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Record No. 6252

In the

Supreme Court of Appeals of Virginia

at Richmond

NORFOLK AND WESTERN RAILWAY COMPANY

v.

WALTER H. ANDERSON, ET AL.

FROM THE CIRCUIT COURT OF ROCKBRIDGE COUNTY

RULE 5:12 BRIEFS

§5. Number of Copies. Twenty-five copies of each brief shall be filed with the clerk of this Court and three copies shall be mailed or delivered by counsel to each other counsel as defined in Rule 1:13 on or before the day on which the brief is filed.

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

HOWARD G. TURNER, Clerk.

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

IN THE

Supreme Court of Appeals of Virginia

AT RICHMOND.

Record No. 6252

VIRGINIA:

In the Supreme Court of Appeals held at the Supreme Court of Appeals Building in the City of Richmond on Wednesday the 13th day of October, 1965.

NORFOLK AND WESTERN RAILWAY COMPANY,
Plaintiff in error,

against

WALTER H. ANDERSON, and
WALTER H. ANDERSON, JR., Defendants in error.

From the Circuit Court of Rockbridge County
Paul A. Holstein, Judge

Upon the petition of Norfolk and Western Railway Company a writ of error and *supersedeas* is awarded it to a judgment rendered by the Circuit Court of Rockbridge County on the 25th day of February, 1965, in a certain motion for judgment then therein depending wherein Walter H. Anderson and another were plaintiffs and the petitioner was defendant; upon the petitioner, or some one for it, entering into bond with sufficient security before the clerk of the said circuit court in the penalty of ten thousand dollars, with condition as the law directs.

RECORD

* * * * *

page 44] A

The Court instructs the jury that the mere fact that the tomato plants failed to produce places no responsibility on anyone and raises no presumption of negligence. The basis of this action is negligence, which the jury cannot infer from the mere fact that the tomatoes failed to produce. You should not return a verdict in favor of the plaintiff which is based on conjecture, surmise or speculation as to what you think may have happened to cause the tomato plants to fail to produce, and if the plaintiff fails to prove by a preponderance of the evidence that the defendant was guilty of negligence, or if it appears from the evidence that it is as probable that the defendant was not guilty of negligence as that it was, or that it is as probable that such negligence did not proximately cause the plants to fail to produce as that it did, then you should return a verdict in favor of the defendant.

Given:
P. A. H. 11/24/64

page 45] B

The Court instructs the jury that if you believe from the evidence that it is just as probable that the damage to the tomato plants and crops was caused by disease as by the negligence of the defendant then you should return a verdict in favor of the defendant.

Given:
P. A. H. 11/24/64

page 46] C

The Court instructs the jury that if you believe from the evidence that it is just as probable that the damage to the tomato plants and crops was caused by natural causes as by the negligence of the defendant then you should return a verdict in favor of the defendant.

Given:
P. A. H. 11/24/64

page 47] D

The Court instructs the jury that if you believe from the evidence that it is equally as probable that the damage to the plants was proximately caused by either one of two causes, for one of which the defendant is responsible and the other it is not, then the plaintiff has failed to carry the burden of proof, and you should return a verdict in favor of the defendant.

Given:
P. A. H. 11/24/64

page 48] E

The Court instructs the jury that if you believe from the evidence that the plaintiff has failed to carry the burden of proof that the spray used by the defendant damaged the plants of the plaintiff, or if it is as probable that the spray did not cause the damage as that it did, then you should return a verdict in favor of the defendant.

Given:
P. A. H. 11/24/64

* * * * *

page 56] We the Jury find the defendant guilty as instructions 1-A and award the plaintiffs damages in the amount of $9000.00.

C. GUY MAHONEY, Foreman

* * * * *

page 58]

* * * * *

This day came the parties, by counsel, and the Court having maturely considered the motion of the defendant to set aside

the verdict for the plaintiffs, heretofore rendered in this action, and now being of opinion that it is proper in all respects to do so, the Court doth overrule the motion, and it is considered by the Court that the plaintiff recover of the defendant the sum of Nine Thousand Dollars ($9,000.00) and their costs in this behalf expended, and the defendant, by its attorney, duly objects and excepts to the foregoing action of the Court for the reason heretofore stated in its motion to set aside the verdict.

At the instance of the defendant, by its attorney, who intimated its intention to apply for a writ of error and *supersedeas*, the court doth order that the execution of the foregoing judgment be suspended for ninety (90) days from this date upon condition that the said defendant or someone for it give a proper suspending bond in the penalty of Five Hundred ($500.00) Dollars conditioned according to law with surety approved by the Clerk of this Court.

ENTER:
PAUL A. HOLSTEIN
Judge
2/25/65

★ ★ ★ ★ ★

page 59]

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NOTICE OF APPEAL AND ASSIGNMENTS OF ERROR

To: Honorable Harry B. Wright, Clerk of the Circuit Court for the County of Rockbridge, Virginia.

TAKE NOTICE, That pursuant to Rule 5:1 § 4 of the Rules of the Supreme Court of Appeals of Virginia, the defendant, Norfolk and Western Railway Company, by counsel, files its notice of appeal from the final judgment rendered against it in favor of the plaintiffs, Walter H. Anderson and Walter H. Anderson, Jr., by the Circuit Court for the County of Rockbridge, Virginia, on the 25th day of February, 1965, and within sixty days from the date of final judgment, and assigns errors as follows:

(1) The verdict is contrary to the law and the evidence and without evidence to support it;

(2) The action of the Court in refusing to strike the evidence of the plaintiffs at the conclusion of the plaintiff's evidence and at the conclusion of all of the evidence;

(3) The action of the Court in granting plaintiffs' Instructions No. 1-A and No. 4;

(4) The action of the Court in admitting the opinion evidence of the witnesses W. H. Anderson, Roy J. Cook and James G. Dunlap;

(5) The action of the Court in refusing to admit in evidence defendant's photographic Exhibits P, Q, R, S, T, U and V; and

(6) The action of the Court in overruling defendant's motion to set aside the verdict of the jury and to enter judgment for the defendant, *non obstante veredicto*, or, in the alternative, to grant the defendant a new trial.

WM. ROSENBERGER, JR.,
Attorney for Defendant
407 Krise Building,
Lynchburg, Virginia

page 60]

* * * * *

Filed in the Clerk's Office of the Circuit Court of Rockbridge County, Virginia on the 9 day of March 1965

_____ Clerk
ELLEN D. TOMLINSON D. C.

* * * * *

page 3] IN CHAMBERS

Mr. Rosenberger: If your Honor please, we tried this case once before ending in a mistrial because of a question which was asked and then later the plaintiff joined in my motion for a mistrial but the issue is in this case whether or not the railway company killed or damaged this tomato crop by a weed killer or whether it was some disease and it involves highly technical knowledge. In the trial before there was quite a bit

of testimony taken and I was put in a position of objecting on numerous occasions because the qualifications of witnesses had not been established to put them in position to give an opinion before the jury.

Then another phase of it is admittedly we did not spray along our right of way in 1963 and counsel thought that might be evidence or some type of evidence showing guilty knowledge.

The Court: Or an admission.

Mr. Rosenberger: We took the position that what happened after that time was something that there could page 4] have been all kinds of reasons for not spraying and particularly —

The Court: Wasn't that discussed at another pretrial conference in this matter?

Mr. Rosenberger: I don't believe Mr. Carter was present at that time. I expressed my opinion at that time I thought that evidence was inadmissible. Then also there was a question whether or not the spray that was used which allegedly killed these tomatoes or tomato plants was poisonous. We did not admit it was poisonous but admitted if the spray is put on tomato plants it would affect the tomato plants.

Mr. Carter: You admit that?

Mr. Rosenberger: It depends on the degree. We are in a technical field. The witnesses will tell you the extent of coverage and the mixture of the spray but I am willing to admit if we got it on there it would be some damage to the tomato plants. I am told if it was on there as Mr. Anderson said it was it would kill them.

Mr. Carter: Judge, are you making a ruling on the admissibility?

The Court: This is merely a conference. I page 5] haven't made any ruling.

Mr. Carter: I just want to get my exceptions in at the proper time whenever that is.

Mr. Rosenberger: We can get it in now if you want to. I would like to keep these matters out of the opening statements because I feel like if counsel tells the jury so-and-so on the basis of going to prove it that to a lot of jurors it is just as if it was a part of the evidence.

Mr. Carter: I don't object to that part of it.

Mr. Rosenberger: You may proffer the evidence during the

trial in the absence of the jury so we don't get it in like we did before.

Mr. Rowe: We could cut this down an awful lot if you could agree on the average price of tomatoes at that time.

Mr. Rosenberger: This is the thing I don't understand. Your man said he was only asking an average of $4.00. All the other testimony was that they were worth much more than that. I don't see how the evidence of damages could go any higher than he is asking.

page 6] The Court: I have studied the entire records and the pleadings and all other matters incidental to the case, and also your instructions. It is alleged that the yield of tomatoes that year in '62 was one bushel per plant. Can that be definitely established or would that be a matter of conjecture or how can we establish the yield per plant was a bushel?

Mr. Rowe: This type of plant usually, as I understand the witnesses, and our client and another person familiar with the type of plant, is that they bring a bushel per plant.

Mr. Carter: In other words, Dunlap who is connected with this farm organization raised tomatoes the same year and he had a number of people he was supervising who were raising tomatoes and he said about a bushel to the plant was not too high that particular year.

Mr. Rosenberger: On his testimony that is where we are going to start out objecting to his qualifications. He had a few tomatoes in his home garden and Judge Moffitt

page 7] instructed the jury he was not qualified as an expert to give any opinion as to the cause of the damage to these tomatoes and his knowledge of raising them in his home garden would not be sufficient for him to give an estimate as to what they would produce and I think that all of that testimony is pure speculation.

The Court: That is what disturbed me in reading the pleadings. The burden of proof is on the plaintiff and I don't think it can be determined through speculation and conjecture as to the yield of this particular tomato crop.

NOTE: At this point this conference was interrupted and during this interruption the jury was selected, the witnesses called, sworn and excluded. The conference is resumed in chambers.

Mr. Carter: Judge, there was some question about expert testimony. I notice here in this book, Law of Evidence of Virginia and West Virginia, it says the question in every case involving expert testimony is has this witness been qualified. In other words, I think you will find that if the witness has a better knowledge or knowledge that the

page 8] jury doesn't have about any subject he is qualified. He doesn't have to have a degree but is qualified so long as he can enlighten the jury from his experience. "Either by study or experience" it says, either one. The Courts are very lenient apparently with who is an expert and who is not. The question is trying to help the jury. When we get to the qualifications of these people then would be the time that the Court would rule on whether or not they are qualified.

The Court: You are contending the ultimate test is whether they are better qualified than the jury?

Mr. Carter: We usually used to think a fellow had to be an engineer or a doctor or something else but this says if a man by experience or study is better qualified than the jury he can testify so long as he doesn't step in the jury box.

The Court: The specific name of James Dunlap was offered. In what way do you feel that he is qualified?

Mr. Carter: He is supervisor of these farmers in growing these crops, including tomatoes. He supervises

page 9] them as to fertilizers, sprays, sprays for blight and for weeds and brush and everything else. He is a general supervisor, as I understand.

Mr. Rosenberger: I have an understanding that this gentleman's official title is Area Supervisor for the Federal Farm Administration. He makes loans on real estate and on machinery. He makes loans for crops but actually he doesn't technically instruct people about the growing of these crops. This man didn't even know what kind of tomatoes Mr. Anderson planted. He has never grown tomatoes commercially. He doesn't know about the various types of tomatoes and from our examination of him on tomato diseases and problems on our examination of him last time, plus our conference with him in the office, the only experience he has he had a few plants in his home garden which isn't a proper comparison between raising them commercially on a farm. I think here the man estimates he had about three and a quarter acres to three and a half acres in tomatoes or 6,270 plants.

The Court: Are there different species of tomato plants that would determine yield?

page 10] Mr. Rosenberger: Some give one yield, some another. You have the question of location, the soil, weather conditions, how much sun, how much rain and all those things affect the yield.

The Court: When these plants were allegedly destroyed were they bearing fruit at the time?

Mr. Rowe: Yes, sir.

Mr. Carter: They had sold some tomatoes at the time but they hadn't reached the height of production. I think Mr. Rosenberger and I disagree as to the qualifications of witnesses but I think when we get to it we will try to qualify him. Then when objection is made the Judge in the light of the law can rule on it.

Mr. Rosenberger: Judge Moffitt ruled after you examined him thirty or forty minutes that he was not qualified to give an expert opinion.

Mr. Carter: I understand this is a new trial.

Mr. Rosenberger: The only thing I was getting at, Judge, after they get through with what they claim will qualify him I would like the benefit of examination to show his lack of qualifications.

page 11] The Court: We will come to that with this or any other witness when he testifies and when some question about him being qualified as an expert arises we will determine that in the absence of the jury and we will do it right out there. Certainly not even by innuendo should we let anything go to the jury which would be improper. Then another thing while we are in here discussing these matters on this phase of the evidence that the railroad did not carry out spraying operations the following year there will be some discussion of that too before a ruling is made on that.

Mr. Carter: The plaintiff took the position that the fact that the railroad company — of course, this damage to our crop happened in 1962 — we undertook or will undertake to prove that the railroad company in 1963 also did the same type of spraying and that when they approached or reached the Anderson property where the damage had occurred the year before that they completely cut off the spray. We think that is an admission; that they knew the spray had killed the crop the year before or would kill the crop the way it

was being used. Of course, the Judge in the other
page 12] trial ruled that was not admissible and we had
some question about it in the trial and brought out that it was not sprayed in '63. Mr. Rosenberger objected and the Judge said we had transcended his ruling about it. We plan to use the same evidence in this trial on the ground that it does show guilty knowledge.

The Court: Suppose the defendant has an explanation?

Mr. Carter: We will let him give it. He can explain it. We think it is admissible. The weight is for the jury.

The Court: I think that ought to be predetermined whether there is a logical reason for discontinuing the spray.

Mr. Rosenberger: If you get sued for $18,000.00 one year you don't take any chances the next year, you just don't spray and that is it. They sued us in February of 1963 and that is one reason but the general law is that if you are establishing a cause or liability for an event leading up to a certain definite date and subsequently, in light of what you have
learned, then you make a change that is not
page 13] admissible to show your liability up to a certain
time. You might do it as a matter of policy, take no risk at all.

Mr. Carter: We have a line of cases where they put up warning signs where they didn't have warning signs before in stores and other places and evidence of those signs are admissible to show the defendant put up the signs later showing that he admitted by that that he should have had up signs at the time. We have a line of cases on that.

Mr. Rosenberger: I don't understand the law to be that. Any change subsequent to the event is not evidence of what occurred at the time.

Mr. Carter: My understanding is you can show any change.

The Court: Have you any authority?

Mr. Carter: No, I don't have it. There was a case I had a couple of years ago.

The Court: It has been my understanding of the law applicable to that point that subsequent acts which might be
interpreted to be corrective are not admissible be-
page 14] cause they merely tend to aggravate or antagonize the case against the defendant. Actually they have no probative value at all, what the defendant may have done subsequently under changing conditions. I will be pleased to consider any authority to the contrary.

Mr. Carter: The plaintiff would like to except to your Honor's ruling at this time.

The Court: I haven't ruled yet because it hasn't been offered yet. At such time when I do rule the record will show your objections and exceptions.

Mr. Rosenberger: May I suggest that when we come to that when one of the plaintiffs are on the witness stand we excuse the jury before that question is asked.

Mr. Carter: I agree to that.

The Court: We don't want to run into any mistrial again.

Mr. Carter: Another thing too might cut down the trial. It is my understanding the issue in this case is not whether or not the spray being used would affect tomatoes but it is a question whether or not the spray got on the

page 15] tomatoes. Now, there is no dispute, as I understand it, the railroad company was doing the spraying along this property. Now, the dispute is whether or not that spray got on our client's crop.

Mr. Rosenberger: When you use the words "get on" you are using them in a technical fashion. I say the issue is whether our spray affected your tomato crop at all. We say it didn't.

Mr. Carter: I understand you admit that if the spray had gotten on the crop it would have affected it.

Mr. Rosenberger: We admit this type of spray will affect tomatoes.

Mr. Carter: Adversely?

Mr. Rosenberger: Yes.

The Court: I notice in one of your instructions, Mr. Carter, you state, "If the jury believes that the defendant through its servants permitted a spray to get on the land of the plaintiffs then the defendant was guilty of trespass."

Mr. Carter: Yes, sir.

Mr. Rosenberger: I don't believe we were trespassing but whether it is a trespass or isn't is beside

page 16] the point here.

The Court: The responsibility is on the plaintiff to prove by a preponderance of the evidence that through the negligence or negligent act of the defendant through its servants the tomato crop was destroyed and the squash and whatever else is involved. That is their burden to bear and if it is as possible that the tomatoes were not destroyed as that they were destroyed they haven't carried the burden. The

burden is on the plaintiff in this case.

Mr. Carter: I understand it is a jury question whether or not your spray got on our tomatoes. You claim blight killed them. You admit if the spray did get on the tomatoes it would affect them.

Mr. Rosenberger: I am not making any admissions. I am just telling you what I think the issues are. I think the proof will show, to be frank with you, that if this type of spray came in contact with the tomatoes in whatever form, and we get to a technical issue I am not in position to discuss, it would affect the tomato. When you start talking about spray, whether it got on there in droplet form or vapor

page 17] form or volatility, those are technical things.

The Court: Let me ask you this: At the other trial did you actually produce chemists to show that this spray was poisonous?

Mr. Rosenberger: They finished their evidence and we didn't get to that point at all.

The Court: That can be avoided if it is conceded.

Mr. Rosenberger: I am not going to make any concessions to relieve them. The burden of proof is on them. I understand if you have a weed killer it will certainly damage tomatoes. That is a matter we know about, but I am not meaning to make any admissions on the record for no reason right out of the clear sky. I am just talking informally with you. That is their burden. It is not a question of them shortening their proof. They may not have any witness on that, they haven't had any witness before. They have never said the train went by and there was spray and the tomatoes started dying.

Mr. Carter: What I asked Mr. Rosenberger was in order to cut the trial down would he admit anything.

Mr. Rosenberger: I am not going to make any

page 18] admissions.

Mr. Carter: We can prove it.

Mr. Rosenberger: I think our evidence will show if you get the weed killer on tomato plants it will affect them.

Mr. Carter: When we close our case and haven't showed it you will move to strike the evidence. I am not going to get myself into that kind of fix.

The Court: Mr. Carter, as I understand it, you will have to prove, No. 1, that the spraying was done; No. 2, that the spray went onto the tomatoes, and No. 3, that it would kill the

tomatoes, and No. 4, you have been damaged. Those are the four elements you will have to prove. If you don't prove them I would anticipate Mr. Rosenberger would make a motion to strike.

Mr. Rosenberger: At the first opportunity.

* * * * *

page 19] EVIDENCE FOR PLAINTIFFS

WALTER H. ANDERSON,

having been first duly sworn, testifies as follows:

DIRECT EXAMINATION

By Mr. Rowe:

Q. Will you state your name?

A. Walter H. Anderson.

Q. Where do you reside, Mr. Anderson?

A. Natural Bridge Station.

Q. What is your occupation?

A. Farming and raising cattle and hogs and hay.

Q. Do you operate the farm by yourself or in conjunction with someone?

A. My son and I.

Q. You operate it together?

A. Yes.

Q. And were you the owner and operator of the property adjacent to the Norfolk and Western railroad track on July 19, 1962?

A. Yes, sir.

page 20] Q. Can you identify from this aerial photograph the approximate position of your land? Would you come down and point out your land to us and show us where the railroad track runs?

A. This is the Norfolk and Western Railroad on this side.

Q. I believe if you look here closely this is where your property is. This is the river here and this would be the east side of the river.

A. This you say is the east or south side?

Q. This is the south side.

A. And where is the Norfolk and Western track?

Q. This is the Norfolk and Western railroad track.

Mr. Rosenberger: Why don't we point it out? The witness can sit down and let Mr. Rowe point it out. I think he knows.

By Mr. Rowe:

Q. You take your seat back in the witness chair and we will point it out. This does identify the land in question. This is the Norfolk and Western railroad track coming down this side. This is the river. The Anderson home and buildings were on this side of the track. The field in question is this portion right here. That is circled. This is where
page 21] the crop was growing. This, as I say, is the land of the Andersons. The Anderson property starts approximately here and ends approximately at the other end of the field there.

Mr. Rosenberger: If you will please turn that so the arrow is up north. If you could turn it and put the north at the top.

By Mr. Rowe:

Q. Now, Mr. Anderson, on July 19, 1962 did you have growing on your land any crops?

A. Yes, sir, corn and tomatoes.

Q. How many tomatoes?

A. We had 6,270 plants of hybrid plants.

Q. And where did you get these plants?

A. Bought them from Martin's Produce in Roanoke. I have been buying from them a number of years.

Q. I show you here some certificates. Will you tell the jury what they are?

Mr. Rosenberger: Let me see them.

By Mr. Rowe:

Q. Mr. Anderson, you tell the Court you had 6,270 tomato plants growing at that time?

A. Yes, sir.

page 22] Q. What state of growth were they in?

A. Well, they were producing tomatoes already

on the 19th of July and just about coming into full production.

Q. Can you tell the Court what you observed on the 19th of July in reference to this lawsuit here today?

A. Well, the spray tank on the railroad came by traveling north, coming from Buchanan to Natural Bridge, and it sprayed all along the railroad tracks and the mist and spray drifted right across the tomato patch and also our corn field.

Q. And you observed this spray at that time?

A. Yes, could see the mist from the tank that was spraying on the railroad track. You could see a mist kind of like a fog.

Q. Was there any wind blowing at that time?

A. There was a pretty good breeze blowing from the southwest to the northeast.

Q. Would you tell the jury what you observed after this spraying operation took place?

A. Well, after they sprayed in three or four days the leaves on the tomatoes just wilted and crumpled up. All the blossoms turned black and dropped off and all the large weeds I had left in the field to help shade the plants page 23] from sunburn and sun scald the leaves curled up and wilted and in about four or five days completely dropped off and left the tomatoes exposed to the hot sun, both ripe and green, and they all blistered from sun scald. The tomatoes were perfectly sound and the green tomatoes after they had been scalded by the sun ripened perfectly except that they were scalded tomatoes and you could cut out the little sunburned blister and the tomato was perfectly sound all the way through.

Q. By sound what do you mean?

A. The tomatoes ripened perfectly.

Q. They were firm?

A. Firm and solid, no disease, no indication of anything except sun scald. They were sound tomatoes that were burnt by the hot sun shining on them which in July and August the sun is hot and the sun shines hot enough to blister the tomatoes.

Q. During this period did you have what you considered a fair crop of tomatoes?

A. I think it is one of the best crops we have ever been able

Walter H. Anderson

to grow, one of the best seasons we have had in the last ten or fifteen years, a wonderful season for hay, corn and all vegetable crops, tomatoes, beans, watermelons, muskmelons, squash and everything. We had it all planted in
page 24] the lower side of the field.

Q. The field that you planted the tomato crop in had you planted tomatoes in that field before?

A. Never. The field hadn't been cultivated I don't think for the last fifteen, twenty or twenty-five years.

Q. And this was the first crop that had been planted in that field?

A. That is right.

Q. In addition to the tomatoes did you have any other vegetables growing in that field?

A. I had some beans, squash, cucumbers, watermelons, muskmelons and some beans.

Q. Did this spraying have any effect?

A. It turned all of the leaves on all of those vegetables to where they just dried up and dropped off after several days. I noticed them turning yellow and withering up the second or third day after the spray struck them.

Q. Mr. Anderson, what precautions, if any, did you take in planting your tomato crop?

A. Well, the tomatoes were planted on the 4th and 5th of May, 4,200 plants, another 2,070 plants were planted on May 11th. They were all certified plants and I had been
page 25] buying those plants through these people for several years, Martin Produce Company in Roanoke.

Q. Had you ever had any difficulty with this type of plant before?

Mr. Rosenberger: We object.

The Court: Objection sustained.

By Mr. Rowe:

Q. What other precautions, if any, did you take?

A. I sprayed them for bugs and cutworms, I think about three sprays by hand, and we cultivated them three times by hand and they were cultivated with a tractor four times. We hoed all of the weeds out of them three times. We sprayed

each week from May 7th or 8th and then we used a Dithane Z-78.

Q. What was that for?

A. That is a spray to prevent any kind of leaf disease or blight or anything like that. I have used that several years.

Q. How did you gather your tomato crop and other vegetable crops?

A. Well, we all gathered them and took them to market two, three and four times a week; sometimes every day. Sometimes we used my truck and sometimes we used the station wagon part of the time for delivering in town, page 26] sometimes hauling a load with a big two-ton Chevrolet truck, haul them into town and deliver them around in the station wagon.

Q. Did you say it was a good growing season that year?

A. One of the best that we ever had.

Q. What would you approximate your yield per plant?

A. Well, I am sure the plants would have yielded a bushel of tomatoes a plant.

Mr. Rosenberger: I object to the question about what he expected it to yield.

The Court That is speculation. You have to proceed with direct proof. The yield would be so much, not a matter of approximation or conjecture or speculation.

Mr. Rowe: May I ask him, your Honor, what the yield was at the time of the spray operation and his estimate?

The Court: Was any harvest made of those tomatoes at the time?

Mr. Rowe: I can ask him that.

The Court: Base it on the number of blooms and the number of fruit, not an approximation but the yield in bushels. You cannot go into speculation.

page 27] By Mr. Rowe:

Q. Mr. Anderson, had you harvested any of the tomato crop prior to the spraying operation?

A. Yes, sir, but a very few. They were just beginning to come in.

Q. And at the time of the spraying operation were there tomatoes on the plants?

Walter H. Anderson

A. Plenty of them. They were just loaded, the ground was covered. You could hardly put your hand down on the ground without touching a tomato that was either ripe or green.

Q. And I believe you say the spray affected the blooms. Were there blooms at the time?

A. Well, on the ends of the vines there were and it killed off about five or six inches of the ends of those young plants. They just dried up and withered away. Even the small tomatoes turned black and dropped off.

Q. From that estimate what was the yield per plant?

Mr. Rosenberger: Does he mean up to that time? That question is indefinite, what the yield per plant was. He said he had a lot on the ground.

The Court: Were there any tomatoes harvested, secondly, if there were green tomatoes on the plants, page 28] and thirdly the number of blossoms. Now, you can ask this man from his experience as a truck farmer a question based on those items. Let me ask him a question.

Q. How much experience have you had, Mr. Anderson, as a truck farmer?

A. I have raised vegetables since I was ten years old.

Q. From your observation of the plants themselves, these 6,270 plants, from the number of tomatoes already harvested from the plants, the number of green tomatoes which were not ready for market and the number of blossoms that remained on the plants what would those plants have yielded per plant?

A. There were no blossoms remaining on the plants whatsoever.

Q. I mean prior to the spraying.

A. Before the spraying? Well, I am sure that the tomatoes would have produced that year at least one bushel per plant.

Q. At least one bushel per plant?

A. Yes, sir. We had gotten one bushel per plant before that.

Mr. Rosenberger: I move the answer be stricken. page 29] You asked him about the blossoms. I don't think he is qualified to testify on July 20th how many

tomatoes would have been produced before the end of the season. This is nothing in the world but his guess and we have had a lot of guesses from these people.

Mr. Carter: I think the evidence is proper. You can't measure the tomatoes after they have been killed. Somebody has to estimate how much that plant would have produced.

They weren't allowed to complete production so you could take a bushel basket and pick them off. The best evidence in this case is what has been asked the witness, considering the green tomatoes, the ripe tomatoes and the blooms what his estimate is that they would have produced. That is the best and only evidence and I say it is admissible.

The Court: This man qualified himself to answer the question which the Court propounded by saying that he had been raising vegetables and was an experienced truck farmer and I believe he testified he had been farming since he was a young boy, raising vegetables.

Q. How long in your adult life have you been
page 30] a truck farmer?

A. I don't quite understand.

Q. How many years have you been actually a truck farmer raising vegetables for the market?

A. Since 1945.

Q. Has that been continuous?

A. Continuous since 1945.

Q. And the major parts of the crops that you raised, what were they?

A. Well, we raised an acre or so of tomatoes every year and raised string beans and cucumbers, squash, crooked neck squash and cabbage and other vegetables and lots of greens, dry land cress and different types of mustard greens and vegetables, kale and so forth.

Q. In the nineteen years' experience as a truck farmer have you observed the yield per plant from these tomatoes?

A. Yes, sir, lots of times on Hybrid plants I have gathered a bushel of tomatoes a year.

Q. That doesn't answer my question. Have you observed the yield, the amount of those plants yielding from the blossom and the green fruit that has not been sent to market,

have you observed that yield?

page 31] A. Well, I say we have gathered for market a bushel of tomatoes from each plant, some of them more than a bushel.

Q. On or before July 19th, 1962 how many of these tomatoes had you already marketed?

A. Well, we hadn't marketed too much because they were just beginning to come in.

Q. How many would you say you had marketed per plant?

A. You mean before the spray?

Q. Yes.

A. I would not know. We marketed several hundred bushels all right.

Mr. Carter: We can prove that by his son. He kept the books.

The Court: What I am trying to avoid, Mr. Carter, is this witness testifying into the realm of speculation and conjecture and I think the only way to establish a plant would yield a bushel per plant is to show the amount of actual fruit to the plant, plus the green fruit and plus the blossoms. I know no other way you could arrive at it.

Mr. Carter: He said that would be at least a

page 32] bushel. That was based on his experience as a farmer and experience he has had over the years, that they would produce a bushel or more per plant. That is what I understand him to say.

The Court: Over the years would not qualify the answer. It is what the yield was at the time or what the yield would have been at the time of the alleged damage.

Mr. Carter: He said at least a bushel. In other words you asked him how much experience he had to see if he was qualified to give that opinion. He said he had some nineteen years experience and during that period of time that he kept account of picking more than a bushel per plant.

Mr. Rosenberger: I object to it, your Honor. He said some plants he had gotten the bushel from but we are talking in this particular case about "Stokleys" hybrid plants and how long he had raised them. We ought to have somebody who knows something about this particular tomato plant and what they would produce. I don't like to take the time but we have had

different estimates from these various people. Rather than guessing about it I think we would like to have someone who knows.

page 33]

The Court: I am not going to permit any guessing but I think this witness should be limited to his experience. Here is a man who planted the plants, he sprayed them, fertilized them, weeded them and observed their growth, and from similar plants he had raised and marketed he is giving his opinion.

Mr. Rosenberger: We understand from him he says now he does not even know how many he had picked.

The Court: He said approximately several hundred bushels.

Mr. Rosenberger: He has a written record there. I thought maybe he ought to find out because I think it will be less.

The Court: Mr. Rosenberger, I am going to permit this man to testify what, from his observations, the yield would have been per plant. You can cross examine him.

Mr. Rosenberger: We respectfully except and I am sorry to take up so much time.

By The Court:

page 34]

Q. Your testimony is from your knowledge of these plants, from the tomatoes that you had harvested, from the number of green tomatoes left on the plants and from the number of blossoms on the plants the yield per plant would have been a bushel. Is that your testimony?

A. Yes, sir, I am sure it would be that much.

By Mr. Rowe:

Q. How long had you and your son been operating this particular farm? I understand you had been a farmer some nineteen years in your adult life but how long had you been on this particular farm?

A. Since 1952.

Q. Approximately ten years prior to this incident with the spraying?

A. That is right.

Q. In those ten years had you ever been troubled with a disease in your tomato crop?

Walter H. Anderson

Mr. Rosenberger: Just a moment. We object.

The Court: Objection sustained. You can't go into past years. What the jury is entitled to know is what happened July 19th.

page 35] Members of the jury, disregard the question as well as the answer given by this witness as to what happened the years before.

Mr. Rowe: We respectfully except. May we ask him about this crop?

The Court: What is the ground of your exception?

Mr. Rowe: We are trying to prove the point we will bring out later. We think we should be able to show his experience with diseases of tomatoes.

The Court: Go ahead.

By Mr. Rowe:

Q. Mr. Anderson, after this spraying operation when did the people from the railroad first come down and observe your field?

A. They sprayed on the 19th. Mr. Shepherd and Mr. Aldridge came about 9:00 A.M. on August 15th, 1962.

Q. Mr. Shepherd and Mr. Aldridge. Did you know what their capacities were with the railroad?

A. I knew Mr. Shepherd was a division superintendent and Mr. Aldridge was a track foreman or overseer.

Q. Did they go through your field?

A. They went over in the field and went all over it.

page 36] Mr. Rosenberger: We object. One is a section foreman and the other a roadmaster. What they said wouldn't be binding.

The Court: Objection sustained.

Mr. Rowe: We think it is an admission, a declaration against interest. They were employees.

The Court: You have not established they had any knowledge of the spraying or any knowledge of the alleged damage. You have got to connect these people.

By Mr. Rowe:

Q. Mr. Anderson, how did it happen Mr. Aldridge and Mr. Shepherd came down to your place?

Walter H. Anderson

A. Mr. Shepherd was in charge of the spraying train when it went by the place spraying.

Q. Was Mr. Aldridge on the train?

Mr. Rosenberger: We object to his conclusion as to who was in charge of the train. He doesn't know, he wasn't there.

The Court: Your objection is sustained at this stage.

By Mr. Rowe:

Q. Did Mr. Shepherd say he was in charge of the train?

A. That is what he told me.

page 37] Mr. Rosenberger: You can't use statements of a person to show relationship, your Honor. You can't prove agency and scope of his employment to make a binding admission on the railroad company by the statement of a person himself, you have to show relationship.

By The Court:

Q. Mr. Anderson, did you know of your own knowledge that Mr. Shepherd was in charge of the train?

A. Well, he told "Mr. Woolline" that he was in charge of it and he never shut off the spray, run it full blast all the way though.

Q. Told Mr. "Woolline?"

A. Yes, sir.

The Court: Objection to his testimony is sustained.

Members of the jury, you will completely disregard the testimony of this witness insofar as the statement of Mr. Shepherd is concerned.

page 38] Mr. Carter: We would like to except to the ruling of the Court on the ground that Mr. Shepherd was in charge of the train. I didn't think there was any denial of Mr. Shepherd being in charge of the train.

The Court: Your witness testified Mr. Shepherd told Mr. "Woolline" something and we don't know who Mr. "Woolline" is. Gentlemen, let's proceed.

By Mr. Rowe:

Q. Mr. Anderson, after Mr. Shepherd and Mr. Aldridge

came down when next did someone come down to your property?

A. On September 7th a lot of railroad men came down and examined the brush and plants along the edge of the railroad field. Was several inspection cars came that morning and Mr. Meadows was there also.

Q. Just a minute. You say Mr. Meadows was there. Is he in the courtroom?

A. Yes, sir.

Q. And where is he?

A. He is sitting over there beside that gentleman.

Q. Was he a railroad employee?

A. He was the claim agent and adjuster.

Q. And he was with these people?

A. He was with some of them, I believe.

Mr. Rosenberger: To save time we will admit
page 39] Mr. Meadows, Mr. Clark and Mr. Adams were there. It was three of them.

By Mr. Rowe:

Q. There were three railroad men there on September 7th?

A. I didn't see anybody but Mr. Meadows that I have a note of here.

Mr. Rosenberger: We admit that, your Honor.

By Mr. Rowe:

Q. When did the people next visit your land?

A. Well, on September 20th Mr. Meadows, a railroad photographer and a man from V.P.I., I believe named Chappel came down and the photographer took pictures and Mr. Chappel made the statement that they called him too late.

By The Court:

Q. Just a minute. Who is Mr. Chappel?

A. He is a V.P.I. professor.

Q. You can't repeat what he told you.

By Mr. Rowe:

Q. They were down there on the 20th?

A. On the 20th.

Q. And to your knowledge is this the first time the railroad was down to take photographs of your property?

page 40] A. That is right. The first time they took any pictures was the 20th of September, two months and one day after the spraying.

Q. Were any pictures taken by either you or your son after the spraying?

A. My son took pictures four or five days after the spraying all over the field everywhere.

Q. By that time, Mr. Anderson, from the 19th of July to the 20th of September was there any difference in the appearance of the field on the 19th of July as opposed to the 20th of September?

A. Sure. After a month or so after the spray new weeds had begun to come up and grow and suckers on the tomatoes began to grow out, new plants coming out from the joints of the tomato plants that were laying on the ground.

Q. Is that what you call suckers coming out?

A. Yes, sir, new plants coming up.

Mr. Rowe: Take the witness.

page 41] CROSS EXAMINATION

By Mr. Rosenberger:

Q. Mr. Anderson, you were telling us that you and your son operate this farm down there. Does your son work there now?

A. How is that?

Q. Does your son work on the farm?

A. Yes, sir.

Q. Entirely?

A. Well, he does all the cultivating. Recently he has had a chance to work over here at Modine.

Q. Where is that?

A. Buena Vista.

Q. How long has he been working at Modine?

A. I don't know exactly when he began working there.

Q. When you first spoke about this spray you actually didn't know what day the train came by, did you?

A. Sure I did.

Walter H. Anderson

Q. Are you sure about that?

A. I was down there.

Q. Now, you told the jury just a few minutes ago that the train came by on July 19th. Wasn't that the date the railroad company gave you rather than the date you

page 42] knew it came by there?

A. I don't remember anything about that.

Q. Don't you remember giving Mr. Meadows a written statement that you signed on September 7th, 1962 in which you told him about noontime on an unknown date around July 24th or 25th, 1962 that the train came by?

A. No, I don't remember giving him any statement to that effect.

Q. Mr. Anderson, will you look at this paper? The railroad company sent you a copy of it so you are pretty familiar with it. That is a two-page statement signed "W. H. Anderson, Sr.," isn't it?

A. I don't know.

Q. Here is the other one signed "W. H. Anderson, Sr.." You signed both of them, didn't you?

A. I don't know. It looks like my signature.

Q. Mr. Anderson, you are a smart fellow. Don't you know whether you signed the paper or not? Is there any doubt about that being your signature?

A. It is my signature, I believe.

Q. You know better about the date now than you did when Mr. Meadows was there.

page 43] A. It was the 19th, I think.

Q. That is not really very material but in this statement you told him that you had sold 184 bushels of tomatoes and they brought in $725.00. You told the Judge you didn't know how many you had sold.

A. Well, I had the records. I had to look it up.

Q. You have got your record right there.

A. I was just guessing.

Q. 184 bushels of tomatoes from these plants before any damage and they brought $725.00 from the sale of these tomatoes. Is that what you told him?

A. I probably told him that but I don't know how accurate I was. My son probably had the accurate figures.

Q. Were you more accurate then on September 7th than

you are now?

A. No, I am telling you what I know about this.

Q. Actually you have had that little book you have referred to. You actually put down the dates you planted the tomatoes.

A. Yes, sir.

Q. And what date did the tomatoes commence coming in?

A. I think the first tomatoes were picked around

page 44] July 6th or 7th.

Q. Don't you have a record there?

A. I believe so. I have some notes here. August 7th picked eight bushels.

Q. You mean July 7th.

A. This was August 7th. I have got some in July.

Q. August 7th you picked eight bushels?

A. Twenty-one and one half bushels I believe that day.

Q. On what day?

The Court: We can't hear you.

By Mr. Rosenberger:

Q. What date?

A. August 7th picked twenty-one and a half bushels. I didn't keep a complete record.

Mr. Carter: I expect the son could do better.

Mr. Rosenberger: This gentleman has the record.

The Witness: July 8th I think the first tomatoes was six and a half bushels and on the 8th seventeen and a half bushels.

By Mr. Rosenberger:

Q. Seventeen and one half bushels on July 8th?

A. Yes, sir, I think those are the first we picked.

page 45] Q. What did you pick on July 8th?

A. They brought $175.30

Q. Then what did you pick on July 9th?

A. I don't guess we picked again for about a week. When they first start coming in we only pick a few bushels every week.

Q. You have got a record there of what you picked.

A. No, I don't have a complete record here of what we picked every day.

Walter H. Anderson

Q. Then you think you skipped a week before you picked some more?

A. Something like that, four or five days or a week when they first begin to come in. After they start coming in we pick every two days.

Q. The next date you guess you picked would be July 16th. Have you got any record of what you picked then?

A. No, I don't.

Q. Have you got any record of the next time you picked?

A. I don't believe I have any notes on it.

Q. You skip all the way from July 8th to August 7th?

A. No, we picked in between.

Q. Don't you have a lot of numbers and figures on those pages that you have there?

page 46] A. No, I don't have any tomato pickings there.

Q. Mr. Anderson, who kept the records of the tomatoes that were picked?

A. Well, I kept some of the records and my son I think kept a record of the sales made.

Q. Where did you get the information from that you gave to Mr. Meadows that you had sold 184 bushels? You told him 184 bushels brought $725.00.

A. Well, I have got that book I haven't got with me that I kept a record of all garden vegetables that was marketed each week.

Q. In other words, you have a record somewhere that shows the amount of tomatoes from the time you started picking?

A. Yes, I believe I have a complete record.

Q. Then in that way you accurately could know how many bushels that were picked before anything happened to your crop. Is that right?

A. Yes, I think we have that.

Q. Has your son got that?

A. I don't know if he has that or not but I know I have it in a garden book that I kept of sales of all garden vegetables that we sold each week.

page 47] Q. Don't you remember the Judge himself was asking you about the tomatoes that you picked and you were giving him an opinion based on how many tomatoes had been harvested, how many tomatoes you had on the vines and how many blooms you had? Now, can you tell me

now, based on your knowledge and, actually how many bushels you had picked or is this 184 bushels on this statement right?

A. That must be about correct, I don't know.

Q. You think that would be about right?

A. I guess so. My son probably would know.

Q. If you divide 184 bushels into $725.00 it comes out to $3.94 a bushel, doesn't it, or will you take my mathematics?

A. Yes, sir, right around $4.00 a bushel.

Q. Now, about your care of these tomatoes, I believe you told the Court that you sprayed them that year and this time you said you sprayed your tomatoes every year for blight.

A. I sprayed them for bugs and cutworms.

Q. You told us that you sprayed them for blight.

A. A preventative for blight and other leaf diseases.

Q. Didn't you tell us at another time in court under oath you had never sprayed tomatoes before?

A. No, sir, I don't believe I did.

page 48] Q. You deny telling us that?

A. I don't remember telling you that. I know we sprayed every year for cutworms and fleas.

Q. I am not talking about cutworms and fleas, I am talking about blight spray. Didn't you tell us at the last trial you never sprayed hybrid plants before?

A. Well, I probably did tell you that because I never had had any diseases before.

Q. I am asking you if you did tell me you ever sprayed before.

A. Yes, sir, we sprayed quite often.

Q. So now you are saying you did spray before. Then when you said you never sprayed before I asked you how you happened to have spray this particular year and you said you needed it for that reason and you used it. Is that right?

A. No, I didn't say we need it, not at all.

Q. You deny those statements. Did you need it?

A. I didn't see any reason for it, just sprayed them as a preventative because I had some of the spray left over from the year before.

Q. Didn't you tell me last time you had just bought the spray?

page 49] A. The Dithane Z-78, I think that is some I kept over from the year before.

Walter H. Anderson

Q. Mr. Anderson, didn't you say the reason you sprayed these tomatoes for blight was because Dr. Chappel's report said that you told him that you hadn't sprayed them and he was surprised at anybody trying to raise them without spraying them? You got a copy of that report, didn't you?

A. I don't think I ever told him that.

Q. Did you tell Dr. Chappel you never sprayed them?

A. No, I didn't tell him any such thing.

Q. You deny that?

A. Yes. He never asked me anything about whether I sprayed them.

Q. How many tomatoes were on the vines at the time these vines were sprayed?

A. Quite a few young tomatoes. The plants were just beginning to get large tomatoes on them when I sprayed them.

Q. You speak in generalities of quite a few this, that and the other. I am just trying to be accurate so we can be fair about it. How many tomatoes were on the vines that you didn't harvest? You harvested 184 bushels.

page 50] A. There were bushels and bushels of them there. The ripe tomatoes I think about four vines would have filled a bushel basket right at the time when the railroad men come there to take pictures and that was when Mr. Chappel was there and he stated the railroad had called him too late.

Q. Just a minute. They were there on September 20th, weren't they?

A. Yes, sir, two months and one day after the spraying.

Q. You say at that time four vines would have filled a bushel basket?

A. I believe it would with ripe tomatoes, not counting the green ones on the vines.

Q. Didn't you sell those?

A. No, couldn't sell them because nobody would buy them with blisters on them.

Q. Two months later they had developed and had blisters?

A. That is right, nothing but sunburnt blisters.

Q. The vines hadn't been killed?

A. The vines were not completely killed but the leaves were off of the vines and the vines were completely naked.

Q. But the vines were still two months later producing

red ripe fruit as much as four vines would have filled a bushel?

page 51] A. That is right, still producing tomatoes.

Q. And I believe you told the jury that the vines put out new shoots and they were producing tomatoes.

A. They were growing tomatoes and would have produced some nice tomatoes if frost hadn't got them. Just before frost I picked four or five bushels of nice green tomatoes and I had tomatoes in my cellar almost until Christmas that ripened beautifully.

Q. Then I take it from that the vines weren't killed.

A. No, the vines were not killed. The leaves were all knocked off until the vines were completely naked.

Q. Now, you told the jury, getting to the time that this train went by, that you saw the train. Tell me what kind of train it was.

A. Well, it was a locomotive hooked onto several coaches and the spray tank coach was in the train.

Q. How many spray tanks did you see?

A. I only saw one in use, it might have been several other tanks on the train.

Q. Did you see any other tanks than the one spraying?

A. Well, I don't remember, it was several coaches.

Q. You mean day coaches?

page 52] A. No, I think it was some tank coaches there.

Q. You know the difference between a tank car and a boxcar.

A. It was only one spray car, that is all I seen.

Q. Did you see any tank cars?

A. I don't remember whether there were any tank cars in the train or not, it seems to me it was.

Q. Do you have any recollection of how many?

A. No, sir, it was several cars between the locomotive and the spray car.

Q. Could you tell me the color of the spray car?

A. No, kind of a light colored car.

Q. Didn't you say at one time, Mr. Anderson, that the car was yellow?

A. I don't know, it might have been yellow.

Q. I am trying to get from you what you know. You gave him a written statement it was a yellow car, didn't you?

Walter H. Anderson

A. I don't know whether it was a yellow car or not, it was so much spray—I mean the mist from the spray car was almost making it impossible to tell the exact color of the car.

Q. This says, "There was a yellow car on the spray train."

page 53] A. I don't remember saying a yellow car exactly, it might have been kind of green colored.

Q. Then you were mistaken when you gave him that statement?

A. I think so, yes, sir.

Q. Now, when you told him about the time you figured it was around noontime?

A. I never read that over before I signed it.

Q. Didn't he read it to you?

A. He read it over to me and I signed it.

The Court: Did you give him a copy?

Mr. Rosenberger: Yes, sir, we mailed him a copy of it.

The Witness: I don't remember ever getting a copy of it.

By Mr. Rosenberger:

Q. Didn't your son come and get it or did we mail it to you?

A. I don't know whether he got any or not but I don't think I ever received any.

Q. You say the wind usually blows from the north and southeast at that location?

page 54] A. It comes from the southwest to the northeast.

Q. The way you have it blowing here it would be blowing away from your tomato patch.

A. No, blowing right on the tomato patch.

Q. If it was blowing from the north and southwest it would be blowing away.

A. It is blowing from the southwest to the northeast.

Q. Then this statement is wrong when it says, "The wind usually blows from the north and southwest."

A. I don't know what the statement says.

Q. Let me read it. "The wind usually blows from the north and southwest here."

A. That is absolutely wrong.

Walter H. Anderson

Q. This says, "I could not tell if the spray was coming over my tomato field or not." Is that right?

A. No. It was coming right over the tomato field. The wind was blowing right toward the tomato field.

Q. Mr. Anderson, didn't you also tell Mr. Aldridge—didn't you tell Mr. Shepherd, the roadmaster, he is up and down the road all the time there on the track, Shepherd and Aldridge, you know them both.

A. Yes, sir.

page 55] Q. Didn't you tell them you didn't see any spray get on your tomato crop but during the night the mist rose from the spray and got over on them?

A. No, sir, I never told him any such thing as that.

Q. Didn't tell them that?

A. No, sir.

Q. Actually were you at home the day this train went by?

A. I certainly was.

Q. Was your son there?

A. My son come a few minutes after the train passed by.

Q. Was your son wrong when he told Mr. Meadows, or did you correct him, that you weren't at home at the time?

A. I never told him I wasn't at home. I was there. He saw me as soon as he drove in. I don't think I had returned to the house yet.

Q. You were at the house up on the hill about how far from this tomato patch?

A. Well, it is 150 or 200 yards from the tomato patch but from the railroad itself to the tomato patch I would say it is only 20 or 25 yards.

Q. I am getting at where you were standing and what you could see. Actually did you see the spray going

page 56] over in the field?

A. They were spraying and mist and everything was going on over in the field. It's a fence on both sides of the track.

Q. You couldn't see where you were any spray going into the field, could you?

A. Sure I could see it going into the field right over top of the fence.

Q. Went over the fence in the form of drops or how heavy was it?

Walter H. Anderson

A. It was in the form of a mist like a fog.

Q. How long afterwards did you go down to check your tomato crop?

A. My son came in about ten or fifteen minutes and we went down immediately.

Q. At the last trial I believe you told me you were down there in about an hour.

A. It might have been an hour.

Q. Well, which was it, fifteen minutes or an hour?

A. Probably thirty minutes by the time we got down there.

Q. And you described it saying the tomato patch got as wet as if it had been a shower.

A. Well, the mist had settled on there and you
page 57] could tell it by feeling the leaves and it was moist and sticky and a very strong odor.

Q. Was it wet all over the entire depth of the field?

A. More on the lower side.

Q. The spray went from the railroad right of way and went the full depth of the field?

A. Yes, sir, and also went over in the corn field on the river bank and affected the corn.

Q. How did it affect the corn?

A. Well, it turned white streaks in it like frostbite.

Q. Mr. Anderson, if the people that know about this spray say this spray won't affect corn do you know that that spray affected the corn?

A. I am positively sure it affected the corn and affected the other plants.

Q. Are you just as sure that this spray covered your entire field?

A. Yes, sir, the mist did.

Q. So that it was wet?

A. Well, I wouldn't say it was exactly wet.

Q. Didn't you describe it at the last trial saying it was just as if a shower like a sprinkle of rain?

page 58] A. I don't remember saying anything like a shower.

Q. It wasn't that wet?

A. No, it wasn't that wet. It was a mist.

Q. Was your tomato patch affected all over, something wrong with the whole field?

A. The whole tomato field.

Q. The same way over in the back as it was up by the fence?

A. Well, the lower corner I don't think was affected as much, not quite as strong as the rest of the field.

Q. How many tomatoes did you pick from there?

A. Didn't pick any much there, never kept track of how many tomatoes I picked from each vine.

Q. Did you make any record of how many you picked after the train went by or after something seemed to be wrong?

A. No, I know when they grew out again we never picked any after the train went by because we were afraid it would poison people if we sold them.

Q. You did sell some to Mr. Cook.

A. After we found out it was all right. Aldridge and Shepherd came in the field and ate a lot of tomatoes, wiped them off and said they were okay.

page 59] Q. I didn't ask you about what they did, I am asking about how many tomatoes were picked after you noticed something wrong and who you sold them to. How many did you sell?

A. I don't remember how many we did sell.

Q. You don't know how much they brought?

A. Not too much because we couldn't sell them on account of the blisters.

Q. But you did sell some to Mr. Cook?

A. Took a load or two to Mr. Cook.

Q. How many bushels do you put on a load?

A. About 35 bushels.

Q. So you don't know how many you sold him?

A. I think it was 35 bushels.

Q. And how much did you get a bushel?

A. He paid a dollar a bushel.

Q. Did you have any other money crop on the farm other than this $18,800.00 tomato crop?

A. Well, nothing except garden vegetables but we gave that all to the family.

Q. Did you raise any hay that year?

A. We always raise hay and corn.

Q. What kind of hay year was this?

page 60] A. Well, in '62 it was the best hay year we have had since we have been on the farm. We baled over 6,100 bales of different kinds of hay.

Q. Do you have more hay in a wet year or a dry year?

Walter H. Anderson

A. When we have sufficient rains we have more.
Q. The more rain the more hay you get?
A. Sure.
Q. As a matter of fact, this was a very wet year, wasn't it?
A. No, in the beginning it was kind of wet—you mean of '62?
Q. Yes, sir.
A. The year '62 we had well distributed rainfall.
Q. You got good rains in July, August and September, didn't you?
A. I think we did.
Q. Now, you raised corn that year.
A. Yes, we raised some good corn.
Q. What size field was this tomato field you had this big crop on?
A. It was a four-acre field and we had sweet corn, a few rows, and a few rows of vegetables.

page 61] Q. You had fifty-seven rows of tomatoes?
A. I believe it was something like that.

Q. And the rows about forty inches apart?
A. Yes, sir.
Q. And the plants how far apart in the row?
A. Five feet.
Q. And that covered about three and a quarter acres, didn't it?
A. Something like that.
Q. I believe you stated at the last trial that you didn't notice anything wrong with the tomatoes until about four or five days after they were sprayed. Is that right?
A. Well, the leaves began to drop off in about four or five days after they sprayed. They curled up and the little ends of the plants about five or six inches long that had the blossoms on them and very small tomatoes the blossoms all turned black and so did the little tomatoes and they dropped off.
Q. Mr. Anderson, I am trying to be specific in my question. We are taking a lot of time and if you will just answer the questions that I ask you. You didn't notice anything wrong with the tomatoes until about four or five days

page 62] after the train went by?
A. A couple or three days.

Q. You change that to a couple or three. You must have been able to pick some tomatoes after you saw the train go by, the ones that were ripe on the vine at the time. In the next four or five days you picked those, didn't you?

A. Picked probably some, yes.

Q. How many?

A. No, I don't think we picked any tomatoes then because we hadn't got any reply from the railroad about what kind of spray they used and we were afraid it might be poisonous.

Q. Now, Mr. Anderson, I want to ask you something specifically. Didn't you say you went all the way across the field because the right of way was as wet as if a street sweeper had been through it?

A. No, I didn't say anything like that. The leaves were kind of sticky and moist and a very strong odor of the spray.

Q. Now, do you remember when Mr. Aldridge and Mr. Shepherd were down there that the weeds along the right of way against your fence were still green?

A. No, even the trees died, big maples died. The Silver Maples were killed by this spray absolutely.

page 63] Q. You do know that the trouble with your tomatoes extended over the entire field, in the back as well as in the front?

A. Yes, sir, practically the same all the way over the field. One lower corner didn't seem to be hit quite as hard as the rest of the field.

Q. But you couldn't pick any to sell so it affected those too?

A. That is right.

Mr. Rosenberger: Thank you very much, Mr. Anderson. I believe that is all.

By the Court:

Q. Mr. Anderson, do you have an accurate account of the tomatoes actually sold off of the tract?

A. Me and my son both have it, I turned it over to him and he has the book.

Mr. Carter: We have the book and we will ask the son about it.

By the Court:

Q. Do I understand you correctly to say that on August 7th you picked some tomatoes and sold them on the market after this spray had been on them?

page 64] A. I believe so.

Mr. Rosenberger: Twenty-one bushels.

By the Court:

Q. Twenty-one bushels on August 7th. Did I understand you correctly to say that two months after this your tomato vines had red ripe fruit on them and four vines would yield a bushel of tomatoes?

A. Yes, sir. That was on September 20th.

Q. Did you take those to market?

A. No, sir, didn't take them to market.

Q. When was the last time you took some to market?

A. Well, we took a few bushels off and on up until some time maybe in September or October.

Q. When did you sell the thirty-five bushels to Mr. Cook?

A. I don't remember offhand that date.

Q. Was that after all the spraying was done?

A. Yes, sir. I think that was somewhere around the middle of July or the first of September.

Q. But it was after the spraying?

A. Yes, sir. They were sunburned and blistered and he told us not to bring any more, that he couldn't use them because there were too many blisters.

page 65] Q. You did sell some tomatoes after the spraying?

A. Yes, sir.

By Mr. Rosenberger:

Q. I neglected to ask you one question. Mr. Anderson, how long does it take from the time you see a bloom on the vine until the time you can pick a tomato?

A. Well, it is generally about thirty or thirty-five days.

Q. Thirty to thirty-five days?

A. Yes, sir.

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page 67]

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FRANK L. SIMMS,

having been first duly sworn, testifies as follows:

CROSS EXAMINATION

By Mr. Rowe:

Q. As I understand, you are from Alexandria, Virginia.

Frank L. Simms

A. That is correct.
Q. You are employed by whom?
A. R. H. Bogle Company.
Q. What type work do you do?
A. Contract work on railroads spraying rights of ways.
Q. On July 19, 1962 were you so employed by the Norfolk and Western Railroad?
page 68] A. I was working under contract with them.
Q. And what was your function?
A. I was in charge of the brush spraying operation.
Q. In charge of the brush spraying operation?
A. And the operation of the equipment and so forth.
Q. What were you spraying at that time?
A. Veon brush killer.
Q. Do you of your own knowledge know the chemical make-up?
A. No.
Q. Who produces that?
A. Dow Chemical Company.
Q. Who furnished that chemical?
A. You mean what company?
Q. Where did you get the chemicals you used?
A. From Dow Chemical Company.
Q. And where was the mixture made? Where did you mix it?
A. On the Norfolk and Western property.
Q. Does your company own the sprayer or was it owned by the Norfolk and Western Company?
A. My company owned it.
Q. And was it at this time under contract to the
page 69] Norfolk and Western?
A. Yes, sir.
Q. How many miles of track had you sprayed that day, Mr. Simms?
A. You want the exact mileage?
Q. Yes, if you have it.
A. About fifty-one miles.
Q. Now, this Veon brush killer you were spraying the purpose of this was to kill brush along the right of way, is that correct?
A. Brush and broadleaf weeds.

Frank L. Simms

Q. And of your own knowledge if this brush killer got on tomato plants would it kill them?

A. It would.

Q. It would kill them. Tell us something about the equipment that you used in this spraying operation, Mr. Simms.

A. We have what we call turrets mounted on regular boxcars which have been made up for this purpose and then the men on these turrets spray the right of way. They spray with controlled pressure, of course.

Q. How many turrets are there?

A. Three on each side.

page 70] Q. And how high off the rails would they be mounted?

A. Approximately ten feet.

Q. Who was in charge of the whole train?

A. Mr. Clark.

Q. Mr. Clark was in charge of the train?

A. Yes, sir.

Q. Is he a Norfolk and Western employee?

A. Yes, sir.

Q. How many men did you have working under you?

A. I had five working under me.

Q. How many other men were on the train at the time?

A. You mean railroad men?

Q. Yes, sir.

A. I would have to guess. I would say probably about three counting Mr. Clark.

Q. Do you know who they were?

A. Well, Mr. Shepherd was on there, he was the roadmaster.

Q. He is the roadmaster?

A. Yes, sir.

Q. And who else?

A. Mr. Clark.

Q. Do you remember the third man?

page 71] A. Probably the conductor or brakeman but that would be a guess.

The Court: Any further questions.

Mr. Rowe: That is all.

Frank L. Simms

CROSS EXAMINATION

By Mr. Rosenberger:

Q. Mr. Simms, I can't hear you very well so I am going to sit over here and raise my voice and I want you to raise your voice so everybody on the jury can hear you. You are employed by R. H. Bogle Company?

A. That is correct.

Q. And the R. H. Bogle Company had a contract with the Norfolk and Western to spray the Norfolk and Western right of way?

A. That is correct.

Q. Now, so we will know what we are talking about, I think these photographs might help you. Will you look at what I have designated as "Defendant's Exhibit A," a photograph of a spray train, and tell me if that is similar to the train you had in operation over in the Natural Bridge area on July 19, 1962.

page 72]

A. Yes, sir, it is similar.

Q. Now, will you describe for the record how that train was made up, starting at the engine or locomotive and coming backwards?

A. Okay. We were headed north. The engine was pulling us with a cab next to the engine.

Q. They might not know what a cab is. I didn't know for a long time.

A. A caboose.

Q. All right, what is next, how many tank cars?

A. It would be eleven in this case, eleven tank cars, and then the spray equipment.

Q. So you have then eleven tank cars. What do you have in the tank cars?

A. One was a chemical car and then we had ten mixers.

Q. Now, when you say "chemical car" is that where you get the chemicals just before you spray it out?

A. That is the raw chemical.

Q. And in addition to that you had ten tank cars?

A. Correct.

Q. And the spray car is the last car on the back?

page 73]

A. The spray car trails.

Q. Now, would you look at what we have designated as "Defendant's Exhibit B" and tell me if that is a close-up of the spray car?

Frank L. Simms

A. Yes, sir, this is the car we were using right here.

Q. Now, looking back toward the back of that car what are those things that you see sticking up in the air that looks like arms?

A. On this one it doesn't have them.

Q. Have you got Exhibit B?

A. No, I am looking at Exhibit A.

Q. Look at B. Now, looking at Defendant's Exhibit B what are those things that stand up on the right side of the car back toward the end?

A. That is the turret you use to spray with.

Q. Now, looking down at the bottom of the car do you also have sprayers down on the bottom?

A. That is correct.

Q. Now, looking at Defendant's Exhibit A I believe that shows some spray coming out down at the bottom.

A. That is right.

page 74] Q. In Defendant's Exhibit B that you are holding in your hand these things that stand up in the air are the things that you spray from the top side?

A. That is right.

Q. And you have them on either side of the train?

A. Mounted on both sides.

Q. Then the business that you see at the bottom is that the sprayer you spray with at the bottom of the car?

A. That is correct.

Q. Now, what is that book you have in your hand, Mr. Simms?

A. These are the records that I kept on that day in question.

Q. Now, for the purposes of the record, do you make any notations of the location that you are spraying and how much spray you use and what day it is and what time of day it is?

A. I have the day and we keep a mile by mile record. No time is kept by me.

Q. Now, assuming that this Anderson farm is between mile post 203 and 202, what day did you go by there?

A. Went by on July the 19th.

Q. Could you tell us from your own memorandum how much spray you used between mile post 203 and 202?

page 75] A. Yes, sir, we used 12.01 gallons.

Q. The mile just before that between mile post 204 and 203 how much?

Frank L. Simms

A. 15.29.
Q. So you cut back about how many gallons?
A. About three and a quarter.
Q. Then the next mile post going the other way from Anderson?
A. That is 202 and 201.
Q. How many gallons?
A. 16.26 gallons.
Q. In other words, a mile on either side you used anywhere from three to four gallons more?
A. Yes, sir.

Mr. Rosenberger: May I show this to these gentlemen? I might say I will prove later but that is miles taken from Hagerstown, Maryland and we were going north so each mile we went north we were coming down a mile.

Q. Show Mr. Rowe where July 19th begins.
A. Right here at 236.9.
Q. No. 236.9. How do you know what day that is?
page 76] A. It is right here.
Q. You have the date up here "July 19th"?
A. Yes, sir.
Q. Is this the original record for July 19th?
A. It is.
Q. Did you make it that day or was it made up since?
A. I kept it as we went along.
Q. Then this July 20th?
A. That followed it.

Mr. Rosenberger: We would like to pass this to the jury and let them see it is an original record.
The Court: All right.

NOTE: The above-mentioned book is passed to the jury for inspection.

By Mr. Rosenberger:
Q. Now, do you have any notations or do you take any observations of the wind on any particular days?
A. Yes, sir, we do.
Q. What is the purpose of that?
A. Well, on windy days we are not supposed to operate if it is too bad.

Frank L. Simms

page 77] Q. Did you make a memorandum of what the wind was on the day before and the day after this?

A. I did.

Mr. Carter: This particular day is the day we are talking about.

By Mr. Rosenberger:

Q. Did you make any memorandum of the wind on this particular day?

A. No, sir, no wind.

Q. Shows no wind, and that was what you made your record at the time?

A. That is correct.

Q. Now, before I forget it, it just occurred to me Mr. Rowe called you by long-distance some time last week and you gave him the same information that you have told him here today?

A. Yes, sir.

Q. You have no reason to tell anything different, do you?

A. No, sir.

Mr. Carter: I might say we appreciated it too, Mr. Rosenberger.

By Mr. Rosenberger:

Q. Do you have any present recollection of going by the Anderson farm and the wind that day?

page 78] A. None whatsoever.

Q. It is all based on your notes?

A. That is right, yes, sir.

Q. I believe these gentlemen wanted to know who was on the train and I want to count everybody that was there. The reason I asked you about the locomotive and the caboose they were up at the front end of the train, is that right?

A. That is right.

Q. Now, who rides up there?

A. You have the engineer, a fireman and the Norfolk and Western carries three brakemen.

Q. They are all up in the front end?

A. Yes, sir, and usually there is a conductor, of course.

Q. As to the Norfolk and Western men who were interested in the spray you mentioned the name of Mr. W. A. Clark.

A. That is right.

Frank L. Simms

Q. And Mr. J. L. Shepherd?
A. That is right.
Q. And Mr. Adams?
A. Mr. Adams was on the train.
Q. He was on the spray car?
A. He was on the spray car.
page 79] Q. Does that take care of all the Norfolk and Western men who were back on the spray car and knew anything about the spray?
A. Yes, sir.
Q. Now, you said you had five men with you. Were these boys that operated the pumps under your supervision?
A. They operate the turrets and one pump. The main pump I operate.
Q. The main pump you operate?
A. That is right.
Q. How do you know exactly how many gallons you sprayed out? How do you know?
A. We have a meter.
Q. What kind of meter is it?
A. A four-inch water meter.
Q. Like you would measure water coming into your house?
A. That is correct.
Q. And you take the reading yourself and you made that memorandum?
A. That is correct.
Q. Now, about these boys that were operating those things are they people who were with you all the time
page 80] or were they college boys?
A. They were college boys.
Q. Do you know where those boys are now?
A. They are scattered around the country. I only know where one might be now.
Q. Where might he be?
A. Hampton, Tennessee.
Q. Is that the only one you have any knowledge of where he might be?
A. That is right.
Q. Were they working for the Bogle Company or working for the Norfolk and Western?
A. Working for the Bogle Company.
Q. Do you have any mechanism on the car that you can regulate the amount of spray that you use at any particular location?

A. Yes, sir, we do.

Q. Explain to the jury the operation and how you cut down on the amount.

A. Well, we have a control on our engine which controls the engine speed and that controls the amount of chemicals put out.

page 81] Q. You don't mean a railroad engine.

A. No, it is a Chrysler V-8 industrial engine we use on our spray pump.

Q. That is something on this car here?

A. Yes, sir.

Q. And knowing the different amounts you concluded you cut down on the spray in that mile where the Anderson farm is?

A. That is right.

Q. And, based on your knowledge of this particular spray, if the Veon got on the tomato plants it would kill them, wouldn't it?

A. Yes, sir.

Q. What is your mixture?

A. One gallon of chemical to 133 gallons of water.

Q. And you have that record?

A. Yes, sir.

Mr. Rosenberger: I think that is all.

page 82] RE-CROSS EXAMINATION

By Mr. Rowe:

Q. As I understand it, in the fifty-one miles that you covered on July 19th you did not personally know where the Anderson farm was.

A. I did not.

Q. Who told you it was in between mile post 203 and mile post 202?

A. The Norfolk and Western people.

Q. Now, you say that you took these readings from a water meter about four inches in diameter?

A. A four-inch water meter.

Q. Where is that located?

A. Located on the discharge side of our pump.

Q. Is it one on each pump?

A. We only have the one.

Q. And when was the last time that meter was inspected to your knowledge?

A. I would say it was about a year old at that time.

Q. You said you had college boys working for you at the time.

A. That is correct.

page 83] Q. And they were your employees and as such were agents of the Norfolk and Western under the contract?

Mr. Rosenberger: I object.

The Court: That is a question of law to be determined by the Court in the instructions.

By Mr. Rowe:

Q. Had these college boys worked for you or with you before that summer?

A. That was their first summer with the exception of one.

Q. The others had not worked for you before?

A. That is right.

Q. You made the statement on cross examination by Mr. Rosenberger that you are not supposed to operate when there is any wind blowing. Is that correct?

A. I wouldn't say "any wind," I say moderate wind and what have you.

Q. How do you gauge the wind?

A. Well, we know when we have trouble reaching the brush we would like to spray, and so forth, and also we know it would be dangerous.

Q. I notice in the chart you kept record on at mile post 219 you cut it down to 7.83 and at mile post 218 cut

page 84] it down to 8.95. Can you cut it off completely?

A. Yes, we can.

Q. But when you went past the Andersons you only cut it down to 12.01. You could have cut it down completely or could have cut it down a lot further. Is that correct?

A. Yes, we could have.

Q. Now, on this July 19th I see nothing on there about wind.

A. That is right.

Q. Can you explain that?

A. When there is no wind we don't put it down.

Q. And there was no wind?

A. That is right.

Q. Are you telling the Court that over fifty-one miles of

travel there was no wind that day?

A. I am.

page 85] RE-CROSS EXAMINATION

By Mr. Rosenberger:

Q. Mr. Simms, one question more. These turrets used on the side to spray from the top of the car I take it they are sort of like guns.

A. That is right. They can be elevated up and down and also vertical.

Q. They are movable. You don't have them stuck straight up but they can go straight up?

A. They can go in any direction.

Q. Mr. Rowe wanted to know if you could cut the spray off. You can have it to just a drip or put it up to high pressure and you can control whatever amount you want to put out?

A. That is correct.

By Mr. Rowe:

Q. Mr. Simms, what pressure is on those turrets? What pressure are they under?

A. It would vary a great deal.

Q. It would vary?

A. Yes, sir.

page 86] Q. In other words, it could come out in a fog or mist as well as coming out in a stream if you wanted it to?

A. It could, yes, sir.

Q. On July 26th I find a notation where you say it was very windy yet you sprayed on that day. Is that correct, from this notation?

A. That is correct.

Mr. Rosenberger: I move that that be stricken out. We didn't spray on July 26th on these people or anybody else, we sprayed on our right of way but it has no materiality as to what the wind was on July 19th.

Mr. Carter: We have a right to cross examine the man. He made a contradictory statement from what the record shows.

The Court: He testified ordinarily on windy days they are not supposed to spray although he has to use his own judgment when he does that.

Q. Is that correct?
A. Yes, sir.
Q. And you have told the jury on July 19th when you passed the Anderson farm there was no wind?
A. That is right.

page 87] The Court: If the record shows on a later date they sprayed when it was windy the jury can accept it for what it may be worth.

By Mr. Rowe:
Q. Mr. Simms, your testimony today is based only on what is in the book. You don't remember definitely whether it was windy or not that day. Is that correct?
A. That is correct.

* * * * *

MRS. WALTER H. ANDERSON,
having been first duly sworn, testifies as follows:

DIRECT EXAMINATION

* * * * *

page 88]

* * * * *

By Mr. Rowe:
Q. You saw the spray train going past your house?
A. Yes.
Q. And was the spray going over into the field?

Mr. Rosenberger: Just a minute. That is a most material thing he is leading the witness on.
The Court: Mr. Rowe, try to avoid asking leading questions. I sustain the objection, it is a leading question.

By Mr. Rowe:
Q. Mrs. Anderson, tell what you saw.
A. Well, the train was passing on and they were spraying all along the railroad and they had the long hose, I guess you would call it, they were spraying all along the place there.

Mrs. Walter H. Anderson

Q. What did the spray look like to you? Can you explain to the jury what the spray looked like to you?

A. Well, it was like a fog.

Q. A fog?

page 89] A. Yes.

Q. Can you explain to the Court where you observed it?

A. I was on top of the hill and the train was passing on and that is how I saw the spray that was spraying then.

Q. And can you tell the Court where they were directing the spray?

A. They were going—

The Court: You might ask which direction the spray was going.

By Mr. Rowe:

Q. Which direction was the spray going when you saw it?

A. They were going toward Natural Bridge.

Q. That is the train?

A. Oh, yes.

Q. Where was the spray going?

A. Oh, they were spraying all around, could see, you know, spraying with the big tubes or whatever you call it, the spray pump, and they were spraying all over.

Q. As the train moved up the track which direction was the spray going?

A. Oh, it was going — it looked all over, it was all over.

page 90] Q. How far was it going? How far did the spray reach?

A. Well, I could not tell you how far it was but I could see it was all fog and misty all over, and it was high.

Q. All over what?

A. All over the field and on the railroad too.

Q. On the railroad right of way and on the field?

A. On the field, yes.

Q. Did you smell anything?

A. Yes, it was strong. The spray was very, very strong.

Mr. Rowe: That is all. Take the witness.

Walter H. Anderson, Jr.

CROSS EXAMINATION

By Mr. Rosenberger:

Q. Mrs. Anderson, were you up at your house up on the hill?

A. Yes.

Q. How far is that up above and away from the railroad track? It's on a high bank up over the railroad?

A. Yes. It is not very far away.

Q. And as the train came by the house you saw just a sort of fog?

page 91] A. Yes, they were spraying.

Q. Where it went you don't know. Where the fog went you don't know, didn't get any on you.

A. Well, it was spraying all over there and I didn't want to stay there any longer than I could get out because they were spraying all over.

Q. Was your husband outside with you at the time?

A. No. The little girl came to get him.

Q. Did he come out?

A. Yes, he came out.

Q. Was your son there?

A. No, he wasn't there.

* * * * *

page 92] WALTER H. ANDERSON, JR.,
having been first duly sworn, testifies as follows:

DIRECT EXAMINATION

By Mr. Rowe:

Q. Would you state your name?

A. Walter H. Anderson, Jr.

Q. And you live down here on the farm with your father and mother and your family. Tell us about the tomato crop that year so far as you know about it. Tell us how many plants you planted and how you cultivated them and just what you had done to them.

A. Well, that year was an excellent year, in fact, our hay crop was so good that when it was all over we had more than we could store in the barn and I have witnesses to that if needed.

Q. Speak out a little louder. Tell us about the tomatoes.

A. The tomatoes was almost waist high and were in perfect

shape, all in bloom and had plenty of green tomatoes on them and a few ripe ones we had just started picking. That was the extent of the growth.

Q. As I understand from your father you were
page 93] the one that marketed the fruit.

A. Yes, sir.

Q. How did you go about marketing the fruit?

A. I had been selling tomatoes right along for the last nine or ten years, selling produce and I had regular customers to go to and my main customers were Kroger and the A&P and the Mick and Mack, they purchased most of my tomatoes, and then I had a lot of other chain stores.

Q. How many plants did you have set out that year?

A. 6,270 plants and the reason why we come to that number was because Mr. Meadows counted them. We planted more than that, around 6,400 or 6,500. We got six boxes of tomato plants and it is from a thousand to a little more to a box and we come to the point of 6,270 because that was Mr. Meadows' count. We went in the field and personally counted them ourselves.

Q. When was that?

A. That was about September 20th, I think the first time the pictures were taken.

Q. The first time the pictures were taken by the railroad?

A. Yes, sir.

Q. Did you take any pictures yourself of the tomato crop?

A. Yes, sir.

page 94] Q. Was that before or after the spraying?

A. After the spraying.

Q. And did you have other crops growing?

A. Yes, sir, beans, watermelons, butternut squash and some sweet corn along the lower side of the field.

Q. You had some corn?

A. A few strips of sweet corn in the same field.

Q. I show you this picture, Plaintiff's Exhibit No. 1. Would you look at that, please, and explain to the jury just what that is and when you took it?

A. I took this picture about five or six days, somewhere along there, after the train had gone through and what happened here is all the leaves had dropped off, a big part of the leaves, and all the blossoms. You notice there are no more blossoms in there and all the green tomatoes, the little fruit, had dropped off, and you notice the white specks on the tomato fruit where it had been sun scald by the sun after the

leaves dropped off.

Q. What about this photograph?

A. This is another part of the field where the sun had gotten to the tomatoes and caused that white blister.

Mr. Rosenberger: We object to him saying
page 95] what caused it.

The Court: When you speak of the pictures you are not to go into argumentative testimony, just explain when the pictures were taken and what the pictures reveal without going any further.

The Witness: Here too you will notice the end of the tomato plant where they drooped down and you can see the brown leaves here.

Mr. Rosenberger: I think the leaves speak for themselves.

By Mr. Rowe:

Q. What part of the field was that?

A. That is farther in the middle part.

Q. Now, will you tell the Court what part of the field that is? This is Plaintiff's Exhibit No. 3.

A. That is toward the end. That first picture was starting in the field, the next one in the middle and this is farther toward the back part of the field. That is between a private property boundary and not between the railroad.

Q. I show you Plaintiff's Exhibit No. 4 and ask you to tell the Court what that shows and what part of the field that was taken in.

page 96] A. That is the squash plants and there is the crooked neck squash plants. They also started turning yellow and at the time I took this you will notice this corn, one cornstalk here growing, and the leaves on it you will notice are curled and turned white like a frost had hit it in July. July 19th is when it was done.

Q. What part of the field is this?

A. That is a little farther down more past midway the field toward the river.

Q. Would that be then down this way from the track? Look at this aerial photograph.

A. I can show you.

Q. Come down and show them where it would be with reference to your field.

A. Here is our home right here. This is the railroad tracks. The train was traveling in this direction.

Mr. Rosenberger: He wasn't there.

The Witness: This is the four-acre field in here. I had sweet corn planted along here. This is where all the leaves had turned.

By Mr. Rowe:

Q. I show you Plaintiff's Exhibit No. 5. Tell the Court what part of the field that was and what crop that was.

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A. This is toward the end of the field and farther down the river where the beans were growing. All the leaves of the beans dropped off and you will notice a few fruit on the beans but we had harvested a few of the beans already, and you will notice the corn planted along here was all wilted too.

Q. Did you tell the Court what part of the field that was?

A. More toward the river this way, away from the railroad track.

Q. I show you Plaintiff's Exhibit No. 6. Would you tell the Court what that shows, please?

A. Well, this is a picture of the railroad looking down on the tomato field. Right below this is the tomato field. The railroad is above the field.

By Mr. Rosenberger:

Q. When was that picture taken?

A. That was taken quite awhile ago, about the same time they sprayed. This is when the spray had killed all the trees.

By Mr. Rowe:

Q. Mr. Anderson, when did you first arrive back home after the spraying took place?

page 98]

A. Well, my mother and little girl were still on the hill where we live in seeing distance of the tomato patch and we just pulled up and they said the spray train had just gone down and as soon as I got out I could smell the spray, a strong smell, and I started to mention when the little girl came to me and said the spray train had gone down the track I right away went down to see what damage they might have done.

Q. What did you find?

A. Well, I found as soon as I went in the tomato patch—well, when you were close to the railroad track it was like a light rain, it was still damp, and you could tell the difference. It was hot that day but it was still damp. As I went on down

in the tomato patch you could tell the spray had gotten on the tomato plants, moist leaves, and as I walked on farther down through the field naturally it would get lighter but you still could see it was on the tomato plants. Along the railroad track it was all wet with spray.

Q. Had there been any rain that day?

A. No, no rain at all.

Q. When did you first notice anything happening to your tomato plants, if at all?

A. Well, practically the next day you could notice a slight droop and then two days later they kept on grad-
page 99] ually wilting on down and then finally the leaves started turning yellow and then the leaves all dropped off and of course, in about five or six days' time the tomatoes were all exposed to the sun after the leaves drooped down and it just caused them to sunburn.

Q. Now, Mr. Anderson, approximately how high is the railroad right of way above your tomato field?

A. Well, when you sight across the track, the two rails you can sight and see the railroad fence a little bit better than half, just see the top part of the railroad fence. Say this was the fence along here and the railroad comes this way, sight across and you could see half of it and the tomato field was another maybe two or three feet below that.

Q. How high is the railroad fence?

A. I think forty-some inches high, a regular railroad wire fence, but under my arm.

Q. Then the railroad tracks were anywhere from five to six feet above your tomato field?

A. Yes, sir, maybe a little better than that, and then slopes down toward the river.

Q. Your field slopes toward the river?

A. Toward the river, I would say maybe two
page 100] or three foot drop every two hundred feet or maybe better.

Q. What was the other vegetables in that field?

A. Well, I had butternut squash, crooked neck squash, cucumbers, watermelons, beans and cantaloupes and sweet corn at the lower part of the field and they all at one time, every bit of it, just started turning and even the sweet corn leaves, they all started turning, they got all twisted and after a few days' time were just exactly like a frost had hit the sweet corn along the railroad on the upper side of my tomato

patch. Apparently from what I could see when the train was coming down—

Mr. Rosenberger: He didn't see it. This is speculation.

The Court: You can testify only to matters you know.

The Witness: I will put it this way: The tomatoes were completely killed along the railroad track and they gradually worked out in the field, well, they weren't completely killed out like they were along the railroad. Then the tall corn, the sweet corn that was growing—if I had something to show you—here is the railroad track going down

page 101] this way and the tall corn growing up this way.

As the spray went down through here it looked like all along the lower side was protected by the corn. It didn't injure those few tomatoes along the lower side and along the corn it looked like the mist overshot the tomatoes.

By Mr. Rowe:

Q. How deep is your field from the fence line?

A. It is a four-acre field and I don't know. It is seventy-some yards to an acre.

Q. Now, did you do the marketing of these tomatoes?

A. Yes, sir.

Q. Will you tell the Court where you marketed them?

A. I have always sold my produce to these stores around here, they always like fresh produce, and that was the main thing we had over the different counties. They were grown right here in Virginia and always sold better than any out-of-town tomatoes which anybody like North Carolina ships in lots of tomatoes, or South Carolina, and they can tell the difference in the flavor and everything and I always got a higher price than others.

The Court: Confine yourself to answering the

page 102] questions. Time is a matter of importance and let's move along.

By Mr. Rowe:

Q. What prices were you getting in July and August for your tomatoes?

Mr. Rosenberger: If I could have a conference with the Court and counsel we could save a lot of time.

The Court: Members of the jury, the Court is going to

declare a recess. We will reconvene at 2:00 o'clock. I caution you not to discuss this matter with any other person when you are out at lunch hour. We will reconvene promptly at 2:00 o'clock.

NOTE: The jury leaves the courtroom and the following ensues in the absence of the jury.

The Court: All right, Mr. Rosenberger.

Mr. Rosenberger: If your Honor please, I object to this question and any similar question. The price he was getting for tomatoes in July would not be a proper measure to determine the amount of damages, if any, that this gentleman has. My reasons for that are these: I think the Court will take judicial notice that when tomatoes come page 103] in at first the price is relatively high and the price drops down. Now, we have a statement, as his father said, showing the price was $3.94 on an average.

The Court: At one time he sold thirty-five bushels at $1.00 a bushel.

Mr. Rosenberger: He was asking what prices he was getting in early July.

The Court: I am going to submit this observation, Mr. Rosenberger: I think the answer to the question should be qualified, in July the prices of tomatoes was so much, in August as the season progressed the price diminished so much, I think we all know that. We all know when tomatoes first come in you can buy them at much higher prices.

Mr. Carter: We propose to put on the Kroger people who will testify to that. They will testify when tomatoes are scarce the price is high and when they are plentiful the price is lower.

The Court: The scale would not be determined by the price tomatoes brought in July.

Mr. Rowe: We realize they fluctuate and we gave Mr. Rosenberger a bill of particulars showing what we page 104] claim the average was. They never went below $4.00.

Mr. Rosenberger: He claims $4.00 on an average but the statement we got from him for the July tomatoes was.

Mr. Rowe: For the sake of argument we will say $3.94.

The Court: I think you can put evidence on to refute their testimony. When they say they were selling tomatoes at $4.00 you can show that tomatoes on the market brought less.

Mr. Rosenberger: There is another point I haven't made clear. I don't think the price of tomatoes on any particular day would be the criterion to establish his damages. His damages in this case would be the value of that crop he claimed was damaged on July 19th as of that day.

The Court: You mean the future is not to be determined?

Mr. Rosenberger: For the reason it gets into speculation. It was brought out by Mr. Anderson that a tomato will come from bloom to fruit in thirty-five days. I take it page 105] they had more than thirty-five days ahead in the growing season from July 19th so here they are claiming damages for something that hadn't even bloomed. Now, we have weather factors, we have leaf factors and when we got into all this speculation as to price per bushel of tomatoes that had not even come into bloom you see what the point is.

The Court: I don't know why make this comparison but in all cases of disability they claim future loss of earnings.

Mr. Rosenberger: If you show you have a continuing disability then you say, "Because of that I can't do this job and I have to take a lower price job," yes.

The Court: The testimony has been that on July 19th these were normal healthy plants. Then you inject observations that there is always some other cause that could destroy the plants. Where the plant is matured and has borne ripened fruit the chances are far greater that it will continue to bear marketable fruit until fall.

Mr. Rosenberger: Except for the question of page 106] disease and bugs. Being a farmer I might be going along fine one day with my tomato crop and the next week something hits me and I can't do anything more. It's like the fisherman, "I can tell about what I had."

The Court: This is your theory of the case, if these plants were destroyed they were destroyed not by the spray but by some other cause. That is your theory. If the jury believes that these plants were destroyed by the spray they will give a judgment. If they believe some other cause other than the spray destroyed the plants they will find a verdict for you. If they believe possibly the spray killed the plants or that there is a possibility some other cause killed them and they can't determine which they will also return a verdict for the defendant. Why argue at this stage as to the determination of value?

Mr. Rosenberger: This is what I don't want to waive and that is the reason I suggested at the beginning I don't want to be popping up. I think in the last trial of this case we had seven or eight witnesses who came here and gave prices they were paying for tomatoes at certain times and it page 107] got to the point I thought I was maybe in the wrong profession and ought to be out raising tomatoes. They pegged them at a certain price and I thought how ridiculous to tell me the price of tomatoes in early August and to get all these bushels from the vine I have got to produce them through the hot dry spells and have got to get by all the diseases to produce that much so I say the value of them by the bushel at that time is absolutely no criterion. I think it will be like a condemnation case, somebody take a look at his patch of tomatoes and says, "We have got so many here, they are worth so much." I think the whole crop, taking everything into consideration, is worth so many dollars. That is the way I think it should be.

The Court: Just say, "The crop is worth $18,000.00" and that is it?

Mr. Carter: It all goes to the weight of the testimony. These men can get on and testify. We all know the market goes up and down.

The Court: I am speaking out of the hearing of the jury but after these plants were partially page 108] destroyed tomatoes continued to be sold from those plants. We have evidence of thirty-one bushels sold. We have other evidence that two months later thirty-five bushels were sold at $1.00 a bushel. We have got all of that in the case. Young Mr. Anderson hasn't finished his testimony. We don't want to get into speculation and conjecture. Now, about fixing a rule or fixing your damages in this case, it has been suggested Mr. Rosenberger wouldn't have any objection to saying, "We were damaged $15,000.00" and that would be the amount.

Mr. Rosenberger: You didn't understand me fully. I said you would have to have somebody give an opinion as to the value of the whole crop right then.

The Court: In your cross examination you can arrive at how they arrived at their figures.

Mr. Rosenberger: I know what is coming when they run all these grocery men in here, "worth so many dollars at such and such a time."

The Court: I don't think it is proper to base it on the prices tomatoes brought in July.

Mr. Carter: I think the standard would be what

page 109] it was over the whole period, in July or any time he would have tomatoes, would have to show it in August and September and all during the growing season and that is what we plan to do. We plan to bring in people to show what they were paying for tomatoes in July and to show that they were cheaper after that because they were more plentiful and then they began to get scarce again in the fall and they had to pay more.

The Court: Then you run into another problem, another matter of conjecture, how many bushels could have been sold at $4.00 in July, how many bushels could have been sold in August and how many bushels could have been sold in September.

Mr. Carter: This is a question of weight, not a question of admissibility. All we are required to do is to produce the best evidence and the best evidence we have is to prove what we lost and what the market value was. I don't know how you could get at it any other way.

(RECESS FOR LUNCH)

page 110] November 23rd, 1964
Afternoon Session

WALTER H. ANDERSON, JR.,
resumes the stand for further direct examination.

By Mr. Rowe:

Q. Mr. Anderson, prior to lunch you were discussing your tomato crop and how it was damaged. Could you tell the Court and jury how you arrived at the damage to your tomato crop?

A. Well, we planted 6,270 plants, according to the count which we made when we went over them with Mr. Meadows, the railroad claim agent, and we figured at the time I was selling tomatoes to start with when we were getting higher prices but at the time I was selling tomatoes I was getting $4.00 a bushel.

Mr. Rosenberger: If your Honor please, we move to strike

$4.00 a bushel at that time." That is immaterial and not a proper item of damage.

The Court: Approach it from a different method. Do you gentlemen have any objection to my making an observation?

page 111] Members of the jury, the Court takes judicial notice of the fact that in the early stages of the season tomatoes sell at a higher price than they ordinarily do when they become more plentiful. Objection has been made to the method of fixing damages. You cannot consider the item of $4.00 a bushel alone. You have got to consider the price depreciates as the abundance of tomatoes appear on the market. I think this witness should be asked the question what tomatoes brought when first put on the market and then what prices they brought subsequently and then what was the average price for the whole season. Do you gentlemen have any objection to that procedure?

Mr. Rosenberger: We think, your Honor, that as of July 19th they should establish a value of that particular field and those plants at that time. I don't think that they can give this jury any definite idea of what he would have had say on August 30th to sell or for many other causes he may not have had any tomatoes to sell.

The Court: Will you members of the jury retire to your room for just a few minutes?

page 112] (JURY OUT)

The Court: Mr. Rosenberger, state for the record your objection.

Mr. Rosenberger: If your Honor please, we object to the introduction of the price of $4.00 per bushel at the time he was selling them or prices at a subsequent date or prices at an earlier date for the reason that that merely leads to an average price per bushel and we feel like that under the evidence, and with this particular kind of crop, you have no assurance of, No. 1, how many—nothing in the record by anyone up to now about how many tomatoes there were. We have the number of vines and we are going on the assumption there would be a bushel, based on Mr. Anderson's testimony. Then he said in response to your questions the number they had already harvested, tried to get out of him how many they were

and that was indefinite and he didn't know. Then he said a lot were on the ground but he didn't state the quantity. Then we find that they sold some later, so this is the prob-
page 113] lem: No. 1, to get the quantity; No. 2, to get the price, and if you took an average price, an average quantity, having in mind that tomatoes develop from bloom to maturity in thirty-five days, here we are talking about the value of something that is not even on the vine. I think that points up the reason I think that the fair measure of damages in this case would be the fair market value of his crop before anything happened. If you had a man walk in there and say, "Well, this crop will produce 275 bushels. I can see we have already produced 50 bushels right here. Now, I can give this much money and that is all because I have got to make a profit on the sale of those." Now, I have got those vines and those vines under certain conditions, under the best conditions, will produce so-and-so but I have got to take the risk of weather conditions, the market price and diseases peculiar to tomatoes to determine how much cash money I want to put up; so if I put myself in the position of that buyer buying the crop like you know they buy apples on the trees, then if I am going to get a dollar or $2.00 a bushel for some that aren't even
page 114] in sight yet I certainly couldn't give much per bushel for something that is not on the vine. For that reason I say that this method is nothing in the world but a guess.

The Court: You are saying on July 19th what that crop would sell for on the open market, if a buyer would come on the land and say to the Andersons, "Now, we will give you this price for this crop."

Mr. Rosenberger: That is right, because you can see exactly what you have got there, either ripe ones, the green ones and then you say, "I take a speculation on what the weather and the market is going to be."

The Court: You run a certain amount of risk, it is true.

Mr. Rosenberger: When you start talking on average per plant or the average price you are purely guessing, and we have the uncertainty involved in this case too whether he continues to get some tomatoes. I would like to tell you all I know about it but it is one of those problems like condemnation. I think

if they say it happened on July 19th then the bar falls right there.

Mr. Carter: I might say, Judge, if we had known
page 115] the train was coming by and spray the field we
would have had somebody there to make us a price. We didn't know it was going to happen. If you hold with Mr. Rosenberger then these people will have no recourse. They didn't want to sell the crop in the field, the blooms and the green tomatoes. They would have no possibility of having a witness that could have put a value on it before the spray train came along. They didn't know it was coming. Now, of course, the best evidence is what those vines would have produced. They say it cost them to produce these tomatoes a dollar a bushel. Now then, if they had produced them at a dollar a bushel what price would they have brought or what would the crop be worth? We are suing for the crop, nothing else.

The Court: These people already have their costs invested in the crop. In order to get their costs out of the crop, plus a reasonable profit, then it is necessary to fix a market value.

Mr. Carter: That is right. If you would hold with the de-
fense how could the plaintiff ever prove his case?
page 116] There wouldn't be any way in the world to prove
it, you couldn't have somebody waiting for the train to come along. They didn't know the train was coming by. This is the best evidence we could produce, how much crop he would have had and what it would have brought. Like I would get out here and get hurt and lose an arm, well it might be true that I might have gotten killed out here in a wreck but I didn't and I am suing for the loss of my job and the loss of my health and we prove life expectancy. It's the same situation here. If these tomatoes had produced what would they have brought? They would have brought the market price. What is the market price? The market price is the average price paid during the period these people would have harvested tomatoes and sold them on the market. I don't know how else to approach it.

The Court: In response to the defendant's request for a bill of particulars the plaintiffs did file their bill of particulars giving the defendant full knowledge of their claim and the

amount they were going to establish in their claim.

NOTE: At this point the Court reads certain
page 117] parts of the bill of particulars which is here omitted.

Now, that apparently satisfied the defendant because we have no responsive pleadings to the bill of particulars. We have no denial, no pleading which challenges the allegations contained in the bill of particulars.

Mr. Carter: The only difference was we mentioned or told Mr. Rosenberger instead of $5.00 we were claiming $4.00 and $1.00 would be for the costs.

The Court: I notice, Mr. Carter, in your instructions you say, "The jury shall award them such sum as will reasonably compensate them, not to exceed the amount sued for." That part would have to be stricken under the evidence so far because there is evidence to the effect that subsequent sales were made after the alleged damage. In view of the pleadings putting the defendant on notice of what constitutes the claim I don't know what objection you have.

Mr. Rosenberger: I say this. Mr. Carter has no way to prove the damages.

The Court: If he has no way to prove damages
page 118] he is out of court.

Mr. Rosenberger: Actually, if he noticed the spray had got on his tomato patch that day and had so many tomatoes on the ground, so many ripe, the damage didn't take effect for about five days, before the leaves dropped off he could have picked all the ripe ones and sold them. Now, he could have had anyone come in and say, "The value of this crop of green tomatoes is worth so much." What else has he got to sell? He has nothing but vines. What is the value of those 6,270 vines? What would somebody on the market pay for them? The reason I point that out is that in this case they are trying to sell an unborn bloom that would produce only at frost time and taking an average price for tomatoes sold from what area? Not from this farm, not from the farm next to it. Now, if he had a comparison within the next field or in the next farm then that would be the answer. I say it certainly isn't a proper element of damage to include the price of a growing fruit yet unbloomed. Then in regard to the bill of particulars

I say I would like to know and we ask for a way to
page 119] prove it. I couldn't control what his answer was.
The bill of particulars sets out actually what he claims.

The Court: You mean you have no right to demur to it?

Mr. Rosenberger: Not to the bill of particulars, no. He could have alleged that he had a hundred thousand dollars worth of damages, if he could prove it, fine but in a demurrer I would have to say as a matter of law he didn't have any claim. That is the point I make.

The Court: Do I understand you to say the determination of so many bushels at the figure of $4.00 per bushel cannot be introduced as evidence even though it is in his bill of particulars?

Mr. Rosenberger: The difference, your Honor, is that I might object to evidence when it is introduced. If I had come up and attacked his bill of particulars he would say, "Well, you will have to wait." He don't have to allege his evidence. Suppose I came in and said, "That isn't proper." He would
say, "You wait and see. I have a man who saw
page 120] them and said he would give me that much a
bushel."

The Court: Let me ask you this question: Suppose the jury would determine that from the negligence of your client the plaintiffs were damaged, now if they were damaged by the negligence of your client and caused to lose a crop how would you determine the value of that crop?

Mr. Rosenberger: My position is they are only entitled to what that value is. If it is alleged we did it on July 19th I say, "Well and good, set the value right here."

The Court: Stop right there?

Mr. Rosenberger: No, I am fixing all the fruit you have got and what you can see on the vines. Now, you also have some vines there. How much am I going to pay on the basis that those vines will produce during the rest of the season, whether a long or short season, wet or dry season, how much will those vines produce? Now, the buyer will say, "If they were such and such I could pay so much."

The Court: Even though you had spray poison
page 121] on them?

Mr. Rosenberger: I am getting up to the day

before the damage. Now, after the spray train comes by he will say, "You have only so many left worth so many dollars" and that would be the difference. It is easy to state the principles. The principle is the value before and after but the reason I go into the method of arriving at it is to point out the error in assuming that you are going to have a certain number of bushels later in the year that will sell for a certain price because you are putting a sale value in August and September after they had become a reality whereas when we are talking about the damage that day we are talking about the value on that day. That is the difference. If it were otherwise then we would get into the question of profits, cost of production for the rest of the year, get into all kinds of items, so I say it just doesn't add up that you could sell me by the bushel at an average price something on vines unproduced and unbloomed as yet.

The Court: You will recall the cross examination. With the permission of counsel I cross examined Mr. Anderson and asked him the specific question how much page 122] ripened fruit had he sold, what fruit was green on the vines and by the number of blossoms or blooms on the vines could he give us an estimate of how much yield, and the question was qualified by asking about ripe fruit, green fruit and blooms, to which he replied, "At least a bushel." Of course, you objected to that.

Mr. Rosenberger: Judge, I asked him if he knew how many there were and he didn't.

The Court: You couldn't expect a man to count the blooms, 1, 2, 3 and so forth, you couldn't do that. You had 6,270 plants and this man had been in the trucking business for a number of years and he gave his best estimate of that. I don't think the law would require him to go from plant to plant and count the blooms, the green fruit and the ripe fruit. Can you show me some authority that would require him to do that?

Mr. Rosenberger: You asked him the proper question based on proper elements but the witness gave you a response without giving you first the amount of fruit harvested, page 123] the amount he had on the ground or what damage actually was done to the remainder of the plants, how many were knocked off and that is the reason I feel like probably we are dealing in the abstract. To get it down we

have multiplied out this 60 pounds to a bushel by 6,270 plants and that is 376,200 pounds of tomatoes and that divided by 2,000 pounds is 47 tons of tomatoes per acre and we find that the average in the whole State of Virginia is 6.8 tons an acre that is the average. Now, we are satisfied that it is scientifically impossible to produce that many tomatoes.

The Court: Did you actually count the number of tomato plants?

Mr. Rosenberger: We actually counted them with Mr. Anderson, Jr. and they agreed on the size of the patch and the number of plants so we know we are right; that 6,270 plants is right.

The Court: Is it unusual for a hybrid plant to bear a bushel of tomatoes?

Mr. Rosenberger: Sure. The best that they have ever been known to raise was on the Eastern Shore 25 tons
page 124] and his average down there on his guess is 47 tons.

The Court: Do you have any experts to testify to that?

Mr. Rosenberger: I have an expert who says he knows the figures.

Mr. Carter: It is still a question for the jury.

Mr. Rosenberger: But you can't get past the physical aspect.

Mr. Rowe: When Mr. Anderson, Jr. was talking about the bushels of tomatoes he wasn't talking about the bushels of best grades to sell, he was talking about all kinds.

The Court: Can't you bring that out on cross examination?

Mr. Rosenberger: I can. That is the reason I say he didn't produce $4.00 a bushel tomatoes that he is talking about from every plant. You can see how far we get on speculation.

The Court: This case comes *de novo* and I have no knowledge of what transpired at the other trial except
page 125] what I gathered from your endeavor to impeach Mr. Anderson by his previous testimony but this Court sits here completely unaware what took place at the other trial.

Mr. Rosenberger: This shows you how we get into the speculative field and that is the reason I went into those figures and the reason I think I am so sound. Any time you have a question of damage it is the value as of the time.

The Court: The burden of proof certainly remains with the

plaintiff and he has to establish damages not by speculation but with reasonable certainty. You can't preclude these people from showing evidence of damage. There is no other approach except by the method they are pursuing, I don't know of any other way.

Mr. Rosenberger: I thought our way was best, the value as of the time.

The Court: Suppose Mr. Anderson was asked the question by Mr. Carter: You have been selling these tomatoes for the past nine or ten years, now, as of July 19th if you all had sold that crop as of July 19th on the market what, in page 126] your opinion, would have been the fair market price?" Suppose he said, "$18,000.00." Then from there you would go in what direction?

Mr. Rosenberger: I would show that was a pure guess out of the sky, No. 1. He wouldn't be qualified to give it.

The Court: As I understand your contention these people can't prove one element of damage.

Mr. Rosenberger: Judge, I am not sure how they would do it but I know there are plenty of people who deal in growing crops who will tell you right off the bat what this growing crop was worth.

The Court: I don't think these people ought to be precluded from showing what that crop would have produced and what they lost after July 19th because of the negligence of your client. I don't think they should suffer the loss. If the jury finds these people were damaged as a result of your client's negligence they shouldn't be caused to lose what profit they should have made out of that crop if they can reasonably establish that the blooms were there; that the green fruit was there; that the ripe fruit would page 127] be damaged, and then give an average price what it would bring on the market. Now, what other method would you have, Mr. Rosenberger?

Mr. Rosenberger: The one I said, the value of that growing crop at that time. In their way you would take into consideration the value of unborn fruit.

Mr. Carter: The evidence is that this boy didn't know what effect the spray would have on the tomatoes. He said they kept getting worse and worse until finally the leaves all came off and the tomatoes blistered. There is no evidence he knew

at any particular time how much his damage would be. When should he have gone out and gotten someone? Should he have done it when they first put the spray on when he didn't know what effect it would have? Should he have done it when the first leaves curled or when the first leaf dropped off? When was he supposed to go out and get his expert?

The Court: If you could have gotten a person who deals in the purchase of crops of tomatoes and asked him

page 128] the hypothetical question: "We have 6,270 hybrid plants all in good condition bearing fruit heavily, some ripe, some green and some blooming and on July 19th, 1962 these plants are destroyed, what, in your opinion, having had wide experience, what is your opinion as of July 19th, 1962 as to the value of those plants as I have described them? What would they be worth, 6,270 plants on the open market?" That is the only thing I see.

Mr. Carter: Then Mr. Rosenberger would say, "You don't know what kind of land it is, whether good land or bad land or anything else. The tomatoes are gone."

The Court: It has been testified there were 6,270 plants bearing tomatoes.

Mr. Carter: If I was on the other side I would scream my head off.

The Court: You are placing the Court in the position where I have got the duty of deciding what evidence is admissible and what is not admissible. You are telling me if you were Mr. Rosenberger you would be screaming too. If that is the case I think I would be inclined to rule with Mr. Rosenberger.

page 129] Mr. Carter: If I was him and I came in here and had an expert asking him a hypothetical question after the tomatoes are gone and asked him a hypothetical question as to how many bushels of tomatoes can you raise on 6,270 plants if they were producing heavy any lawyer on the other side for the defendant would say that testimony is no good because you don't know the type of land, didn't see the land, don't know anything else about it. The proper way is the way we are doing it because we can't do it any other way.

The Court: Another thing, Mr. Rowe's examination of Mr. Anderson this morning, was no objection made at all and no

question raised as to the propriety of the method of figuring and Mr. Anderson brought out the fact that on August 7th he sold twenty-one bushels at $3.94 a bushel.

Mr. Rosenberger: Excuse me, he didn't know the price then but the $3.94 that was the price before July 19th. That was the 184 bushels I had him testify to that was shown in that statement.

The Court: It was brought out that thirty-five bushels were sold to Mr. Cook at $1.00 a bushel.

page 130] Mr. Rosenberger: The reason for bringing that out was that he was talking about $15.00 a bushel early in the game. He testified he only sold 184 bushels which brought $725.00, which divided is $3.95. Now, that is proper in the sense that it shows the crop produced by those tomatoes up to that time and, Judge, I want to tell you one more thing about this case, I'm just talking too much, but if you will multiply that amount by three, because it is about a third of the growing season, you see how many tomatoes he was getting. He said 187 bushels but call it 200 bushels and if you multiply that by three it would be 600 bushels. Now, Mr. Carter made another point, he said if we brought experts in they wouldn't know about the soil, the weather conditions, what were the diseases so I say a buyer who is paying a fair price for these things is going to discount it substantially.

The Court: What would preclude him from asking the witness to assume the weather conditions would remain the same?

Mr. Rosenberger: You couldn't do it. That is the reason I brought out by this gentleman that it

page 131] was the best hay crop he had ever had. Heavy rains are bad for tomatoes. That is the reason he had the blight.

The Court: Gentlemen, I tell you I am going to rule as I see fit to rule and if I am wrong it can be corrected later on. I am going to permit the question to be asked of this witness what the price of tomatoes were in July from his normal experience and the same in August and then strike a happy medium somewhere. That is the only way I see to approach it.

Mr. Carter: We will have other witnesses to the same effect.

The Court: I take the position if negligence is established certainly they should not be caused to lose their future crop or that portion of the crop where blooms were on the vines,

green fruit on the vines and also ripe fruit. I don't see why they should be made to suffer that loss.

Mr. Carter: Will you agree on $4.00 a bushel?

Mr. Rosenberger: No, sir. You are bound by your bill of particulars and you can't exceed $4.00.

page 132] Mr. Carter: We claim $4.00 average all the way through. I have a whole lot of people to prove the market value. I wish we could agree on a price.

Mr. Rosenberger: I couldn't agree on a price on something you don't even have to sell, that is my point.

The Court: Do you wish to note an exception?

Mr. Rosenberger: We wish to object and except for the reasons heretofore stated.

The Court: Gentlemen, we will have to move along.

(JURY PRESENT)

Mr. Rosenberger: It is understood by the Court and counsel our position and we won't have to go into that any more if evidence is offered on that subject?

NOTE: Counsel approach the bench.

The Court: It is understood it applies to all such testimony.

page 133] WALTER H. ANDERSON, JR.,
resumes the stand for further direct examination.

By Mr. Rowe:

Q. You testified there were 6,270 tomato plants at the time of the spraying operation on July 19th. Would you now tell us what was the price brought per bushel for the first tomatoes that were harvested out of this crop?

A. Probably around $14.00 or $15.00 per bushel.

Q. And what was the price per bushel subsequent to that?

A. Well, they gradually dropped to $12.00 and $10.00 and $8.00.

Q. What in your experience as a truck farmer was the lowest price your tomatoes ever brought per bushel, the lowest price?

A. The lowest I sold that year was $4.00 a bushel and the

next haul I was supposed to make at Kroger Store and he told me he was going up to $4.50.

The Court: You can't testify to that, not what somebody told you.

Q. The lowest you sold on the local market was $4.00 a bushel?

A. Yes, sir.

page 134] By Mr. Rowe:

Q. There has been some testimony here that later in the season you sold thirty-five bushels to Mr. Cook. Will you tell the Court why you took these tomatoes to Mr. Cook at that price when you could have gotten $4.00 per bushel?

A. Well, the way I figured it if Mr. Cook would have taken those tomatoes with the scald spots on them I could have hauled him a lot of these tomatoes but the first load of thirty-five bushels I took him, I don't remember the exact amount, but he said he couldn't handle any more of those tomatoes.

Q. This scald that was on them how did that scald come upon these tomatoes?

A. By the leaves dropping off and the sun hitting them and causing a white big blister on top. He told me he had to cut entirely too much of it out.

Q. And Mr. Cook is a canner of tomatoes?

A. Yes.

Q. And the sun scald was brought on by the leaves wilting and from the spray. Is that correct?

A. Yes, sir.

Mr. Rosenberger: We object and move that the answer be stricken out.

The Court: I am going to instruct the jury to

page 135] disregard it. You will disregard the last question and the answer. It was a leading question. Counsel for the plaintiffs supplied the question as well as the answer so you will completely disregard it.

By Mr. Rowe:

Q. Going back to the figures we had, Mr. Anderson, will

you tell the Court and jury how much you were damaged in your opinion because of this spraying operation and how you arrived at it?

Mr. Rosenberger: We object and move to strike out the question because that calls for a technical expert answer. I have no objection, particularly in light of the Court's ruling, but save the point. He can say how many bushels he lost and how many dollars.

The Court: He can tell how much he was damaged and how he arrived at it. He has a record of the sales he made.

By Mr. Rowe:

Q. How many tomato plants did you have growing in the field?

A. 6,270.

Q. What was the yield per plant?

page 136] A. One bushel per vine.

Q. How did you arrive at that?

A. According to what —

Mr. Rosenberger: We object.

The Witness: According to what fruit was already there and the little tomatoes that were all in clusters around the top and counting the blooms they would easily the way I figured it average at least a bushel per vine.

Q. And what is the average price per bushel?

A. Well, could I go back the last few years I sold them?

The Court: As to what any brought on the market at that time.

The Witness: $4.00 a bushel.

By Mr. Rowe:

Q. At $4.00 per bushel how much per bushel do you figure it took you to raise and cultivate them and plant them and sell them?

A. $3.00 — I don't quite understand the question.

The Court: The question was what does it cost you to raise your crop.

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page 137] By Mr. Rowe:

Q. How much did it cost you to raise them per bushel? You testified that they would bring $4.00 a bushel, how much of that was profit?

A. $3.00 a bushel.

By The Court:

Q. It would be $1.00 per plant it would cost you to raise and market them?

A. For the expenses of picking and hauling and raising them, $1.00 per bushel.

By Mr. Rowe:

Q. Did you have any loss of other vegetables?

A. Yes, sir, the squash and we never failed on squash.

Q. And how many mounds of squash did you have?

A. It must have been about 3200 hills of squash. The womenfolks planted the squash and the beans and that was their profit, whatever we sold they had that as their money.

Q. How much in dollars was that you lost on the other vegetables?

A. About $150.00 or $175.00 or something like that.

By The Court:

Q. Was it $150.00 or $175.00?

page 138] A. I would say about $165.00, Judge, on the vegetables that the women would have made on them.

By Mr. Rowe:

Q. How much would you have lost on the tomatoes?

A. About $18,000.00, the amount would have been $18,-950.00.

Q. Is that on the tomatoes alone?

A. Just the tomatoes.

Q. Now, there has been testimony by your father of selling tomatoes prior to the damage and some afterwards to Mr. Cook. Do you have the figures on your sales of tomatoes prior to the spraying on July 19th?

A. The total amount?

Q. The total amount you received for tomatoes.

A. Before the spray?

Q. Yes.

A. Can I go back and continue on about these vegetables that I answered awhile ago? The total was $18,960.00 and the tomatoes would come to $18,810.00, about $150.00 for the vegetables, bringing the total to about $18,960.00.

Q. Then $18,960.00 is the total?

A. Yes, sir, counting the vegetables.

Q. Now, tell the Court and jury during the
page 139] growing season of 1962 what your records show that you got on your tomatoes during the year.

A. The annual summary on tomatoes we sold by July amounted to $1,484.25.

Q. Is that tomatoes alone?

A. That is just tomatoes alone.

By Mr. Rosenberger:

Q. What was that figure you gave?

A. $1,484.25 — let's see.

By The Court:

Q. Have you got it broken down?

A. No, I had no idea at the time they were coming by spraying.

By Mr. Rowe:

Q. Was that a good growing season?

A. It was an excellent season that year. The rains were regular and all the growing crops like hay and corn just filled the barn up and we had to even stack some underneath the barn. It wasn't what we call a wet season at all, just a perfect season.

Q. Then the whole season was a good growing season throughout the year 1962?

page 140] A. Yes.

Q. No hailstorms?

A. No.

Q. Any windstorms?

A. No.

Q. Anything that would have destroyed the crop?

A. No, not that whole year because we got in everything in good shape.

Q. Let me ask you this: Are you familiar with the tomatoes that were purchased?

A. Yes, sir.

Q. Can you tell me something about those tomatoes? Did they have any warranty or anything of that nature with them?

Mr. Rosenberger: We object to anything like that, any warranty.

The Court: Yes, sir. The witness won't answer that question, I have ruled on that. The witness has testified that he sold $1,484.25 for the tomatoes in July. Continue on with the rest of the season.

Mr. Rowe: That was the whole season.

The Witness: I can go on. According to my father he got some of it down but not all.

page 141] By The Court:

Q. Don't you have a record of the sales?

A. No, not per bushel.

Q. Don't you have any record of sales after July 19th?

A. Yes, sir, I have back here thirty-some bushels hauled to Cook.

Mr. Carter: He put down so much for tomatoes as he deposited the money in the bank.

The Court: You are claiming a complete loss for the whole crop and it develops now he sold some.

Mr. Carter: We are going into that. What I want you to understand and the jury to understand is that the record shows how much he got for tomatoes at different times but it is when he deposited money in the bank rather than when the sale was made.

The Court: If the sales were made in August and September he wouldn't deposit that in July.

Mr. Carter: No, he wouldn't.

The Court: I want to know if he has any records.

Mr. Carter: Let him read his records and see what he has.

page 142] By Mr. Rowe:

Q. Will you explain what your records show?

A. What we done we sold produce and we just kept that cash that we had so much and then we deposited it. Here in August at that time we deposited $176.00 and then we deposited again $764.00 in August and then here I have a little notation under here, it is tomatoes and vegetables, but at that time this was really just sales. The beans had just come in and I had sold them. This $300.00 here would be some bean money mixed up with that so I would say maybe eight or ten bushels of beans was in that $300.00 and they were selling at $3.00 a bushel.

Q. How much was the deposit in August?

A. $746.20 and another time $176.00 and then at the time there was some garden vegetables I have in here, I can remember it was some beans.

Q. How much was that?

A. It is $300.00 deposit on that but I would say maybe eight or ten bushels of beans would come out of that and they usually sold for $3.00 a bushel.

Q. And what would be the rest?

A. Tomatoes. Then we go on down here in Sep-
page 143] tember is $8.00 deposit. That was for tomatoes, $8.00. Then in October and November and then in December I have got "tomatoes, Cook, $35.00" which meant thirty-five bushels and according to my father's figures there that might have gotten mixed up and those tomatoes are the only tomatoes we hauled to Cook and he turned us down on that. He took that load since we had hauled them up there and told us not to bring him any more tomatoes. This money was deposited at that time because they only pay off when the first frost comes, pay off late. We haul tomatoes and wait until the frost comes to collect our money and that is why it was in December $35.00. That covers all of that.

Q. They are deposit dates?

A. Dates of deposit. This was deposited the 18th and I have the notation "Cook."

Q. Could you have sold all your tomatoes at the cannery had you wanted to?

A. Sure. He buys tomatoes all over the State practically.

Q. You could have sold him all of your tomatoes if they

hadn't been damaged by the sun?

A. I could have sold him thousands of bushels.

Mr. Rosenberger: We are dealing in speculation when he says what he could have done.

page 144] The Witness: It would have been no problem for me to sell all our tomatoes if I had wanted to sell them to Cook but I had a good market with ten years of hauling tomatoes and I had my regular customers and I had my orders to fill out and if they didn't get their tomatoes on time or regular they would jump on me about it and lots of times I would haul tomatoes —

Mr. Rosenberger: Can I look at the book?

The Witness: Yes, sir, this is the book we have to keep every year for recording records through the FHA. In fact lots of times when I am hauling my tomatoes to these customers someone wants five or six bushels at a time and up to eight bushels and I would haul them maybe two that evening and haul the rest so they would be kept filled up.

By The Court:

Q. Are you unable to tell the Court and jury the number of bushels you sold out of the 1962 crop?

A. No, sir.

Q. You are claiming a loss of the entire crop. It is in the record that quite a few bushels were sold.

page 145] A. Yes, sir.

Q. And you don't have a record of that. You don't have the bushels sold, just the dollars and cents?

A. Just the dollars and cents, yes, sir, but the thing is I never expected the railroad to come by or I would have kept a better record. If I had known they was going to want it I would have had it down bushel for bushel.

By Mr. Rowe:

Q. Did you have any other tomatoes other than the tomatoes in the field that were sprayed?

A. Yes, sir, I had some up in the garden.

Q. Were they affected by the spray?

A. No, sir. They were out of the same bunch of tomato plants and they bore fruit until frost, and I have several witnesses to prove that. The little girl planted a garden of her own and her tomatoes did good.

Q. Did you give the railroad company any permission to spray your land?

A. No, sir.

Mr. Rowe: Your witness, Mr. Rosenberger.

page 146] CROSS EXAMINATION

By Mr. Rosenberger:

Q. Mr. Anderson, you weren't at home when the train came by?

A. No, sir. I was home right after it went by.

Q. And you went down to see about the crop right afterwards, didn't you?

A. Yes, sir.

Q. And I believe you told us that the tomatoes were wet from the spray all over and damp.

A. They were damp. You could feel by the leaves that there had been a fine mist traveling over on them.

Q. Were they wet or were they dry?

A. They were damp.

Q. Damp?

A. Yes, sir.

Q. So damp you could see it on the leaves?

A. Yes, you could notice it.

Q. And it was all over from the fence all the way back to the end?

A. From the fence to about middle way or a third of the way you could notice it real plain and farther down

page 147] it faded on out.

Q. I believe you told us it affected your entire crop, your whole field?

A. Yes, it did.

Q. So if the spray was what was involved then you are telling this jury that this spray got on the whole tomato crop?

A. Yes, it got on the whole crop. The farther away it got the less it got on it but it still injured those tomatoes that were along the corn.

Q. If you will just answer my question. Did the spray get on the entire crop so that you could see it?

A. Yes.

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Q. Now, when you talked with Mr. Meadows about this — first you counted these tomatoes with Mr. Meadows on September 7th, didn't you?

A. Yes, sir.

Q. And you and he went along and stepped it off and you got the measurements of the field to be 525 feet long and 366 feet deep, didn't you?

A. I have got the record on this. I measured it myself after this but I don't know if those fiegures there are accurate.

Q. You were walking right along with him.

page 148] Don't you remember you placed in there fifty-seven rows of tomatoes?

A. Yes, we counted the tomatoes and everything.

Q. And you got the depth of your field?

A. Yes, sir. What is this? Where is the railroad track?

Q. Excuse me, I thought you understood it. Here is the fence right here, the railroad here. We have got the figure 33 feet from the center line of the track to the fence. Is that about right?

A. Yes, sir.

Q. And a road running north and south, the railroad. Then the tomato field was on the west side of the track?

A. Toward the river.

Q. Plants 110 plants per row. Is that about right?

A. I guess it is if it figures out 6,270.

Q. Then he has got twelve rows and a path and then the butternut squash and cucumbers and watermelons. Yellow squash six rows and five rows of tomatoes and two rows of corn and twelve rows of tomatoes. All I am trying to do is to get something definite. It that about right?

A. Yes. You say he came September when?

Q. September 7th.

A. This was the 20th when he came in.

page 149] Q. Don't you remember he came in earlier on September 7th?

A. That is when he took the first pictures. September 20th we took the first pictures.

Q. You remember you gave him some of your negatives on September 7th, don't you?

A. September 7th?

Q. The first time he came.

A. The first time he came down there was September 20th

and since he told me it had been so long that the tomatoes had all died out along here to let him borrow my negatives so he could have some developed.

Q. At the last trial, Mr. Anderson, didn't you tell me he was there on September 7th and he, himself, was taking pictures and that the weeds were so tall in this field that you gave him your negatives?

A. When he came down on September 7th he came down with the railroad men on an inspection.

Q. September 7th?

A. September 7th.

Q. We have established he was there on September 7th?

A. Yes, sir, Meadows came down with the inspection men and took samples and that is all he done.

page 150] Q. Did you give him some negatives at that time?

A. No, not at that time.

Q. You didn't give him yours?

A. Not September 7th.

Q. Then you think the first time you gave them was September 20th?

A. Meadows came down with Chappell and took pictures.

Q. If you will just answer my question so we can get along. The next time they were over there was September 20th. Is that right?

A. Yes.

Q. This shows the general layout of your place. Before I get away from it I want you to look at yours. That is about the way it was laid out?

A. Yes, sir, except it wasn't that close to the railroad.

Q. You have got an area in between that doesn't show?

A. A fifteen acre field in there between.

Q. In tomatoes you had about three and a quarter acres, didn't you?

A. Around that.

Q. I just want to get some things nailed down. Now, you went into Roanoke, didn't you, Mr. Anderson, to

page 151] see Mr. Meadows about this thing?

A. At the beginning.

Q. And at that time you saw him on September 4th in his office, didn't you?

A. September 4th?

Q. Yes, sir.

A. It might have been later on but I know I made a long-distance call and went a few days after that.

Q. If you will just answer my question. I am talking about when you were in Roanoke. It was September 4th and that is the statement you signed, isn't it?

A. Did I sign this at his office?

Q. You see on here "Roanoke, September 4th."

A. He might have come down to the farm and wrote that letter, I don't know. It's been quite awhile.

Q. Did you sign it?

A. That is my signature there.

Q. And it has got on here "Roanoke, Virginia, September 4th, 1962." Is there any reason for you to think there is anything wrong with that?

A. I will tell you what he done there. He wrote down on a paper what we had at the farm place and then page 152] he went back to Roanoke and typed this out. That is what you are trying to get to. He typed that out and then he sent us down a copy.

Q. This says "Roanoke, September 4th." Doesn't it say that? It doesn't say Natural Bridge, does it? He wasn't down there on September 4th, was he?

A. I don't remember.

Q. You remember about prices and bushels and I want to ask you specifically about these things. You signed this and it was dated. Is there any reason for you to believe that was wrong?

A. The amount of tomatoes is wrong there. At that time that was before September 20th when he first came down. When he took the pictures that is when we counted the tomatoes on September 20th. I am trying to figure that out.

Q. Isn't your problem that you are confused trying to figure things back rather than trying to give us answers to what you know? That is your trouble all the time in this case, isn't it? Doesn't it stand to reason when you gave him the figure of 6300 tomato plants you were giving him a round number?

A. That was before we counted the vines. That was more or less a conference we had up there telling him what had

happened, that is what that was.

page 153] Q. So you recall you were in Roanoke on September 4th. Is that right?

A. I might have been. I am not exactly sure on that.

Q. Let's stop trying to figure. Didn't you go to his office and talk to him and didn't you sign a statement up at his office?

A. If I told you "Yes" I wouldn't exactly know right now because I don't remember.

Q. That is your signature?

A. That is my signature. I do not know whether it was signed at Roanoke or not.

Q. Now, the next thing in this paragraph, "I have the date the spray train came by our place but I do not have it with me now." That sounds like you were in Roanoke instead of at home, doesn't it?

A. I suppose so.

Q. You must have been in Roanoke.

A. Must have been in Roanoke.

Q. You told him at that time, "Neither my father nor I saw the train go by but my wife saw it as well as my mother." Did you tell him that?

A. This is the second time they came down and

page 154] sprayed. You are confusing and getting the thing mixed up. That is the second time they sprayed.

Q. That is what you are rationalizing. Did you tell him, "neither my father or I saw it?"

A. I remember writing this out plain. The first time my wife was with me and this here is something about the second time they came through with the spray train. The spray from the first spraying done the damage.

Q. This was in Roanoke?

A. Sure.

Q. You see this. "In about two days the tomato plants started to wilt. We got only two or three bushels of tomatoes since then." You sold some, I understand, in August.

A. That is right. We picked out the ripe tomatoes and took them to Kroger.

Q. Thirty-five bushels?

A. A pickup load.

Q. Thirty-five bushels?

A. Thirty-five bushels.

Q. This says "two or three bushels."

A. These two or three bushels I may have taken out myself to V.M.I. That is where them two or three
page 155] bushels come from, V.M.I., and before I could sell them I had to get a test from the County Agent down here and see if they were edible.

Q. You sold some to V.M.I. after the train went by?

A. Just two or three bushels.

Q. And you didn't mention selling Mr. Cook thirty-five bushels.

A. No, I didn't see no reason to mention it there.

Q. At this time you said, "One hybrid plant is supposed to produce one bushel of tomatoes. At the time of the damage I was selling my tomatoes to Kroger in Lexington for $4.00 a bushel."

A. That is right.

Q. "I believe the total damage could amount to as much as $25,200.00. We are making claim on the basis of one half bushel per vine."

A. That is if they would settle.

Mr. Carter: That is a matter of compromise, Judge.

The Court: There is no evidence of compromise.

By Mr. Rosenberger:

Q. When you were talking about one bushel to a plant you said, "One hybrid plant is supposed to produce
page 156] a bushel" but when you made your claim you only asked for half a bushel a vine, didn't you?

A. It must have been some way we figured it out there and we talked it over.

Q. If you figure a half a bushel that is 3,150 bushels or if you multiply that out by eight you come out with $25,200.00, don't you?

A. By eight? How could you figure $8.00?

Q. All I did was to multiply eight times 3,150.

A. I wasn't getting no $8.00, I was only getting $4.00.

Q. I only asked you about what you signed. You were making claim for $25,200.00 for half a bushel a vine. Where were you working then? You weren't working on the farm then, were you?

A. Sure I was, doing nothing but strictly farming.

Q. Where are you working at now?

A. Modine. I started since in February.

Q. What do you do there?

A. Receiving clerk.

Q. When do these tomatoes start to produce? Your father estimates from his records on July 8th.

A. How is that again?

page 157] Q. What do your records show as to when you started to get any tomatoes off the vines?

A. All I done was when we had tomatoes that were ready I would haul them.

Q. Where did your father get the idea you had exactly the record each day you picked?

A. I don't keep that kind of record.

Q. Where did he get the record of 184 bushels sold for $725.00?

A. We were figuring on the basis of the money we had on hand at the time I sold those tomatoes.

Q. You didn't figure that on your record, did you?

A. Yes, the same way. The money is brought there but no amount of bushels. You see here this is an annual summary.

Q. Let's start in the beginning. You didn't have anything coming in, in May except 105 bushels of corn.

A. That was shelled corn.

Q. Now in June?

A. In June we had some tomatoes.

Q. In June you had $22.00 worth of tomatoes that you sold?

A. Yes, sir.

Q. How many bushels?

page 158] A. Maybe two bushels at $11.00 a bushel.

Q. Did you start producing them in June?

A. Might have got a few early ones, a couple of bushels.

Q. July 17th "tomatoes $87.50" and then you have "July 17th tomatoes $8.00; July 17th tomatoes $10.50."

A. That is something I failed to read to you in July.

Q. So in July nine and seven is sixteen, $97.00 you took in instead of $725.00?

A. No, that is right over here. It is a complete record. In this record book we are involved in money and what we make at the end of the year according to the FHA and we have got

to prove how much we make and how much we sell.

Q. The record as you have got it here is tomatoes $87.00, tomatoes $8.00 and tomatoes $8.00 and $10.50, that is all you have got in July.

A. Yes, sir.

Q. Let's go to August.

A. This was the time the money was deposited. Those tomatoes were not picked in August.

Q. It is shown down here on August 23rd tomatoes.

A. That is a deposit.

Q. $176.00?

page 159] A. That is right.

Q. Now, these others that you have written in here this is written with a different pencil at a different time.

A. No, sir.

Q. No dates put down.

A. Figuring on the same dates, all deposits the same dates.

Q. Back over here you put down one date of the 17th.

A. That is the same date.

Q. Now, on the 23rd of July you had $176.00 worth of tomatoes—I mean of August.

A. That is right, August 23rd.

Q. August 23rd you have $746.20 for tomatoes and then you had garden vegetables and tomatoes $300.00?

A. This is the deposit. This money was taken in and is bound to have been in July.

Q. If you will just answer my question. I am just talking about your record. The total income for all of August was $1222.20, wasn't it?

A. Yes, sir.

Q. From tomatoes and vegetables?

A. $354.00 was for a gas refund.

page 160] Q. I notice you went to the trouble of putting down every little $5.00 item and $10.00 item that you spent.

A. That is what we always do all through the year.

Q. Then over in September you have got tomatoes $8.00.

A. That is right. This $8.00 might have been hauling to V.M.I.

Q. Excuse me, let's not go into what might have happened. All I want to know is what your records show. Now, in October you don't have any income from any crop, do you?

A. No.

Q. In November you don't have any. You have "from gas refund $75.00." You don't have any entries. Then in December you have December 8th was $35.00 from tomatoes and you have written over there "garden."

A. Over here is "Cook."

Q. You put that in later, didn't you?

A. No, sir. I have the checks.

Q. What do you mean by "garden?" You told the jury awhile ago you had another garden of tomatoes.

A. Well, for the family's use we kept a garden up on top of the hill back of the house.

Q. These didn't come out of that?

page 161] A. No.

Q. So going through your income for the year your total income from the truck garden was $1484.20 for the whole year?

A. That is still through July, not the whole year.

Q. This shows December.

A. That was $35.00 but we didn't haul tomatoes to Cook in December, that was hauled during the summer but that deposit was made at that time. The tomatoes really stopped after July after I hauled this $8.35.

Q. According to this record you didn't start out selling very much. I thought you sold $725.00 worth.

A. We sold $722.00 in July right there to start with.

Q. That says August.

A. That was the time the money was deposited but still they were tomatoes sold in July. You don't seem to understand.

Q. I understand. All I am saying you are going back from memory now.

A. No, this is the actual records right here.

Q. What did you do with the ones that you picked in September? Your father said there were as much as a bushel to four vines then.

A. He meant that was how much tomatoes was

page 162] there that you could pick at that time but there was lots of green tomatoes besides the ripe ones on the vines there.

Q. What I am getting at is you could have gotten a bushel

for every four vines of ripe tomatoes. What did you do with those?

A. Those were blistered and that is the reason we couldn't pick them.

Q. I understood the vines had grown back and started back to producing.

A. They had started back but it was too late for them. The frost got those. They had big tomatoes toward the end.

Q. I am talking about the ripe ones right at the end.

A. They were blistered.

Q. Your father is right about on September 20th having all these ripe tomatoes on the vine and if you go back one month that makes it August 20th. You said the tomatoes produce from bloom to full-grown tomatoes in a month to five weeks so these ripe tomatoes weren't on the vine at all at the time of the spray in July, were they? The vines continued to live on and produce brand-new tomatoes.

A. No, I tell you what happened. As soon as the spray hit the green tomatoes that were there they just
page 163] stopped growing, the size of the tomatoes stopped but they ripened on the vine and that is exactly what happened. You have seen green tomatoes coming in the market where you pick them green and they don't get no larger, they just ripen.

Q. Mr. Anderson, just getting to the pictures you took, the pictures that you gave Mr. Meadows were all black and white, weren't they, just like this one?

A. That is right, what I gave to Mr. Meadows.

Q. You gave him eight negatives, didn't you, and this is one of them?

A. I don't remember.

Q. Where did you get the colored ones?

A. I wasn't going to give him all my pictures.

Q. Were these different rolls?

A. I had two cameras, one in technicolor and one in black and white. I took a set in each camera.

Q. These were taken how long after July 19th? When I say "these" I mean Plaintiffs' Exhibits 1, 2, 3 and 4.

A. I would say within about maybe five or six days, somewhere along there.

Q. And the leaves had fallen off?

A. Yes, sir.

page 164] Q. What are these green things we see here all on the vines?

A. That is tomato leaves there.

Q. The spray didn't affect those leaves?

A. No, but if you look real close you will see even some of them are drooped.

Q. Excuse me, I am looking at what I see.

Mr. Carter: Judge, he cuts the man off when he tries to make an explanation. He shouldn't cut him off as long as his answer is germane to the question.

The Court: Gentlemen, I will tell you counsel is supposed to give the witness an opportunity to complete his answer. I know we all at times ask the witness another question before maybe he has finished answering a question. We all make mistakes but let's give the witness an opportunity to answer the question.

Mr. Rosenberger: If your Honor please, at the same time I would like to ask the witness to listen to my question and answer it.

The Court: I will ask the witness to try to follow the question.

page 165] By Mr. Rosenberger:

Q. I am looking at Plaintiffs' Exhibits 1, 2 and 3 and I ask you if they are all tomato leaves I see that are green leaves on those plants?

A. All of them?

Q. Yes, sir. You see that green foliage. Are they all tomato leaves?

A. Yes, it is green foliage and there might be some weeds in there or a few weeds.

Q. And those leaves are shown five days after the train went by at least. Is that right?

A. Around four or five days.

Q. I see one stalk of corn.

A. That is right.

Q. Is that the one that shows the leaf curled and it looks like frostbite?

A. Yes, sir.

Q. You noticed that particular one?

A. Yes.

Q. It didn't affect your corn crop, did it?

A. It turned all the leaves on the sweet corn just like a frost had hit it.

page 166] Q. Did it affect the corn?

A. It didn't injure the corn, no. It did not injure the sweet corn.

Q. You noticed that effect on the corn right away?

A. Just about the same time as the tomatoes.

Q. Mr. Anderson, I know you have to think back and we have to guess because you don't have any records. How many tomatoes did you pick after July 20th?

A. How many tomatoes did I pick after July 20th?

Q. Yes. It took four or five days for the leaves to fall off. Now, how many bushels of ripe tomatoes did you pick after the 19th.

A. Not too many. This shows thirty-five bushels I took up to Mr. Cook and he didn't want any more and then a few bushels later on I took to V.M.I.. I remember hauling him some and he could have been another witness too.

Q. The ones you took to Cook you expained to the jury were sunburned and I take it that if you had your crop in prime condition on the day the train went by there must have been good ripe tomatoes that you could have pulled during the five-day period that you could sell.

A. That is right, but I was afraid to sell them.

page 167] Q. What did you do with them?

A. I was afraid to sell them because of the spray. We didn't eat any of those tomatoes for our own use until Mr. Shepherd came down. I believe that was Mr. Shepherd and Mr. Aldridge.

Q. What you are getting at Mr. Shepherd and Mr. Aldridge ate some tomatoes on August 15th?

A. I told him he ought to wash them before he ate them and he said, "All you have to do is to wipe them off."

Q. And he ate them?

A. Yes, sir.

Q. Now, about the squash. They took some squash home from these vines.

A. Those were butternut squash. The vines had died and there were a few butternut squash laying on the ground and

I picked a few and let him have them.

Q. They were good, weren't they?

A. I don't know, I guess they would have been. I don't know if they fully matured but he wanted some, I guess, for experiments or to test them or something.

Q. Did they take some tomatoes too?

A. Yes, maybe that was the reason he got
page 168] the tomatoes too to find out what was wrong with them.

Q. On September 20th that is when you picked three or four bushels and put in your basement?

A. No. September 20th is when they came down. The time we picked those tomatoes was just before frost. These tomatoes had sprouted back and started growing again, had started from the roots and they had started shooting up and just before frost had tomatoes that were nearly ripe. If it had just stayed warm another couple of weeks we could have been selling tomatoes.

Q. Then the spray didn't kill the vines.

A. It killed the vines completely out next to the track but as it went down toward the corn field, as I stated before, it just injured them and all the blooms got knocked off and what fruit was on there didn't ripen right.

Q. Actually the weeds along the fence line hadn't been killed either, had they?

A. Oh, yes, they were killed.

Q. Are you sure of that?

A. Yes, I have got pictures if I can bring them into court, I have got pictures to prove that.

Q. Let me show you these photographs and see
page 169] if these aren't the ones that you gave Mr. Meadows so he could develop them. That is one showing the field looking toward your house that you took, isn't it?

A. I tell you exactly what this picture shows.

Q. Excuse me, is that the one you took?

A. No, I don't think so. These are pictures he took after two months later and the weeds had already grown up again. That is what this shows. These are pictures he took. You are trying to bring in his pictures and say they are my pictures.

Walter H. Anderson, Jr.

Q. I am not trying to confuse you. I am just trying to understand.

A. Those are his pictures.

Q. He says these are pictures taken from negatives taken by you.

A. These are pictures that he took that day he borrowed my negatives. You don't even see no tomatoes there. You see my tomatoes on the other pictures. These are pictures took two months later when the weeds had already started back growing.

Q. I show you another picture. Are there any weeds in there?

A. There are weeds in there too.

Q. And tomatoes in there too?

page 170] A. That is right.

Q. That shows your field, doesn't it?

A. Yes.

Mr. Rosenberger: We offer this as Defendant's Exhibit C.

Q. That is looking southeast from your tomato field and shows your house in the foggy distance, doesn't it, up on the hill?

A. I believe that is the corn crib there but I am not sure. It looks like he has switched pictures.

Q. It looks like your house on the hill?

A. I don't know. I can't believe it is made from my pictures.

Q. If you can't say it is your picture just say so.

A. I believe Mr. Meadows ought to know.

Q. He knows.

A. Didn't he take this picture?

Q. He says you did.

A. I don't remember that.

Q. See the line by the railroad track. Don't you recognize the territory? We will pass on to another one. I don't want you to say something you don't know. Do

page 171] you recognize this one, Exhibit D?

A. I recognize the outline up here.

Q. That is one you took and gave him, isn't it?

A. I wouldn't say that either.

Q. But it is your tomato field?

A. Yes, sir, it is my tomato field.

Q. And full of weeds?

A. That was taken, as I told you, about two months later. The weeds had started growing back.

Mr. Rosenberger: We offer that as Defendant's Exhibit D.

Mr. *Roe*: We object to these pictures until we can find out who took the photographs.

Mr. Rosenberger: He says they are his field and we can produce a witness to prove them.

Q. They are pictures of your field?

A. I wouldn't say as to that other one.

Q. Defendant's Exhibit E is a view north from the squash and the beans on the right. Is that right?

A. That is my field there. I have got pictures just like those.

Q. This is the identical picture?

page 172] A. That is my picture. I have got pictures just like those.

Q. That is from the negatives you gave Mr. Meadows.

A. But not that picture up there. I didn't give him the ones up there. You have got two sets of negative pictures mixed up it looks like to me.

Q. Can you tell me that the one I just showed you isn't the same as the one you offered?

A. The same one but taken at two snaps. That is not the same identical picture.

By the Court:

Q. When were these pictures taken?

A. They were enlarged, your Honor. I have got my smaller ones.

By Mr. Rosenberger:

Q. See that corn right in the center. See the corn right over on the side. It is the same one you have got a color one of. You can see the beans.

A. No, you didn't get no picture of the colored ones.

Q. You have got one just like it.

A. How did he get hold to them pictures there?

Q. You gave it to him.

page 173] A. Not the colored negatives.

Q. This is exactly like the colored one is what I am saying.

A. I don't know.

Mr. Rosenberger: We offer that as Defendant's Exhibit E.

Q. This is a view of your field looking north, a close-up of the squash.

A. Those are pictures you have had enlarged.

Q. We had them developed but you gave us the film.

By the Court:

Q. Do you remember giving him the film?

A. I gave him my negatives but he says that is a colored film and I know it is not. I didn't give him any colored negatives.

Mr. Rosenberger: I don't say it is a colored film.

The Court: If he denies he took the pictures, Mr. Rosenberger, you will have to qualify them through the testimony of your witnesses.

Mr. Carter: Let him withdraw the ones he has shown him.

page 174] Mr. Rosenberger: He said he took these. He is talking about the colored ones but he took the black and white ones.

The Court: The black and white ones that he says he took you can introduce those.

By Mr. Rosenberger:

Q. Here is another view, Exhibit G. That is a close-up of your tomato plants that you took, isn't it?

A. Yes, sir. That must have been the black and white negatives you had enlarged.

Mr. Rosenberger: We offer that as Exhibit G.

Q. Then here is another black and white photograph made

from your negatives. You see the tomatoes in the foreground and the corn patch to the left in this Defendant's Exhibit F. Is that right?

A. Yes, sir.

Mr. Rosenberger: We offer that as Defendant's Exhibit F.

Q. Then Defendant's Exhibit I is a close-up of the tomatoes and you took that, didn't you?

A. Yes, sir.

Mr. Rosenberger: We offer that as Defend-
page 175] ant's Exhibit I.

Q. Mr. Anderson, I don't want to confuse you. I was asking you about a colored one and you said this is black and white and you only gave him black and white. I understood that. Now, if you will just listen to my questions and I will put all these black and white photographs out here, don't want you to get excited and say something you don't mean—they are all the black and white photographs that you gave Mr. Meadows when you loaned him your negatives. It was seven of them.

A. Except that first one. I recognize six of them but I don't recognize that first one there.

Q. It looks like your field but you don't recognize it as being one of your photographs. Is that right?

A. That picture I believe was taken by Mr. Meadows when he borrowed my negatives. He had waited too long and the weeds had started growing again.

Q. My question is if you recognize that as your field.

A. That is what it looks like but I don't see the field of corn along here. He must have gotten way back in the woods and took it. It's a long ways back the way that picture shows up.

page 176] Q. You admitted it awhile ago. This one is looking in the opposite direction from the first one, isn't it?

A. Yes.

Q. Now, look at the pictures before you answer. Defendant's Exhibit E is the identical same picture to the one you made with black and white, Exhibit 5 that I showed you

awhile ago, isn't it? It is a little larger but the same identical picture. See the corn in the middle, the corn there and the trees over here?

A. It looks the same but it looks like still it was two snaps. That is one negative and this is another because that shows part of the corn and this shows the whole corn here. You notice the whole cornstalk there? It is bound to be two different snaps.

Q. They are different size pictures.

A. You couldn't add the other half on there.

Q. Now, looking then at these, this one is taken at the same time as those, isn't it?

A. Different parts of the field. That colored picture is a different part of the field.

Q. See these trees at the top—see those trees?

A. That is a different part.

page 177] Q. That is an identical picture.

A. No. You see the lower part of the fence. This is toward the railroad here. The railroad comes down this way and this here is toward the river side. This is a fence and the river is on the other side. That is not the same picture.

Q. Did you take this one?

A. Yes, sir. You enlarged it but I took the small one.

Q. You took the negatives and the prints were made from it. Is that right?

A. Have we got the small ones?

Q. The thing I am trying to get at is the ones that you remember you took from the different exhibits, Defendant's Exhibits D all the way through Defendant's Exhibit I, pictures you took within five or six days.

A. Except C. I don't remember C.

Q. I don't want to mislead you but Defendant's Exhibits D, E, F, G, H and I, you took those?

A. Yes, sir.

Q. Mr. Anderson, do you agree that a bushel of the tomatoes that you raised would weigh sixty pounds to the bushel?

A. Fifty-five pounds is the limit but mine usually weighed out sixty pounds.

page 178] Q. Yours usually weighed sixty pounds to the bushel, as you said before?

A. Yes, sir.

Q. I multiplied that out to be 376,200 pounds, and anybody can check my mathematics, and I divided that by 2,000 pounds which would be 188 tons and you had about three and a quarter acres or 47 tons an acre. That is what you reasonably expected from this crop?

A. Well, according to you.

Q. I want to know according to you.

A. Yes, I don't see why not.

Mr. Rosenberger: That is all I want to ask you.

RE-DIRECT EXAMINATION

By Mr. Rowe:

Q. When did you first report the damage to the railroad? Do you have a date you first reported the damage to the railroad?

A. Just from my memory. As soon as I noticed the leaves starting to wilt I made a long-distance call to Roanoke and they told me that they did not take claims by tele-
page 179] phone but I would have to have a letter written to the claim agent so that delayed me there another day or two on that part and then we were just ignored for a long time until the date they came down and September 20th was really the first time they came down.

* * * * *

page 184] FRANK PHILLIP HUFFMAN,
having been first duly sworn, testifies as follows:

DIRECT EXAMINATION

By Mr. Rowe:

Q. Mr. Huffman, will you state your name and occupation?

A. Franklin Phillip Huffman, Produce Manager for Kroger's in Lexington.

Q. Produce Manager in Lexington for Kroger Company?

A. Yes, sir.

Q. Do you recall in 1962 Mr. Anderson selling you tomatoes?

A. Yes, sir, his son did.

Frank Phillip Huffman

Q. Can you recall, sir, at the beginning of the season what you first had to pay for home-grown tomatoes?

A. The first part of the season would have been around the first part of July and the last of June. We were paying around $10.00 to $12.50 a bushel.

Q. And as the season progressed did the price go up or down?

A. It went down.

Q. And what would you say would be the lowest figure?

page 185] A. Well, when tomatoes were coming in good they would drop to as low as about $3.00 a bushel.

Q. $3.00 would be the lowest?

A. Yes, sir.

Q. Could you state from your past experience as a produce manager for Kroger what would be the average?

A. Well, to figure the average you would have to figure that normally you pay more for the beginning and you buy more at the first part than you would in the end.

Q. What figure would you place on the average?

A. About $7.00 a bushel.

Mr. Rowe: Your witness.

CROSS EXAMINATION

By Mr. Rosenberger:

Q. How many pounds of tomatoes in a bushel, about sixty?

A. Sixty is good. They normally figure about fifty-five.

Q. When you are paying $10.00 a bushel for them that is 6¢ a pound?

A. Close to that.

Q. Then you have to double it to sell them?

A. Not necessarily.

page 186] Q. What do you usually sell them for when you are paying $10.00?

A. It depends on the price of tomatoes at that time of the year, about 25¢ or 29¢ a pound to come out retail on them.

Q. About 29¢?

A. Yes, sir.

Q. You don't only double them, you more than triple them.

A. Yes, sir.

Q. Do you have any record of buying any tomatoes from Mr. Anderson in '62? Did you make any record of it?

A. No, sir.

Q. You don't know whether you bought any from him in '62 or not, do you?

A. Yes, sir.

Q. Do you know how many bushels you bought from him?

A. Offhand I would say six or seven bushels.

Q. You certainly can't remember what you paid him back in '62, can you?

A. Well, when he first came around with them I know about what he usually asked for them.

Q. I am asking you if you had any present recollection of what you paid this man that year for any tomatoes.

page 187] A. In '62, no, sir, not offhand.

* * * * *

JOHN WEBBER,

having been first duly sworn, testifies as follows:

DIRECT EXAMINATION

By Mr. Rowe:

Q. Mr. Webber, will you state where you reside and your occupation?

A. I live at Natural Bridge and I am manager of the cafeteria there.

Q. How long have you been working as manager of the cafeteria?

A. About ten years.

Q. And can you tell us how long you have been purchasing tomatoes from the Anderson's?

A. I would say three or four years or maybe five years.

Q. You recall the year of 1962 whether or not you bought tomatoes from them during that year?

page 188] A. Yes, sir.

Q. Do you recall, sir, what you paid for them per bushel at the beginning of the season?

A. I think tomatoes generally, whether Mr. Anderson or some other source, ran about $12.00, $14.00 or $16.00 a bushel and even higher at the beginning of the season.

Q. During the season as the season progressed would that figure go down or up?

A. Come down.

Q. And what would be the lowest it would go down to?

A. Depending on the quality of the tomatoes, No. 1 tomatoes never go much below $4.00 or $5.00 a bushel.

Q. No. 1 tomatoes would be $4.00 to $5.00 a bushel. The produce Mr. Anderson was selling you how would you classify that?

A. No. 1.

Q. Of course, at the end of the season when tomatoes are getting scarce the price goes back up again?

A. Yes, sir.

Mr. Rowe: Your witness.

page 189] CROSS EXAMINATION

By Mr. Rosenberger:

Q. Mr. Webber, when does the season start around here?

A. It varies, depending on the weather. Just when Mr. Anderson's season started I couldn't say exactly.

Q. You know when the season started in 1962, when you started getting tomatoes?

A. We started getting our tomatoes from different parties. The tomatoes we call home-grown tomatoes start usually at the eastern shore or maybe even Carolina and we begin to get home-grown tomatoes the early part of the year and just when Mr. Anderson's tomatoes started I couldn't tell you.

Q. You get them shipped in from eastern shore as early as May?

A. Guessing roughly I would say yes, perhaps.

Q. And I guess that accounts for your estimate of change. Last time I believe you said the beginning of the year you bought them anywhere from $10.00 to $14.00.

A. At that time I was estimating just like I am now. I have no way of knowing accurately just what price we paid for tomatoes or the exact date when the season started.

Q. Or what exact price you paid Mr. Anderson, page 190] you don't know, do you?

A. I would say his early tomatoes in all probability brought considerably higher prices than the later ones but just what that was I don't know.

Q. That is true with everybody, early tomatoes bring more than late tomatoes.

A. That is true.

Q. You have no records?

A. I am estimating. Mr. Anderson usually brings in tomatoes fairly early but what part of his crop is early I don't know.

Q. You don't know what is fairly early for home-grown

tomatoes around here because you don't know when eastern shore tomatoes stop and when the local tomatoes started here that year.

A. What would be fairly early for one farmer would not necessarily be early for another. Fairly early is usually regarded as the time before tomatoes reach a level over a period and sell for about $5.00 and the earliest ones they bring in would sell anywhere from $14.00 to $16.00 or $18.00.

Q. If you have got them coming from all around you they don't bring $14.00 to $18.00, do they?

page 191] A. Well, when they begin coming in from all around, no.

Mr. Rosenberger: Thank you sir.

RE-DIRECT EXAMINATION

By Mr. Rowe:

Q. How do you establish what you are going to pay for tomatoes? Do you have a process you go through?

A. We pay market price. We have several sources of tomatoes and we always pay the farmer the market price regardless of what he asks for his tomatoes. We offer him the market price. Very often he asks us less than we pay him and sometimes he asks us more than we pay. We pay him the market price as established by the various concerns we trade with.

By the Court:

Q. You mean you pay him more than he asks?

A. Yes, sir. By the same token when he comes in that way I can pay him less than he asks the next time if he asks too much.

By Mr. Rosenberger:

Q. If he wants more than you want to pay him it's no deal?

A. That is right.

page 192] The Witness Stands Aside.

Mr. Rosenberger: I want to again say I am not waiving my objections and exceptions.

The Court: The Court understands that.

C. LLOYD TOLLEY,

having been first duly sworn, testifies as follows:

C. Lloyd Tolley

DIRECT EXAMINATION

By Mr. Rowe:

Q. Will you state your name and where you reside, sir?

A. C. Lloyd Tolley, Natural Bridge, Virginia.

Q. And what is your occupation, Mr. Tolley?

A. Merchant.

Q. Who do you work for?

A. Myself.

Q. Are you acquainted with Mr. Anderson and his son here?

A. Yes, sir.

Q. During the year 1962 did you have occasion to purchase tomatoes from the Anderson's?

A. Yes, sir, I did.

page 193] Q. Could you tell the Court what the price range was in respect to what you paid for the early tomatoes and what the lowest you paid for tomatoes and then what the average might have been?

A. The highest paid was $15.00 and I believe the lowest purchased from him was $4.00.

Q. Were they all good tomatoes?

A. He always brought me first-class stuff.

Q. When did you normally start buying local tomatoes?

A. I believe the first I bought would have been from Mr. Anderson or a man in Roanoke.

Q. What time of the year was that?

A. Along the last part of June.

Q. Do you know whether or not the Anderson's raised early tomatoes? Did they come in sooner than the others?

A. His tomatoes would come in usually a little earlier than the average fellows around here.

Mr. Rowe: Take the witness.

page 194] CROSS EXAMINATION

By Mr. Rosenberger:

Q. Mr. Tolley, did you make any record of whether you bought any from him or not in 1962?

A. Yes, I think I have a record.

Q. Have you referred to that record or are you giving this to the jury from memory?

A. I just have to give it to you from memory now but I know I have it in my book some place.

Q. You don't know when you first actually bought them from him?

A. Offhand I don't know the date.

Q. If Mr. Anderson, Sr. estimated he first picked tomatoes on July 8th you couldn't have bought them on June 25th, could you?

A. I didn't say June 25th, did I?

Q. You said the last of June.

A. You asked when did I usually buy early tomatoes and I said usually the last part of June.

Q. Mr. Tolley, all we are interested in is the year 1962. Do you know when he first sold you any that year?

A. No, sir.

page 195] Q. You don't know what you paid or how much you bought?

A. I don't know how many I bought but I know I paid $15.00 for first-class tomatoes and that is the most I paid.

Q. That is what you paid but you don't know whether you paid him or not?

A. That is the highest price I paid. As I recall it was $15.00.

Q. Do you recall specifically you paid him $15.00 in 1962?

A. Yes, I do.

Q. How many bushels for $15.00?

A. I don't know how many bushels, I would have to check that.

Q. You didn't bring any records last time and you didn't bring any this time?

A. No, sir.

* * * * *

page 196] F. SHERMAN HENSON,
having been first duly sworn, testifies as follows:

DIRECT EXAMINATION

By Mr. Rowe:

Q. Mr. Henson, where do you reside?

A. 2052 Sycamore Drive.

Q. And your name is what?

A. F. Sherman Henson.

Q. What is your occupation?

A. I operate Sherman's Market.

Q. And you have operated that since when?

A. Since January 1st of this year.

Q. Prior to that time where did you work?
A. Mitchell's Market at the same location.
Q. How long did you work there?
A. From April 1st, 1962.
Q. During the year 1962 do you recall purchasing tomatoes from the Anderson's?
A. Yes, sir.
Q. What price did you pay for early tomatoes and what was the lowest price you paid during the season for tomatoes?

page 197] A. I was buying tomatoes from another party in the early season. After I started buying tomatoes from Anderson I paid $5.00 for some and $4.00 for some.
Q. And were these tomatoes good quality?
A. Good quality tomatoes, yes, sir.
Q. Did you buy throughout the season from the Andersons that 1962 season?
A. No, they stopped coming. I bought as long as they came through but they quit and I had to buy from somebody else.
Q. What time do you recall they quit coming through?
A. I can't tell you what time it was.

Mr. Rowe: All right, your witness.

CROSS EXAMINATION

By Mr. Rosenberger:
Q. You don't know, Mr. Henson, when you started buying from them and when you stopped, do you?
A. I don't know the dates without going back and getting the tickets.
Q. And you didn't have those tickets the last time, did you?
A. No, sir.

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* * * * *

THOMAS R. RANSON,
having been first duly sworn, testifies as follows:

DIRECT EXAMINATION

By Mr. Carter:
Q. You are Mr. Thomas R. Ranson?

Thomas R. Ranson

A. Yes, sir.
Q. Where do you live?
A. Buchanan.
Q. What is your occupation?
A. Drug clerk.
Q. In what store?
A. Ranson's Drug Store in Buchanan.
Q. Did you buy any tomatoes from Mr. Anderson in 1962?
A. Yes, sir, we did.
Q. The early part of the season what prices were you paying? What was your highest price and your lowest price during the season?
page 199] A. It ran from $3.50 to $13.50 a basket.
Q. From $3.50 to $13.50?
A. Yes, sir.
Q. When they were $13.50 what part of the season was that?
A. That is when they were very scarce, the early part of the season.
Q. Is that also true the late part of the season?
A. Yes, sir, but not quite as bad I think in the late part as in the early part.

Mr. Carter: I believe that is all.

CROSS EXAMINATION

By Mr. Rosenberger:
Q. Do you know when you bought any from Mr. Anderson in 1962?
A. Not any exact date. We bought them all through the season whenever he brought them around and we needed them. We would buy them from him when we needed them.
Q. And you remember the year 1962, do you?
A. Yes, sir.
Q. And you remember buying them from him
page 200] all during the season?
A. Yes, sir, several years in a row we bought them from him.
Q. I am not talking about several years in a row, I am talking about 1962.
A. Yes, sir.
Q. Did he bring good quality tomatoes all through the season?
A. We serve them on sandwiches and the way we serve them we have to have first quality tomatoes.

Q. I want to be certain you are right. You bought good quality tomatoes to serve on sandwiches and you bought them all the season of '62?

A. Yes, sir.

Mr. Rosenberger: That is all.

By The Court:

Q. What was the season for tomatoes?

A. I would say from the latter part of June until the latter part of September.

Q. And you bought them all during that time from him?

A. Yes, sir.

page 201] By Mr. Carter:

Q. Do you know whether or not that particular year you bought Anderson's tomatoes all through the season or whether he stopped bringing them in?

The Court: He has already testified they did. The question was propounded to him three separate times by Mr. Rosenberger and once by me.

Mr. Carter: I understood what he said was that any time he brought them in he bought them from them when he needed them.

The Court: Mr. Rosenberger asked on three separate occasions if he bought them through the season of '62 and that is why I followed it up with the question that I propounded.

★ ★ ★ ★ ★

page 202] RICHARD D. BLASSER,

having been first duly sworn, testifies as follows:

DIRECT EXAMINATION

By Mr. Rowe:

Q. State your full name.

A. Richard D. Blasser.

Q. What is your occupation?

A. Manager of the A. & P. Store.

Q. In that position do you purchase tomatoes for your store?

A. Yes, sir.

Q. And how how are your prices set?

A. By the market price.

Q. Can you explain that?

A. That is by what we have to pay for them.

Q. What did you have to pay for them in 1962 at the beginning of the season and on during the season?

A. Well, at the beginning of the season we pay $14.00 a bushel for the first week or ten days when tomatoes are scarce and then the price drops accordingly. About the second or third week it is about $12.00 and in four or five
page 203] weeks it runs around $9.00 and then gets down to about $5.00 toward the peak of the season.

Q. Gets down to around about $5.00 a bushel at the peak of the season?

A. Yes, sir.

Q. Does the price go back up when tomatoes start getting scarce again?

A. No, because there are plenty of tomatoes everywhere by the time you hit the peak of the season. The local gardens and everybody else are raising tomatoes and the demand for them has slackened off by that time.

Q. And at that time your price is what that you purchase them for?

A. When?

Q. At the peak of the season.

A. About $5.00 a bushel.

Mr. Rowe: You may examine.

CROSS EXAMINATION

By Mr. Rosenberger:

Q. Mr. Blasser, you are manager of the A. & P. Store?

A. Yes, sir.

page 204] Q. You didn't bring any records here today?

A. I didn't have any.

Q. I understood you at the first trial to say the price ran as high as $15.00 and toward the end when it gets to the peak they get down to $2.00 or $3.00 a bushel.

A. Actually by the end of the season they do get down to $2.00 or $3.00 a bushel.

Q. You start the season on home-grown tomatoes around here around the 25th of June?

A. Somewhere along about the last of June or the first of July.

Q. Then by the time you get to about the third week in July you are getting to where everybody has tomatoes in their home gardens.

A. That is right.

Q. And by July 20th they are down to $3.00 anyway, aren't they?

A. Down to around $3.00, yes, sir.

Q. And then from then on they will go on down to $2.00 and then you don't handle want to them any more at any price. Isn't that right?

A. Well, from the first of August we don't
page 205] care for too many, no, sir.

Q. Because people don't buy them, they have got them at home.

A. They have got them at home and won't buy them.

Q. And that is when the price got down to $2.00 you are talking about?

A. That is right.

* * * * *

ROY J. COOK,

having been first duly sworn, testifies as follows:

DIRECT EXAMINATION

By Mr. Carter:

Q. State your full name.

A. Roy J. Cook.

Q. Where do you live, Mr. Cook?

A. I live at what they call Webster. Blue Ridge is my mailing address. I live a little west of Blue Ridge.

Q. Between Roanoke and Blue Ridge?

page 206] A. Yes, sir.

Q. Mr. Cook, what is your occupation?

A. Well, I have several of them. I can tomatoes and farm a little. I am getting a little too old for farm work but I do can some yet.

Q. How long have you been in the tomato business?

A. Well, I have been right around fifty-five years working in canneries and raising tomatoes and canning tomatoes.

Q. You have both raised tomatoes and canned tomatoes for fifty-five years?

A. Yes.

Q. And you are still doing it?

A. Yes.

Q. Do you know these two gentlemen sitting next to me?

A. Yes, sir.

Q. How long have you known the Anderson's?

A. Well, I don't know, I would say five, six or seven years, couldn't recall.

Q. Did you buy any tomatoes from the Anderson's in 1962?

A. Yes, sir.

Q. Tell the jury about it.

page 207] A. I had been handling tomatoes from them for maybe a few years before that, I don't know how long, and in '62 I was using their tomatoes when they would bring them to the factory until they got so bad, sunburnt, and I just couldn't handle them. I had to cut away so much and wasted so much that I couldn't get no turnout, wouldn't can out, so I had to stop them, couldn't use them on that account.

Q. What were you paying for them at that time as canning tomatoes?

A. $1.00 a bushel.

Q. You stopped buying their tomatoes because they were sunburned?

A. Yes.

Q. Otherwise were they good tomatoes?

A. In other words, I got a good many what I call culls because most everybody sells the best tomatoes where they bring more money and I couldn't blame them for that.

Q. If their tomatoes hadn't been sunburnt could you have taken the whole crop of the Anderson's?

A. Oh, yes.

Q. At a dollar a bushel?

A. At a dollar a bushel, yes, sir.

page 208] Q. I show you a picture, Mr. Cook, Plaintiff's Exhibit No. 3, and ask you whether or not those are the same kind of tomatoes that the Ander-

son's brought you that were sunburnt.

A. Well, yes, but I believe the ones they brought me were sunburned more than this.

Q. I hand you Plaintiff's Exhibit No. 2 and ask you whether or not those tomatoes shown sunburn?

A. Well, I would think they do.

Q. I show you Plaintiff's Exhibit No. 1 and ask you whether or not those tomatoes in that patch show sunburn.

A. Yes, sir, they show it too.

Q. Those tomatoes are no good when they are sunburned like that for canning or anything else?

Mr. Rosenberger: He is leading the witness.

The Court: Don't lead the witness.

By Mr. Carter:

Q. Mr. Cook, have you ever had any experience with blight during your fifty-five years of experience as a grower and canner of tomatoes?

A. For the last several years I have had a little bit every year with different people and I have had it in my own farm several times.

Q. And are you familiar with blight?

page 209] A. Yes, well, I think so, if I wasn't I don't know who is.

Q. Are you familiar with the effects of blight on tomatoes?

A. Well, I think so.

Q. Were the tomatoes Mr. Anderson brought you affected by blight or sunburn?

Mr. Rosenberger: I object to that. It asks for a conclusion of the witness based on a matter of technical opinion. I would like to examine the witness first.

The Court: Members of the jury, retire to your room for a few minutes.

(JURY OUT)

The Court: Before the witness answers the questions you want to qualify him as an expert?

Mr. Carter: The Court understands I gave you authority on what is an expert. He doesn't have to be a man with a degree from V. P. I. to be an expert.

The Court: He also has to have knowledge peculiarly within his knowledge and not within the knowledge of the jury. We don't know but what the page 210] jury may have seen blight and sunburn. I understand he was a farmer and was in the canning business off and on for fifty-five years.

Mr. Carter: I will try to qualify him while the jury is out. I have a pamphlet here entitled "Tomatoes" put out by the United States Department of Agriculture and I have shown it to counsel on the other side. This is called "Tomato Diseases and Control."

Q. I will ask you if the tomato shown on Page 20 has early blight?

Mr. Rosenberger: I would say from looking at a folder designating what is early blight and what is not doesn't qualify him as being an expert. That is the Department of Commerce showing this witness what they say it is.

Mr. Carter: I will follow it up.

Q. What is your answer?

A. Both of these pictures here on this show blight to me. I can't see that it is anything else.

Q. I will ask you whether or not during your years of growing tomatoes for fifty-five years and canning page 211] tomatoes whether or not you have seen tomatoes with the same condition?

A. Oh, yes, plenty of them.

Q. Would you say you are familiar with blight and the effects of blight on a tomato?

A. Well, if I ain't I don't know where you would hardly find somebody that is.

Q. You mean by that you are familiar, I presume.

A. When a man grows them all that time and sees them in different ways I don't know how you would get more *familar* with it.

Roy J. Cook

By the Court:

Q. Mr. Cook, there has been evidence in this case that these tomatoes were sunburned because of spray blown on the property of these people which withered the leaves and let the tomato not have any shade resulting in the tomato being sunburned. Now, what is the difference between the outer appearance of a tomato that has been sunburned and a tomato that has been hit by blight?

A. Well, you can stop me any time.

Q. I am asking you in order to have you qualify as an expert.

A. Some people say early blight.

page 212] By Mr. Rowe:

Q. How many kinds of blight are there?

A. I planted some that I would say had early blight and when we would go to those plants to start with you could see little spots around the stem and I thought perhaps they needed a few more days to finish out a little patch and thought maybe we could overcome that. It was a dry season and we watered them and set them out and pulled the dirt up over that to make them heal. After we had planted them things maybe they would stand there and some few went on through until they got tomatoes on them and then some of them green tomatoes would have that blight on them, little round hard spots that would be hard and some of them black and with that early blight my experience was the stems would rot off. Then I have had them in fields and I would like to tell you this, I had a field one time about seven acres in it and it was a pretty field of tomatoes as I have ever seen. We went over in the field like today and looked at it and two or three had been hauling out some green ones, wanted to sell them, and I let them have some and I went over and looked at them and came back the next morning and I had told the boys at the factory with the price I had been offered for them tomatoes we couldn't afford to put them in the cannery and I had one young fellow working for me and my son and

page 213] I said "You get baskets and go over and pick but don't pick nothing that ain't no account at all." They weren't gone more than thirty minutes when they come back over to the factory and they said "Dad, we ain't

got no tomatoes over there." That was a shock to me. He said "You can go over there and I doubt if you have got twenty bushels in that field." I did go over there and them things overnight had turned spots on them about half.

Q. Right around the stem?

A. Around the stem and on the sides of them and about half of them were that way and they just wasn't no account for nothing.

Q. That is what is called late blight?

A. That is what I call late blight.

Q. Have you seen occasions when you have great big beautiful green tomatoes on the plant and the plants look healthy and all of a sudden the green tomatoes drop off?

A. I never had many to drop off. Most times the blight kills the vine and sometimes that vine will maybe come back a little bit, in my experience.

Q. What is the difference between sunburn and blight? What is the difference in the looks of the tomatoes?

page 214] A. You mean the fruit?

Q. I am talking about the fruit that has got sunburned and fruit that has blight.

A. Sunburn will make a place maybe half of it or all over it sort of yellow or maybe half of it on one side will be yellow and a blight will have spots on it about like that (indicating) and from that on over it will turn black and there will be hard places in it. When you cut it open the seeds will be black in it sometimes too.

By The Court:

Q. And how long have you been in the tomato raising business?

A. Well, of course, I have been helping in tomatoes ever since I was twelve or thirteen years old. It won't take but a minute to tell my experience with it. I went to carrying water for a great uncle of mine putting it on the packing table. We used to sell water and one tomato and I worked at that a couple of years. Then I got promoted from that on up and we used to cap them with an old soldering iron and they gave me a job putting acid on that top, dip it over here and run it around that way and I worked at that two or three years and

Roy J. Cook

one day I had been doing that with the capping
page 215] iron and one of the fellows was gone and my
uncle was attending to the factory at that time and he said "Roy, can't you cap some?" I went around and I got to capping and I finished up that whole season capping and then I capped two or three years or maybe four years.

Q. Did you ever raise tomatoes for commercial purposes?

A. I have raised them for a little of everything.

Q. You ever raise them in large quantities?

A. Oh, yes — I don't know what you call large quantities but I have had five, six, seven or even ten acres.

Q. You had several thousand plants?

A. Yes.

Q. And during the time you raised them did you sell tomatoes?

A. Yes.

Q. How many?

A. Some every three or four years along.

Q. How long have you been doing that?

A. I would say fifty years.

Q. How old are you now?

A. I am past my seventieth birthday, and when I was eighteen years old my daddy got killed with *lightening* and I had
to take over. I was married at eighteen.

page 216] Q. We have to qualify you as an expert for
you to state a conclusion as to what happened to these tomatoes.

A. I have had a lot of experience with tomatoes.

By Mr. Rosenberger:

Q. Mr. Cook, you remember I asked you about different kinds of blight and you testified here before and you said you didn't know the different kinds of blight. You told me that, didn't you?

A. Well, I don't know what you call maybe the name of it.

Q. If you knew a lot about blight so you could look at a fruit you would want to know the different kinds of blight or what is wrong with it, wouldn't you?

A. I would know it was blight.

Q. You wouldn't know what kind of blight?

A. No. Some doctors will tell you you have got one thing

and some another and sometimes it's the same thing but it has got different names.

Q. When I showed you a photograph and asked you about what kind of diseases the particular tomato had you said at the time "I am not an expert," didn't you?

A. I don't claim to be no expert.

Q. That is what I was getting at.

page 217] A. I don't know what it takes to be an expert.

Q. Then when I asked you to look at Exhibit D-1 you said you couldn't tell what kind of disease was getting into the tomatoes.

A. I don't know about that now.

Q. In other words, if you really wanted to tell about blight you have got to look at the vine on the ground to know something about it, haven't you?

A. Well, of course if you said you had a patch of tomatoes over there planted and asked me what kind of blight it was and I had never been over there I wouldn't know what it was and I don't think you would or any expert would either.

Q. In other words, if somebody brought you a tomato and said "What is wrong with the vine?" you would say "Let me look at the vine," wouldn't you?

A. No, if it had blight on it I would know it was blight.

Q. How would you know the difference between blight and bacterial spots?

A. What is a bacterial spot?

Q. I am asking you. Bacterial spot is, according to my understanding, a disease of the tomato and it shows on the tomato. Do you know what it is?

page 218] A. No. I think if you would examine them and they had blight that nine times out of ten you would know it was blight.

Q. You know what blossom-end rot is on a tomato?

A. Yes, I think so.

Q. You could distinguish between that and blight?

A. My experience with a blossom-end blight is it commences rotting right around the side from the stem.

Q. Actually the ones with blight start around the stem.

A. Not every time, no.

Q. Sometimes they do?

A. They start around the stems sometimes.

Roy J. Cook

Q. What I am getting at if blight will start in two or three places on the tomato you can't look at the picture and tell that it is blight you have to look at the vine because other things start on it.

A. Then what would you go by on the vine to find out?

Q. Doesn't blight affect the leaves on the vine?

A. Well, it will some, no doubt it will if it stays there long enough.

Q. And does the stage of the blight on the tomato affect your judgment? Doesn't it look one way at a stage and another *was* at another?

page 219] A. No, not all the time.

Q. That is what I am saying, generally when you are looking at blight it is one size when it starts out and it gets progressively worse, don't it?

A. Well, maybe at times it would and maybe at times it wouldn't. I have seen them have blight and places come on them, we will say, maybe half of it or two thirds or three fourths of it.

Q. Would you like to look at some pictures and tell me whether you think they are pictures of blight or not?

A. It don't make any difference with me.

Q. Would you look at this and tell me what that shows? I want to cover up the printing and just have you look at the picture and tell what that is.

A. Why are you covering this up?

Q. I just want you to tell me what it is. You want to look at the tomato and tell me what it is?

A. That may be altogether blight and it may not. It is not set up solid all over.

Q. Does blight set up solid all over?

A. The bigger spots, most of them. That looks like blight but mighty little spots.

page 220] Q. Is that blight or not?

A. Well, I couldn't say for sure but it looks like blight.

Q. Now, when you see what it says it says that shows bacterial spots.

A. What is bacterial spots?

Q. I am asking you. You are the expert.

A. If I don't know you ought to know.

Q. I want to ask you can you look at those tomatoes and see anything wrong with them?

A. Yes, sir, something wrong with them.

Q. What do you think that is?

A. Well, with no more than I can see from just looking at the picture it would be hard to tell whether it is blight or sunburn. The yellow part looks like sunburn and the other looks like blight.

Q. That is late blight, according to V. P. I.

A. How do they know a late blight from an early one?

A. They are experts.

A. I want to learn what it takes to be an expert. What does it take to be one?

Q. They can tell you how to control it.

A. I have had them in my field and they never page 221] have told me.

Q. Can you look at that leaf and tell what it has got?

A. No, I don't know. That is something that is set up on it but I don't know what you would call it.

Q. Have you ever had it in your field?

A. Well, I have had tomatoes like that to curl in the field when they had blight.

Q. Have spots like that?

A. I don't know. I don't recall but I expect I have.

Q. Have you ever had any early blight?

A. Didn't you hear me say awhile ago I had early blight?

Q. I want to know if you had anything like that.

A. I don't know, I expect maybe I have. I don't know as I have ever paid too much attention to them.

Q. That is early blight, according to V. P. I.

A. I have had some of them fellows to come to my field and when they come to my field they look to me like they don't know any more than anybody else does.

Q. What do you call that?

A. That looks like a blight and it has turned black.

Q. That is blossom-end rot.

A. Yes, it looks like blossom-end rot too. When page 222] you are looking at the picture it is different from looking at a tomato.

Q. Mr. Carter now wants you to look at a picture and you

Roy J. Cook

are under oath to tell the jury that you know what caused it. Can you do it?

A. Who?

Q. He wants you to do it.

A. No, I can't do it and I don't believe a Blacksburg man can do it either.

Mr. Rosenberger: We move to disqualify him. He never has told me anything that would qualify him as an expert.

The Court: From the examination of this witness all we have is that thirty-five bushels of tomatoes were brought to him and that they were sunburned. Now, that is as far as this witness can go because he readily admits by looking at the pictures of blight and sunburnt tomatoes that you can't tell the difference and his observations about V. P. I. remains to be seen. This witness says he does not hold himself out to be an expert to differentiate between diseases of tomatoes by pictures.

Mr. Carter: Here is the point I am making, he
page 223] says he can tell when a tomato has got blight.
He saw the actual tomato itself.

The Court: And he said they were sunburned.

Mr. Carter: I want to ask him did he see anything about those tomatoes that showed they had blight.

The Court: Suppose the blight had hit the plant without hitting the fruit itself? How could you tell the difference. You would have the same sunburned tomato coming from a plant that had no leaves.

Mr. Carter: I want to ask him if he saw any evidence of blight on the tomato or was all he saw sunburn. I am asking him what he saw. He said he had had experience with blight for over fifty years in his own fields and also in the canning business and he knows blight, knows what blight is. He can't distinguish between early blight and late blight and all I want to ask him is whether there was any evidence of blight he saw on the tomatoes or was it sunburn only. He saw the tomatoes. I am not asking him a hypothetical question because he actually saw the tomatoes.

Mr. Rosenberger: His opinion is based on look-
page 224] ing at the tomatoes. I point this out to you because he admittedly don't know the different

kinds of blight. He admits that blight at different stages looks differently, sometimes differently on different sides of the tomato. He has looked at different pictures of tomatoes and he can't say what is wrong with them. Now, I don't object to him saying that the tomatoes he saw were sunburned. I know that gentleman is conscientious in telling what he knows. He said it looked like it was burned from the sun because the leaves were off. Now, when I asked him if he had seen the plant he hadn't. Now, the question is what caused these leaves to fall off?

The Court: I don't think he can testify to that.

Mr. Carter: Then do you claim that the fruit itself had any evidence of blight on it or just sunburned?

Mr. Rosenberger: I didn't see the fruit.

Mr. Carter: Does the railroad claim the blight ruined the fruit?

Mr. Rosenberger: All this witness saw was on some indefinite date some fruit that was sunburnt.

page 225] I am not testifying. I have examined this gentleman sufficiently to see he is frank enough to admit he is not an expert on these things and all he saw was fruit that was sunburnt. I have no objection to that and did not object to that. That is all he saw.

The Court: This man in his vast knowledge in raising tomatoes and being in the canning business has testified he has observed tomatoes that have been hit by blight or injured by blight. I see no reason why this man from his experience cannot testify that the tomatoes sold to him by the Anderson's were sunburned and how that tomato compared with a tomato that had been injured by blight.

Mr. Rosenberger: I will tell you the difference. At different stages of development there is a difference in appearance and you would have to be an expert to tell at what stage it is. He might recognize blight at a certain stage. He thought this end rot which was a large black spot was blight but it isn't and blight does when it gets to that extent look like end rot.

page 226] We don't have any way to establish that what this man saw and what he thought to be blight in the field actually was blight.

The Court: The testimony of fifty-five years as a farmer who raised thousands of plants and periodically he had been

struck by blight and in the canning business also has seen on frequent occasions tomatoes that had been struck by blight. He can testify as to his experience with blight.

Mr. Rosenberger: There are different kinds of blight and he admittedly don't know the different kinds. There are different points of development and it is like I say "I have a temperature and I know that I have appendicitis" and the doctor says "Yes, you have a temperature and you have a pain in your stomach but it doesn't come from your appendix, it comes from your bladder or it comes from somewhere else." This is a highly technical thing and I think it gets right into the meat of the coconut. We need somebody who can differentiate.

The Court: Do you have any expert witnesses?

Mr. Rosenberger: Yes, sir.

The Court: Witnesses who will be able to differentiate between sunburn of tomatoes and blight?

page 227] Mr. Rosenberger: Different kinds of blight and different kinds of diseases and I know it is a technical field. If he cannot distinguish between the different kinds of diseases, as he demonstrated he couldn't, then he can't say it is this, that or the other.

The Court: Why not permit him to testify these tomatoes were sunburned?

Mr. Rosenberger: For the simple reason when leaves fall down lots of them sunburn. That is not a symptom of any particular kind of disease.

The Court: That is their theory of the case, that the spray killed the leaves and there was no shade for the fruit and that is why it was sunburned.

Mr. Rosenberger: The same thing will happen from blight, the leaves will fall down and your leaves dry up. The sunburn is not a distinguishing characteristic.

Mr. Carter: Their expert hasn't even seen the tomato.

Mr. Rosenberger: This gentleman here says the fruit was solid, good solid fruit and if you cut off sun-

page 228] burnt part, it was good fruit. This gentleman says he couldn't use them because he couldn't get enough to can them economically.

The Witness: That was sunburn because they didn't have

foliage to protect them and they were laying in the hot sun which would bake them.

By The Court:

Q. Mr. Cook, do you feel you can differentiate between blight and sunburn?

A. If I see it I can.

Mr. Carter: And he saw them. These experts didn't see the tomato. We are not trying to get him to differentiate between different kinds of blight, what I want to ask him is from the tomato he saw was there any blight, anything on it other than sunburn.

The Witness: I had a fellow come from Blacksburg one year when we had these bad tomatoes and they couldn't tell me what caused it. If they were experts it looked like to me they could tell you, doesn't it?

The Court: I would assume so.

Mr. Rosenberger: I can sit up and look at a
page 229] tomato and say "that tomato is sunburned" and
I can say "that tomato doesn't have blight" but it is a stage in the development and it might not have gotten that far.

The Court: We could ask him this question: "Did the tomatoes you observed appear to you to have blight?"

Mr. Carter: That is all I want to ask him.

Mr. Rosenberger: That calls for a technical opinion. He said "The tomatoes I saw had sunburn because the leaves were folded up to let the sun hit them and the sun burned them." Now, the question is "What caused the leaves to fold?" Can anyone looking at a sunburned tomato tell me what caused the leaves to fall?

Mr. Carter: I am not asking him that.

Mr. Rosenberger: Otherwise you can't tell what the tomato was affected by. That is the whole point. Just telling me you have a sunburned tomato is not telling me what caused the trouble. All you have got is the fruit which is not sufficient
to tell what affected the vine because he said the
page 230] vine had to be affected to let the leaves go down
to let the tomatoes get burned.

Mr. Carter: He can say what he saw on the fruit.

The Court: He can describe what he saw on the fruit. Mr. Rosenberger's objection to that is there is no evidence that he saw the plant itself which would be the first thing to be affected by the blight.

The Witness: I know this spray they spray along highways and railroads will kill anything.

The Court: It is admitted if the spray used struck these tomato plants it would have affected them and the whole issue is was the plant affected or killed by something else. That is the sole issue.

Mr. Carter: All I want to ask him is what he saw. If they want to bring an expert and say "You can't observe blight in certain stages" that goes to the weight of the evidence.

Mr. Rosenberger: He stated what he saw and all he saw was sunburn and he can't go beyond that.

The Court: Has he described the appearance of the tomatoes?

Mr. Carter: Other than to say he thought they
page 231] had sunburn on them. I am going to ask him now
if there was any evidence of blight on them.

The Court: I don't know if you are or not.

Mr. Carter: He saw these tomatoes and the experts didn't. They haven't seen these tomatoes. I want to ask him was there any evidence, with his experience with blight for fifty-some years in the canning business, was there any evidence that he could see on that fruit that he saw of blight. Now, he is certainly better qualified than anybody on this jury to qualify him as an expert either by study or by experience, according to the law I pointed out to you. Either by study or experience if he is better qualified than the jury then he is qualified as an expert. He says he is not an expert but that is a matter of opinion. If he said he was an expert you wouldn't let him testify because he said he was an expert. You can't disqualify him because he said he wasn't an expert. I say he has a knowledge acquired over fifty years of experience.

The Court: I don't want to keep this jury here much
longer.

page 232] Mr. Carter: Mr. Cook has a sick wife.

The Court: I am considerate of both sides. I never permitted myself to make any hasty rulings. I want to look at some authorities. My present thinking is that this

man has not qualified himself as an expert so he can say to the jury "In my opinion this tomato was not struck by blight." Then my second thinking is when a truck farmer raising tomatoes and having seen blight affect tomatoes whether he cannot make comparison of some tomato sold him by the Andersons and tomatoes he has seen affected by blight without drawing a conclusion. I am afraid if I permit this witness to tell the jury that the Andersons' tomatoes were not affected by blight I would be stretching the rule too far. I don't believe he has qualified himself sufficiently. If he were to say "I have seen tomatoes in my experience as a farmer and canner which were infected with blight," and describe how that tomato looked; then let it go; describe the tomato that was sunburned, the outward appearance of that tomato.

Mr. Carter: Could I ask him was there any
page 233] evidence of anything else on the tomato except sunburn?

Mr. Rosenberger: That is a conclusion again.

Mr. Carter: I am asking him what he saw with his eyes.

Mr. Rosenberger: All he saw was sunburn.

Mr. Carter: Let him say that is all he saw. He has got a right to say what he saw.

Mr. Rosenberger: Then you would conclude that was all that was on there. He might not be looking with the intelligent eyes of an expert to know what kind of disease the thing had.

Mr. Carter: Even if he wasn't an expert he could say what he saw, what the appearance of that tomato was.

The Court: I am surprised objection was not made to begin with when you went on to ask this man about the tomato being sunburnt.

Mr. Rosenberger: I don't object to that.

Mr. Carter: He will admit it was sunburnt but he says it was due to blight.

The Court: Caused by spray falling on the
page 234] foliage.

Mr. Carter: What he is going to say is the sunburn is due to the leaves coming off from blight rather than from spray.

The Court: Will your expert say that the blight hit the plant without hitting the tomato?

Mr. Rosenberger: What happens the blight hits the plant

and the plant withers. You get some tomatoes that are sunburned and some tomatoes that show signs of blight. It all depends on the stage, but what I am saying is the fact the tomato is sunburnt is not a differentiating symptom as to what caused the plant to give that result. Sunburn is no more than a mechanical feature of the leaf not covering it. You heard Mr. Anderson say he had left weeds in the patch to protect them in addition to the foliage. We have problems with normal sunscald just because the foliage isn't heavy enough. They speak of it here, sunscald is not a disease, it is a mechnical thing.

The Court: You can ask this witness to describe the appearance of this tomato.

Mr. Carter: Can I ask if he saw anything else
page 235] on it other than sunburn? I am just asking what he saw.

The Court: You can ask what he saw on the tomato, describe what he saw on the tomato. I don't believe the witness himself is able to draw a conclusion that he knows it was blight or not blight.

Mr. Carter: Can I ask him if there was any evidence of blight on it?

The Court: You are asking for a conclusion. Gentlemen, I would prefer not to rule on this.

Mr. Carter: I will limit it to that. I agree to limit it to that because I can't bring this man back.

The Court: I would like to withold ruling until tomorrow morning.

By Mr. Carter:

Q. Mr. Cook, describe the tomato to us, everything you saw.

A. From everything I seen I would say it was sunburn.

Q. Everybody admits it was sunburn.

By Mr. Rosenberger:

Q. Tell what you mean by sunburn.

page 236] A. The hide on it gets tough and thick and yellow. I have seen a fellow come in this year to my factory and brought some that had blight and it still wasn't ripe and it was hard around that place 'bout the size of a fifty cent piece. I have seen some of that.

Roy J. Cook

By Mr. Carter:

Q. What did you see on these particular tomatoes?

A. Well, it was sunburn.

Q. Is that all you saw, sunburn?

A. Yes. I just figured it was because the foliage wasn't on there to take care of it. I am confident of that.

Q. Is that all you saw?

A. Yes.

Q. Didn't see anything else but sunburn?

A. No.

Mr. Rosenberger: We object to this, your Honor.

Mr. Carter: The jury is not here.

Mr. Rosenberger: I don't want to waive my objection.

The Court: What is your objection?

Mr. Rosenberger: I don't want to sit quietly by while he continues to ask this gentlemen for conclu-
page 237] sions.

The Court: If you continue to object I will let him qualify as an expert.

Mr. Rosenberger: While he was examining him I thought he was trying to bring out matters that were objectionable.

The Court: He is trying to qualify the nature of the answer he is anticipating.

Mr. Carter: And it is out of the presence of the jury.

The Court: I will rule he is an expert if you want to continue to object.

Mr. Rosenberger: I don't mind you doing anything you want to just so you understand I am not waiving it.

The Witness: I don't believe the expert has enough knowledge to know anything like that. Half of their study is books and they see all these pieces of tomatoes here and yonder. They have never been in a field enough to know anything.

The Court: This witness has already testified he had fifty-five years of experience as a truck farmer
page 238] raising tomatoes and raising thousands of plants and that blight has affected his tomatoes on occasions. He has also testified that as a canner he has also observed tomatoes affected with blight. I am going to permit you to recall him and ask him to describe the appearance of the tomatoes sold to him by the Anderson's in September of

1962 and let him describe them. Then I will permit you to ask if he saw any other markings or damage to the tomato. I will let it go at that.

Mr. Carter: I don't know how much we got in the presence of the jury. It is understood he had been in the business that long and he has had experience with blight.

Mr. Rosenberger: If your Honor please, I respectfully object and except to the action of the Court in permitting the witness to be examined further on what he saw. He has already stated he saw sunburn.

The Court: Let's limit it to what I suggested.

NOTE: The examination of this witness is resumed in the presence of the jury.

page 239] By Mr. Carter:

Q. Mr. Cook, I was questioning you about your experience in canning and raising tomatoes and I understood you said you had been in both businesses for about fifty-some years. I think I also asked you whether or not you had had any experience with blight on tomatoes and you said you had experience with those you raised yourself and some of them that came into the canning factory.

Mr. Rosenberger: Your Honor, that is asking for a conclusion which I respectfully object and except to and I move that the question be stricken.

The Court: Wait until the question has been asked. He has stated he had that unfortunate experience on some occasions while raising some himself and on other occasions while he was canning.

Mr. Rosenberger: They will get the idea that was responsive to a question. I thought he had covered it sufficiently without Mr. Carter going back over it.

The Court: We had covered how long the man had been in business.

Mr. Carter: I was just bringing the jury up-to-

page 240] date.

Q. Now, the tomatoes the Anderson's brought you and you told them not to bring any more, Mr. Cook, what did they have on them?

A. Well, it was just a yellow place where the sun had been so hot on them and had made the hide so thick on them you couldn't peel them and get anything out of them.

Q. You call that sunscald or sunburn?

A. Yes, sir.

Q. Did you see any evidence of anything else on the tomato except the sunburn or sunscald?

A. That is all I seen was sunburn.

The Court: Let it go at that.

CROSS EXAMINATION

By Mr. Rosenberger:

Q. My understanding was you used these tomatoes in 1962 until they got so badly sunburned you had to stop using them.

A. How was that?

Q. Let me start at the beginning. I believe you say you came here sixty-five miles to testify.

A. I didn't say exactly sixty-five.

Q. You live over in Botetourt County?

A. Yes, sir.

page 241] Q. Does Mr. Carter represent you?

A. No, sir.

Q. I believe you told him in response to a question from him that you bought tomatoes from the Anderson's in 1962 until the sunburn was so bad you stopped using them.

A. Yes, that is right.

Q. And that you were buying them at $1.00 per bushel?

A. Yes, sir.

Q. How long did you buy them, Mr. Cook?

A. I didn't answer that question. If I had my books here I could tell you but it is hard for a man to remember. I have got it at home set down on the books so I can tell you.

Q. And you remember you paid him $1.00 a bushel?

A. Yes, sir.

Q. And you were buying them along?

A. Oh, yes.

Q. You know how many you bought from him?

A. No, I didn't buy any after they were sunburnt but I couldn't say offhand how many I bought before.

Roy J. Cook

Q. I don't know if you heard Mr. Anderson say this but he said you could cut off the sunburnt part and it was a good solid tomato.

page 242] A. That is right, solid but it was sunburnt.

Q. Couldn't you cut that off and use it for canning? Why didn't you use it?

A. Because it was too much waste in them.

Q. Couldn't you offer him a smaller price? You just had it right on top, didn't you?

A. I don't know what you mean by top but that was the top price I was paying, $1.00.

Q. I mean the sunburn was on the top of the tomato.

A. No, not all the time, sometimes it reached down over the side or maybe some of it would be all on one side.

Q. In other words, on different sides of the tomato?

A. It depends on which way that tomato was laying in the field.

Q. Did you make any notes of exactly how the tomatoes looked? Did you write down how these tomatoes looked?

A. No, sir, I know how they looked.

Q. Would some of them have just a little sunburn when you first got them and then they got worse and finally you stopped buying them?

A. No, I don't think at first they were sunburnt at all.

Q. How long did you buy them? Did they get

page 243] progressively worse with the sunburn?

A. I couldn't say how long I bought them. He might have *bought* a load or two that wasn't so bad at first and I went ahead and used them expecting to get through with it but after they got so bad I couldn't use them.

By The Court:

Q. These tomatoes you bought from the Andersons, were they top grade?

A. They were good tomatoes except for the sunburn.

Q. And you paid $1.00 a bushel for them?

A. Yes, sir. When they got that sunburn on them I couldn't buy them.

Q. Before the sunburn you were paying a dollar a bushel?

A. Yes, sir.

By Mr. Rosenberger:

Q. Mr. Cook, you never did go up to Mr. Anderson's field, did you?

A. No, sir.

Q. You don't have any record as to exactly when you had any trouble with them from sunburn?

A. Not here. I can go back to my house and tell you about when the last ones I bought from him because I

page 244] have got it down at home.

Q. Do you know how many bushels you bought in 1962 from him?

A. No, not offhand. If you want to come up there *tomight* I will sit down and tell you.

Q. That is too far, thank you just the same.

RE-DIRECT EXAMINATION

By Mr. Carter:

Q. Mr. Cook, you have no record of how many tomatoes you bought with you, whether one basket or more than one basket?

A. I bought more than one basket, maybe several hundred, I don't know. I couldn't tell you that offhanded. I have maybe twenty-five or thirty raisers of tomatoes and I can't keep that in my head.

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page 245]

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JAMES G. DUNLAP,

having been first duly sworn, testifies as follows:

DIRECT EXAMINATION

By Mr. Rowe:

Q. Will you state your name and address?

A. James G. Dunlap and I reside here at Lexington.

Q. What is your occupation, sir?

page 246] A. I am County Supervisor for the Farmers Home Administration, United States Department

of Agriculture.

Q. How long have you been so employed?

A. About twenty-five years, since 1939.

Q. What background educationwise do you have, Mr. Dunlap?

A. I have a B. S. degree in agriculture.

Q. And when did you receive that degree?

A. In 1939.

Q. Have you been working in this field since that time?

A. Yes, sir.

Q. I believe you went to V. P. I.

A. That is right.

Q. Have you in the past ten years owned or been on farms or raised any crops of your own?

A. Yes, sir, I have owned a farm myself the past ten years.

Q. Did you have any courses in biology or bacteriology while at school?

A. Yes. When I first started to school I had hopes of going into medicine and I took three years of biology and at that time the depression was on and I couldn't get enough money to go to medical school so I finished up with the page 247] course. Of course, I had biology, zoology and bacteriology and other courses.

Q. Do you know the Anderson's?

A. Yes, sir.

Q. Are you familiar with their property?

A. Yes, sir. I have been working with the Anderson's a number of years. They are clients of mine or of the Farmers Home Administration. We loan money to farmers and also give them technical advice in farm management guidance.

Q. In this advice does that include technical aspects as well as evaluation of farm and farm equipment?

A. Yes, sir.

Q. Has this technical advice included crops?

A. Yes, sir.

Q. Does this include what is the best crop to grow and what to do for them as far as fertilizing and taking care of the crops?

A. Yes, sir, fertilizing methods and cultivation, harvesting and planting.

Q. And the control of diseases?

James G. Dunlap

A. That is right.

Q. Bugs and insects?

page 248] A. Yes, and any kind of disease.

Q. You have records in your associations and in your supervisory capacity. Do you have records of being on their property in 1962?

A. Yes, sir.

Q. What were those dates?

A. As I recall, I was there on the 18th day of May, the 29th day of May and I believe July 28th.

Q. Will you tell, sir, what you observed on the 18th of May?

A. I was there later on again in October. On the 18th of May they had a nice crop of tomatoes and their crops were doing very well.

Q. Did you observe the field to distinguish what type of crops were in the field?

A. Oh, yes. They had sixty-one hundred or sixty-two hundred tomato plants and in the center of the tomato field they had cucumbers and squash, I believe two different kinds of squash.

Q. On the 28th of July you said you were on the property. What did you observe at that time?

A. They had one of the earliest and nicest to-

page 249] mato fields I had seen in the county.

Q. And in the way of what you observed insofar as the condition of the tomato field and the other *vegtables* on the 28th of July what did you observe?

A. On the 28th of July?

Q. No, I mean when you were there on the 28th of May.

A. It was May 29th.

Q. And you were again there on the 28th of July?

A. That is right. You want to know what did I see on the 28th of July?

Q. Yes.

A. Well, Mr. Anderson contacted me and seemed to be quite upset about his tomatoes, said they were all dying.

Mr. Rosenberger: Please don't repeat what was said.

The Court: Don't repeat what was said.

By Mr. Rowe:

Q. What did you do?

James G. Dunlap

A. I went down there to see what the trouble was. The leaves were *wiltering,* yellowing and I couldn't see any signs of blight or disease.

Mr. Rosenberger: Ask him not to express any
page 250] opinion until he is qualified. I move that the answer be stricken.

The Court: He hasn't answered yet. He hasn't stated what he observed other than the wilted leaves. He hasn't gone into an opinion yet. Do you object to the witness stating his opinion?

Mr. Rosenberger: Yes, sir, I do.

The Court: I think the matter should be heard in the absence of the jury. You members of the jury retire to your room.

(JURY OUT)

Mr. Rosenberger: Before we proceed, when I was addressing myself to you and you were listening to me I don't believe you heard the witness say "I didn't see any evidence of blight."

By The Court:

Q. Mr. Dunlap, did you make that statement?

A. Yes, sir.

The Court: I will have to tell the jury to disregard it.

Mr. Rowe: We feel that Mr. Dunlap, with
page 251] twenty-five years of experience in a supervisory capacity, plus his own experience —

The Court: Wait a minute, Mr. Rowe. Up to this time you have not proved he is anything but a county agent or supervisor. Thus far you haven't qualified him as an expert on the diseases of tomatoes. He did testify that he took a course in bacteriology and biology at V. P. I. but he hasn't qualified as an expert in diseases of crops.

Mr. Rowe: I thought he testified he was also technical advisor on diseases.

The Court: I might say I am a technical advisor in the field but that wouldn't qualify me.

The Witness: May I say something?

The Court: Yes, sir. This is in the absence of the jury.

The Witness: In my business and my work I have to have a working knowledge of plant diseases and insects and what not and methods and ways of eliminating them and preventing anything that might happen to a crop, sprays and dusts and whatever it may take. We have many things

page 252] around here the farmers have to fight continuously.

By The Court:

Q. What is your technical knowledge of blight on tomatoes? Can you tell whether a tomato has been stricken by blight or whether merely sunburned?

A. Yes, sir, I can. You have to observe the plant itself. Now, a tomato plant if it has early blight, which is a fungus disease, it shows up first in little spots on the leaves and then it goes into the stem, some of it, and as it progresses the leaves fall or curl up and drop and your tomatoes afterwards get sunburnt. Then later on you have got what is called collar rot which goes on down to the base of the plant where it comes out of the ground. A big collar forms there, swells up, and the plant falls over and breaks off. That is what you call an early blight.

Q. Now, in the performance of your duties you say you must *familarize* yourself with these types of diseases which affect tomatoes and other crops?

A. Yes, sir.

Q. And over what period of time does that extend, *familarizing* yourself with these diseases?

A. We have to keep on our toes continuously.

page 253] Q. How long have you been engaged in that?

A. Since I have been working at this particular job.

Q. Since 1939?

A. Yes, sir.

Q. And how many crops would you say you have personally observed which had been infected by the blight?

A. I have never seen many actually with the early blight in our county, it has been some but I haven't observed very much of it. We don't have but two commercial tomato growers and Mr. Anderson is the only one that has had any trouble.

James G. Dunlap

Q. In your professional capacity do you feel you are qualified as an expert in the field of diseases infecting tomato crops in particular?

A. Well, I have to keep up on my knowledge of plant diseases and insects. The people that we work with, of course, we loan them money to operate on, to stay in business or to go in business, and we have to collect that money and we have to give them guidance and know how to do it properly and we have a lot at stake too.

By Mr. Carter:

Q. You raise tomatoes every year, Mr. Dunlap?

A. Yes, sir, and have been for twenty-five
page 254] years, ever since I had a garden.

Q. You raise tomatoes every year?

A. That is correct.

Q. And do the people that you lend money to raise tomatoes in the gardens, do nearly all of them raise some tomatoes?

A. Yes, sir.

Q. And are you at their beck and call all the time for any diseases in any plant regardless whether in a garden or in a field or anywhere else?

A. That is my business, yes, sir.

Q. Now, does having a good garden or a successful garden have some effect on the net income that the farmer would have?

A. Yes, we encourage that. As a matter of fact we want to see all of our people produce the major part of their fruit and *vegtables.*

Q. In other words, more of the staples they raise to eat like in a garden the less they have to spend?

A. The less they have to go to the grocery store.

Q. And the more money they can save to repay your organization?

A. That is right. As I was trying to say a minute ago about the tomato crop, take six thousand tomato plants,
page 255] well, it is so important to the financial well-being that I have to work it out pretty closely. I come in from time to time to see how things are going and naturally I have to know what I see when I see it.

Q. In other words, if there had been any early blight in

Rockbridge County in tomatoes, whether in the garden or on farms of the people that you service, you think you would have known about it and could have checked it?

A. My farm is three miles as the crow flies from his place. I had a good crop that year.

By The Court:

Q. Is your soil similar to the soil on his farm?

A. Yes, sir.

Q. And are all the other raising conditions similar?

A. Yes, sir.

CROSS EXAMINATION

By Mr. Rosenberger:

Q. Mr. Dunlap, you finished V. P. I. in 1939, didn't you?

A. Yes, sir.

Q. And the first three years was in pre-med

page 256] which dealt with anatomy and that sort of thing?

thing?

A. Yes, sir.

Q. You didn't deal with any plant life?

A. No, sir.

Q. You were dealing with the body because you were taking pre-med?

A. Later on when I went into agriculture we had agronomy and how to treat plants.

Q. You spoke of the fact you went into agriculture but my understanding from you in talking with you in your office on September 25th, 1963 you told me you took a degree in animal husbandry.

A. Yes.

Q. Animal husbandry fitted right into your pre-med, didn't it?

A. No, sir.

Q. Your training in pre-med equips you to do animal husbandry.

A. Not exactly.

Q. You got that degree in one year following your switch-over.

James G. Dunlap

A. I took three years of agriculture. They told
page 257] me with the subjects I had I would have to go to
school for three more years to get a degree so I
told them I couldn't afford to take that long; that I had to get out and get to work so I asked if I couldn't double up on subjects and I selected work that took thirty-some hours and their average was eighteen. He said he wouldn't allow it and finally settled on twenty-eight and said "If you don't have a B average you go back to eighteen."

Q. Excuse me, I am trying to get not the details of time but actually your subjects were pre-med for three years and then in the fourth year in the summer didn't you change over to what you told me was animal husbandry?

A. That contains many, many courses, agronomy, soil chemistry and all that goes with it.

Q. You did take animal husbandry?

A. Sure, that is what they call it, animal husbandry.

Q. Was that your degree instead of a degree in agriculture? What was your degree?

A. Animal husbandry, which is agriculture.

Q. I call it animal husbandry.

A. It is immaterial what you call it. It is agriculture really.

Q. How long have you been in Rockbridge
page 258] County in your capacity as supervisor of Farmers
Home Administration?

A. Since 1942. I went into service and came back. Let me clear this up a minute, Mr. Rosenberger. I worked Rockbridge County and Botetourt County when I first started working in '39. That was part of my area and then they switched the territory and gave me an office of my own.

Q. Then you had been working in Botetourt County since 1939?

A. I am working that now too.

Q. I am just trying to get the facts. In 1939 you came into the county.

A. That is right.

Q. And if I subtract 1939 from 1964 that is twenty-five years and, of course, you had some time in the service, I take it. Was that four years or five years?

A. It was three years.

Q. And during all that time you never have seen any blight

in Rockbridge County, have you?

A. No, sir, not that kind.

Q. You told the Court you had never seen any early blight in Rockbridge County.

A. That is right. I have seen all kinds of diseases.

page 259] Q. In addition to that you said there were only two commercial growers of tomatoes in Rockbridge County.

A. Two that I know of. They are clients of mine.

Q. You are county agent.

A. I am not county agent.

Q. You are Farm Home Administrator.

A. That is right.

Q. And you loan money?

A. I only work with our clients.

Q. How many times have you loaned money on tomato crops?

A. That is a good question. I don't have my records here. I wouldn't know whether to tell you four times, three times or ten times and I will tell you why. When a man comes in to borrow money for operating he needs money for feed, fertilizer, not just tomatoes but for corn, hay and small grain and lots of things and we, of course, figure what he wants and add it up and make the loan to him.

Q. Specifically, you never have made any loan on tomatoes except this one instance you loaned this gentleman money on this tomato crop. Isn't that all you can remember?

A. We have another client we have loaned money to.

Q. But you never loaned it to him just for

page 260] tomatoes, did you?

A. You mean Mr. Anderson or the other man?

Q. I mean the other man.

A. No, you are right there. I didn't loan Mr. Anderson money just for tomatoes either.

Q. You made the loan with tomatoes being part of it and that is the reason you have to go to look at the crop.

A. That is right.

Q. Now, since you never had seen any early blight in this county you never have given any technical advice about it, have you?

A. No.

James G. Dunlap

Q. And you never had seen tomatoes damaged by spray either, have you?

A. Yes, sir.

Q. Where and when?

A. Well, we have had several of our people when they would be spraying near the garden and they would get damage to their garden tomatoes.

Q. Didn't you tell me when I saw you in your office you never saw any tomatoes damaged by spray?

A. Commercially. I am speaking of garden
page 261] tomatoes, I have seen that. There is not much loss there.

Q. Getting around to the question of gardening, you didn't have as many as fifty plants in your garden, did you?

A. It varies from year to year from say thirty-six to maybe fifty.

Q. The only tomatoes you raised were in a garden. You spoke of having a farm but as far as raising tomatoes on your farm you haven't raised tomatoes commercially.

A. Not commercially.

Q. And you have them only at your home?

A. At my farm. I don't have a garden up here.

Q. And you never raised over thirty to fifty?

A. No, sir.

Q. Then when you speak of seeing other people's tomatoes around you just see those in home gardens?

A. Except at Mr. Anderson's.

Q. And the ones at Mr. Anderson's you only saw those on May the 18th, May the 29th, those two times before July 19th. Is that right? You saw them twice?

A. I saw them again on July 28th.

Q. You saw them twice before July 19th?

A. Yes.

page 262] Q. Now, you never took any course dealing with diseases in tomatoes, did you?

A. No, sir.

Q. And many of the tomato problems are new in the last ten or fifteen years, aren't they?

A. Some of them are.

Q. Different blights and different rots and different diseases, some of them are new in tomatoes?

A. Well, we have had these tomato diseases for a number of years but how many years I wouldn't be able to tell you.

Q. And any new ones in the last ten years are ones you don't know about?

A. I don't know of any new ones in the past ten years. We may have some new ones in some parts of the United States that wouldn't affect us here that I wouldn't know about.

Mr. Rosenberger: That is all I care to ask him.

By The Court:

Q. Mr. Dunlap, where do you get your technical knowledge with reference to diseases of plants or crops?

A. Well, we have information coming from the Department of Agriculture. I get publications monthly from the department on new things that are coming out and they

page 263] are always doing experiments and we also have information that tells you how to diagnose different diseases and the treatment.

Q. You acquire that information through your observations of crops?

A. Yes, sir. That is why we get that information.

Q. Now, in your twenty years of experience in your line of work that you are engaged in have you ever seen any crops of tomatoes diseased by blight?

A. No, sir.

Q. How do you feel you are qualified to determine whether a plant is infected by blight or by other causes?

A. Well, in the information I have on it we have descriptions of diseases telling how to identify it when you see it and it is very simple, not difficult at all. Anybody who can read and see should be able to tell blight when they run across it. For instance, in certain blights, as I said awhile ago, that starts out with small spots about an eighth of an inch in diameter and then they enlarge gradually in an irregular circle to about a half an inch.

Q. You volunteered the statement to the jury in answer to Mr. Rowe's question that the plants you observed on the Anderson farm on July 28th were not infected by

page 264] blight.

A. That is right. What I saw, in my opinion,

was spray damage.

Q. And you have gotten your information from the Department of Agriculture and other sources?

A. Yes, sir. Another thing I saw he had squash and cucumbers in the center of the patch and they had the same aspect. The leaves on them were curling up and wilting and dying on those and the same diseases that will affect tomatoes won't affect cucumbers or squash, just won't do it, so why would they all die too? Not only that, he had a corn field right beside the tomatoes on the upper side and when I first went down there I saw a triangular place up near the railroad on the back that looked like it hadn't been damaged and they were nice healthy looking plants. It looked like the spray had drifted and the corn had shielded that little corner and it hadn't got the lethal dose that the others had. It took longer to affect those plants but the next time I was there they were affected too.

Q. Do you believe your knowledge of diseases of plants is peculiarly within your knowledge and beyond that of the jurors'?

A. Yes, sir, I do.

page 265] By Mr. Rosenberger:

Q. Mr. Dunlap, I understood you to say in response to a question from the Judge that your reason for thinking that you were qualified to answer the question was because you read literature that came into the office and you thought that anybody who read the literature could tell the different blights. Isn't that so?

A. I said "any person" but maybe I ought to back up on that. I ought to say any person who has knowledge of agriculture.

Q. I understood you to say anybody who could read.

A. I made that statement. I don't mean anybody who can read because everybody who can read can't understand unless they have some knowledge of agriculture.

Q. I understood your statement to be that anybody who could read could tell this disease because it was a very simple thing.

A. When I said that I didn't mean you, I meant any agriculturalist.

Q. Actually your knowledge has come from reading bulletins from V. P. I.?

A. This came from the Department of Agricul-
page 266] ture.

Q. I think I read the same thing. A small lesion starts and that spreads out on the leaf, the leaf begins to get yellow and then it dries and then the sun can get to the tomato and it starts as a small lesion on the fruit in some instances, doesn't it?

A. Well, my understanding is when the leaves start to go back on the plant it lets the sun in and you have sunscald.

Q. And if you have sunscald on your tomato then anybody just looking at the fruit couldn't tell what caused it other than the sun had scalded it?

A. No, sir, not in my opinion.

Q. If Mr. Cook said he could look at the fruit and tell whether the plant had a disease you would say he is wrong?

A. I don't know what Mr. Cook said.

Q. You say you would have to look at the plant?

A. I would, yes, sir. Maybe Mr. Cook has had more experience in fruit than I have had.

The Court: Gentlemen, I am going to rule this gentleman is an expert in his field and he may make his statements.

Mr. Rosenberger: We object and except for the reason stated. You understand our reasons?

page 267] The Court: Oh, yes.

(JURY PRESENT)

DIRECT EXAMINATION (RESUMED)

By Mr. Rowe:

Q. Mr. Dunlap, I believe you testified you had observed this crop on May 18th and May 29th. What did you observe on your visit on July 28th, 1962 to the tomato field and the other field at the end?

A. Well, I walked into the field and I saw the leaves were wilting and yellowing and the tomato blooms were doing the same thing.

Q. And what did you observe of the other vegetables in the field? I believe you said there were other vegetables, squash, cucumbers and other plants, what did you observe about them?

James G. Dunlap

A. I first tried to see if there was any kind of a plant disease so I went on in the middle of the field and they had squash, two varieties as I recall, and cucumbers and they were selling those too on the market. The leaves were curling up and yellow ing on the cucumbers the same as they were on the tomatoes and also they were curling up and yellowing on the page 268] squash, and in addition to that I saw a corn field right above it right along the railroad track and it looked like the corn blades were firing up.

By Mr. Rosenberger:

Q. What was the corn doing?

A. It looked like the corn was firing up.

Q. What color?

A. That means getting yellow, and I saw a little angle from the corner of the corn field which was along the railroad track on the back side, the middle of the field, didn't go out quite that far, a small angle there in the patch that was healthy looking, looked healthy and the leaves weren't damaged at that time. The next time I went back they also were damaged. I figured then it must have been spray because they were protected to some extent and they didn't get the lethal dose that the other plants got because they were shielded by the corn which was up six or seven feet high but they died later on too. I examined the plants for early blight and I saw no signs of it or any other disease.

By Mr. Rowe:

Q. How did you check for blight?

A. Early blight affects tomato plants starting page 269] out with small spots on the leaf and the stems are affected too and they are round spots and irregular in shape and they get as large as a half inch in diameter as the disease progresses and then, of course, you have the same thing on the plant stems and as it goes on you have what they call "collar rot," an enlarged circle around the stem as it comes out of the ground, and it is a fungus that affects that and, of course, that weakens the plant until it will fall over. I pulled up some of the plants, not on that particular visit, but later I believe in October or in September, anyway I pulled plants up to look at the roots and they were hard to get out of the ground, had strong roots and strong stems.

Q. If the field was struck by blight would any of the tomato plants come back later on in the year?

A. No, sir, not to my knowledge.

James G. Dunlap

Q. Have you in your work observed any spray damage to tomato plants in other gardens other than this one?

A. In gardens, in home gardens, but not on a commercial basis.

The Court: I will not permit that. You have to qualify if it was spray used by the railroad or a similar
page 270] spray. There is no evidence on that. I think you have gone as far as you can with this witness.

By Mr. Rowe:

Q. Did you have occasion to observe on your visits any other patches of garden owned by the Anderson's other than this tomato field here in question?

A. Yes, he had maybe an acre or an acre and a half or two acres up behind his house on the hill.

Q. Was that just a home garden?

A. They raise vegetables up there for market too.

Q. In your visits did you also examine this field?

A. Yes.

Mr. Rosenberger: I think we should stick to tomatoes. I don't think there is any evidence he had tomatoes up there.

The Court: Eliminate testimony except as to the tomato crop within the boundary of the tomatoes you allege were damaged in your motion for judgment.

Mr. Carter: We ought to prove whether there was any damage to the tomatoes up at the house.

The Court: There is no claim for that.

Mr. Carter: I mean to show it wasn't from blight since it was in the other field.

page 271] The Court: I think he has gone far enough. I think he has covered that very thoroughly. You can examine on the damage you claim was done by spray. You claim the tomato crop was totally destroyed as well as the squash and corn that was in the boundary of the tomato field. I think to go beyond that would be carrying it too far.

Mr. Carter: If the defense is blight we want to call him in rebuttal to show there wasn't any blight.

The Court: I don't know what the defense will be.

Mr. Carter: We can call him in rebuttal if necessary.

By Mr. Rowe:

Q. In your examination of the field in question could you

determine from what you saw as to the production of these plants?

Mr. Rosenberger: He hasn't been qualified.

The Court: He has been qualified merely in the field of diseases to plants and crops.

Mr. Rowe: He has testified as to what he saw.

The Court: You are getting ready to ask him
page 272] his opinion about the yield of tomatoes.

Mr. Rowe: That is right.

The Court: I don't think he is qualified to answer that.

Mr. Carter: Do you mind if we try to qualify him?

The Court: I will not permit it. I don't think he is qualified.

Mr. Carter: Do I understand the Court will not *not* allow the plaintiff to qualify this witness as to whether or not he is an expert in giving his opinion as to the amount of tomatoes that could be produced on these particular vines or how many tomatoes he saw on the particular vines in bushels as to how much that vine would produce? Is that the ruling of the Court?

The Court: The ruling of the Court is you have that testimony without qualifying this man. I am going to have to excuse the jury again.

Mr. Carter: We want to ask him how many tomatoes he saw on the vines.

The Court: You can ask that but you can't ask him
about the yield without qualifying him. You can
page 273] ask him what he saw.

By Mr. Rowe:

Q. Mr. Dunlap, what did you observe on your visit to the field with reference to the quantity of tomatoes on the vines, both red, green and blossoms?

A. All I can say, Mr. Rowe, it looked like he had a good crop and when we plan for the year's operation we have to plan for the yield in bushels.

The Court: That is not an answer to the question. Merely answer the question directly. The question propounded to you is whether you observed the amount of ripe fruit, green fruit and the amount of blooms or blossoms on the plants.

The Witness: Well, it is awfully hard for me to say.

The Court: You cannot state your opinion because you haven't been qualified.

The Witness: I can't say, your Honor, whether I saw a bushel or two bushels. Is that what he wants me to say?

By Mr. Rowe:

Q. I want you to say whether it was a good crop
page 274] in reference to what you saw in the way of ripe fruit, green fruit and blossoms.

A. It was a good crop, yes. I misunderstood the question.

Mr. Rowe: You may examine.

CROSS EXAMINATION

By Mr Rosenberger:

Q. Mr. Dunlap, I am going to try to be as clear as I can to you in my questions.

The Court: For the record, Mr. Carter, have you excepted to the Court's ruling?

Mr. Carter: No, sir. Let's get along.

By Mr. Rosenberger:

Q. Mr. Dunlap, I understood you to say sometime in your examination here that in order to determine what affects a plant you would have to look at the plant, you couldn't look at the fruit and say whether the sunscald was due to one thing or another. Is that right?

A. That is correct, sir. Now, we have diseases that will affect the fruit.

Q. Different diseases will cause sunscald so you have to look at the plant?

page 275] A. Yes.

Q. I understand too that you told us while the jury was out that your degree was in animal husbandry from V. P. I.

A. That is right.

Q. And you have actually been in this county working as a Federal Farm Home Administrator since 1939.

A. Not as an administrator. I was county supervisor.

Q. And you make loans on real estate, machinery and all kinds of crops?

A. Crops, yes, sir.

Q. And you testified that there have only been two commercial growers of tomatoes in Rockbridge County during that time?

A. Two to my knowledge that I have worked with. There may be more but I don't work with them.

Q. As far as you know there have been only two commercial growers of tomatoes?

A. Yes.

Q. You have never seen any form of blight on any commercial crop in the county?

A. Not early blight.

Q. You have never seen any early blight?

page 276] A. No, sir.

Q. Now, you say the way you can tell diseases is to read the books and follow the descriptions in the books and based on your reading of the books you didn't think these tomatoes had early blight?

A. That is right.

Q. And you did make the statement that anybody who can read and who had any agricultural background could read the book and tell what the plant had?

A. They should, yes.

Q. When I talked to you in your office on September 23rd, 1963 you told me at that time —

Mr. Carter: I object unless he is going to try to contradict him and if he does he will have to take the witness stand.

By Mr. Rosenberger:

Q. Did you tell me in your office in September of 1963 that Mr. Anderson had informed you that these plants were, according to V. P. I. experts, suffering from late blight?

Mr. Carter: I object to what Mr. Anderson told him. What Mr. Anderson told him would not have anything to do with what his witness knows.

page 277] The Court: Mr. Anderson is a party litigant to this case. There is a close relationship between the Andersons and the witness. I feel what Mr. Anderson told this man who had negotiated a loan on his crop is admissible.

Mr. Carter: We would like to except.

By Mr. Rosenberger:

Q. Didn't you tell me you thought it was late blight based on what Mr. Anderson had told you?

A. I don't recall that, I might have.

Q. Don't you remember, Mr. Dunlap?

A. I saw the letter that this man at V. P. I. had written the Norfolk and Western Railway. He showed me a copy of that which stated that there was no spray damage. This letter said, I believe, it was early blight or late blight, but I forgot exactly what the letter said.

Q. At the time you were giving me the impression you thought it was late blight you got up and walked over to the bookshelf and pulled down a book from the Government Printing Office entitled "Plant Diseases 1953," didn't you?

A. I don't know.

Q. And didn't you thumb through it and tell me

page 278] "Well, I don't find late blight in it?"

A. Late blight?

Q. Yes, sir.

A. Late blight is in there.

Q. But you didn't find it when I was in there.

A. I don't recall but it is there.

Q. Now, at this time which was a year later you didn't have any notes about what you saw on the plants when talking to me.

A. No, I just recalled it from memory.

Q. And what you told the jury here today are the symptoms of early blight that you read out of the book?

A. Yes, sir.

Q. When Mr. Rowe asked you how did you examine it for early blight you merely recited those symptoms that you had gotten out of the book. Now I want to ask you specifically what examination did you make of the plant?

A. I looked at the plant, Mr. Rosenberger.

Q. In the field?

A. In the field. I looked the whole field over and saw the squash dying and saw the cucumbers dying and late blight or early blight will not affect squash or cucumbers.

page 279] Q. Then your opinion is based on the fact that it was neither early blight nor late blight because the cucumbers were affected?

A. I saw no symptoms of any blight.

Q. You didn't examine them for blossom-end rot or anthracnose or any of those diseases?

A. Yes.

Q. Did you take any plants in?

A. I didn't put them under the microscope because I didn't have one.

Q. Did you know that what you needed in the early stage was to put it under the microscope?

A. No, sir. You can see that with your eye. They have small spots on the leaves from an eighth of an inch to a half an inch.

Q. The color on the leaves on the cumbers and squash were sort of gray, wasn't it?

James G. Dunlap

A. What is that?
Q. What was the color of the leaves on the squash?
A. They were yellowing.
Q. Weren't some of them gray?
A. I don't recall that. I don't recall any gray color.
page 280] Q. We have some photographs here. You notice in Plaintiff's Exhibit No. 4 that those leaves have a grayer look than they do green?
A. That looks like a shade of green to me.
Q. These were taken four or five days after the thing happened and you saw them on the 28th. You don't see but one yellow leaf in the whole patch there, do you?
A. It is a degree of green. I wouldn't say it is gray.
Q. Shading into gray, a grayish green?
A. Is it?
Q. I am asking you.
A. No, I don't say it is gray at all.
Q. Isn't that mildew on the cucumbers and squash?
A. No, sir.
Q. You are sure about that?
A. Yes, sir.
Q. Did you examine them for mildew?
A. Yes, sir.
Q. Do you know what kind of spray the railroad was using?
A. No, sir.
Q. You don't know?
A. No, sir.
page 281] Q. Do you know that the spray that the railroad was using will not affect corn?
A. No, sir, I don't know what they used.
Q. Don't you know, as a man that goes visiting farms, that actually you spray corn fields to kill the weeds and it will not affect the corn?
A. I have sprayed corn myself, Mr. Rosenberger, but you have to have a diluted solution or you can kill your corn too.
Q. Now, if the people who are familiar with this spray say that it will not affect corn will you say this corn was affected by this spray or affected by something else?
A. I couldn't say that the corn was affected by spray because I don't know but it was firing up when I saw it.
Q. It was firing up?
A. In other words, the blades were firing up.
Q. You don't know what caused the firing up of the corn?

A. No, sir. I do know corn can be fired up for various reasons and I don't know the spray did that.

Q. You don't know what caused the damage to the cucumbers and squash, do you?

A. I think it was the spray, Mr. Rosenberger.

Q. How far were the cucumbers away from the
page 282] railroad track?

A. How wide is the right of way?

Q. Thirty-three feet from the center line to the fence.

Q. He had a little road there about eight feet wide and then the tomato patch and that would be up to forty feet, I guess.

Q. Didn't he have about forty rows of tomatoes and then a patch before he got to the squash and cucumbers?

A. I didn't count the rows.

Q. The field is about three hundred and sixty-six feet deep, isn't it?

A. I didn't measure it.

Q. Did it kill everything in there?

A. I think some of the tomatoes on the far end kind of came back later on, the ones next to the river away from there.

Q. Did you go back to find out?

A. Well, actually those tomatoes were affected too and the leaves dropped off.

Q. Everything in the full distance of the field was affected?

A. Yes, sir.

Q. So it looked like it had even coverage of some-
page 283] thing all over it, didn't it?

A. As I recall they had a few rows back there in the far end that later on spurted out, leafed out again.

Q. Don't you know that a tomato plant with blight and fungus when the fungus dies down the plant will come back?

A. Sometimes it will, yes, sir.

Q. Actually it will all the time when the fungus dies down, will come back.

A. Not all the time, no, sir.

Q. Actually when spray hits them heavy enough to make the leaves wet all over they die, don't they?

A. I don't think the actual spray hit these, I think it was vapor, volatile vapor.

Q. You don't think the spray got on this field like the Andersons said?

A. It was effects from the spray. You can have spray or the volatile vapor that comes off of that spray and drifts out over a patch like that and that is just as lethal as the spray itself

to tomatoes and some other vegetables.

Q. The railroad sprayed its right of way and put the wet spray down on the right of way that thirty-three feet and then after it got on the right of way the vapor rose and

page 284] moved over to the patch?

A. That is common knowledge as to weed sprays and brush sprays, the vapor is lethal.

Q. You don't think at the time of the spraying it covered the whole field?

Mr. Carter: We object. He couldn't possibly know. He wasn't there.

The Court: He has already expressed an opinion without objection. He didn't think the actual spray itself did the damage but the vapor, he has already testified to that.

Mr. Carter: I am objecting now. He couldn't possibly know.

The Court: What are you doing letting him testify without objecting?

Mr. Carter: I can object now.

The Witness: I don't know where the spray went but I wouldn't think the railway company would actually throw a spray over a field like that, it would be kind of silly.

By Mr. Rosenberger:

Q. You know enough about spraying to know

page 285] that spray couldn't go three hundred and sixty-six feet.

A. No, you are right. I don't think the railway company or anybody else on their right of way would throw out spray like that. I think it was a simple accident.

Q. You think the spray was down on the right of way and then the volatility of it during the night would move over?

A. I don't know when it moved but it drifted over there some way or another in my opinion.

Q. Don't you know that different sprays have different bases?

A. Yes, sir, they do.

Q. Do you know whether the one with the salt base will vaporize?

A. What kind of salt?

Q. Triethylamine salt.

A. Well, I can't tell you that.

Q. Now, in explaining that vaporizing to the jury so they will understand what you mean what do you mean by vaporiz-

ing? If I put a tomato plant under a bell and put a saucer under the bell with that spray in it then even if I don't put any of the spray on the plant itself that vapor that is given off and the fumes will spread up and kill that plant just as page 286] if it had been put on it. Is that what you call volatility?

A. That is right.

Q. Is that the process you say was here?

A. I think so.

Q. You are an expert and giving the jury the answers.

A. I wasn't there when the spray was sprayed.

Q. You told me the reaction, the reason it got all over the field was it was vaporizing and got on it, isn't that so?

A. I think you had a mist that came out there and it came across the patch and then the vapor that followed that drifted over the patch and naturally on the back part that would be affected later on, later than the part near the railroad.

Q. But you still hold to your theory that the vapor did it?

A. Vapor or mist from the spray, yes, sir.

Q. And you are giving that on the basis, even though you don't know that this was a veon brush killer that was used?

A. I don't know what was used.

Q. Are you familiar with the different kinds of sprays with different bases?

A. I don't know what the bases are, Mr. Rosen- page 287] berger. I do know, as a matter of fact, all the agricultural people tell the farmer when he comes to spray to be sure to follow the manufacturer's instructions.

Q. Mr. Dunlap, if this veon spray has a salt base then when the spray gets on the leaves and evaporates you have the salt that remains deposited on the leaf. Do you know that that is the reaction that you get from a salt-base spray?

A. It may be.

Q. And then on the other sprays that they call "ester sprays" you spray it on the plant and then as that evaporates it gives off gases into the air that will spread and do the damage. Is that right?

A. You apparently are right there. The vapor that is lethal may hit the plant. Some plants are less susceptible than others.

Q. So then for these plants to be affected like you say then it had to be an ester base spray that was spread over the field?

A. That is right.

Q. And you will admit this was a spray that would not vaporize and move, not volatile, and it couldn't have done

the damage?

page 288] A. I don't know what kind of spray you used. If what you say is correct then you apparently want me to say I am incorrect.

Q. No, I am following along logically what you told the jury about what you as an expert know.

The Court: He hadn't qualified as an expert on volatility.

Mr. Rosenberger: He has qualified as to spray.

The Witness: I am not an expert on sprays.

The Court: Objection hasn't been made but this witness hasn't qualified as an expert in the field of spraying.

Mr. Rosenberger: I don't think he is an expert.

Mr. Carter: You tell me in one breath to get along and the next breath you want me to object. We can't get along if I keep on objecting. That is the position I take in this case. I know we have to finish today.

Mr. Rosenberger: This gentleman has said the spray damaged the crop. I submit I am entitled to examine him on his knowledge of spray to determine that he hasn't the

page 289] faintest idea whether the spray did it.

The Court: I permitted it because he volunteered the opinion to the jury without objection by counsel and if the Court recalls correctly he said he thought it was a vapor from the spray that killed these plants.

The Witness: That is right. I didn't see the spray car come by.

By Mr. Rosenberger:

Q. So you gave us voluntarily your opinion it was spray or vapor from the spray?

A. That was my theory.

Q. So if I say this particular spray didn't give off any vapor then this railroad spray didn't kill the plants?

A. All the sprays I have come in contact with were what we use on farms and that is 2,4-D and 2,4,5-T.

Q. Some has one base and some another base?

A. Yes, and, of course, we follow the manufacturer's instructions on how to use it and where to use it and when to use it, different times of the year.

Q. Now, in giving your opinion that spray killed these tomatoes you are going by the manufacturer's in-

page 290] instructions and what you read out of the book, is that right?

A. No, I have used the sprays. I have used dust and I have

sprayed corn and sprayed pastures.

Q. Have you sprayed tomatoes with it?

A. With what?

Q. With veon brush killer. Have you sprayed any tomatoes with brush killer?

A. No, sir. I have seen farmers who have sprayed their corn fields right by their garden and they lost their tomatoes.

Q. One further question. I don't want to interrupt any speech you want to make. You are interested in collecting some money from Mr. Anderson and Mr. Anderson is indebted to you.

A. Not to me but to my office.

Q. That affects your records and your collections.

A. It affects Mr. Anderson's records, not mine, no, sir?

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Mr. Rosenberger: If it please your Honor, the defendant, by counsel, moves the Court to strike from
page 291] the record the testimony of the witness James Dunlap on the ground that his evidence and his own statements show that he is not a witness that is qualified to give an opinion.

The Court: The Court has ruled that he is an expert and you excepted to that. The Court's ruling will remain the same.

Mr. Rosenberger: Since that time he has shown more that he is not an expert about the spray.

The Court: He gave the opinion that spray killed these tomatoes and you brought that out yourself.

Mr. Rosenberger: I believe you will find on direct examination he said spray affected the tomatoes and that is the reason I was inquiring as to his knowledge of spray and then he ultimately said he didn't know enough about sprays to testify about them and therefore his testimony that the spray killed these tomatoes should be stricken from the record. That is what I wanted to make clear with you. I think you were thinking about him as an expert on blight but he went further than blight.

page 292] The Court: I don't think he qualified as an expert on the effects of spray but you brought it out in your cross examination.

Mr. Rosenberger: I think if you follow the record you will find that he said that the spray killed these tomatoes.

The Court: He said the vapor from the spray killed them.

You mean you want that portion stricken from the record?

Mr. Rosenberger: I want his opinion stricken.

The Court: If I strike his opinion the whole thing would go out.

Mr. Rosenberger: I think the jury should be instructed to disregard all his testimony, No. 1, that there was no blight; No. 2, that the trouble with the tomatoes was spray—now, specifically you know how he said the corn was seven to nine feet tall and the corn protected the tomatoes and they were not affected at first from that because the vapor was kept off from the tall corn but ultimately it got on all. That was on direct examination. That is the reason I inquired to show actually this man doesn't have the knowledge to qualify him.

page 293] The Court: You didn't object to that portion of his testimony.

Mr. Rosenberger: I objected all the time that he was not an expert qualified to testify.

The Court: In the field of diseases but you didn't object at all, not at one stage, with reference to his opinion that he expressed as to the spray. I don't see how you can let that evidence go before the jury without objection and then ask the Court subsequently to consider an objection and rule that the evidence should be stricken.

Mr. Rosenberger: Judge, I will tell you why.

The Court: I am interested to know why.

Mr. Rosenberger: You know when Mr. Rowe was trying to qualify him as an expert he gave the opinion that he had seen spray affect tomato plants in gardens and I thought that was the reason that you were letting him testify as an expert. I was objecting to him as an expert on any matter and if you will read the testimony while the jury was out I didn't want to be always making objections, I thought you understood I ob-

page 294] jected to him giving an opinion on any phase.

The Court: It would appear to me, Mr. Rosenberger, that the last portion of this witness' testimony was by your own endeavor and should remain in the record. You will recall he testified that he thought the railroad did everything it should do in spraying its right of way and then by accident the vapors drifted over and do you want that out of there?

Mr. Rosenberger: No.

The Court: You can't ask for one portion and let the other remain.

Mr. Rosenberger: I want everything out. I want everything out of the record on which this man gives an opinion.

The Court: Everything injurious to your side of the case?

Mr. Rosenberger: The whole business that has to do with his opinion.

The Court: I am not going to do it.

Mr. Rosenberger: I object and except.

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page 296] JAMES T. SHEPHERD,
having been first duly sworn, testifies as follows:

DIRECT EXAMINATION

By Mr. Carter:

Q. Mr. Shepherd, what is your occupation?

A. I am Roadmaster with the Norfolk and Western Railway.

Q. Are you in charge of the tracks of that particular section of the road for the Norfolk and Western that goes through the lands of our clients, the Andersons?

A. I am in charge of the track and right of way, yes, sir.

Q. The track and right of way involved in this case?

A. That is right.

Q. How long have you worked for the railroad?

A. My first day of service was December 1, 1928, that was my first day of service. I have worked regularly since November 1, 1935.

Q. Were you in charge of the spray train that did the spraying on July 19th, 1962?

A. Well, not in charge of the train. The train is under the supervision of the conductor.

page 297] Q. Were you in charge of the work along the road?

A. I was in charge of the operation, yes, sir. I was in charge of the operation to the extent to see that the right of way was sprayed as the company wanted it to be done. I had nothing to do with the operation of the car itself. I simply showed them where and what spraying we wanted.

Mr. Carter: I want to renew my motion.

Mr. Rosenberger: If your Honor please, I believe if you go into it further you will find he was merely on the train to point out locations they were to spray and where they should-

n't spray. He had nothing to do with the operation of either the train or the spray car. He is an employee of the Norfolk and Western and he is the roadmaster.

The Court: Do you object at this stage to this witness being regarded as an adverse witness?

Mr. Rosenberger: Yes, sir. They called him. We know everything he is going to say. Mr. Carter knows everything, he has just been talking to him.

The Court: Mr. Carter, did you interview him subsequently to him being summoned?

Mr. Carter: I talked to him a few minutes ago.

page 298] The Court: I adhere to my former ruling.

Mr. Carter: I still except to the Court's ruling.

Q. You say you were in charge of the spraying to see that it was sprayed properly?

A. I represented the company to see we got the type of job we contracted for.

Q. And one of your duties too was to see there was no damage done to the adjoining landowners?

A. By being familiar with the territory I pointed out where and where not to spray.

Q. And where not to spray I suppose would be where there are crops or something to be damaged?

A. That is correct.

Q. Then you took the position it was your duty on behalf of your company not to damage adjoining landowner's crops?

A. That is right.

Mr. Carter: Thank you.

page 299] CROSS EXAMINATION

By Mr. Rosenberger:

Q. Mr. Shepherd, you were riding on this spray car which did the spraying, weren't you?

A. Yes, sir.

Q. And that is the spray car shown in Defendant's Exhibit B?

A. Either that one or one similar to it.

Q. Now, on that car can you tell me who from the railroad was on there?

A. I was on there and the engineering department always has one or two representatives such as Mr. Clark and Mr. Adams.

Q. Mr. Clark and Mr. Adams were on there?

A. Yes, sir.

Q. Did Bogel Company have a man on there?

A. Yes, sir, Mr. Simms was on there.

Q. Then who worked under Mr. Simms?

A. He had I believe it was five vacationing college boys working under him.

Q. Now, where is the Anderson place between what mile post on the railroad?

A. Between Mile Post 202 and 203 as measured from Hagerstown.

page 300] Q. In other words, if this train was going north it would be going from Mile Post 203 to Mile Post 202?

A. That is right.

Q. Every mile you gain you would reduce one?

A. That is right.

Q. When you passed Mr. Anderson's place, particularly the tomato field, can you tell us what was done about the spray?

A. Yes, sir. We lowered the pressure and dropped the spray so that we only put spray about fifteen feet from the track.

Q. That is as far as the spray went?

A. That is right.

Q. How wide is the right of way taken from the center line of the track over to the fence along Mr. Anderson's field?

A. It is thirty-three feet on each side of the track.

Q. So if you only sprayed fifteen feet of it you left a buffer of fifteen feet?

A. About eighteen feet was left of the buffer.

Q. On the railroad property?

A. Yes, sir.

Q. Now, we have talked about these arms. Will you come down here so the jury can see? Will you indicate

page 301] what you mean by the arms being let down?

A. The spray for the bushes is from these

nozzles up on top.

Q. The jury can't see it. You say the nozzles up on top?

A. The nozzles up on top, and what we do we come to a place we don't want to go beyond the right of way and these nozzles are pointed right down at the ground next to the track and the pressure is shut off so it just puts spray right next to the track.

Q. Were there other railroad men on the train like the conductor, the fireman and the brakeman?

A. Yes, sir, a regular work train crew.

Q. Were they back on the spray car or were they up in the front with the locomotive?

A. The engineer and the fireman were on the locomotive and the train crew, as best I remember, were on the caboose which was next to the locomotive.

Q. And that was how far ahead of you all?

A. I believe we had nine tank cars between us and the caboose.

Q. Now, were you instructed to go up to Mr. page 302] Anderson's farm to see him subsequent to July 19th? We are assuming July 19th was the day you went by with the spray car.

A. Yes, sir.

Q. Now, on August 15th did you go up to see Mr. Anderson?

Mr. Carter: I don't believe he can go into anything other than what I went into on direct examination.

Mr. Rosenberger: You put him on but I will take him for my witness.

The Court: You can call him later on if you want to.

Mr. Rosenberger: I will take him as my witness.

Mr. Carter: You will take him as your own witness?

Mr. Rosenberger: Yes, sir.

Q. Mr. Shepherd, you went up to Mr. Anderson's with Henry A. Aldridge on August 15th, 1962, didn't you?

A. Yes, sir.

Q. When you went up there who did you see?

A. I saw Mr. Anderson and his son.

Q. And did you go into the tomato field?

A. Yes, sir.

page 303] Q. Did you tell Mr. Anderson anything about your spray and whether the spray had affected the tomatoes or not?

A. I told him the spray was shut off and pointed down and I showed him the line which you could see very clearly it was dead up to where we had sprayed and that is about fifteen feet from the track, and from the spray over to the fence was still green, so I showed him where we had shut off so we couldn't possibly have gone over the fence.

Q. Now, what, if any, statement did he make about how the spray got over the weeds you didn't kill and then got over to the tomato patch?

A. He explained that that was by a mist or fog in the night that carried the chemicals over into the field.

Q. Something that rose up during the night and came over?

A. That is the way he explained it to me.

Q. Did he make any complaint to you about the squash?

A. He told me that some of the squash and I believe he said some of the cucumbers were dead but he wasn't going to say anything about that because he didn't have a great quantity of them.

Q. What did he say about the corn?

A. I don't recall him mentioning the corn.

page 304] Q. Did you eat any of the tomatoes?

A. Yes, sir, I ate one right there.

Q. Did he have any tomatoes picked on August 15th when you were there?

A. Yes, sir, there were, I would judge, somewhere around twenty or twenty-five baskets of tomatoes.

Q. Ripe tomatoes?

A. Yes, sir.

Q. Did you get any squash?

A. Yes, sir, he gave us several squash apiece to take home with us, butternut squash.

Q. You just pulled them off the vines?

A. I didn't go back to the vines. He and Henry brought some back and gave me some.

Q. Mr. Shepherd, will you look at what is designated as Defendant's Exhibit E-1 and tell me whether or not that is a correct photograph of a view looking north on the right of

way? This shows it was taken on September 20th. I know you were there on August 15th but I want you to look at that and see if you can tell me what this shows in the upper right-hand corner and what this shows in the field.

Mr. Carter: I would like to know who took this.

page 305] Mr. Rosenberger: Mr. Overstreet took them and he is here.

The Witness: I don't see anything of the track to tie it into but I would say it is facing north just over the fence from the track at the location of the tomato patch.

Q. What is that on the right-hand side?

A. That is vegetation along the fence row, the brush and the weeds along the fence row.

Q. And is that the fence row between the railroad track and the tomato field?

A. That is the fence row between the railroad track and the tomato field, yes, sir.

Q. Was it greener when you were there on August 15th than it is in that picture on September 20th?

A. It was green all the way through, green up until frost hit it.

Mr. Rosenberger: We would like to show that to the jury. We have referred to the fence row between the field and the track.

The Court: For identification purposes what exhibit do you wish it to be?

page 306] Mr. Rosenberger: Defendant's Exhibit E-1.

Q. Will you look at Defendant's Exhibit H-1 and tell me if that is a view on the railroad track?

A. It is. That is looking north just about opposite the tomato patch looking due north.

Q. On the left-hand side of the picture can you see where your line of spray was and where it stopped?

A. Yes, sir, you can see very clearly right through there where the spray stopped because the weeds and brush are dead to that point and beyond that they are still green.

Mr. Rosenberger: We offer that as Defendant's Exhibit H-1.

Q. Now, with reference to the one that the jury has just seen, is this one on the railroad side of that fence row shown in Defendant's Exhibit E-1?

A. That is right. That picture is right over the fence from this one.

Q. Now, will you also look at Defendant's Exhibit I-1 and tell me if that is a view looking south that shows the west side of the road over toward the tomato patch?

A. Yes, sir.

Q. And does that show where the vegetation was killed?

page 307] A. Very clearly right there.

Q. And then you have the weeds that are green?

A. The weeds are green over here and the weeds up to this point here are dead.

Q. Is that pole and these weeds that you see in the upper right-hand corner of this exhibit all on the defendant's right of way?

A. Yes, sir. That pole is on our right of way.

Q. And that is on the opposite side of the fence?

A. It is on our side of the fence from the tomato patch.

Q. And that is the other side of the hedgerow that wasn't killed?

A. Yes, sir.

Mr. Rosenberger: We offer that as Defendant's Exhibit I-1. You may examine.

RE-DIRECT EXAMINATION

By Mr. Carter:

Q. I might ask you a question or two I didn't ask you. I believe your company sprayed again about August 10th.

A. Yes, sir.

Q. In other words, you sprayed July 19th, 1962

page 308] with brush killer?

A. Yes, sir.

Q. Then on August 10th, 1962 you sprayed again with weed killer?

A. Yes, sir.

Q. From the pictures of your train I believe you have two ways of spraying.

A. That is right.

Q. You have your brush killer that you can spray from the top and bottom of that car?

A. No, the brush killer is only sprayed from the top, from these nozzles here. Now, this arm right here it is not anything in the world but a pipe with little nozzles on it and that pipe is approximately eight feet long and from those nozzles we spray the grass and weeds next to the track.

Q. And that is right on the track.

A. You can see it is not far above it. Now, that swings out. It sticks out eight feet from the ties.

Q. What is the purpose of that?

A. That is to kill the grass right next to the track where the train crew has to walk.

Q. And on July 19th you were using brush killer

page 309] from the top of the train?

A. That is correct

Q. That was from the top of the car and on August 10th you were using the weed killer from down underneath the cars?

A. That is right.

Q. Now, that weed killer, as I understand, won't kill brush but will kill weeds.

A. That is right.

Q. But the brush killer will kill everything?

A. I won't say how much it will kill. There are some things it will not kill but generally speaking it kills vegetation.

Q. It kills vegetation?

A. Yes, sir.

Q. And that is trees, bushes and brush along the right of way and that is why you use it?

A. Yes, sir.

Q. And also it will kill tomatoes?

A. I suppose it would if you put it on them.

Q. You suppose it would. Now, do I understand that you have not sprayed that right of way along the track or the right of way with brush killer since 1962?

page 310] Mr. Rosenberger: Just a minute. We went into that before.

The Court: Members of the jury, retire to your room, please.

(JURY OUT)

Mr. Rosenberger: If your Honor please, you have already ruled that you would not permit that and I understood counsel to say they would not ask the question in front of the jury.

Mr. Rowe: He wasn't talking about whether or not they shut it off when they came through after 1962.

The Court: I understand that before you had a mistrial for that same reason.

Mr. Carter: You don't understand the question.

The Court: You asked was there any further spraying by the railroad after August 20th.

Mr. Carter: What I am talking about is the whole line. You are thinking I am asking about the Anderson property. That wasn't the question before. What I am asking now page 311] is did the railroad spray anywhere. I am not trying to get in they didn't spray on the Anderson property.

The Court: You will have the same thing happen that happened last time if you go into that.

Mr. Carter: The last time you weren't here.

The Court: I know all about it.

Mr. Carter: I remember it quite vividly. What we asked him the last time was whether or not in 1963 they cut the spray off when they sprayed through the Anderson property. That is not what I am asking him now. What I want to ask him is have they sprayed any of the railroad.

The Court: What is the relevancy of that?

Mr. Carter: We want to lay the foundation to show that the brush killed was killed in 1962 when they went along there and that is the reason for it.

The Court: If the spray struck these tomatoes it was poisonous enough to kill the tomatoes and that is a *concessum.*

Mr. Carter: We have pictures to show. They are now saying that they shut that spray off when they went page 312] through there or cut down the pressure so there was a clear demarcation and outside of that demarcation and inside the fence between the demarcation and

the field that it didn't kill anything. That is what the evidence is. We have pictures that show that that isn't the fact; that the spray did kill all the brush along the right of way through this field but we have to show that they didn't spray it at some later time in order to show that that was the spray that killed it rather than some other time. What I want to ask him is did they spray anywhere in that fifty miles after that time, did they spray anywhere along that track with brush killer, not only through the Andersons but through anybody. That is the difference in the two cases. Now, before we asked "Did you shut the thing off in '63?" That is what I got in trouble over. That was on the Anderson property. What I want to ask him now is did they use brush killer on any of the right of way since 1962. It is an entirely different situation.

The Court: I can't see the materiality.

Mr. Carter: The materiality is this: We have pictures taken in 1963 which show the brush was

page 313] killed. Now, I want to show they did not spray for brush after 1962 when they went through there on July 19th, 1962, all along the track, not this particular place I am talking about but the whole fifty miles. Then I am going to undertake to introduce this picture to show that this brush was actually killed all the way across, not where they are claiming there was some demarcation between the field and the right of way. I am laying a foundation. I don't want to get in any trouble. It's an entirely different question from what we asked before.

The Court: Mr. Rosenberger, I will hear from you.

Mr. Rosenberger: If I can follow him.

The Court: I haven't been able to follow him.

Mr. Rosenberger: My understanding is he says "I can show they haven't ever sprayed since that time." He is laying the foundation to establish that everything that is dead must have been killed by the spray a year or two before. Now then, he would eliminate everything else, the frost in between, freezes in between, fires in between,

page 314] everything in the world. Now, he doesn't limit it to the Anderson property. He is now taking up a whole railroad right of way, I don't know how far it goes,

whether it runs from Monroe to Hagerstown or where. We leave the whole gates down. Now, as we have discussed in chambers before, a change in policy, a change in practice or change in conditions is not admissible.

Mr. Carter: This isn't the same thing that we had last time. I want to bring the whole track in this time. It wouldn't be the same objection he had last time.

Mr. Rosenberger: We could have many reasons. We didn't want to get sued by the Andersons for $18,000.00, that would be good enough reason. There are many reasons, the cost of the spray, the operation of the train, the contract between us and Bogel—many reasons why we wouldn't spray.

Mr. Carter: I talked to the witness. This witness will say they only spray ever so many years because it takes that long for the growth to grow back and that is the reason. It wouldn't be because they knew they did any dam-
page 315] age. That is the policy over the whole line. The main thing I wanted to show was there wasn't any spray put on the brush.

The Court: When were the pictures taken?

Mr. Carter: In 1963.

The Court: What part of the year?

Mr. Carter: In July of 1963.

The Court: A year after the damage was done. How do you know whether or not that brush was dead?

Mr. Carter: I want to put on this evidence and then he can prove that frost kills brush or dry weather kills brush and many other things kill brush.

The Court: I am not going to permit it.

Mr. Carter: Then I believe that will be all.

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Mr. Rosenberger: May it please your Honor, the defendant, by counsel, moves the Court to strike the evidence of

the plaintiffs on the grounds that the evidence fails to show as a matter of law that the spray of the Norfolk and Western train affected in any way or damaged their tomato crops.

Enlarging on my statement or my reasons, we only had the witness, Roy J. Cook, and the witness James G. Dunlap, who dealt with the causes or possible causes, you might say, of damage to this crop. Mr. Cook never did see the vines. The Court merely permitted him to say that the tomatoes that he saw, or the thirty-five bushels that he saw showed evidence of sunburn. He had been buying
page 317] them over a period of time and the sunburn got worse. He did not see any evidence of blight on the fruit itself. Now, he did not say that the spray caused the sunburn and he would not have been permitted to say it because of his lack of knowledge under the Court's ruling.

The witness, James G. Dunlap, was permitted to express an opinion as an expert that the tomato crop was not affected by early blight. We know that there are seven diseases and I enumerated four or five of them to the witness Cook from the V.P.I. manual, bacterial spot, late blight, anthracnose, blossom-end rot, and of course, leaf spot and gray leaf spot. Mr. Dunlap, just found no evidence of early blight.

Now, when you get around to the question of saying it was spray we asked him if he knew what kind of spray caused this damage and he didn't know. He didn't know about the sprays. He did know that some sprays were volatile and some weren't; so without that basic information he was not in a position to say that this spray caused the damage. He admitted that one spray is volatile
page 318] and one is not. He did not know which one the railroad company was using. Under those circumstances he was not a position to express an opinion about what caused the damage.

The Court: Mr. Rosenberger, may the Court interpose a question at this time?

Mr. Rosenberger: Yes, sir.

The Court: Isn't it true that in the plaintiff's evidence there appears a *concessum* that if the spray did reach these plants that it was of such a substance that it would destroy the plants? Isn't that a *concessum?* You admitted that during

some course in the plaintiff's evidence that if the spray did reach these plants, which of course is denied, it was sufficient to kill the plants.

Mr. Rosenberger: It was sufficient to damage them.

The Court: Don't we have the testimony of Mrs. Anderson who said she observed the spray and it was like a large fog, as she expressed it, which seemed to go over all the field? That was her testimony.

page 319] Mr. Rosenberger: That is right.

The Court: Right there on that alone wouldn't we have a factual issue which at this stage of the proceedings would be sufficient to go to the jury?

Mr. Rosenberger: The reason I say we wouldn't have a factual issue from her is because she was some distance away from it.

The Court: Wouldn't that be a question of fact for the jury?

Mr. Rosenberger: They would have to guess because counsel could not get her to say which field she saw it go into.

The Court: She said all of the field.

Mr. Rosenberger: She didn't know whether it got over in the tomato field or not and she was so indefinite that is the reason I didn't examine her. I want to go further than that though. They have one expert on this that the spray caused the damage and that is limited to not getting the spray on these tomatoes. Actually I think he harmed the plaintiff's case. He said, and that is the only one that gives an opinion that this spray did it, he says it was

page 320] pure accident that they sprayed the right of way and it was by this volatility, this gas movement from the right of way over into the field that got it uniformly. Then when he was examined on this question and he was told there are two different kinds he doesn't know which one it was and then we got around to the point finally of saying he wasn't an expert on spray so that wasn't enough. Now, as to Mrs. Anderson, we can say she saw spray generally and after that there was damage. That would be insufficient to establish causal connection because of the number of other things that could have caused it like a number of other diseases on tomatoes. You see we are specu-

lating all the time and not pinpointing it that this spray did it, we are making a big cloud like Mrs. Anderson did, she saw it all over the field, not only the tomato field, I think they had seven hundred acres in that farm. It is obvious *her's* was just a general description because she couldn't have seen it over all the fields. Now, assuming she is a hundred per cent right we don't establish the connection page 321] between the extent of the spray that got on them and the damage. You see depending on the amount of spray that gets on a plant will depend on the damage done to it and the only man, and I say again with all deference to the Court, Mr. Dunlap I don't think knows enough to say but it is the plaintiffs who have to live with him, they have to live with him and he is the only one that says this spray actually damaged those tomatoes.

The Court: Wasn't that portion of the testimony brought out by your cross examination?

Mr. Rosenberger: I think he brought it out in direct, I am satisfied of that and I pointed that out, your Honor. You remember he says about the corn and how some of it was done later and it was his opinion it was later. If we don't have him giving an opinion as to spray causing the damage you have no connection between the train and the damage to the tomatoes. It is true you have the train going by in a cloud but there is no actual causal connection. There could have been seven diseases rather than the spray.

The Court: You remember also the testimony page 322] of young Mr. Anderson that the vegetation was moist or wet and that there was a very strong odor of this spray and he observed that on all the plants.

Mr. Rosenberger: That is right.

The Court: I think, Mr. Rosenberger, there is sufficient facts right now and I couldn't possibly sustain the motion.

Mr. Rosenberger: We object and except.

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page 323]

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HENRY ALDRIDGE,
having been first duly sworn, testifies as follows:

DIRECT EXAMINATION

By Mr. Rosenberger:

Q. You are Mr. Henry Aldridge?

A. Yes, sir.

Q. You are not the one on radio?

A. No, sir.

Q. How long have you been working for the Norfolk and Western?

A. Thirty years.

Q. What is your job?

A. Section foreman.

Q. Are you the section foreman in the area where Mr. Anderson's farm is?

A. Yes, sir.

Q. Were you on the spray train on July 19th, 1962?

A. No, sir.

Q. Did you go up there to the farm with Mr. Shepherd on August 15th, 1962 to look at the tomato patch?

page 324] A. Yes, sir.

Q. Did you go into the field?

A. We did.

Q. Did you hear Mr. Shepherd make any statement to Mr. Anderson about the spray not affecting his tomatoes at all?

A. He said he didn't think it did; that they didn't spray that far.

Q. Did you see any ripe tomatoes there that day?

A. Yes, sir.

Q. About how many bushels?

A. I would judge about twenty-five.

Q. Were they on vines or picked?

A. He had some picked.

Q. Did he give you some tomatoes?

A. We ate some, yes, sir.

Q. Did he give you anything else?

A. Yes, sir, gave us some squash.

Q. When Mr. Shepherd told Mr. Anderson he didn't think the spray got as far as the tomato patch what did Mr. Anderson say?

A. He said he thought the vapor went over; that the fog carried the vapor over.

page 325] Q. At what time?

A. At night.

Mr. Rosenberger: You may examine.

CROSS EXAMINATION

By Mr. Carter:

Q. Mr. Aldridge, that was a good crop to tomatoes, wasn't it?

A. Yes, sir.

Q. I believe you said it was one of the best crops you had seen.

A. I don't remember saying that but they were nice tomatoes.

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page 326] R. L. ADAMS,

having been first duly sworn, testifies as follows:

DIRECT EXAMINATION

By Mr. Rosenberger:

Q. You are Mr. R. L. Adams?

A. Yes, sir.

Q. Where do you work, Mr. Adams?

A. Norfolk and Western in Roanoke.

Q. Talk louder so this lady way over here can hear you. How long have you been working for the Norfolk and Western?

A. Seventeen years.

Q. Were you on this spray car on July 19th, 1962 when it passed through or by this farm of Mr. Anderson's?

A. Yes, sir.

Q. Do you have any present recollection now of passing the farm?

A. Not that particular place, no, sir.

Q. You don't remember it particularly?

A. No, sir.

Q. Actually you don't have any recollection of the mile post number or anything like that?

page 327] A. Well, after all of this thing came up we went back into it and found out where it was.

Q. And do you remember now between what mile posts it was?

A. I believe it was between 203 and 202 from Hagerstown.

Q. Were you keeping the chart that controlled the meter reading of the spray or was Mr. Walter Clark doing that?

A. We both alternately kept it. I think at the particular time I was doing it.

Q. Were you actually writing on the record on this day?

A. Yes, sir, part of the day.

Q. Do you have that record with you or does Mr. Clark have it?

A. Mr. Clark has it.

Q. Do you recall from that record whether or not there was any wind that day?

A. No wind recorded.

Mr. Carter: The record would be the best evidence.

The Court: Is that the same record introduced yesterday?

Mr. Rosenberger: No, sir, that is another one.

page 328] Q. Will you take a look at that record and tell counsel how much spray you put out between Mile Post 204 and 203? How do you have it?

A. I think that tomato field was more particularly situated between 203 and 202.

Q. Give me the spray. You keep it by mile posts and you think this was between 202 and 203.

A. Yes, sir.

Q. Give me the spray you put out between 204 and 203.

A. 15.29 gallons of concentrate.

Q. How much did you put out between Mile Post 203 and 202?

A. 12.01 gallons.

Q. How much did you put out between 201 and 202?

A. 16.2.

Q. Based on that record what did you do when you passed the Anderson farm with regard to the amount of spray that you put out?

A. Well, this record indicates that it was a reduction in the amount of spray in that territory.

Q. Does that record indicate to you whether or not there was any wind that day?

page 329] A. The weather is simply marked "clear." If it was windy we would have it so marked and we don't have any wind.

R. L. Adams

Q. If it had been windy you would have marked it?
A. Yes, sir.
Q. Is that the reason you state there was no wind?
A. Yes, sir.
Q. Did you subsequently go to the Anderson farm with Mr. Meadows and Mr. Clark?
A. Yes, sir.
Q. And can you tell me what day you did go?
A. I believe it was September 7th.
Q. When you went down there will you tell us whether you could determine where the railroad train had sprayed along the right of way and if so how you could tell?
A. Well, the spray line was in evidence and as we approached the particular location of the tomatoes we reduced our spray pattern both in pressure and in distance from the track as we passed the field.
Q. How was that shown on the ground when you went back on September 7th?
A. Well, the spray line was in evidence, as I say. I stepped off to the spray line and to the tomato field. From
page 330] the berm line I think I stepped two and a half paces and came up with somewhere in the neighborhood of fifteen feet from the line track.
Q. The spray line was only extended fifteen feet from the center line of the track?
A. Yes, sir.
Q. From there where the spray line stopped over to the fence line on the right of way how far was it?
A. It is thirty-two foot of right of way so it was approximately eighteen feet.
Q. Was there any evidence of any spray damage in that eighteen feet of weeds on your right of way?
A. None that I could see, no, sir.
Q. What did you find there instead of spray damage?
A. Green foliage and a few weeds and small brush.
Q. Will you look at Defendant's Exhibit F-1 which was taken by Mr. Overstreet on September 20th to see if that shows the spray line and also the green over by the fence on that eighteen feet you talk about?
A. Well, I believe it would be on the left of the picture, the green foliage we have been talking about.
Q. That was the same sort of situation when
page 331] you were there on September 7th, was it?
A. Yes, sir, very similar.
Q. Now, looking at this photograph taken by Mr. Overstreet

on September 20th do you see the fencerow?

A. Yes, on the right of the picture.

Q. And that is taken inside the field?

A. Yes, sir, in the field.

Q. Is that the weed that was not killed when you were down there at the time?

A. Yes, sir, green foliage.

Q. Did you see any tomatoes when you were down there then?

A. Yes, sir.

Q. Did you see any weeds in the field?

A. Yes, sir.

Q. What was the condition with regard to weeds?

A. Well, it was right many weeds on that farm.

Q. You know the difference between a weed and a tomato plant?

A. Yes, sir.

Q. Were there many weeds?

A. Yes, sir, right many.

page 332] Q. The spray that you put out is that supposed to kill weeds?

A. Yes, sir.

Q. And it did kill them on the right of way along the fifteen foot stretch?

A. Yes, sir.

Q. But these weeds on the fencerow and inside the tomato patch were not killed?

A. No, sir.

Mr. Rosenberger: You may examine.

CROSS EXAMINATION

By Mr. Carter:

Q. Mr. Adams, I believe on that spray train you have a weed killer, don't you, along the track, a boom or something that comes out of the bottom of the car? Are you familar with it?

A. That wasn't used on this occasion. This was a brush train and we didn't use any boom.

Q. You are familiar with Defendant's Exhibit D showing the cars being used that day?

A. Well, that is not the same car that was used that day.

page 333] Q. It is not the same car that was used that day?

A. No, sir, it doesn't appear to me to be the

same car.

Q. It is not the same car?

A. Of course, the car could have been repainted since that time.

Q. How do you know it has been repainted or isn't the same car?

A. Because I used that car this summer.

Q. You are familar with the car then, aren't you?

A. To a certain extent, yes, sir. I have been on it on two different occasions.

Q. You don't think that is the car. Is weed killer different from a brush killer?

A. As far as I know it is but I am not an expert on it.

Q. You know what they are doing when they spray close to the track from the bottom of the car, don't you, with booms on each side?

A. That is what we refer to as weed spraying.

Q. Did you weed spray along that same right of way later on?

Mr. Rosenberger: We are not talking about any damage done later on.

page 334] The Court: It is in evidence there were two sprayings, July 19th and August 20th, one spray being used was a brush spray and the other was a weed spray. Why are you objecting to it now?

Mr. Rosenberger: He didn't claim any damage from the other spray.

The Court: I understand that.

Mr. Rosenberger: I am trying to keep it down.

By Mr. Carter:

Q. If this brush killer would kill weeds why would you spray for weeds some other time, Mr. Adams?

A. This particular year in this particular area it was not on our program to be sprayed by weed spray.

Q. Only brush spray?

A. Yes, sir, but we had some chemicals left over from our previous weed killing program and felt we had better use it on this particular track.

Q. And used it at a later date?

A. The brush spray does not get down within the berm

line, the ballast line over the side of the track. The weed sprayer is primarily for that area.

Q. Now, Mr. Adams, referring to your chart page 335] here—what do you call that, a log?

A. Well, we refer to it as a log.

Q. If you refer to that log I notice you don't have how much spray was used anywhere else except this particular place. Do you see any other place that shows how much you used or how much you cut down at any other place along the track?

A. No, sir. This is the record here of the discharge.

Q. The amount of discharge there at Mile Post 204 is 70,550. What does that mean?

A. That is gallons of mix.

Q. And Mile Post 203 is 72,600 gallons of mix. Is that right?

A. Yes, sir.

Q. Does that have something to do with how much you put on it?

A. You divide the gallons of mix between two particular intervals by 133 and it gives you the gallons of concentrate.

Q. Now, Mile Post 202 you have got 74,210. As I understand, this field is between Mile Post 203 and 202. Is that correct, so far as you people on the railroad can determine?

A. Yes, sir, I believe that is correct.

Q. So where you had a mix there of 74,210 gal-
page 336] lons on 202 and a mix of 76,203 gallons on 201
I notice up here on 213 mile post you only had a mix of 151,810 gallons. Is that correct?

A. We read the meter as we pass a mile post and it gives us what has gone out at that particular time.

Q. In other words, you put out about 25,000 gallons less up there on Mile Post 213 than you did at Mile Post 202, didn't you?

A. That is the total reading. This is an accumulated reading. It increases as the day goes along.

Q. How many gallons did you put on between 203 and 204?

A. According to this calculation it was 15.29 gallons of concentrate.

Q. Tell me what the gallonage was between 213 and 212.
A. I will have to figure that out.

The Court. What point are you talking about?
Mr. Carter: Between 213 and 212.
The Court: We are interested in what was used between 202 and 203.
Mr. Carter: I want to compare that with what he used at different other places along the railroad, Judge. They claim they were trying to protect these
page 337] crops and I want to see if they were.

Q. What is your figure?
A. 1650 gallons of mix.

Mr. Rosenberger: I don't think he understands you. You are asking him how much spray was discharged in a mile.

The Witness: In this particular mile the mix was 1650 gallons.

The Court: Find out how much was used in between 202 and 203.

By Mr. Carter:
Q. Tell us how much you used in that area.
A. 1610.
Q. Look at this record and see if you can find anything on there that says anything about any wind? Does it say whether it was a wind or whether there wasn't a wind?
A. The condition of the weather says "clear."
Q. It don't say anything about any wind, does it?
A. No, sir.

Mr. Carter: All right, that is all.

page 338] RE-DIRECT EXAMINATION

By Mr. Rosenberger:
Q. Mr. Carter only showed you one of these pictures. I

understood one car was similar and another car looked like the one.

Mr. Carter: Judge, he is telling the witness. He is not asking him a question.

The Court: He said that car did not look like the one.

The Witness: He asked me if that was the car.

The Court: And you said "no."

The Witness: I said "no." It is a similar apparatus.

By Mr. Rosenberger:

Q. Look at this one, Exhibit A. Is that the same one?

A. That is the car.

Q. That is another exhibit Mr. Carter didn't show you. Now, when Mr. Carter was asking you about these totals I understood you gave the amount of concentrate in this mile to be 12.01 gallons of concentrate.

A. I believe that is correct.

Q. Now, when you are looking at this are these

page 339] gallons that come out that leave the water meter?

Isn't that what that reading means when he talks about thousands of gallons?

A. The figures in pencil is the total consumption of that time of day.

Q. That is the total sprayed by that time of day?

A. Yes, sir.

Q. And the next mile you read what it was and write it down and subtract it and see how many total gallons goes out?

A. Yes, sir, in any particular mile.

Q. And when you gave me this figure 15.29 from between Mile Post 204 and 203 that is the amount of concentrate used?

A. Yes, sir.

Q. And 12.01 gallons of concentrate was what was used in the Anderson mile?

A. Yes, sir.

Q. And 16.29 was in the mile after Anderson's?

A. Yes, sir.

Q. Now, Mr. Carter makes a point that this don't say any-

thing about wind. If there had been wind what would you have done?

A. We would have recorded the wind. If the wind had been excessive we would have stopped spraying.

page 340] Q. Mr. Adams, I asked you about Mr. Clark being with you, was this gentleman, Mr. Meadows, with you on September 7th?

A. Yes, sir.

Q. Will you tell me whether anyone took any photographs on that day?

A. I honestly don't remember.

★ ★ ★ ★ ★

WALTER A. CLARK,

having been first duly sworn, testifies as follows:

DIRECT EXAMINATION

By Mr. Rosenberger:

Q. You are Mr. Walter A. Clark?

A. That is right.

Q. And you are an engineer with the railway company?

A. Yes, sir.

Q. Where are you stationed?

A. Roanoke.

Q. How long have you been stationed there?

page 341] A. I went to work for the railway company in 1940.

Q. When I speak of engineer with the railway company what kind of engineer are you?

A. Well, I am classified as a resident engineer.

Q. You don't operate a locomotive?

A. That is right.

Q. Now, were you on this freight train on July 19th when it passed the Anderson farm?

A. I was.

Q. What was your position on that train?

A. I was in charge of the spraying on that train.

Q. How long had you been on that train?

A. In years?

Walter A. Clark

Q. This particular train, how long had you been operating it that year?

A. Well, I would have to look at my log but I think we started in June, about the middle of June.

Q. Middle of June of 1962?

A. Yes, sir.

Q. When you speak of a log do you know whether this is in your handwriting or whether this is in Mr. Adams' handwriting?

A. The first page of this is in my handwriting

page 342] and the second page is in Mr. Adams' handwriting.

Q. What is your practice on the train with reference to keeping up with the amount of spray that you use?

A. Each mile we record the time and the amount of spray used in that mile.

Q. Could you tell us at what time you were at Mile Post 204?

A. When we were at Mile Post 204 it was 1:08 P.M.

Q. What time was it when you were at Mile Post 203?

A. 1:14 P.M.

Q. And when you were at Mile Post 202?

A. 1:20 P.M.

Q. Mr. Anderson's farm is between 203 and 202, do you agree?

A. Yes, sir.

Q. So you were along that mile between 1:14 and 1:20 P.M.?

A. Yes, sir.

Q. Now, we have gotten these records from Mr. Adams and also got them from Mr. Simms who has testified here showing the amount of spray used to be 15.29 gallons between Mile Post 204 and 203; 12.01 gallons between 203 and 202; and 16.29 gallons between Mile Post 202 and 201. Now, Mr. Clark, what does that

page 343] indicate to you, the difference?

A. It indicates in this mile in question that we cut back considerably in the amount of chemical we used.

Q. Now, with regard to wind, what does your record indicate to you?

Walter A. Clark

A. It indicates it was no wind that day because if there is wind we always insert it in the record.

Q. You would show it on your record of that day?

A. Yes, sir.

Q. Did you go back to that farm with Mr. Meadows on September 7th, 1962?

A. I did.

Q. Do you recall whether Mr. Meadows or you or anybody took any photographs that day?

A. I didn't.

Q. Do you recall whether anybody else did?

A. I wouldn't say. I don't know.

Q. When you went back there on September 7th was there any indication to you where the spray line was as against where the growth was?

A. It was a distinct boundary of the spray line.

Q. And how far, approximately, was that
page 344] from the center line of the tracks?

A. I would say approximately fifteen feet.

Q. Then how much distance was there between that spray line and the fence on the right of way?

A. The fence line is thirty-three feet away.

Q. Leaving eighteen feet?

A. Eighteen feet.

Q. Was that sprayed or unsprayed?

A. It was unsprayed.

Q. That is over to the fence?

A. That is right.

Q. Now, along the fencerow what, if anything, did you notice?

A. Well, there was medium light brush and it was green showing no indication whatsoever of having any spray on it.

Q. What about weeds?

A. The weeds were green beyond the line of demarcation.

Q. Now, in the Anderson field what about the weeds in there?

A. The weeds were very high.

Q. What, if anything, would this spray do if the spray got on the weeds?

page 345] A. The spray would kill weeds.

Q. What kind of spray were you using?

A. Brush spray, Veon brush killer.

Q. Is that as strong as weed killer or stronger?

A. Well, it depends on the weed killer and it depends on a whole lot of things. There are so many products that can be used for weed killers that I can't say whether this was stronger than any particular one weed killer.

Q. But this Veon is strong enough to kill brush?

A. That is right.

Q. And strong enough to kill weeds?

A. Yes, sir.

Q. And strong enough to kill tomatoes?

A. Yes, sir.

Q. And if it got on tomatoes it would kill them?

A. It would kill them.

Q. They wouldn't come back or would they?

A. No.

Q. Now, when you went in that patch in addition to seeing weeds did you see any tomato vines?

A. I saw tomato vines.

Q. Did you see any tomatoes?

page 346] A. Saw both red and green tomatoes.

Q. That was on September 7th?

A. September 7th.

Q. Are you *familar* with the preparations, Veon, what kind of base it has?

Mr. Carter: I will have to object.

The Court: Objection sustained.

Mr. Rosenberger: He buys it, Judge. That qualifies him.

Mr. Carter: Judge, I let him get in here what this spray would do. I should have objected. This fellow is not qualified as an expert.

The Court: Mr. Rosenberger, you made objection to a similar thing.

Mr. Rosenberger: I have got the man here.

The Court: Then put the man on.

Mr. Rosenberger: This man has made a study of it.

The Court: What is the materiality? It is a *concessum* in the case if the spray hit the tomato it would kill it.

Mr. Rosenberger: I want to go into the ques-

page 347] tion of volatility.

Mr. Carter: Let him bring his expert.

Walter A. Clark

The Court: The issue is really simple. If the spray hit the tomatoes then they killed the plants and that is a *concessum.*

Mr. Rosenberger: One gentleman said the spray was volatile.

The Court: He said the vapor went over. Do you have any expert who can testify to that?

Mr. Rosenberger: I have one but I want to have two.

The Court: Qualify him first.

By Mr. Rosenberger:

Q. How long have you been dealing in sprays, buying sprays for the Norfolk and Western?

A. Since 1957 and before that I started working with sprays in 1950.

Q. Tell me about your educational background, where were you educated?

A. Roanoke College.

Q. What kind of degree?

A. A.B. degree.

page 348] Q. What, if any, chemical studies did you have?

A. I had one year of college chemistry.

Q. After you got with the Norfolk and Western when did you start working on their spray program?

A. 1950.

Q. Have you worked on it every year from that time until now?

A. With the exception of 1954. I did not work on it in 1954.

Q. Who has to make recommendations for the purchase of spray, weed killers and brush killers?

A. I do.

Q. You make that recommendation?

A. Yes, sir.

Q. Do you know the difference in sprays or brush killers, the different bases of the different ones?

A. I do.

Q. Will you describe to the jury the base of the different sprays as to volatility?

A. Well, the 2-4-D is made up either with a salt base or an ester base, they are the two forms. The ester form is

volatile, the salt form is not volatile.

page 349] Q. When you say 2-4-D is made in two forms you mean you make a brush killer of 2-4-D that has a salt base and another one that has an ester base?

A. Yes, sir.

Q. Tell me what the salt base is with regard to volatility.

A. It is not volatile.

Q. What do you mean by volatility?

A. Well, with the salt base the salt dries on the plant as a salt whereas the ester base has alcohol in it and it goes off in a volatile manner.

Q. What is given off when the ester base 2-4-D dries, what goes away from it?

A. It is a gas or a fume.

Q. If I put the ester base 2-4-D in a saucer and put a plant under a bell and the saucer under the bell but not let them come in contact will the one with the ester base get on the plant?

A. The one with the ester base would kill the plant. If you did the same thing with a salt base it would not kill the plant.

page 350] Q. When you use the ester base is that by direct contact between the spray itself or vapor?

A. That is by the vapor.

Q. Now, the Veon brush killer you were using what sort of base did it have?

A. It is an amine salt.

Q. Do you mean an amine salt is different from other salts you have described?

A. This happens to be one of them. They can make 2-4-D with sodium but amine is the base we buy.

Q. Did you on this particular train have any ester base 2-4-D or 2-4-5-T?

A. No.

Q. What other killer does Veon have in it?

A. What other killer?

Q. What other business like 2-4-D?

A. They have 2-4-5-T.

Q. Those two are mixed with this salt base?

A. Yes, sir.

Q. When you put that on a plant and it evaporates or dries does anything give off from that?

A. Nothing.

Q. The salt stays on it?

page 351] A. The salt stays on the plants.

Q. In using it commercially what benefit does that have over a gaseous one, particularly with reference to rain? Is it effective as if it stays on there a little while, or a long time before a rain comes?

A. We say once it dries on the plant —

Mr. Carter: We object.

By The Court:

Q. What is your opinion?

A. Once it dries on the plant we believe that it has done all it is going to do; that once it has dried on the plant it has entered the plant.

By Mr. Rosenberger:

Q. Does that stuff stay on the plant a long time before it dries? Generally how long does it take to dry?

A. It depends on weather conditions. On a hot, dry day I would say it dries completely within twenty to thirty minutes.

Q. Now, if you use the one with the ester base and put it on a plant in the process of drying what does it give off?

A. I will say this much, it is not particularly dangerous. There is a possibility it will give off vapor but in some years we have used ester base materials and it is not

page 352] dangerous. Most utilities use ester base material because it is a little more effective on certain plants.

Q. But yours was the salt base?

A. The salt base.

Q. And that has no volatility?

A. No volatility.

Mr. Rosenberger: You may examine.

CROSS EXAMINATION

By Mr. Carter:

Q. On what plants is the ester base more effective?

Walter A. Clark

A. There are a lot of different opinions on this.

Q. I want yours.

A. On some of the hardwood trees we believe the ester base is more effective.

Q. How about the weeds and brush?

A. On weeds and brush they are both effective.

Q. The ester base is usually used for spraying weeds rather than brush, as I understand it.

A. The 2-4-D is for spraying weeds only. We have never used the ester base on the Norfolk and Western.

Q. Don't you use the ester base at times?

page 353] A. Not for spraying weeds.

Q. What is more effective for killing weeds, ester or salt?

A. This is one of the questions I am not qualified to answer. We think the amine salt does a satisfactory job.

Q. Do you ever mix them together?

A. No.

Q. You don't mix them together?

A. No.

Q. Let me ask you this: How many feet are in a mile?

A. Five thousand two hundred and eighty.

Q. Do you know how many running feet are in an acre, assuming it is square?

A. I don't remember.

Q. It is seventy square yards and what I am trying to get at is how many running feet there are in four acres of ground, assuming that it was four acres of this man's land along your railroad track.

A. It would depend on whether it was square but I am not qualified to answer that question.

Q. What I want to know is how much distance this four acres of land extended along your railroad tracks.

page 354] Mr. Rosenberger: The evidence is that it was five hundred and thirty-three feet.

By Mr. Carter:

Q. If it was five hundred and thirty-three feet and there are five thousand two hundred and eighty feet in a mile then it was about four thousand seven hundred and forty-seven

feet of other land besides this crop land in that particular mile. Isn't that correct?

A. I don't know. I am not a mental mathematician.

Q. The gallons of spray that was used within that mile was figured from each mile post, was it not?

A. That is right.

Q. Now, that spray car had a regulator on it, I suppose, so you could regulate the amount of spray that was coming out of these turrets, didn't it?

A. Yes, sir, it could be regulated.

Q. And it could be completely shut off, couldn't it?

A. Yes.

Q. Then couldn't you have used all of that amount of spray that is shown on that meter at any particular place within that mile?

A. No.

page 355] Q. Why couldn't you?

A. You couldn't do it unless you stopped the spray train.

Q. Couldn't you have opened it up and used a whole lot more at one point than you did at another point and still it would have shown the same when you got to the end of the mile post?

A. That is possible.

Q. In other words, the fact that you measured from one mile post to the other doesn't really indicate as to how much you used on this particular five hundred and thirty-three feet that this crop was in, does it?

A. No.

Q. You could have shown a low quantity used over the mile but you could have had a high quantity of that amount used on this five hundred and thirty-three feet, couldn't you?

A. It would be possible, yes.

Mr. Carter: That is all.

RE-DIRECT EXAMINATION

By Mr. Rosenberger:

Q. Mr. Clark, in regard to the spray line itself when you

went back there to investigate on September 7th
page 356] did that show whether you used as much or more
or less as you went by the tomato field?

A. It showed the spray was cut down and that probably only one turret was being used when we went by there.

By The Court:

Q. There has been some conflict as to whether there was a wind that day. If there was a wind how would that affect the volatility of that spray?

A. This spray is not volatile. If there had been a strong wind it would have blown the droplets but volatility wouldn't enter into it. The spray could have drifted or the spray could have been blown.

Q. A witness testified to her it appeared to her like a fog that went over that field. Would that have been a natural reaction of this particular spray?

A. No, it would not have been. The natural reaction in this particular case would be to spray something similar to a hose spraying a particular portion of ground.

By Mr. Carter:

Q. Mr. Clark, as I understand it, the moisture from the spray, whether you call it a mist or whether you call it droplets, or whatever you call it, if the moisture from
page 357] the spray got on the tomato plants it would kill
them, wouldn't it?

A. It would have killed them. There would have been no green tomato plants.

Q. I am not asking you that. You just answer the qeustion.

A. All right.

Q. You are a witness representing the railway company.

The Court: He understands that.

By Mr. Rosenberger:

Q. Did you see any live tomato plants when you were there on September 7th?

The Court: He said he did. He saw them green and saw them ripe.

By Mr. Carter:

Q. Mr. Clark, I believe you said you were familiar with this Veon brush killer being used on that particular day when you were spraying the right of way.

A. I was.

Q. I have here a pamphlet on Veon brush killer and I want to see if you agree with what it says. It says "Do not apply Veon brush killer directly to, or otherwise permit it to come into contact with vegetables, flowers, grapes, fruit

page 358] trees, ornamentals, cotton or other desirable plants which are *sensative* to 2-4-5-T and 2-4-D. Do not permit spray mist containing it to drift onto them, since even minute quantities of the spray may cause injury." Do you agree with that?

A. I do agree with that.

Q. This says "Accordingly, applications by airplanes, ground rigs and hand dispensers should be carried out only when there is no hazard from drift." Is that your understanding?

A. That is my understanding.

Mr. Carter: Thank you, sir.

By Mr. Rosenberger:

Q. Mr. Clark, is that drift because of the wind or the pressure you put it out with or does that differ for volatility?

A. That is entirely from the pressure we put it out with.

Q. In other words, that is what that direction on the label is referring to?

A. That is right.

* * * * * *

page 359] AUBREY L. OVERSTREET,
having been first duly sworn, testifies as follows:

DIRECT EXAMINATION

By Mr. Rosenberger:

Q. You are Mr. Aubrey L. Overstreet?

A. Yes, sir.

Q. By whom are you employed?

A. Norfolk and Western Railway Company.

Q. For how long have you been employed with the Norfolk and Western?

A. Since December of 1950.

Q. What department are you in?

A. The photographic department.

Q. In that department is your job just to take photographs and develop them?

A. Yes, sir.

Q. You recall going to the farm of Mr. Anderson on September 20th, 1962?

A. Yes, sir.

Q. At that time did you take photographs of the field?

A. Yes, sir.

page 360] Q. Will you look at what has been designated as Defendant's Exhibit A-1 and tell us what direction that is looking and what day you took it?

A. I took it on September 20th, 1962 and it is looking southeast from the north.

Q. What is that green plant that you see in that photograph?

A. In the foreground?

Q. Yes.

A. That is a tomato plant or the top of one.

Q. Then what is that tall weed or bush that you see there? Is that a tomato plant?

A. That is just a tall weed. I don't know the name of it.

Mr. Rosenberger: We offer that as Defendant's Exhibit A-1.

Q. Will you look at what is designated as "Defendant's Exhibit B-1" and tell us if you took that on the same date, September 20th, 1962, and what direction it was looking.

A. It was looking south from the north side of the field and taken the same day, September 20th.

Q. And that foliage was in there from the north

page 361] side of the field?

A. Yes, sir.

Mr. Rosenberger: We offer that as Exhibit B-1.

Aubrey L. Overstreet

Q. Will you look at what has been designated as Defendant's Exhibit C-1 and tell me in which direction you were looking and what is shown in that?

A. From the southeast corner it is just a close-up more or less of a tomato plant.

Q. And that was taken on the same date?

A. Yes, sir.

Q. Now, what is that red thing I see there in the foreground?

A. It is a tomato.

Q. These are tomatoes shown in the foreground?

A. Yes, sir.

Q. And that shows them as they were at that time.

A. Yes, sir.

Mr. Rosenberger: We offer that as Exhibit C-1.

Q. Now, will you look at the next one and tell me what view that is looking, in what direction? That one is designated D-1. Tell me if you took that photograph on September 20th, '62 and where you were looking.

page 362] A. I took it on September 20th, 1962 and it is a close-up of a tomato plant.

Q. What direction?

A. I don't know the direction. It was just in the center of the field looking down on a tomato.

Q. Would you look at the next exhibit which is designated "Defendant's Exhibit E-1" and tell me if you took that on September 20th, '62?

A. Yes, sir, I did.

Q. Now, which way is that looking?

A. North.

Q. And what is that to the right?

A. It is the railroad right of way.

Q. What is the green?

A. This is a hedgerow.

Q. Along what?

A. On the right side of the tomato field.

Q. And what is that, the end of the railroad right of way and the beginning of the farm? Is there a fence along there?

A. Yes, sir.

Q. And this business is right along that fence?
A. Right along the fence.

page 363] Mr. Rosenberger: We offer that as Exhibit E-1.

Q. Will you look at the next photograph, Exhibit F-1, and tell me if you took that on September 20th, '62 and which way you are looking?
A. I took it September 20th, '62 and it is looking north from the south side of the field.

Mr. Rosenberger: We offer that in evidence as Exhibit F-1.

Q. Would you look at the next one, Defendant's Exhibit G-1, and tell me if you took that on September 20th, '62 and also what that shows?
A. Yes, sir, I took it on September 20th, '62. It is a view east from the southwest corner of the field.
Q. And you have written the directions on the back of all of these?
A. Yes, sir.

Mr. Rosenberger: We offer that as Defendant's Exhibit G-1.

Q. Will you look at the next one designated as Defendant's Exhibit H-1 and tell me if you took that on September 20th, '62?
A. Yes, sir, I took that September 20th, 1962. It is looking north on the west side of the right of way next to
page 364] the tomato field.

Mr. Rosenberger: We offer that as Defendant's Exhibit H-1.

Q. This next one is a photograph designated "Defendant's Exhibit I-1." Tell me if you took that on September 20th, 1962.
A. Yes, sir.
Q. Tell me what direction is it looking.
A. Looking south on the west side of the right of way next to the tomato field.

Mr. Rosenberger: We offer that as Defendant's Exhibit I-1.

Q. Now, will you look at the next one which we have designated as "Defendant's Exhibit J-1" and tell me if you took that on September 20th, '62 and which way you were looking.

A. I took this one on September 20th, '62. It is looking southeast. It is a view southeast of the tomato field looking toward the Anderson home from the northwest corner of the tomato field.

Mr. Carter: We do not object to the photographs.

The Court: The photographs, A-1, through J-1 just qualified and identified are accepted by the Court as exhibits for the defendant.

page 365] By Mr. Rosenberger:

Q. Mr. Overstreet, did you hear Mr. Anderson, Sr. make any statement as to whether the spray got on the tomatoes or not?

A. No, sir.

Q. You did not?

A. No, sir.

Q. Did you observe any tomato plants and any fruit in the field?

A. I saw tomato vines and some tomatoes.

Q. Do you remember whether any were picked that day, any in baskets that day?

A. I don't recall.

Q. That was the only day you were up there?

A. Yes, sir.

Q. And the foliage was that day like it is shown in these photographs?

A. Yes, sir.

Q. At the time you were up there do you recall who was with you?

A. Mr. Meadows and Dr. Chappell.

Mr. Rosenberger: You may examine.

page 366] CROSS EXAMINATION

By Mr. Rowe:

Q. I heard you say that you were an employee of the railroad company. How many years have you been so employed?

A. Since December, 1950.

Q. And was it your main purpose going there September 20th for the purpose of taking photographs?

A. Yes, sir, it was.

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E. L. MEADOWS,

having been first duly sworn, testifies as follows:

DIRECT EXAMINATION

By Mr. Rosenberger:

Q. Will you state your full name?

A. E. L. Meadows.

Q. By whom are you employed?

A. Norfolk and Western Railway Company.

Mr. Carter: We will admit Mr. Meadows can
page 367] identify each one of these photographs taken on
September 20th, 1962 and we will admit that in his opinion they are true photographs of what they represent.

The Court: That portion of his direct examination can then be omitted.

Mr. Rosenberger: As soon as we get to that.

Q. Mr. Meadows, what part of the railway company do you work with?

A. The claims department.

Q. When did you first go to Mr. Anderson's farm about this tomato business?

A. September 7th, 1962.

Q. Who went with you at that time?

A. Mr. Clark and Mr. Adams.

Q. Did you have any photographic equipment with you?

A. Yes, sir.

Q. What did you have?

A. A black and white camera.

Q. At that time was Mr. Anderson, Jr. and Mr. Anderson, Sr. there?

A. Yes, sir.

page 368] Q. Was anything said to you by either of the Mr. Andersons about photographs or you borrowing their negatives?

A. Yes, sir.

Q. And did you borrow the negatives?

A. I did.

Q. And after you borrowed them what did you do with them?

A. I had them enlarged.

Q. Mr. Anderson has admitted on his testimony that he recognizes Defendant's Exhibits D, E, F, G, H and I which are black and white photographs of his field showing the tomatoes. He admits that but he did not recognize Defendant's Exhibit C which is labeled "View southeast from tomato field." Could you tell me where that negative came from that you had that one made?

A. I think that was from a negative I borrowed from Mr. Anderson.

Q. One of the group you borrowed from him?

A. That is correct.

Q. And that is the print that you gave me from the negative that you had?

A. That is right.

page 369] Q. And will you tell me what buildings they are that you see in the mist and fog?

A. That is the Anderson home and farm buildings around the home.

Q. What field is that in the foreground?

A. That is the tomato field involved.

Q. And those had already been taken when you were there then on September 7th?

A. Yes, sir.

Q. As well as all those that you have in your hand?

A. Yes, sir.

Q. And they had been taken by Mr. Anderson because you

hadn't been there before September 7th?

A. That is right.

Q. What did you take a camera up there for?

A. To take pictures of the tomato field.

Q. Did you take any that day?

A. Yes, sir.

Mr. Rosenberger: Now, will you gentlemen stipulate as to these?

Mr. Carter: What day are they supposed to have been taken?

page 370] Mr. Rosenberger: September 7th.

Mr. Carter: We can't identify some of those.

By Mr. Rosenberger:

Q. Mr. Meadows, will you look at what has been designated as "Photograph J" and tell me what that is?

A. That is a photograph of the tomato field involved.

Q. When did you take it?

A. September 7th, '62.

Q. What direction are you looking?

A. Facing north.

Mr. Rosenberger: We offer that as Defendant's Exhibit J.

Q. Does this Exhibit J show the foliage and the weeds and things in the tomato field at the time you took the photograph?

A. Yes, sir.

Q. Now, will you look at what is designated as "Photograph K" and tell me who took it and in what direction you were looking?

A. I took this photograph on September 7th, 1962 and it is facing northeast showing the tomato field involved.

Q. All that foliage and business in there?

page 371] A. Yes, sir.

Mr. Rosenberger: We offer that as Defendant's Exhibit K.

Q. Will you look at Defendant's Exhibit designated "L"

and tell me who took that photograph, when and what it shows?

A. I took this photograph on September 7, 1962 facing in a southwest direction showing the tomato field involved.

Mr. Rosenberger: We offer that as Defendant's Exhibit L.

Q. Will you look at what is designated as "Photograph M" and tell me who took that, what day and what direction?

A. I took that photograph on September 7th, 1962 taken in the southeastern direction showing the tomato field involved.

Q. What is that building there?

A. That is the Anderson barn.

Q. Can you tell where the railroad right of way is in that photograph by any other object in there?

A. Yes, sir.

Q. What is it?

A. I can tell it by the right of way fence.

Q. And what about those wires and that pole?

A. That is the right of way signal light.

page 372] Q. Is that on the railroad right of way?

A. It is.

Mr. Rosenberger: We offer that as Defendant's Exhibit M.

Q. Are these the wires up here that you say is the communications line on the right of way?

A. Yes, sir.

Q. Will you look at what is designated as "Photograph N" and tell me who took that one and when?

A. I took that photograph September 7th, 1962 facing in a southward direction showing the tomato field involved.

Mr. Rosenberger: We offer that as Defendant's Exhibit N.

Q. Will you look at what is designated as "Photograph O" and tell me when that was taken, who took it and what it shows?

A. I took this photograph on September 7th, '62 facing downward really showing the tomato field involved and the tomato plant and a tomato.

Mr. Rosenberger: We offer that as Defendant's Exhibit O.

Q. Mr. Meadows, how was it you happened to borrow Mr. Anderson's photographs?

page 373] A. Because I thought they would illustrate the condition at a date closer to the time it was alleged to have occurred.

Q. Did you make any statement to them about what you wanted to show particularly in the photographs you were having some trouble showing?

A. The photographs at the time I was taking them there were so many weeds in the field I didn't think it would be too accurate and I would like to get photographs closer to the time of the alleged damage.

Q. Were you trying to show something particularly in your photographs?

A. I was trying to show the condition of the tomatoes.

Q. Mr. Meadows, when you talked to Mr. Anderson up there did he make any statement to you about how the spray got on the plants?

A. Yes, sir.

Q. What did he say?

A. He said the spray did not hit the tomatoes but a mist came from it and spread over the entire field.

Q. Was that mist at the time the spray train went by or a subsequent time?

A. At a subsequent time.

page 374] Q. Did he speak of it rising at night?

Mr. Carter: I object to the leading question.

The Court: It is a leading question.

By Mr. Rosenberger:

Q. Did he say at what time the mist came along?

A. No, sir, I don't recall him specifying the time.

Q. Are you the gentleman who took the statement from him.

A. I am.

Q. And are you the same gentleman that took the statement from Mr. W. H. Anderson, Jr.?

A. I am.

Q. Referring to the statement of September 4, '62, headed "Roanoke" that I asked him about yesterday, where did you actually write that statement and where did he sign it?

A. In the claims department office of the Norfolk and Western Railway office in Roanoke.

Q. Did he claim the tomatoes would produce a bushel or a half-bushel?

A. A half-bushel.

Q. Are you sure about that?

A. As well as I recall.

page 375] Q. If you want to review his statements —

Mr. Carter: We object to that.

Mr. Rosenberger: All I want him to do is to refresh his recollection.

The Court: You can't introduce just a portion of the statement.

Mr. Rosenberger: I went over it with Mr. Anderson yesterday and that will take care of it.

Q. Did you take a statement from Mr. Anderson, Sr.?

A. I did.

Q. Do you recall that he told you how many tomatoes they had picked up to the time and how much money it was?

A. Not exactly, but I think it was somewhere around one hundred and eighty-four bushels and $725.00.

Q. Did you go back up there again on September 20th with Mr. Overstreet and Dr. Chappell?

A. I did.

Q. At whose request did Dr. Chappell go?

A. At the request of the Norfolk and Western Railway Company.

Q. He is the gentleman from V. P. I., Dr. Chappell?

A. That is correct.

page 376] Q. When you were up there with Mr. Anderson that time did he make any statements about whether the spray got on the plants directly or whether it

was on there at a later time in a form of a vapor or mist?

A. He said it was in the form of a vapor or mist.

Q. At the time the train went by?

A. I can't recall that, whether it was immediately or subsequent to the train's passage or the following night.

Mr. Rosenberger: I believe you gentlemen may examine.

CROSS EXAMINATION

By Mr. Rowe:

Q. Were you riding on the spray train?

A. No, sir.

Q. That is not one of your jobs?

A. No, sir.

Q. Who did the enlarging of the photographs?

A. The photographic department of the Norfolk and Western in Roanoke.

Q. Was the reason this statement was taken in Roanoke because when Mr. Anderson 'phoned in to tell
page 377] about this damage that someone said they would have to come down there; that you took no information over the 'phone?

A. That could be correct, yes, sir.

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page 378]

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E. L. MEADOWS,

recalled, testifies as follows:

RE-DIRECT EXAMINATION

By Mr. Rosenberger:

Q. Mr. Meadows, when you went up to the Anderson farm on September 7th, 1962 did you, in company with Mr. Anderson, Jr., step the field to get some idea of the measurements?

A. Yes, sir.

E. L. Meadows

Q. And as a result of that stepping to get the measurements did you also write down the rows of tomatoes and where the paths were and that sort of thing?

A. Yes, sir.

Q. Will you look at what we will designate to be "Defendant's Exhibit K-1" and tell me if that is a rough diagram of the field you made.

A. It is.

The Court: Any objection to that being offered in evidence?

Mr. Carter: No objection.

page 379] By Mr. Rosenberger:

Q. Without going into the details this shows the rows of tomatoes and a path, then some more rows and a path and then some squash, cucumbers and watermelons and a path?

A. Yes, sir.

Q. That shows the field parallel to the railroad track and the railroad track, I believe, runs north and south?

A. That is correct.

Q. And it is between the railroad track and the river?

A. That is correct.

Q. That is the James River?

A. That is correct.

Q. Now, Mr. Meadows, you spoke of having Dr. Chappell up there at the Anderson farm on September 20th. Subsequently did he make a written report on the conditions he found?

A. He did.

Q. Did you give a copy of that to Mr. Rowe, attorney for Mr. Anderson and his son or did you give it to Mr. Anderson?

A. I don't recall which one I gave it to but it was given to them.

Q. They have it?

A. Yes, sir.

page 380] Q. On that map you have a green area in there along that fence line. What does that represent?

A. That represents small undergrowth and vegetation that remained green.

Q. Green when you went up there on the 7th of September?

A. That is correct.

Q. And that was between the railroad right of way and the tomato field?

A. That is true.

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RICHARD A. SCHWARTZBECK,
having been first duly sworn, testifies as follows:

DIRECT EXAMINATION

By Mr. Rosenberger:

Q. Will you please state your full name and your address?

A. Richard A. Schwartzbeck.

Q. And where do you live?

A. In Midland, Michigan.

Q. Have you lived there a long time or have
page 381] you just gone there recently?

A. I have been there for one week.

Q. By whom are you employed?

A. The Dow Chemical Company.

Q. For what length of time have you been employed by The Dow Chemical Company?

A. Almost four years.

Q. And prior to this last week that you were moved out to Midland, Michigan where were you stationed?

A. I lived in Arlington, Virginia.

Q. And where was your place of business with Dow Chemical Company?

A. It was in Washington, D. C. office.

Q. What department of The Dow Chemical Company do you work in?

A. I am in the Bio-Products Department.

Q. And what do you do in the Bio-Products Department?

A. I am in the Plant Science Research and Development section of this department.

Q. And in that section what do you work with?

A. I work with herbicides and plants.

Q. And what are herbicides?

page 382] A. Herbicides are weed killers and brush killers.

Q. Is it accurate to state that you do research to determine the effects of herbicides such as weed killers and brush killers on vegetation, brush, plants and weeds?

A. Yes, sir.

Q. Prior to going to work with Dow Chemical Company — by the way, you are still within the same department except you are transferred out to Midland, Michigan?

A. Yes.

Q. Prior to going to work with The Dow Chemical Company by whom were you employed?

A. I was at the University of Minnesota.

Q. Let's start back at the beginning. Where did you first go to college?

A. At the University of Wisconsin.

Q. And what degree did you obtain there?

A. I obtained a Bachelor of Science degree with a major in soil.

Q. And a minor in what?

A. Botany and plant physiology.

Q. When did you get that degree?

A. 1954.

page 383] Q. Then in 1955 where were you?

A. I was at the University of Wisconsin. I received a Master's degree in 1955.

Q. What was that in?

A. Major in soil and minor in plant physiology.

Q. And from Wisconsin where did you go?

A. I went to Texas. I was on the staff as an agronomist for two years.

Q. Tell me what an agronomist does.

A. He is concerned with the study of field crops and field production, all phases of it, fertilization and weed killing and irrigation.

Q. And how long were you in Texas?

A. Two years.

Q. Then where did you go?

A. To the University of Minnesota.

Richard A. Schwartzbeck

Q. And what did you do there?
A. Finished getting my Doctor's degree.
Q. And was that a *P.H.D.*?
A. Yes, sir.
Q. What is that in?
A. Soil chemistry, minor in botany.
page 384] Q. Now, after getting your *P.H.D.* in '58 what did you do in that field?
A. I stayed on for approximately two years as a postfellow.
Q. At the University of Minnesota?
A. That is right.
Q. Now, can you tell me what trade name Dow Chemical Company uses for its brush killer, or one of its brush killers?
A. Well, we have several different types.
Q. Do you put out one known as the Veon brush killer?
A. Yes.
Q. Do you know whether or not that is the same Veon brush killer used by the Norfolk and Western Railway Company?
A. Yes, it is.
Q. Will you tell me what are the killing elements in that Veon brush killer that affects weeds and brush?
A. It is the acid that affects the weeds.
Q. What kinds of acid are they?
A. They are known as 2-4-D and 2-4-5-T.
Q. And they are acids with those numbered names?
A. That is correct.
Q. And they are combined and used in that brush killer?
page 385] A. That is correct.
Q. Now, what kind of base do you use with Veon with those acids?
A. With Veon we use a salt base.
Q. What kind of salt is used in 2-4-D?
A. Dimethylamine salt.
Q. And what is the base of the 2-4-5-T?
A. Triethylamine salt.
Q. Now, Doctor, how does that type of killer differ from the type that has an ester base?

Richard A. Schwartzbeck

A. In general we have two types. You have your salt base like this Veon and then what we call an ester base. The difference between the two is that the ester formulations are volatile and the Veon we are talking about is not volatile.

Q. Now, when you use an ester base killer what are the acids in there?

A. They are the same acids.

Q. They are the same acids used in your 2-4-5-T but they have a different base?

A. Yes, sir.

Q. Explain to the jury what the ester base is.

A. The term "ester" is a chemical term and in

page 386] making these weed killers we react the acid 2-4-5-T with alcohol.

Q. When that type spray is put out and is put on the plant what happens during the course of the evaporation of the spray? What is the reaction between alcohol and the acid?

A. When an ester base chemical is applied to a plant if we are using what we call a high volatile ester the complete chemical will volatilize or evaporate and leave the surface of that plant in the gaseous form.

Q. To get it to the particular area will you give us an example of using that sort of base killer under a bell with a plant and a killer that is of a salt base under a bell?

A. In simple language an ester base could be compared with something like gasoline. When that is spilled on the ground and the sun hits it it will all evaporate and will be nothing left. With the salt base in case the same thing happens, you spill it on the ground, just the water evaporates and this salt with the chemical is left on the ground. This can be compared to your tea kettle where after awhile boiling water you get a precipitate form in the tea kettle and it fills up. That is the scale. The water is gone but all the chemical stays there.

Q. To give an example of the bell and the

page 387] vegetable plant under the bell and how this volatility works tell me about what happens if you put a plant under a bell like you used to see them in ladies' windows and then put some of the ester base under that bell, does the ester stay and not get on the plant or does it? Tell us what happens.

Richard A. Schwartzbeck

A. In a situation like that all the chemical which is in the ester form would leave this little cup that is underneath the bell or jar. It would vaporize or volatize and get into the air and you could not see it and it would affect the plant's growth.

Q. Now, by the same token if you put in that saucer instead of ester some of this salt base veon what would happen?

A. Under the same situation the water would evaporate from the chemical and you would see a white precipitate on the saucer. The chemical would not go into the air.

Q. What effect, if any, would the salt on the saucer have to do with the plant? Would it kill the plant like the ester would?

A. No, it wouldn't.

Q. Now, Doctor, assuming for the purpose of this question that the Norfolk and Western was using a mixture of one to one hundred and thirty-three of the Veon, one

page 388] gallon of Veon to one hundred and thirty-three gallons of water, and if that was sprayed so that it dampened the foliage of all the tomato plants in the field tell us, if you will, what would happen to those tomato plants if you had direct contact.

A. If there were a direct contact between the tomato plant and the chemical within three or four hours you would see drooping and wilting of the plant.

Q. What would follow?

A. Within possibly two to three weeks all of the plant would be completely dead.

Q. Would those plants grow back so as to produce tomatoes later on?

A. No, they would not.

Q. In other words, it would kill the plant?

A. It would kill it and would stop all growth.

Q. On the other hand, if you sprayed a right of way fifteen feet out from the track and left a buffer zone eighteen feet wide separating the sprayed area from the tomato patch by eighteen feet of buffer zone, if you put the Veon on the fifteen feet strip and did not put it on the eighteen foot strip and had a fencerow that was green such as is shown in Defendant's Exhibit E-1, you see that green hedge-

page 389] row or fencerow in that exhibit?

A. Yes.

Richard A. Schwartzbeck

Q. If you had that separating the sprayed patch of fifteen feet could the Veon get over into the field and damage the the tomatoes at all?

A. Not likely.

Q. If you put it all down on this fifteen-foot strip and none of it touched the other could it do any damage?

A. No, it couldn't.

Q. Now, looking at this tomato vine in Defendant's Exhibit D-1 do you see any green plants in that?

A. Yes.

Q. That was taken on September 20th, according to the evidence. If that plant had been hit by this spray on July 19th would it be green like that?

A. No, it would not.

Q. What would it be?

A. It would be dead.

Q. I don't believe I asked you but during your experiments with plants have you experimented with weed killer on tomato plants?

A. Yes, I have.

page 390] Mr. Rosenberger: You may examine.

CROSS EXAMINATION

By Mr. Rowe:

Q. Doctor, do you recognize this pamphlet put out by your company?

A. Yes.

Q. Do you recognize these words in this pamphlet under the heading of "Use Precautions?"

A. Yes.

Q. I will read this to you now for the benefit of the record: "Do not apply Veon brush killer directly to, or otherwise permit it to come into contact with vegetables, flowers, grapes, fruit trees, ornamentals, cotton or other desirable plants which are *sensative* to 2-4-5-T and 2-4-D. Do not permit spray mist containing it to drift onto them, since even minute quantities of the spray may cause injury. *Course* sprays are less likely to drift." Do you agree with that?

A. Yes.

Q. I will continue reading this: "Do not contaminate irrigation ditches or water used for domestic purposes. Do not store near fertilizers, seeds, insecticides or fun-
page 391] gicides. Excessive amounts of 2-4-5-T acid and 2-4-D acid in the soil may temporarily inhibit seed germination or plant growth. Because of the difficulty of thoroughly cleaning sprayers and other equipment used with 2-4-5-T and 2-4-D formulations, such equipment should not be used for handling or applying other agricultural chemicals. Shipping containers should not be re-used for any material which will be applied to desirable vegetation." Do you agree with what is said in those precautions?

A. Yes, sir.

Q. This says "Applications should be carried out only when there is no hazard from drift." Do you agree with what that says?

A. Yes.

Mr. Rowe: That is all.

RE-DIRECT EXAMINATION

By Mr. Rosenberger:

Q. Doctor, is there any difference between the word "drift" used in those directions and the word, "volatility" that you have explained to us as a mechanical or chemical pro-
cess?
page 392] A. Yes. Drift is the actual movement of liquid particles through the air. Volatile is movement of the chemical in a gaseous form. You cannot see that.

Mr. Rosenberger: I believe we are through with him.

RE-CROSS EXAMINATION

By Mr. Rowe:

Q. From your testimony mist is visible to anyone observing or looking in that direction?

A. No, not necessarily.

Q. You mean a mist is a drift of particles of water?

A. Particles of liquid, yes.

Q. And it would be visible?
A. Not necessarily.
Q. Is a fog visible?
A. Sometimes it is.

By Mr. Rosenberger:
Q. Doctor, will this Veon kill corn?
A. No, it won't.
Q. It will not?
A. No.
page 393] Q. You have tested it?
A. Yes, I have.

* * * * *

W. E. CHAPPELL,
having been first duly sworn, testifies as follows:

DIRECT EXAMINATION

By Mr. Rosenberger:
Q. Will you please state your full name?
A. William E. Chappell.
Q. And what is your profession, Doctor?
A. I am a professor of Plant Pathology and Physiology at V. P. I.
Q. Where did you receive your first degree and what was it?
A. Louisiana Tech in general agriculture.
Q. What year?
A. 1939.
Q. And what was that degree?
page 394] A. Bachelor of Science.
Q. Then following that in 1939 what did you do?
A. I did graduate work.
Q. Did you get any degree as a result of that work?
A. Master of Science in Horticulture.
Q. In what year?
A. 1941.
Q. And from there where did you go?

W. E. Chappell

A. Assistant County Agent at Livingston Parish, Louisiana and Homer, Louisiana was my headquarters. I worked there until October, 1943.

Q. Then where did you go?

A. I went to Cornell University Graduate School.

Q. What did you do there?

A. I worked toward a Doctor's Degree in vegetable crops.

Q. And what kind of work did you do on crops?

A. I worked with various vegetable crops and we learned how to actually grow them to the best advantage and I worked on weed control in vegetable crops.

Q. When did you get your Doctor's Degree?

A. 1947.

Q. And then until 1951 where were you?

page 395] A. I went to the University of Connecticut as assistant professor and I was Extension Vegeable Inspector.

Q. Then following that where did you go?

A. I worked for the United States Department of Agriculture in Washington and in Maryland.

Q. What kind of work did you do in Maryland?

A. I had charge of the field testing and approving labels for herbicides — that is, testing to see if they were doing the job that they were supposed to do and approved the labels for their use in interstate shipment.

Q. Now then, in 1951 where did you go?

A. I went to V. P. I.

Q. And you have been at V. P. I. from '51 down to now?

A. Yes, sir.

Q. What is your title there?

A. Professor.

Q. Professor of what?

A. Professor of Plant Pathology and Physiology.

Q. Will you tell us what plant pathology and physiology consists of?

A. Plant Pathology is the study of diseases affecting plants and physiology is the study of the growth of

page 396] plants, how to grow them, how to kill them, any phase — anything that has to do with the growth of plants.

W. E. Chappell

Q. Are you a member of any professional societies?

A. Yes, I belong to the American Society of Plant Physiologists, Weed Societies of America, the Southern Weed Conference, the Northern Weed Conference, the Virginia State Horticultural Society.

Q. Are you listed in any magazines or professional papers or books?

A. Yes, I am listed in the American Men of Science.

Q. Any other?

A. I believe that is all, the memberships in the various societies I have mentioned.

Q. Dr. Chappell, at the request of the Norfolk and Western Railway Company did you go to the tomato patch of Mr. W. H. Anderson, Jr. and Mr. W. H. Anderson, Sr. near Natural Bridge on September 20th, 1962?

A. Yes, sir, I did.

Q. Will you tell us what you saw when you got there?

A. Well, the tomato field in question was showing signs of diseases of some kind. The leaves were almost all brown, lots of them had dropped off, and there was blight

page 397] lesions on the leaves, stems and a few on the fruit.

Q. Were there some green leaves?

A. Some plants still had green tips on them, yes, sir.

Q. Did you see any fruit of any kind?

A. Well, yes, there was a good many tomatoes. A lot had fallen off the vines and a lot was still on the vines.

Q. Ripe or green?

A. Both ripe and green.

Q. Now, as you approached the field walking from the railroad track did you notice any spots that showed where a weed killer had been used on the right of way?

A. Yes, sir. The right of way of the railroad had been sprayed and then there was a green area up and down the tracks.

Q. Will you look at Defendant's Exhibit H-1 and tell me if that shows the line of spray along the railroad track?

Mr. Carter: Let him testify.

W. E. Chappell

By Mr. Rosenberger:

Q. Tell me what it shows.

A. That shows evidence of spray along the track there where the weeds along the edge were sprayed.

Q. Do you notice any difference in the color or are all the colors the same along the right of way?

page 398] A. Well, there are more dead weeds and plants along toward the track and in the background there is some green vegetation.

Q. I call your attention to that green vegetation in the background. Did that green vegetation show any evidence of any weed killer on it?

A. No, sir. It was a strip that extended, I don't recall the exact footage, but some twelve or fifteen feet out from the roadbed was sprayed. There was an unsprayed area before you got to the fence of the field there.

Q. Then after you got to the fence what did you notice along the edge of the fence?

A. Well, behind the hedgerow along the fence where the brush and weeds were there was no vegetation that indicated any damage from weed spray that had been put out, whereas in front of the fence back toward the track there was definite signs of dead weeds and brush.

Q. Will you look at Defendant's Exhibit E-1 and tell us what you see in that photograph?

A. Well, you see the green vegetation on the backside of that hedgerow that went along the fence between the field and the tracks.

page 399] Q. Is that the hedgerow that separated the right of way from the tomato field?

A. Yes, sir.

Q. As you see it in the picture and as you saw it that day did that green hedgerow show any signs of spray?

A. None of the weeds or other plants showed any symptoms of a weed spray.

Q. Now, first let me ask you this: Would this Veon brush killer kill weeds as well as tomato plants?

A. Yes, sir, it will kill weeds.

Q. Will you look at Defendant's Exhibit A-1 and tell me what you see in that tomato field?

W. E. Chappell

A. Well, I see what looks like three or four different kinds of weeds in there and a few tomato plants.

Q. Can you see any evidence of any weed killer on any of those plants?

A. No, sir.

Q. Doctor, based on your experience with weed killers and with tomato plants if you put Veon weed killer, one to one hundred and thirty-three mix on a tomato plant how soon will it take to kill it?

page 400] A. It will vary a little bit, depending on temperature, but to kill it completely it would take two to three weeks to kill it.

Q. From the time you put it on there until the time it dies is there any way to reverse the process to keep it from dying?

A. No, sir, once it is exposed to the concentration you mentioned there there is nothing you can do to save it.

Q. Now, looking at Defendant's Exhibit C and Defendant's Exhibit D which have been introduced here as photographs of that patch on September 20th, do you see any plants — looking first at D, tell us what you see there.

A. Well, it is some tomato vine plants there and a couple of weeds. It looks like one morning-glory in there. I would have to see it in living form to identify it.

Q. Doctor, is that picture sort of typical of the different plants and the growth that you saw there?

A. That is fairly typical. I think most of them had more signs of this disease or blight that I mentioned.

Q. Looking at this Exhibit C-1 tell me what you see in that photograph.

page 401] A. This shows the old tomato vines that have been diseased so long they are turning gray; also shows most of the leaves have dropped off of the tomato plants and looks like these in this particular picture the biggest part have practically died.

Q. Now, after you saw those signs on those plants did you arrive at a conclusion as to what caused the leaves to fall off?

A. I immediately saw the typical results of early blight disease. I wasn't sure if that was all they had and I took samples. I pulled up plants, roots and all, entire plants and took them back to the laboratory where I could look at them

under a microscope and could look at the leaves under a microscope and also see if there was any other diseases present.

Q. After you took them back to your laboratory for examination did you find any other diseases?

A. No, sir.

Q. Did that laboratory test confirm or deny your first diagnosis?

A. It confirmed my first diagnosis.

Q. Now, when you were there on September 20th did you see much fruit?

A. Yes, there was a considerable amount of fruit, a lot of it had decayed.

Q. Tell me what causes early blight.

page 402] A. Well, it starts out as a very small infection on the leaves of the plant. These spots on the leaves will expand, that is, they will continue to grow. The disease organism continues to get on the leaves of the plant and will expand and in severe cases will completely kill the leaves.

Q. When it first starts killing them what color does it turn?

A. What color does the leaf turn?

Q. Yes, sir.

A. They turn yellow first.

Q. And from yellow what does it go to?

A. They turn brown.

Q. When they have gotten brown and died and drop off what happens to the fruit that is ripening?

A. Well, anything that knocks the leaves off leaves the fruit exposed to the direct rays of the sun and you have what is known as sunscald spots on the tomatoes.

Q. Did you see any sunscald on some of these tomatoes?

A. Yes, sir, most of them did have sunscald.

Q. This disease you spoke of you say it gets on the leaf and it grows outward, the circle gets larger?

A. That is right.

page 403] Q. What type of disease is that?

A. That is a fungus disease that grows in steps. It will grow for awhile and then stop and it results in circular rings around the spots and it has a target type appearance. It is very often referred to as a target blight because it makes concentric circles as it expands.

W. E. Chappell

Q. Do weather conditions have anything to do with this type of fungus?

A. Yes, sir, it always spreads much worse when it is fairly cool and humid. Dampness helps it to spread.

Q. If humidity will affect it what does rain have to do with it?

A. Rainfall is the same way, the rains splashes it around and transfers it from one leaf to another and gets it under the stems and to the roots.

Q. Does it spread faster in wet weather or dry weather?

A. It spreads much faster in wet weather.

Q. Now, if you have had this on your plants and the growing season hasn't ended do the plants ever come back out?

A. At times the tomato plant will continue to grow, the yellow portion that hasn't been affected grows and makes fairly normal growth.

page 404] Q. Did you see any evidence of any such condition in this tomato field?

A. Yes, sir. Some of the plants had recovered in that manner, the uninjured stems of the tomato plants were green and a few leaves were growing and even blossoming and some new fruit had been put on since the disease had run its course.

Q. How many diseases are there to tomato plants, just this one early blight?

A. Oh, no, probably a dozen or more. The more common ones are early blight and late blight and wilt, bacterial spot, leaf spot and bacterial cancer, and there are several more.

Q. Are there other diseases that will twist leaves as well as this early blight making the leaf dry up or curl them?

A. Yes, the late blight will do that and also fusarium wilt.

Mr. Carter: If he didn't find anything but early blight what is the sense in going into that?

Mr. Rosenberger: I am just asking him about the different diseases. He only found one. I want to qualify him as to diseases.

The Court: You have already qualified him.

page 405] By Mr. Rosenberger:

Q. Now, doctor, have you made some photographs showing blight conditions?

A. Yes, sir, I have.

Q. While those gentlemen are looking at the photographs I will ask you this: Did Mr. Anderson make any statement to you about whether or not he had dusted his tomato crop that year for blight to prevent blight?

A. Yes, sir, I asked him whether if he ever used anything to control blight.

Q. What did he say?

A. He said that the variety of tomatoes he was growing did not have blight and that he had not sprayed or dusted them for it.

Q. Did you make any comment in your report about the practice of dusting?

A. Yes.

Q. What is your reaction to that?

The Court: A report to whom?

Mr. Rosenberger: He reported to the Norfolk and Western and a copy went to Mr. Anderson.

The Court: He couldn't bind the Anderson's.

page 406] Mr. Rosenberger: I want to be certain if he commented on that.

The Court: You can ask if he made a report but I don't think you can go any further than that.

Mr. Rosenberger: Without him saying what he advised I want to know if he commented to us.

The Court: All right, and stop at that.

By Mr. Rosenberger:

Q. Did you comment on it in your report as to whether or not somebody should use dust to prevent blight?

A. Yes, sir.

Q. Now, you say Mr. Anderson said he didn't use it because he didn't need it?

A. That is what he told me, yes, sir.

Mr. Carter: Judge, apparently these are pictures of some other field and we don't know anything about them.

Mr. Rosenberger: I am going to establish them right now.

The Court: Members of the jury, retire to your room.

W. E. Chappell

(JURY OUT)

page 407] The Court: What do you intend to show by these pictures?

Mr. Rosenberger: Let me ask him a few questions.

Q. Dr. Chappell, did you take Defendant's Exhibit P?
A. Did I take it?
Q. Yes, sir.
A. I don't believe I had a camera with me that day.
Q. Look at the back of it and see if that is one you took.
A. This is a picture of one of our experimental plants at V. P. I.
Q. That is what I am getting at. That photograph shows what?
A. This shows early blight as it affects the foliage of tomatoes.

By The Court:
Q. Was that picture taken at the Anderson farm?
A. No, sir.

Mr. Rosenberger: These are typical examples of early blight which I think is enlightening to the jury and this gentleman can identify them as such.

page 408] The Court: He has already described the symptoms of blight and the damage that progressively appears on the plants caused by this blight.

Mr. Rosenberger: I want to compare these pictures with the pictures of Mr. Anderson's to show they have the same characteristics.

Mr. Carter: I object to it.

The Court: I think you are going into a danger zone. It might mislead the jury. They have other photographs and Dr. Chappell has testified and certainly it has been established he is an expert in plant pathology. These pictures were taken elsewhere and they may have been different types of plants and different types of soil and they might confuse the jury and mislead them in the case and we certainly want to stay away from that.

Mr. Rosenberger: I want this gentleman to make compari-

sons between this blight shown in these photographs, blight of typical tomato plants and typical early blight to compare that to these vines shown in the photographs taken of the Anderson tomatoes.

The Court: He can look at these photographs taken of the Anderson's tomato crop and testify
page 409] whether they were affected by blight and not by spray and I think that is as far as you can go.

Mr. Rosenberger: For the record I want to identify them and note my exceptions.

The Court: All right.

By Mr. Rosenberger:

Q. Doctor, Defendant's Exhibit No. P is an example of early blight taken from a test plot at V. P. I.?

A. Yes, sir.

Q. Now, would you look at Defendant's Exhibit Q and tell me what that is?

A. That is a typical blighted leaf. That shows a different stage, a little further stage than the one that came before, where most all of the leaves are dead and the fruit exposed.

Q. What kind of blight is that?

The Court: Mr. Rosenberger, I don't wish to appear too meticulous but I have refused you permission to introduce those photographs.

Mr. Rosenberger: That is right.

The Court: You were going to merely identify the photographs for the record and except to my rul-
page 410] ing for the reasons you stated. I don't believe you should go into all the details on the pictures.

Mr. Rosenberger: The only reason is you can't look at the pictures with an uneducated eye and tell what we are missing. I want the witness to say what each picture represents.

The Court: If this case goes to the Court of Appeals the pictures will accompany the record.

Mr. Rosenberger: I don't suppose those gentlemen could look at them and know that is the same kind of blight.

The Court: They will know that these pictures were not taken on the Anderson farm.

Mr. Rosenberger: That is right. All I want them to know

is these are tomato plants with early blight.

The Court: Why don't you just state it for the record?

Mr. Rosenberger: All of these photographs, Defendant's Exhibits P, Q. R and S all show early blight.

Q. Is that correct, Dr. Chappell?

A. Yes, sir.

page 411] Q. And if you compare them to the photographs of the Anderson farm it seems the same, does it not?

A. It appears to be the same disease.

By The Court:

Q. For the record, am I correct in recalling that your testimony was that in your opinion, after viewing the plants and the fruit at the Anderson farm in September that is was your opinion, as an expert in this field, that these plants were infected by an early blight?

A. By an early blight, yes.

Q. And you rule out the possibility that they were affected because of the spray? Is that the gist of your testimony?

A. Yes, sir.

Mr. Rosenberger: That is clear.

The Court: I want to be fair to both sides.

Mr. Rosenberger: I have two more I want to show him while the jury is out. These are not taken at the Anderson's but they show weed killer damage.

Mr. Carter: We object for the same reasons.

The Court: I refuse them for the same reasons.

page 412] By Mr. Rosenberger:

Q. Dr. Chappell, will you look at Defendant's Exhibit U and V and tell us whether or not they show weed killer damage to tomato plants at different stages?

A. Yes. This one certainly shows typical distortion of the stem and leaves of the plant.

Q. That is Exhibit V. Exhibit U, is that early or a later stage?

A. This was a little bit earlier stage. Only the tips are

showing it there. It probably could be a less exposure to the chemical or a later exposure.

By The Court:

Q. There is one thing I would like to get in the record also. These exhibits have been accepted in evidence thus far. The colored picture is a picture which is accepted as evidence. You personally viewed that?

A. Yes, sir.

Q. And in corroboration of the pictures you have stated your opinion openly here before the jury that this shows every indication of early blight and not damage by spray?

A. Not by weed spray.

Q. And you did refer to these colored photo-
page 413] graphs as you testified before the jury?

A. Yes, sir.

The Court: Bring the jury in.

(JURY PRESENT)

By Mr. Rosenberger:

Q. Doctor, assuming for the purpose of this question — I don't believe when you were up there on the 20th of September you counted the number of plants.

A. No, sir.

Q. Assuming for the purpose of this question there were six thousand two hundred and seventy plants in the field, and assuming that the plants would produce a bushel of tomatoes each, how many pounds usually make a bushel?

A. Sixty pounds make a bushel.

Q. Assuming that I am right in multiplying sixty by six thousand two hundred and seventy with a result of getting three hundred seventy-six thousand two hundred pounds of tomatoes from that crop over a period of a season, and assuming that I am right by dividing two thousand pounds into that number and I get forty-seven tons — no, first, that we had three and a quarter acres of tomatoes, and
page 414] dividing the pounds by dividing two thousand pounds into the total I come up with forty-seven tons per acre, now, based on your knowledge of the tomato

growth in this state since you have been at V. P. I., what is the average production of tomatoes a ton in the state?

Mr. Carter: He hasn't qualified him as being a marketing expert in tons or anything else and I object to all this.

By Mr. Rosenberger:

Q. Are you *familar* generally with the production of tomatoes by the acre?

A. Yes, sir.

Q. In the State of Virginia?

A. Yes, sir.

By The Court:

Q. Have you observed the soil and the conditions on the Anderson farm?

A. Yes, sir.

Mr. Carter: I want to object to this. He is not a market expert. I don't know how *familar* he is with the State of Virginia. He has one little part at V. P. I.

page 415] By The Court:

Q. Do you hold yourself out as an expert in the field of marketing?

A. I don't know what an expert is but I review the records of the results of the farms in the state. I would like to elucidate if I may. I checked the yearly average production in the state. Those figures come out every spring and I go over them.

Q. You feel you are *familar* with those?

A. I am *familar* with those.

By Mr. Rosenberger:

Q. Could you tell me what the average yield per acre of tomatoes is in the State of Virginia?

A. Taking the last three years as an average it is a little over six tons per acre.

Q. Where is the best production in the state?

A. On the Eastern shore.

Q. And what is the best tonage reported there?

A. From their individual reports it is occasionally twenty to twenty-five tons.

Q. Have you heard any reported as high as forty-seven tons an acre?

page 416] A. No, sir.

Mr. Carter: We haven't said it was forty-seven tons, that is Mr. Rosenberger's figures.

The Court: Mr. Rosenberger said "Assuming my mathematics are right."

Mr. Rosenberger: He has a lot of figures down there and he knows if they are right or not. You may examine.

CROSS EXAMINATION

By Mr. Carter:

Q. Dr. Chappell, would you mind taking a pencil and see if you are a better mathematician than Mr. Rosenberger.

A. Sometimes I wonder about my mathematics.

Q. You are not an expert in that?

A. No, sir.

Q. Before you start, I might ask you if it isn't true that tomatoes weigh approximately fifty pounds per bushel.

A. Well, they are measured at fifty pounds to sixty pounds a bushel. Tomatoes vary a little bit but I guess for marketing purposes you are correct.

Q. Then if I am correct Mr. Rosenberger

page 417] wasn't exactly right on his pounds, was he?

Mr. Rosenberger: Excuse me. His own witness said his tomatoes would run sixty pounds to the bushel.

By Mr. Carter:

Q. You are *familar* with the United States Department of Agriculture's figures?

A. Yes, sir.

Q. And I believe the United States Department of Agriculture says the weight of a bushel of tomatoes is fifty pounds.

A. All right, I stand corrected.

W. E. Chappell

Mr. Rosenberger: You mean to say your client is wrong when he says sixty pounds to the bushel?

The Court: What is the objection?

Mr. Rosenberger: He is bound by what Mr. Anderson said and he told us his tomatoes ran sixty pounds to the bushel.

The Court: I believe on cross examination Mr. Carter has the right to ask your witness this question.

By Mr. Carter:

Q. Let's split the difference, put down six
page 418] thousand two hundred and seventy bushels and multiply it by fifty-five pounds to a bushel and what do you get?

A. Three hundred and forty-four thousand eight hundred and fifty pounds.

Q. And how many tons is that?

A. 172.4 tons.

Q. Then if you divide that by 3.25, the number of acres, then how much do you get per acre?

A. Fifty-three tons per acre.

Mr. Rosenberger: He wouldn't take my figures.

Mr. Carter: I will let that go temporarily until I get my mathematics straight.

Mr. Rosenberger: You mean you will take my figures.

By Mr. Carter:

Q. Mr. Chappell, I believe it was two months after the alleged damage was done on July 19th, approximately two months, before you saw the tomatoes at all. Is that the only time you went down there, on September 20th?

A. Yes, sir.

Q. And it was lacking one day of being two months. Is that correct?

page 419] A. I will have to get my calendar.

Q. It happened July 19th and you went down there on the *21st* so roughly it was two months.

A. That is correct.

Q. Do you say that this Veon brush killer would kill the total tomato plant bed if it got on it?

A. I would have to qualify that, it depends on the concentration.

Q. It would depend on how much got on it?

A. The amount and the concentration, yes, sir.

Q. In other words, whether or not it did kill the plant completely would depend on the amount and the concentration that got on the tomato plant?

A. That is correct.

Q. Then it might not kill the plant or it might kill it?

A. Depending on the concentration, yes.

Q. Would this early blight kill cucumbers and squash, Doctor?

A. That fungus does not affect cucumbers and squash.

Q. That was a fungus you found, that early blight?

A. Yes.

Q. And that does not affect cucumbers and
page 420] squash. Then if any of the cucumbers and squash
were affected it wasn't by any early blight?

A. No, sir.

Q. Now, Doctor, the Norfolk and Western Railway Company is paying you to come here as an expert witness, aren't they?

A. That is correct.

Q. And you refused to discuss this case with me before you took the witness stand, did you not?

A. You asked me at noontime to answer some questions and I stated that I felt what I knew about the case should be told to the entire Court and I wasn't *familar* with legal procedure and I didn't feel I should talk to you at that time and answer your questions that you proposed to ask.

Q. I tried to assure you that a witness was everybody's witness and could discuss it with a lawyer on either side. Isn't that correct?

A. Yes, sir, you did.

Q. And Mr. Rosenberger came by and I asked him about it and he agreed that a witness was everybody's witness?

A. Yes, sir.

Q. And you still refused to give the landowners' lawyers
any information about what you might know
page 421] about this situation. Is that correct?

A. Well, sir, I reported my findings.

Q. Is that correct?
A. That is correct.

RE-DIRECT EXAMINATION

By Mr. Rosenberger:

Q. Dr. Chappell, when I came by Mr. Carter was told that he had a copy of your findings, wasn't he?

A. Yes, sir.

Q. He was told then that you were an expert witness and that the information that you had you would give in Court. Is that right?

A. Yes, sir.

Q. Now, does the fact the Norfolk and Western is paying you for your time and expense have anything to do with your opinion?

A. No, sir.

Q. Now, getting back to Mr. Carter's mathematics, based on the way he wanted to figure it you figured it was fifty-three tons per acre?

A. A little over fifty-three tons.

page 422] Q. Now, he asked you about not being up there until September 20th. Does the fact you got there September 20th or July 28th make any difference in your diagnosis? Could you see what had happened in July based on evidence that was still there?

A. The entire plants were still lying in the fields and the diseased leaves were still on the plants, even those that were dead, and I could have distinguished between disease and weed spray damage at that time, even though the plants were dead.

Q. When you were answering Mr. Carter's question whether a weed killer would kill the tomato vines dead you said you would qualify it as to the amount and concentration. That would depend on how much got on the plant and the concentration. Is that right?

A. That is right.

Q. Now, if you will accept as true that the Norfolk and Western used one gallon of concentrate to one hundred and thirty-three gallons of water, and assuming as true that this Veon got all over the field so as to dampen and make sticky

the leaves on all plants in the field, including the weeds, would that have killed the tomato plants?

page 423] A. That concentration would have killed all of the tomatoes.

Q. How about the weeds?

A. It would have killed the weeds also.

Q. Now, when you saw the cucumbers and squash in that patch he asked you about, asked you whether early blight would have affected those vegetables, did you see any sign of disease or any form of fungus on the cucumbers and squash?

A. There was some mildew on the squash plants and the cucumbers that I saw. I recall the cucumbers were all about dead at the time. I don't think there were any live cucumbers that I remember seeing.

Q. And the ones that you saw had mildew?

A. They showed mildew at that time.

Q. Now, thinking back to this mixture of Veon the Norfolk and Western used, assuming that one gallon of concentrate to one hundred and thirty-three gallons of water is true, would that kill corn?

A. No, sir.

page 424] RE-CROSS EXAMINATION

By Mr. Carter:

Q. Doctor, if the corn crop protected some of the tomatoes from spray so that the spray couldn't get on the tomatoes it would not affect the tomatoes that it did not get on which were protected by something else?

A. When you use the word "protected" I don't know what you mean exactly.

Q. There is some evidence here that in a certain portion of the field that part of the crop was protected by something, I have forgotten what it was, some other crop, maybe some brush, and in that part of the field that the tomatoes weren't damaged or weren't as severely damaged as they were in other parts of the field. I am asking you whether if there was something in between the tomatoes and the spray that kept the spray from going on the tomatoes that the spray then would not have affected the tomatoes because it didn't get

on them. Is that correct?

A. If it kept it off of them entirely that is correct.

Q. Doctor, who was present when you examined these tomatoes down there on the 20th of September?

A. Mr. Anderson, Sr. and Mr. Anderson, Jr. and Mr. Meadows and a photographer, I don't remember his name.

page 425] Q. You say you pulled up some of these tomatoes and you say those tomato plants were dead when you pulled them up?

A. Some were dead. The ones I pulled up still had some live tips on them, some of them.

Q. You pulled them up by the roots, I suppose.

A. Yes, sir.

Q. And you say you could detect something that you thought was blight?

A. Yes, sir.

Q. Were you pretty sure of it?

A. Yes, sir.

Q. Did you tell the Anderson's it was blight?

A. I don't know that I told them when I pulled them up but I asked him what he was using for blight.

Q. That is not an answer to the question I asked you. Did you tell the Anderson's when you were there that day that they did have blight in those tomatoes?

A. I don't recall telling them that, no, sir.

Q. In fact, one of the few things you did tell me at lunch time was that you did not tell them. Isn't that true?

A. I said I don't recall telling them that. I don't think I did.

page 426] Q. You don't think you told the landowner when you were there that you knew it was blight when you knew the landowner was there trying to find out what was wrong with his crop? You mean to tell this jury that you didn't tell him what you thought it was?

A. Later on in the discussion I asked him about blight.

Q. I asked you did you tell him what you determined it was.

A. I don't remember telling him, no, sir.

* * * * *

page 427] The Court: I understood you would.

Mr. Rosenberger: If your Honor please, the defendant, by counsel, moves the Court to strike the evidence of the plaintiffs on the ground that it fails to prove as a matter of law that the defendant is responsible for the injury to the crop and have failed to prove the damages that these plaintiffs have incurred in such a manner that the jury could determine the amount of damages.

The Court: The Court again respectfully overrules the motion.

Mr. Rosenberger: The defendant, by counsel, respectfully objects and excepts for the reasons stated.

page 428] INSTRUCTIONS AND OBJECTIONS AND EXCEPTIONS THERETO:

Mr. Rosenberger: The defendant, by counsel, objects and excepts to the action of the Court in giving any instructions on behalf of the plaintiffs on the ground that the plaintiffs have not proved that the defendant caused any damages to the crops nor have the plaintiffs proved the amount of any damages.

Plaintiffs' Instruction No. 1 (Refused):

"The Court instructs the jury that if they believe from the evidence that the defendant, Norfolk and Western Railway Company, in the spraying of its right-of-way through the plaintiffs' land, caused or allowed said spray to enter upon the lands of the plaintiffs, then the defendant was guilty of trespass.

And if they further find from the evidence that the spray, if any, that entered upon the plaintiffs' land damaged their crop, then they shall find for the plaintiffs and assess their damage at such sum as is warranted by the evidence.

Mr. Carter: The plaintiffs, by counsel, except page 429] to the ruling of the Court in refusing to give Instruction No. 1 and substituting therefor Instruction No. 1-A on the ground that Instruction No. 1 correctly states the law and is based on the facts in this case. Plaintiff takes the position that the law of trespass should be considered by the jury in which event it would not be neces-

sary to prove negligence as required in Instruction 1-A. The railroad company admits that they had no right to put spray on the land of the plaintiffs and the plaintiffs gave them no such right and if the jury believes that the defendant did trespass upon the plaintiffs' property by putting the spray on the plaintiffs' crop then it was guilty of trespass and the defendant would be liable for the resulting damage to the plaintiffs' crops regardless of any negligence of said defendant.

Plaintiffs' Instruction 1-A (Given):

"The Court instructs the jury that if they believe from the preponderance of the evidence in this case that the defendant, Norfolk and Western Railway Company, through page 430] its agents, servants or employees, negligently permitted or allowed its spray to precipitate on and upon the land of the plaintiffs and that such acts of the defendant resulted in damage to the property of the plaintiffs, then they should find a verdict in favor of the plaintiffs in such amount as will compensate the plaintiffs for such damage as they may find from the evidence they have suffered."

Mr. Rosenberger: The defendant, by counsel, objects and excepts to the action of the Court in granting Instruction 1-A on the ground that there is no evidence on which to base the instruction; because there is no evidence that the defendant was negligent; there is no evidence that the spray actually damaged the tomato crop, and the instruction does not state a proper standard for determining the amount of damages in the event the jury concludes that the defendant is responsible for the damage.

* * * * *

page 432] Plaintiffs' Instruction No. 4 (Given):

"The Court instructs the jury that if the instrumentality which caused the plaintiffs, Andersons, damage was in the control of the defendant, Norfolk and Western Railway Company, and the damage was such as would not ordinarily occur if reasonable care was used by the defendant, and the defend-

ant alone had the means of discovering how and why it happened, the jury may infer that the damage was due to some negligence of the defendant."

Mr. Rosenberger: The defendant, by counsel, objects and excepts to the action of the Court in granting Instruction No. 4 on the ground that this instruction contains the doctrine of *res ipsa loquitur* which is not applicable under the facts and circumstances in this case; the evidence is that other causes could and did damage the tomatoes which were in the sole control of the plaintiffs. This instruction is in conflict with Instruction No. 1-A which put the burden of proof on the plaintiffs to prove negligence on the part of the defendant. This Instruction No. 4 changes the

page 433] burden of proof and puts the burden on the defendant to show that the spray did not get on the the tomatoes; this instruction puts the burden on the defendant to explain what happened to the tomato crop which was under the control of the plaintiffs and it in effect would change the burden of proof that the defendant did not damage the crop and in this case many other things could have caused the damage or it might have been unexplainable; and this instruction is in conflict with the other instructions given in the case.

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Mr. Rosenberger: If your Honor please, the defendant, by counsel, moves the Court to set aside the verdict of the jury and to enter up judgment for the defendant *non abstante veredicto* or in the alternative to grant the defendant a new trial on the ground that the verdict is contrary to the law and the evidence, without evidence to support it; for the action of the Court in admitting evidence over the objection and exception of the defendant and in refusing to strike it from the record; for the action of the Court in refusing to admit in evidence the defendant's exhibits P, Q, R, S, T, U and V; for the action of the Court in refusing to strike the evidence of

the plaintiffs at the conclusion of the plaintiffs' evidence and at the conclusion of all the evidence and for the action of the Court in granting any instructions
page 437] for the plaintiff and for granting Instructions No. 1-A and No. 4.

NOTE: The above motion is taken under advisement by the Court.

* * * * *

A Copy—Teste:

H. G. TURNER, Clerk

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