oil burner, a simple operation (Case, p. 652), and next morning would write on the daily factory record previously referred to (Case, pp. 926 to 949) the hour at which he had shut off the fuel oil burner (Case, p. 565). This was the daily operation of the plant except on Saturdays, Sundays and legal holidays when it was closed down. The testimony of the three witnesses who prove it, Messrs. Barrett, Kline and Brandt, is absolutely uncontradicted and their accuracy is attested by the contemporaneous record kept by Barrett and Kline from day to day. The record appears Case, pp. 926 to 949. From it the witness Barrett refreshed his recollection (Case, p. 653). This disposal system was from the date of the introduction of the fuel oil burner in August, 1912, a complete and unqualified success, with the exception of occasions on which there were accidents and breakdowns, all of which are noted in tabular form in Schedule B, *infra*. On

Saturdays no oil was boiled, but the pipes from the kettle covers to the chamber were taken down and cleaned, the front of the chamber is knocked down in part (Case, p. 555), and although no soot is ever found inside the chamber, a kerosene oil blaze is put in there to burn out any accumulation (Case, p. 556). This process does not take five minutes and by actual test of the witnesses produced no smell (Case, p. 557). At the same time any of the fire brick inside the chamber that needs renewing is renewed. The inside wall of the chamber is lined with a course of fire brick set loosely in order that it may be removed easily, and with various "baffle bricks" which are set about on the grate bars here and there in the chamber to break up the flame and gases into particles, and thus to insure the complete combustion. These are also renewed.

An effort was made by the complainant to show that this Saturday process would produce a smell, the argument being that if some acrolein remained in the pipes, chamber or stack through the week, it would be liberated by the Saturday process. The answer to this is that acrolein is a very volatile substance changing from the liquid to the gaseous form at 126 degrees Fahrenheit (Case, pp. 614, 615, 690 and 691). It would stop coming off from the oil when that cooled to 325 degrees and the burner which remained going until the oil got down to 250 degrees would have plenty of time to consume all that had been given off, a very wide margin of safety, particularly since the oil cools at the rate of 25 degrees an hour (Case, p. 558). Acrolein is so volatile that it flashes at ordinary temperature. In other words, enough volatile gases come off at ordinary temperature for it to take fire directly (Case, p. 691). The result is, first, that none can stay

in the pipes from the kettles to the chamber long enough to liquify because of the fact that at all times while it is being produced from the oil, the temperature is far above this liquifying point. In the second place if any could stay, it is so volatile (being just like ether, Case, p. 614) that it would all have evaporated long before Saturday. In short, the only significance of the Saturday question is the importance attached to it by the complainant showing how serious her counsel deem the attack made on her case by the showing of Schedule A, *infra*, giving among other things the great number of Saturdays on which the complainant and her witnesses had claimed to be annoyed by smells.

As experts, the defendant produced two chemists exceptionally well qualified for this case. Dr. Rogers since 1905 has been in charge of industrial chemistry at the Pratt Institute in Brooklyn and there has charge of a miniature plant in which is boiled linseed oil in kettles of three to five gallons capacity to make lithographic varnishes, using commercial methods on a smaller scale. He described the smell of acrolein as resembling that when a nice juicy steak is fried and is burned on the stove (Case, p. 576). He visited the plant of the defendant on several occasions one of which was the day when the complainant's experts made their inspection. His conclusion was that it was impossible for the fumes to pass through the chamber unconsumed, because the temperature was high enough to decompose any organic matter given off by the oil and there was draft enough to get a complete combustion. The completeness of the combustion is evidenced by the fact that, except when the fires under the kettles were re-coked, there came off from the top of the chimney nothing but heated air, which the complain-

ant's lay witnesses so frequently described as the clear fume. He tested the gases in the stack by climbing up on the ladder and drawing the stack gases into an Orsat gas machine. This test was made on the day of the complainant's experts' visit. He found that the gases from the stack contained 2 per cent. of carbon dioxide, $18\frac{1}{2}$ per cent. oxygen, no carbon monoxide and the rest nitrogen. This shows that combustion was complete (Case, pp. 581, 700), because when there is not enough oxygen to give complete combustion, carbon monoxide is found. The effect of this test of the complainant's experts is very amusing. Dr. Olsen, the junior expert, when asked if he had made that analysis and had found that result whether he would say combustion had been fairly complete, answered: "It might and it might not" (Case, p. 409). The senior expert, Dr. McKenna, on his cross examination (Case, pp. 443, 444 and 445) in this connection, said that he could not believe that gases in proportion shown by the analysis could come from the product of the combustion of the furnaces in question. In other words, he insisted on dodging the question.

Mr. Thompson, defendant's other expert, was a chemist of twenty-five years' standing and for twenty-two years chief chemist for National Lead Company specializing in paints, oils and varnishes, particularly in linseed oil from its growth, refining and boiling and use in the arts (Case, p. 689), having boiled the oil himself in open kettles and having supervised the boiling of thousands of gallons. Both Dr. Olsen and Mr. Thompson were shown pieces of fire brick which Barrett testified (Case, p. 534) to have taken from the interior of the combustion chamber, one from the front and one from the extreme rear. Each

in his opinion stated that the fire brick from its color had been subjected to a temperature of 2000 degrees Fahrenheit (Case, pp. 605, 696). Mr. Thompson said that he should judge the chamber's temperature to be quite uniform throughout all its parts, his judgment being based on the observation of the fire brick, and the physical fact that surfaces radiate heat very much more effectively at high temperature than at low (Case, p. 696). He agreed with Dr. Rogers' analysis that the gases from the stack showed complete combustion (Case, p. 700). Both of these gentlemen examined the defendant's plant and gave it an absolutely clean bill of health.

Compare with them the inexperienced and impractical experts produced by the complainant. Dr. Olsen (Case, p. 403) admitted that he had no experience of boiling linseed oil before his visit to the plant of the defendant, and that afterwards he boiled it several times in an open dish and in a retort in his laboratory and once in his house. Dr. McKenna likewise had to admit (Case, p. 433) that his acquaintance with linseed oil had been only in laboratory experiments. This witness' ignorance appeared further in his supposing that kettles in which the oils were boiled were made of cast iron (Case, p. 414) and his admission of his ignorance that cast iron would not do at all (Case, p. 434). So inexperienced was he on the question of linseed oil that he had recourse to text book authority while testifying on his direct examination (Case, pp. 427, 864, 865). These references were made over the defendant's objection and illustrate how inexperienced and unqualified the witness was.

And yet, these alleged experts who both admitted that the fumes of boiling linseed oil can be rendered innocuous by burning (see point I of

this brief, *supra*) assumed to criticize the defendant's disposal chamber. Dr. McKenna, out of the abundance of his wisdom, for it certainly was not out of his experience, said that if he were given the problem, he would condense the fumes in water (Case, p. 447). The defendant tried condensing and found that method a failure (*Kline*, Case, pp. 477, 478; *Barrett*, Case, p. 504, 505). Dr. McKenna further says that the disposal chamber is inadequate because there is not enough heat and not enough oxygen (Case, p. 429). The answer to this are manifold. First, both Dr. McKenna and Dr. Olsen admitted that one time on the day of their inspection the chamber was working successfully (Case, pp. 393, 449). They seek to weaken this admission by saying that at that moment for the first time the bricks on the inside of the chamber were red hot (Case, p. 393) and this, although little can be seen of the chamber's interior. Of course, they are contradicted in this not only by Barrett, who says he gets the chamber at a white heat in fifteen minutes after the lighting of the burner (Case, p. 516); by the defendant's experts' own observations (Case, pp. 577, 604, 696, 697) but also by the impartial testimony of Mr. Mulligan, one of the members of the local Board of Health, who testifies that on the day of his visit he examined the consuming chamber and found the interior of it to be white hot (Case, p. 639, 640). Added to this, there is the forceful evidence of the two pieces of fire brick produced by Barrett from the front and extreme rear of the chamber (Case, p. 534). Both Dr. Rogers (Case, p. 605, 6), and Mr. Thompson (Case, p. 696, 697) say in their opinion these pieces of fire brick have been subjected to a temperature of 2000 degrees Fahrenheit, a heat admittedly adequate totally to consume the acrolein (Case, p. 717). The experts for

the complainant also say that they believe there is not enough oxygen in the chamber to allow a complete combustion (Case, p. 428). They state no reason for this, but they do say that if there were not a complete combustion the fire would burn with a smoky flame and there would be a deposit of soot on the walls of the chamber (Case, p. 428). But Barrett testified that upon his regular Saturday examination of the interior of the chamber he never found soot on its walls (Case, p. 555), and everybody admits that what emerges from the chimney is with sporadic exceptions nothing but heated air or a clear fume as some of the lay witnesses describe it. The sporadic exceptions, Dr. McKenna admitted himself on the day of his inspection, were not due to the chamber, but to the fires under the kettles which from time to time were re-coked, resulting in incomplete combustion there (Case, p. 455). The intimation that the opening in the face of the furnace, 3x5 inches, is not large enough to let in sufficient oxygen together with that which comes from over the kettles through the crevices in their hoods, seems at first blush to be weak, and this weakness is fortified by the clear testimony of Mr. Thompson that the fierce inrush of the atomized oil through the face opening of the chamber acts like an injector on a steam engine and sucks in a rapid draft of air around it (Case, p. 702). Furthermore, one of the components of acrolein itself is oxygen (Case, p. 690). But the best evidence of all is the fact that the chamber, its size, shape and openings were determined upon after a series of practical experiments in which as many as ten or twelve different chambers were tried (Case, p. 488), when the experimenters during the operation, continually climbed to the top of the chimney to ascertain if any fumes were escaping, and did not rest from their labors until they found a

chamber which did work. The complainant's attack on this chamber is the attack of inexperienced theory founded on no fact, and colored by desire to reach a certain result, against judgment entrenched upon experience and experiment. Two men who have never boiled linseed oil except in their laboratories, say that they think it cannot work. Practical men experimenting over a period of months kept working until they found something which did work successfully, and the judgment of two trained chemists who have devoted their lives to linseed oil, supports the actual conclusion of the practical men.

The complainant of course argues that the testimony of her lay witnesses that they were from time to time annoyed by smells, proves that the defendant's disposal chamber did not work; but to attach this effect to that testimony, is to assume the very point at issue, which is whether the defendant is the source of the objectionable odors. We have seen how weak the testimony of the complainant and her witnesses is, and how strongly it is contradicted by the testimony of the defendant's lay witnesses. Certainly the complainant has not adduced a preponderance of evidence. This certainty is made doubly certain when attention is directed to Schedule A attached to this brief. There in parallel columns are arranged the names of the complainant's witnesses with reference to the page of the record where the testimony appears, the dates on which they claim to have been annoyed by smells, and in another column, proof that on those days the defendant was not boiling linseed oil. There are fifty-six distinct occasions involving seventeen different witnesses. Of course, only such witnesses as would pin themselves down to actual dates could be

affected. In connection with this, the learned Vice Chancellor said in his opinion (Case, p. 957):

“Many occasions have been given upon
 “which the fumes were seen and an attempt
 “has been made by the defendant corporation
 “to show that some of these times they were
 “not operating the factory. While there
 “are some slight contradictions of the wit-
 “nesses of the complainant, yet, at this point,
 “I am satisfied beyond peradventure that on
 “most of the dates they enumerated seeing or
 “feeling the effect of the fumes that the con-
 “ditions prevailed as described by them.”

A pretty successful “attempt” we should say, when it is absolutely uncontradicted, when its accuracy is attested by the fact that it is based on contemporaneous records (Case, pp. 926 to 949) made without any idea as to whether or not upon the several days on which the defendant did not boil, it would be alleged that on such days, it created a smell (Case, p. 653). The record is a daily factory record kept by an honest and conscientious man whose honesty the complainant did not even attempt to shake—Barrett, and his testimony on this, cannot be mistaken, he is either right or a perjurer. He is, moreover, on certain of the days corroborated by three witnesses, all of which appears on Schedule A. If the Court will choose at random a few of the references on Schedule A to the testimony of the complainant’s witnesses, and see how positive they are, that the defendant is responsible, and if the Court will bear in mind how we have shown that there are a number of other plants in the town so situated that with any direction of the wind, one or more of them may have been responsible for such smell as actually existed, the Court will be convinced that the testimony of the complainant and her witnesses is just as wrong on the other days on

which the defendant indeed was boiling linseed oil, and as to which the complainant's witnesses describe conditions identical with those described on the idle days on Schedule A.

The defendant frankly admits that from June, 1913, to May 4th, 1915, there were seventeen occasions when there were slight accidents or breakdowns, some of which may have allowed some smell to escape. It is significant that none of them took place after June 23rd, 1914, showing how the management improved. These appear in the testimony of Mr. Barrett and in the factory record and are frankly listed in Schedule B of this brief, *infra*.

The case comes down to a question between a number of vindictive, unreasonable and unreasoning persons whose testimony is contradicted not by witnesses who never were able to smell, but by people who used to get it, but are discerning and honest enough to admit that from the time of the improvements in the disposal system, they ceased to get it, and also by the record evidence of witnesses who cannot be mistaken and whose veracity has not in the least been shaken. Upon such a case, no court giving the matter reasonable consideration can hesitate.

III.

None of the other work done by the defendant produces any objectionable smell or fume.

This point in our brief is made necessary by the eleventh hour effort on the part of the complainant, when her counsel no doubt felt themselves beaten on the discharge of acrolein from the chimney of the boiling house, to bring into the case

the rosin pots in the open yard. It is true that Dr. McKenna, in his original direct testimony, announced with apparent delight that he had seen in the open yard two large pots over a concrete fire place, which were empty the day of his visit, but which if filled with linseed oil and boiled, would give off acrolein directly into the atmosphere (Case, p. 422). This matter was, however, dropped like a hot brick when the doctor was asked on cross examination that if rosin were boiled in those pots whether any acrolein would be given off. He, of course, had to answer in the negative (Case, p. 443). Barrett testified that only rosin, and never linseed oil, was boiled in those pots (Case, p. 532). The matter rested there, without further effort on the complainant's part, until the last day of the trial—eight months after the defendant had closed its defense, and eight months after the complainant had entered upon her rebuttal, and had been forced to take an adjournment, owing to the Court's engagements. On this last day of the trial, Mrs. Harrigan, Mrs. Popp and Mrs. Scanlon, all testified that they saw these same pots boiling and got a rosin smell. Each, in a way half-hearted for them, said that this rosin smell was objectionable. Now, of course, this evidence was outside of the pleadings, as the complainant's counsel tacitly admitted, by moving at this stage of the proceedings to amend the bill, which motion, after objection and brief argument, was allowed (Case, p. 902), and the amendment filed (Case, p. 11).

Now, nothing had been said against rosin up-to-date, and with the attack directed against acrolein, the defendant had not only prepared, but made, and closed its defense. It had to do the best it could on this last day of the trial. All it had was the admission of the complainant's ex-

pert that rosin, if boiled, would not produce acrolein (Case, p. 443). Mr. Barrett, the superintendent, took the stand in sur-rebuttal, and said that rosin gives off an unobjectionable piney smell, the source of the adjective "resinous" (Case, p. 909, 918). He also showed, by referring to his daily memorandum, that on thirteen of the different occasions complained of by the complainant's witnesses on this last day, the rosin pots were not in use. All this appears in Schedule A, attached to this brief, *infra*. He said that they also have a rosin still in the still-house, in addition to the rosin pots outside. Of course, not even a resinous smell can come from a still, as its very function is to condense all the vapors given off from the heated rosin; and that is the fact in this case (Case, p. 919).

This eleventh hour attack, therefore, is weak enough to be met on the facts alone. No expert is produced to show that the odor of rosin is objectionable or harmful. No nuisance is made out.

From a legal point of view, the weakness is even clearer. The defendant had closed its case, and the complainant had entered upon her rebuttal, and had taken an adjournment. It was extraordinary enough to permit the regular line of testimony to continue as to dates subsequent to the last prior hearing, but the defendant was not afraid of them, and, therefore, its counsel made only a suggestion, and not a legal objection (Case, p. 869). But to open then a brand new charge of rosin on "the premises," when prior thereto, both in pleading and evidence, the charge had been confined to the pots on the assumption that they were the source of acrolein exuding from the chimney, was extremely unfair and prejudicial to the defendant, and a clear case of judicial error.

THE LAW.

IV.

The few admitted accidental breakdowns do not constitute a nuisance.

In *Ross v. Butler*, 4 C. E. Green, 294, which was a smoke case, *Zabriskie, C.*, said at page 298:

“The law takes care that lawful and useful business shall not be put to a stop on account of every trifling or imaginary annoyance, such as may offend the taste or disturb the nerves of a fastidious or over refined person. But, on the other hand, it does not allow any one, whatever his circumstances or condition may be, to be driven from his home, or to be compelled to live in it in positive discomfort, although caused by a lawful and useful business carried on in his vicinity. The maxim, *sic utere tuo ut alienum non laedas*, expresses the well established doctrine of the law.

It is not necessary, to constitute a nuisance, that the matter complained of should affect the health or do injury to material property. It is sufficient, in the language of Sir Knight Bruce, if it is ‘an inconvenience materially interfering with the ordinary comfort, physically, of human existence, not merely according to elegant and dainty modes and habits of living, but according to plain and sober and simple notions among the English people.’”

And again on page 302:

“A nuisance of this kind may possibly occur so seldom that it will not be held to produce a material discomfort. Where the occurrence was only accidental and not produced by the regular course of business, and recurring only three or four times a year, and not intended to be again permitted, it was held not to be a proper cause for an in-

junction to stop a lawful business, but that the party must be put to his action for damages.”

In *Hennessy v. Carmony*, 5 Dick. (Ch.) 616, 617, Pitney, V. C., said:

“Upon reason and authority, I think there is a clear distinction between that class of nuisances which affect air and light merely, by way of noises and disagreeable gases, and obstruction of light, and those which directly affect the land itself, or structures upon it. Light and air are elements which mankind enjoy in common, and no one person can have an exclusive right in any particular portions of either, * * * it follows that we cannot expect to be able to breathe air entirely free from contamination, * * * In all these matters of the use of the common element—air—we give and take something of injury and annoyance, and it is not easy to draw the line between reasonable and unreasonable use in such cases, affecting, as they do, mainly the comfort and in a small degree only the health of mankind. In attempting to draw this line we must take into consideration the character which has been impressed upon the neighborhood by what may be called the common consent of the inhabitants.”

In *Tuttle v. Church*, 53 Fed., 422 (Circuit Court, Rhode Island, 1892), Colt, J., said at page 425:

“The question is whether the annoyance is such as materially to interfere with the comfort of human existence. It is not sufficient that the injury is accidental and occasional, but it must be permanent and repeated.”

Of the seventeen distinct admitted breakdowns set forth in Schedule B, eight at the most could have been serious enough in their results to have

caused any annoyance. They are the accidents of September 4, 1913, December 3, 1913, January 13, 1914, February 25, 1914, March 5, 1914, March 10, 1914, and April 8, 1914. On the other nine occasions either no one claims to have been annoyed by a smell or else the time of day given by them is a different time than the occurrence of the accident. This leaves eight occasions in twenty-three months, approximately four a year, and each of these occasions was an accident with a result that, for not more than ten minutes in each case, fumes may have escaped and no doubt did so. It is significant moreover, that the last substantial accident, that of April 8, 1914, took place more than a year before the last day of testimony and the last accident of any nature on June 23, 1914, a little over ten months before (Case, p. 911). This speaks volumes in showing that the management of the plant had improved. Such occasional accidents cannot be said materially to interfere with the ordinary comfort of human existence. For no such rare accidental and brief annoyances as these will an injunction be granted. Indeed, the learned Vice Chancellor did not go on this ground, but taking what we contend to be a clearly mistaken view of the effect of certain prior decisions in the Court of Chancery, felt himself bound by those decisions as to the effect which he must necessarily give to the testimony of the complainant's lay witnesses.

V.

The Vice Chancellor erred in the effect given by him to the testimony of the complainant's lay witnesses.

The learned Vice Chancellor in his opinion (Case, p. 958), said: "In a long line of cases, this Court has dealt with situations similar to the one disclosed by the evidence in this case." He then cited *Croecker v. Camden Coke Co.*, 13 Buch., 371, (Walker, C., 1913), and *Board of Health of Irvington v. Schmidt*, 13 Buch., 35, (Stevens, V. C., 1914). The doctrine of these cases traces back to *Rausch v. Glazer*, 74 Atl., 39, (Walker, V. C., 1908). This was an injunction to restrain an annoyance maintained by a rendering plant in Fanwood Township, Union County. There was absolutely no doubt as to the source of the alleged objectionable odors. The only question was whether the smells were objectionable. The complainant produced a number of witnesses that they were objectionable, and the defendant produced some who said they were not annoyed. In advising a decree on this state of proof, Walker, V. C., said at page 41:

"The nuisance said to exist upon the Glazer place being established by satisfactory testimony, that proof is not overcome by testimony of a negative kind, of which character was most of the testimony adduced on behalf of the defendants. Testimony of some of the neighbors that they are not annoyed does not disprove that the complainant and his family are nauseated."

Board of Health of Irvington v. Schmidt, *supra*, was a similar case where the nuisance complained of was a piggery in the Town of Irvington. Again there was absolutely no question as to the source

of the alleged odors. Stevens, V. C., said at page 37:

“The mere fact that the odor is not noticed by or does not affect some of the neighbors does not show that it is not a nuisance to others.”

In the case at bar, the learned Vice Chancellor relied on the doctrine of these cases. The extent of his reliance appeared far more thoroughly in the course of his remarks to counsel during the final argument than from the brief opinion which he delivered immediately upon its close, although the cases cited by him in his opinion show the basis of his decision. In the case at bar, the very point at issue and which was vigorously contested, *was whether the defendant was the source of the annoying fumes*. The claim that it was, was met in three ways: first, by showing that the defendant had adopted and maintained an adequate disposal system. The second was by producing a large number of witnesses who said they once had received the smell, but had not done so from a time corresponding more or less accurately with the final completion of the disposal system. The third defence and perhaps the most significant, was the showing by the defendant that there were other plants in Edgewater which from time to time produced smells, and that on fifty-six distinct occasions upon which the complainant and her witnesses say they were annoyed by smells, the defendant was not operating its plant. The question in this case is not whether smells from an admitted source are or are not sufficiently annoying to be a nuisance. It is not between a number of witnesses who are annoyed and a number who say they are not. Indeed, the most discerning witnesses are the defendant's, for they say they once were annoyed, but are able now to say

that the smell which they attributed to the defendant has ceased. The doctrine of *Rausch v. Glazer* and the subsequent cases was not a startling innovation upon the ordinary rules of the burden of proof. It is a common sense doctrine to the effect that if a substantial number of persons of ordinary sensibilities are annoyed, a nuisance is established which is not disestablished by the production of a number of persons who say that they are not annoyed. That the Court will see is not the situation in the case at bar. Here the question is whether the complainant has picked out the proper culprit; and on that question the testimony of the complainant and her witnesses cannot be singled out from the whole case and given the same conclusive effect, which the testimony on the part of the complainant was given in *Rausch v. Glazer, supra*, and the other cases.

Wherefore, it is respectfully submitted that the decree must be reversed.

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March Term, 1916.

SCHEDULE A.

This table shows the days since June 1st, 1913, on which the defendant was not boiling oil and on which days the complainant and her witnesses claim to have noticed an objectionable smell. The figures refer to the page of the record. The capital letter "R" means that the reference is to the daily memorandum kept and identified by the witness Barrett (Case, p. 926-949).

1913	Smelled By:	Boiling Oil?
June 6	Harrigan (38) Kehoe (151) Conklin (157) Dinan (255)	"Fake Run" { Barrett (526) Grant (810) Murray (821)
" 7	Harrigan (38) McGarry (65) Smith (72)	Didn't boil (R) 927 ran burner 2 P. M.
" 10	Dobbs (159) Glasson (167) Harrigan (356)	Didn't boil (R) 927 (1st day of trial)
" 24	Helen Burns (177) Popp (198) Mooney (35) Ryan (284)	Didn't boil (R) 927
" 26	Popp (198)	"Fake Run" { Barrett (526) Grant (812) Murray (821)
" 27	H. Burns (177) Popp (198)	Didn't boil (R) 927 (2nd day of trial)
July 1	Harrigan (356)	Didn't boil (R) 928
" 3	Harrigan (356)	Didn't boil (R) 928
Aug. 9	Campbell (340) Harrigan (356)	Didn't boil (R) 929
(S) Oct. 11	Harrigan (357)	Didn't boil (R) 931
(S) " 18	Harrigan (357)	Didn't boil (R) 931
" 28	Harrigan (357)	Didn't boil (R) 931
Nov. 6	Harrigan (357)	Didn't boil (R) 932
" 11	Harrigan (357)	Didn't boil (R) 932
" 12	Harrigan (357)	Didn't boil (R) 932

Oct. 10	Harrigan (879) Popp (870)	}	No. (905)	Outside (914)
" 31	Harrigan (879) Popp (870)			
Nov. 1	Harrigan (879) Popp (870)	}	No. (906)	
" 7	Harrigan (879) Popp (870)			
" 21	Harrigan (879) Popp (870) Kennedy (876)	}	No. (906)	No. (914)
Dec. 19	Harrigan (879) Popp (870)			
1915				
Jan. 30	Harrigan (879) Popp (870) Kennedy (876)	}	No. (907)	Outside (915)
Feb. 1	Harrigan (879) Popp (870) Kennedy (876)			
" 6	Harrigan (879) Popp (870)	}	No. (907)	No. (915)
" 8	Harrigan (879) Popp (870)			
" 27	Harrigan (879) Popp (870) Kennedy (876)	}	No. (907)	No. (915)
Mar. 20	Harrigan (879) Popp (870)			
Apr. 10	Harrigan (879) Popp (870) Kennedy (876)	}	No. (907)	No. (915)
" 27	Harrigan (879) Popp (870)			
(Fifty-six different days in all.)				

SCHEDULE B.

ADMITTED BREAKDOWNS SINCE JUNE, 1913.

- Sept. 4—Thunderstorm—electric power off compression 11 P. M. (521) Mrs. Campbell (340) and Mrs. Harrigan (357) smelled.
- Oct. 1—Electric power off (521). Nobody smelled. Immediately applied steam.
- Nov. 17—Belt of compression broke 7:30 P. M. (521) Mrs. Harrigan smelled (357). Immediately applied steam—just matter of shutting air valve and opening steam valve.
- Nov. 21—Belt broke between 5:30 and 6:00 P. M. Used steam (572) Mrs. Harrigan smelled (357).
- Dec. 3—Fire in kettle between 11:00 and 11:30 A. M. Quite bit of smoke escaped through crevices in roof for few minutes. Takes about 10 minutes to put fire out (522), Mrs. Harrigan smelled (357).
- Dec. 8—Power off five times, used steam (522). Mrs. Harrigan smelled (357).
- 1914—
- Jan. 13—Trouble with gravity oil pipe because of zero weather. Threw compressed pipe on—matter of short time (522). Mrs. Harrigan smelled (357).
- Jan. 21—Burner valve clogged for few seconds at 11:30 A. M. (523). Mrs. Campbell (340) and Mrs. Harrigan smelled (357).
- Feb. 12—Burner out of order 8-9 P. M. (523). Allison (313) smelled 11 or 12 midnight, Mrs. Peterson (331) daytime, Mrs. Harrigan (357), Mrs. Barnold (861).
- Feb. 25—Burner trouble 9 A. M.—1 P. M. at intervals and kettles were pumped out and flooded with cold oil to prevent escape of fumes

- (523). Allison smelled (314) early in evening. Mrs. Peterson (331) night. Mrs. Campbell (340), Mrs. Harrigan (357).
- March 5—Fire in kettle out in 5-10 minutes (523) Mrs. Harrigan smelled (357).
- March 10—Fire in kettle 11 A. M. (523). Mrs. Harrigan smelled (357).
- March 20—Power off—used steam (524).
- April 8—Two kettles flashed 11 A. M. (524). Mrs. Peterson (373) smelled. Mrs. Harrigan smelled (357).
- May 26—Burner choked for 5 minutes 4:30 P. M. (910). Mrs. Harrigan smelled (850).
- May 27—Burner choked upon starting at 6:45 A. M. (910). Mrs. Harrigan smelled (850).
- June 23—New burner didn't work well, 6:27 A. M. (910). Mrs. Harrigan smelled (850). No more breakdowns to May 4, 1915 (911).

