INDEX

Judgment Record 1
Complaint 2
Answer 13
Reply 21
Amendment Complaint 22
Order 35
Judgement 37
Notice of Appeal 39
Grounds of Appeal 40
Amendment of Complaint 46
Request to Amend Complaint 183
Motion for Non-suit 396
Motion to Amend Complaint 522

TESTIMONY

PLAINTIFFS' WITNESSES

Harry B. White, Direct 47
Re-called 304
Niart Rogers, Direct 64
Re-called 370
John Doran, Direct 67
Cross 101
Re-direct 129
Re-cross 135
Re-called 253
Re-called 383

New Jersey State Library

Rufus L. Savage, Direct 139
Cross 147
Re-direct 157
Re-cross 161
George K. Allen, Direct 167
Cross 176
Re-direct 180
Re-cross 181
Re-called 313
Edward Gifford, Direct 184
Cross 186
Re-direct 187
Re-cross 187
Louis Weidman, Direct 188
Cross 204
Re-direct 223
Frederick A. Woehrer, Direct 225
Cross 239
Re-direct 250
Re-cross 252
John Exel, Direct 259
Charles Rugarber, Direct 260
Cross 264
Re-direct 270
Re-cross 272
Mrs. Elizabeth Woehrer, Direct 274
Cross 277
William C. Cottrell, Direct 283
Cross 285
Re-direct 287
Re-cross 289
Re-called 301
Mrs. Mary Doran, Direct 289
Cross 294
Re-direct 300

Mary Sarah McCabe, Direct 306
Cross 308
Re-direct 311
Re-cross 311
Leonard Hulit, Direct 324
Cross 330
Re-direct 339
Peter F. Dodd, Direct 340
Cross 347
Re-direct 355
Re-cross 355
Re-direct 359
Re-cross 360
Abram J. Palmer, Direct 364
Thomas J. Preston, Direct 366
Cross 367
Re-direct 368
Re-cross 369
Dr. Aaron E. Ballard, Direct 384
Cross 386

DEFENDANT'S WITNESSES

Major John C. Patterson, Direct 404
Cross 416
Thomas J. Winckler, Direct 421
Cross 436
Re-direct 443
Re-cross 445
Martin L. Bamman, Direct 446
Cross 456
Re-direct 461
Re-cross 463
Re-direct 465

Israel R. Taylor, Direct 466
Cross 470
Re-direct 473
Herbert O. Gardner, Direct 474
Cross 482
George Cook, Direct 483
Cross 485
Re-direct 487
Re-cross 487
Thomas Herbert, Direct 488
Cross 492
Re-direct 496
Mrs. Harriett Sophia Miller, Direct 497
Cross 498
Mary Ann Peer, Direct 499
Cross 501
Benjamin Zwicker, Direct 501
Cross 505
Henry Benvenga, Direct 509
Cross 511
Sidney Hicks, Direct 512
Samuel D. Marrow, Direct 513
Cross 514
Edward Strano, Direct 515
Cross 519
Re-direct 521
Robert M. Purdy, Direct 524
Cross 528
Harry J. Bodine, Direct 529
Cross 531
Lenwood Shepard, Direct 531
Cross 534
Walter D. Franklin, Direct 535
Niart Rogers, Direct 539
Cross 545
Re-direct 547
Re-cross 548

Michael E. Sexton, Direct 549
Cross 552
George W. Pittenger, Direct 555
Cross 558
Lewis Brown, Direct 559
Cross 561
Re-direct 563
Frank Smith, Direct 564
Cross 569
Frank Tantum, Direct 573
Cross 578
Re-direct 580
Re-cross 583
Harry B. White, Direct 584
Cross 587

REBUTTAL

Mrs. Maud Fees, Direct 589
Cross 590
Re-direct 592
Re-cross 593
George W. Treat, Direct 594
Cross 598
Re-direct 601
Re-cross 605
Re-direct 606
Re-cross 610
John Doran, Direct 612
Louis Weidman, Direct 617
Frederick A. Woehrer, Direct 620

Motion to Amend 621
Motion for Direction 622
Amendment Allowed 623
Charge of the Court 625
Supplemental Instruction by the Court 638
Defendants' Objections 641
Plaintiffs' Objections 644

MONMOUTH COUNTY CIRCUIT COURT

MARY J. DORAN, JOHN DORAN, ELIZABETH WOEHRER, FREDERICK A. WOEHRER AND LOUIS WEIDMAN, Plaintiffs

vs.

THE CITY OF ASBURY PARK, A MUNICIPAL CORPORATION, AND THE OCEAN GROVE CAMP MEETING ASSOCIATION OF THE METHODIST EPISCOPAL CHURCH, BODY CORPORATE.

JUDGMENT RECORD.

The city of Asbury Park a municipal corporation and the Ocean Grove Camp Meeting Association of the Methodist Episcopal Church body corporate were summoned to answer unto Mary J. Doran, John Doran, Elizabeth Woehrer, Frederick A. Woehrer and Louis Weidman in an action at law upon the following declaration or complaint.

MONMOUTH COUNTY CIRCUIT COURT

MARY J. DORAN, JOHN DORAN, ELIZABETH WOEHRER, FRED A. WOEHRER AND LOUIS WEIDMAN,
Plaintiffs,
vs.
THE CITY OF ASBURY PARK, A MUNICIPAL CORPORATION, THE BOARD OF COMMISSIONERS OF ASBURY PARK, HARRY B. WHITE, CLERK OF THE CITY OF ASBURY PARK, AND THE OCEAN GROVE CAMP MEETING ASSOCIATION OF THE METHODIST EPISCOPAL CHURCH, BODY CORPORATE,
Defendants.

COMPLAINT.

The plaintiffs residing in the Township of Neptune in the County of Monmouth and State of New Jersey complaining say that:—

1. The plaintiff, Mary J. Doran before and at the time of the committing of the grievances by the said defendants as hereinafter mentioned was and still is the owner of a certain triangular shaped lot of land and premises situate on the westerly side of South Main Street, in the City of Asbury Park in the County of Mon-

mouth and State of New Jersey opposite Ocean Grove and nearly opposite Wesley Lake, which lot is irregular in shape, being thirty-four feet fronting on said Main Street and about sixty feet at its deepest part, and the third and northerly line extending about sixty-eight feet along the southerly bank of a certain brook known as Wesley Lake Brook, a description of which said lot of land is set forth in a certain deed made by the State Mutual Building & Loan Association, body corporate to Mary J. Doran and recorded in the Monmouth County Clerk's office in Book 767 of Deede pages 33 etc. upon which said lot at the time of the committing of said grievances and for several years prior thereto was a building three stories in height with a cellar under the while of the first or ground floor, in which the plaintiffs, Mary J. Doran and her husband, John Doran conduct an extensive butcher business; the second and third stories are and were used as living apartments; and that the whole building was and is heated by a hot water heater in the cellar; that said cellar is also used for storage purposes and various other purposes.

2. The plaintiff Frederick A. Woehrer before and at the time of the committing of said grievances by the said defendants as hereinafter mentioned was and still is the owner of a certain lot of land and premises situate on the westerly side of said South Main Street in the City of Asbury Park County and State aforesaid, the northerly line of which lot is twenty-two feet south of the southerly line of the said tract of Mary J. Doran above mentioned; the said lot of the plaintiff Frederick A. Woehrer extending from the point above mentioned forty-two feet south along the westerly line of Man Street and the tract being sixty feet in depth; upon which said lot at the time of the committing of said grievances and for several years prior

thereto was and still is a building two stories in height with a cellar under the whole and containing two stores; in the northerly of which two stores the plaintiff Louis Weidman conducts an extensive bakery business on the ground floor under a lease from the plaintiff Frederick A. Woehrer; and in the southerly of which stores the plaintiff Frederick A. Woehrer conducts an extensive shoe business on the ground floor; and the second story of each building was and is used as living apartments and the whole building is heated by a hot water heater in the cellar, which cellar is also used for storage purposes and various other purposes.

3. The plaintiffs aver that at the time of committing of said grievances and for more than thirty years last prior thereto said Wesley Lake Brook had flowed in an easterly direction past the lot of the plaintiff, Mary J. Doran to a lake known as Wesley Lake, east of said Main Street and from a point distant to the westerly of the said plaintiff's said lot; and the plaintiffs say that the City of Asbury Park at the time of committing of said grievances was and still is situate north of said Wesley Lake and that Ocean Grove was and still is situate to the south of Wesley Lake; and that the center line of said Brook and lake is the boundary line between the territory of said Ocean Grove Camp Meeting Association of the Methodist Episcopal Church and the territory of the City of Asbury Park.

4. The plaintiffs further aver that before the committing of said grievances by the defendants the normal level of the water of said brook west of Main Street where it flowed past the lot of the plaintiff Mary J. Doran for more than twenty years last past had been and then was more than eighteen inches below the top of the southerly

bank of said brook along the said northerly boundary line of the plaintiff, Mary J. Doran as aforesaid; and that before the committing of said grievances as hereinafter set forth said Wesley Lake Brook was of sufficient capacity to carry and accommodate and did carry and accommodate all the water which flowed therein past, near and from the plaintiff's said lots easterly to Wesley Lake, upon all occasions and at all times and did properly drain plaintiffs' said lots, and that the said brook before the time of the committing of said grievances had never overflowed the said southerly bank or overflowed said lot of the plaintiff or flowed into plaintiff's said cellars; and the plaintiffs further aver that before the committing of the said grievances the said defendants had assumed control of and taken possession of said Lake for a distance of three hundred and fifty feet easterly from South Main St. and of the easterly end of the said Brook where the same flowed into Wesley Lake; and between April 26th, 1911, and July 1st, 1911, they did fill in said Lake for a distance of about three hundred and fifty feet easterly from said South Main Street and did construct said portion of said Lake so filled in and near the center thereof and about half way between the boulevard and the said Main St. a detritus tank thirty feet wide and sixty feet long of reinforced concrete with three compartments diagonally across the center of said lake, and also did construct a concrete flume leading from the easterly side of Main Street near plaintiff's said lot to the southwesterly corner of said detritus tank and another flume from the southwest corner of said tank in an easterly direction to the unfilled portion of the said lake; also constructed other constructions called catch basins along the side of the Wesley Lake Brook at or near the westerly side of Main Street and the whole of said tanks and flumes were covered with roof or covering of reinforced concrete; so that the water

of said Brook in flowing easterly from along the lot of the plaintiff, Mary J. Doran was forced to flow through said westerly flume to the said detritus tank at its south-westerly corner and thus in an easterly direction through said tank into the easterly flume leading into the said Lake; that between the 1 day of June, 1912 and the first day of September 1912, the defendants constructed a so called straight a way connecting with the culvert which carries the water from Wesley Lake Brook across and under the said South Main Street; that the said straight a way has a diameter of four feet while the culvert above mentioned has a diameter of eight feet and that the bottom of the said straight a way is three or four feet higher than the bottom of the culvert, and that the said straight a way runs in an easterly direction emptying into Wesley Lake; that since the construction of said straight a way the detritus tank and the straight a way leading to it were destroyed and abandoned by the defendants and the four foot straight a way last above mentioned was and has since been relied upon by the defendants to carry the water from the said Wesley Lake Brook into the said Wesley Lake.

5. Between the first day of June 1914, and the first day of September, 1914 the defendants constructed at the easterly end of the said Wesley Lake a certain spill way and gate for the regulation of the water in the said Lake and to provide for the outlet of the water in the said Lake into the Atlantic Ocean immediately to the east of the said Wesley Lake.

6. By the construction and regulations provided by the defendants the normal level of the said Wesley Lake is at the same height as the level of Wesley Lake Brook and upon any unusual amount of water flowing into the

said Wesley Lake it is necessary to open the gate or spillway at the easterly end of the said Wesley Lake in order to keep the said Wesley Lake Brook from overflowing its bounds and flowing back upon plaintiff's lands.

7. And the plaintiffs aver that it was the duty of the defendants in the construction of the said straight a ways, tanks, flumes, gates, walls, spillways and other constructions to construct or cause to be constructed the same in such a manner and of such dimensions that the water of said Wesley Lake Brook upon any and all occasions would flow freely through the same and would not be hindered or obstructed or backed up or dammed up so that it would overflow its banks, or either of them or flow upon or over the lands of the plaintiffs or into the plaintiffs cellars and that the said plaintiffs were then and there entitled to and had the right and still have the right to have the water in said brook run and flow through its original and usual channels past the lands of the plaintiffs as the same had been accustomed to run and flow and still of right ought to run and flow and where then and there entitled to and had the right and still have the right to have said brook carry off past the lots of the plaintiffs all the water that flowed therein along the said lots at all times as it theretofore had been accustomed to do, and that the plaintiffs ought to have and enjoy their said property as they had enjoyed the same prior to the committing of the said grievances.

8. The plaintiffs aver that it was the duty of the defendants in the building of the gates spillways, straight a ways and other constructions to so construct them that the normal flow of water from Wesley Lake Brook into the Wesley Lake was not interfered with; and plaintiffs say it and has been the defendants' duty to so attend and

regulate its gates, spillways and other constructions that when water should come into the Lake from Wesley Lake Brook the said water should be carried off by the proper regulations and opening of the gate at the easterly end of Wesley Lake, and should not be permitted through the failure of the defendants to open the said gate to flow back upon the plaintiff's land.

9. The plaintiffs say that the defendants neglecting their duty in that behalf and depriving plaintiffs of the use, benefit and advantage of their said property and hindering and preventing them from carrying on their said business in so ample and beneficial a manner as they had theretofore done, and of right ought to have done and to injuring them in their trade and business of conducting a butcher business and of running apartments and of conducting a bakery business and of conducting a shoe business, which they all the time aforesaid exercised and carried on, and still do exercise and carry on at the said premises, and putting them to great charge, expense and inconvenience while the plaintiffs were so possessed of their respective premises with the appurtenances aforesaid; did wrongfully and injuriously construct the said straight a ways, tanks, walls, flumes, gates, spillways and other constructions and ever since the said 1st day of July, 1911 have kept and maintained and continued the same of such dimensions and constructions that the same did not and do not give proper vent to the waters of said Brook which were and are compelled to flow and do flow into the said straight a way from said Brook and said straight a way did not and does not permit said water from said brook to flow through and to carry off with sufficient rapidity as otherwise it would have flowed and been carried off and by means thereof said defendants have hindered, obstructed and prevented

the water in said brook from flowing, passing with sufficient rapidity through said culvert under said South Main Street and from said brook along plaintiff's lot as it had been accustomed to do and thereby causing said water to overflow its said banks, and flow over and upon the lands of the plaintiffs and into the cellars of the plaintiffs where the same has remained for a long period of time.

10. The plaintiffs further say that the defendants knowing the premises but neglecting their duty in that behalf and contriving and wrongfully and unjustly intending to injure and prejudice the plaintiffs in this respect, and to deprive them of the use, benefit and advantage of their said property, and to hinder and prevent them from carrying on their said business in so ample and beneficiary a manner as they had theretofore done and of right ought to have done, have neglected and failed to open and regulate the gate or spill way aforementioned at the eastern end of the said Wesley Lake at the times when it became necessary to open or regulate the said gate or spillway in order that the waters of the said Wesley Lake Brook might be carried off as they should and ought to have been carried off and were carried off before the construction of the said devices above mentioned by the defendants; and that as a result of the defendants having negligently and improperly regulated and managed the said gate and spillway and the other causes aforesaid the waters of the said Wesley Lake Brook have at divers times between the 1st day January, 1913 and the 1st day of March 1917 been backed up, held or dammed up and the defendants have hindered, obstructed and prevented the water in said Brook from flowing and passing with sufficient rapidity through the said culverts and said straight a ways and from said Brook along

plaintiffs' lot as it had been accustomed to do, thereby causing the said water to overflow its banks and flow over and upon the lands of the plaintiffs where the same has remained for a long period of time.

11. Plaintffs further say that as a result of the said grievances committed by defendants as above set forth, certain goods, wares and merchandise of the said plaintiffs then and there being in the said cellars have become wet, soaked, sodden and covered with muddy deposit and with filth and thereby injured, destroyed, and rendered of no value, to wit; large quantities of burlap, meat coverings, barrels, boxes and other articles the property of the plaintiffs, Mary J. Doran and John Doran of the value of fifty ($50) dollars; also said water in said cellar flowed over and about a certain steam heater belonging to plaintiffs, Mary J. Doran and John Doran used for heating said building and apartments and put out the fire in said heater and prevented and will in the future prevent the plaintiffs, Mary J. Doran and John Doran from heating their said building and apartments; also deposited over and about the same mud, dirt and filth and said water standing and remaining in the said cellar deprived the plaintiffs, Mary J. Doran and John Doran of said cellar for storage purposes for a long period of time, to wit; from January 1st, 1912, hitherto and in the future will deprive them of the use of said cellar of the value of thirty ($30) dollars per month, also damaged and injured the walls and floor of the said cellar and the foundations of said building to wit: of the value of five hundred ($500) dollars; also certain goods, wares and merchandise of the said plaintiff Frederick A. Woehrer then and there being in the said cellar of the premises occupied by the said plaintiff Frederick A. Woehrer, thereby having become wet, soaked, sodden and covered

with a muddy deposit and filth and thereby injuring and rendering of no value to wit; large quantities of shoemaker's leather, shoes, barrels, boxes, and other articles of property of the plaintiff, Frederick A. Woehrer of the value of one hundred ($100) dollars; and also the water in said cellar flowed over and around a certain steam heater belonging to the plaintiff and being in said cellar used for heating said building and apartments, and put out the fire in said heater and prevented the same from burning and from thence hitherto prevented and in the future will prevent plaintiff from heating his said building and apartments; also deposited over and upon the same mud, dirt and filth; and said water standing and remaining in said cellar deprived the plaintiff Frederick A. Woehrer of the use of said cellar for storage purposes for a long period of time, to wit: from January 1st, 1912, hitherto and in the future will deprive him of the use of the said cellar of the value of thirty ($30) dollars per month; also damaged and injured the walls and floor of the said building, to wit: of the value of five hundred ($500) dollars; and also deposited over and about the cellar under the store occupied by the plaintiff Louis Weidman, mud, dirt, and filth; and said water standing and remaining in said cellar deprived the plaintiff, Louis Weidman of the use of the said cellar for storage purposes for a long period of time, to wit: from January 1st, 1912, hitherto and in the future will deprive him of the use of said cellar to the value of thirty ($30) dollars per month to the damage of the plaintiff, Frederick A. Woehrer; also damaged and injured the walls and floor of said cellar and foundation of said building to the damage of the plaintiff, Frederick A. Woehrer, the owner of the said building and cellar, of the value of five hundred ($500) dollars; and also the said water of the said Wesley Lake Brook being hind-

ered, obstructed, dammed up and forced to flow back by reason of the grievances committed by the said defendants as hereinbefore mentioned did undermine the foundations of a certain large baking oven constructed by the said Louis Weidman at the rear of the bakery occupied by him on the premises of the said Frederick A. Woehrer and did cause the stones in the oven to become broken and displaced by reason of the displacement of the foundation to the damage of the said Louis Weidman of the value of two hundred and fifty ($250) dollars.

12. And the plaintiffs say that they have suffered as a result of the grievances of the defendants hereinbefore mentioned divers other injuries.

The plaintiffs demand as their damages five thousand ($5000) dollars.

WARD KREMER,
Attorney for Plaintiffs.

The defendant, the City of Asbury Park, answered as follows:

MONMOUTH COUNTY CIRCUIT COURT

MARY J. DORAN, JOHN DORAN, ELIZABETH WOEHRER, FREDERICK A. WOEHRER, AND LOUIS WEIDMAN, Plaintiffs

vs.

THE CITY OF ASBURY PARK, A MUNICIPAL CORPORATION, AND THE OCEAN GROVE CAMP MEETING ASSOCIATION OF THE METHODIST EPISCOPAL CHURCH, BODY CORPORATE, Defendants.

ANSWER.

Defendant, the City of Asbury Park, a municipal corporation, says that,

1. This defendant has no knowledge or information of the various matters set up in the complaint, sufficient to form a belief thereof, except as in herein stated.

2. Defendant admits that it joined with the Ocean Grove Camp Meeting Association in the construction of

a flume, culvert or tank, on the east side of Main Street at the head of Wesley Lake, and says that said flume, culvert or tank does not interfere with or retard or reduce the free flowage of water from Wesley Lake Brook.

3. Defendant denies that since the construction of said flume, tank or culvert that the water of said brook in heavy storms has overflowed its banks, or backed water or spread over the premises of the plaintiffs, to greater extent than before the construction of said flume, tank and culvert and nothing has been done by defendant that has changed the condition existing surrounding the premises of plaintiffs; that always in cases of severe storms and the heavy fall of rain said Wesley Lake Brook has overflowed its bank, covering in some cases the land immediately west of the railroad, with water for an area of several acres, and has always overflowed its banks and covered for a large space and area, the lands in the rear of the buildings of the plaintiffs, from Main Street to the railroad.

4. Said Wesley Lake is a shallow body of water, and receives the overflow from the surface in Ocean Grove and Asbury Park for a considerable area, in both directions, and in cases of heavy storms rapidly fills up and rises very considerably above its normal level, and on such occasions the water necessarily backs up and overflows at the head of the Lake to the banks of the brook, which flows into the lake; that this condition of overflow in cases of severe storms has existed for many years, and no new or aggravated conditions have been created because of the construction of the said flume, culvert or tank.

5. Defendant says that if the water has overflowed

to the extent, as stated in the complaint, and has flowed into and upon and over plaintiffs' premises, as alleged in the complaint, such conditions were caused only by an excessive and unusual precipitation of rain, and are only such conditions that would be created and have been created from time to time upon the occasion of heavy storms and an excessive precipitation of rain.

6. Defendant says that the flow of the water through Wesley Lake Brook is not hindered or retarded by the construction of said flume, culvert or tank, but that the water flowing from Wesley Lake Brook has the same free volume of flow as before the construction of said flume, culvert and tank.

7. Defendant says that upon the occasion of heavy storms and sever precipitation of rain, the level of Wesley Lake itself rises considerably, and does not permit the water to flow down into said Lake from said brook, and naturally causes a rise in the level of the brook itself, together with a heavy precipitation of rains, which causes great quantities of water to be drained into said brook, and the level of said water to also rise, and that this condition is only a natural or normal condition which has always existed upon the occasion of heavy rains and severe storms, and the construction of said flume, culvert and tank have not and do not tend to aggravate the normal and natural conditions.

8. Defendant says that the said alleged injuries complained of by the plaintiffs were not caused by any act of this defendant, but are the result of natural cause, beyond the control of this defendant.

9. Defendant says that there is no corporate liability

on the part of this defendant, for the acts complained of by the plaintiffs.

10. Defendant says that the plaintiffs have joined in one action, several separate and distinct causes of action, personal to the several defendants and not common to them as a whole, and that said action cannot be maintained.

DURAND, IVINS & CARTON,
Attys. of Deft. City of Asbury Park.

10

The defendant, the Ocean Grove Camp Meeting Association of the Methodist Episcopal Church, answered as follows:

MONMOUTH COUNTY CIRCUIT COURT.

Mary J. Doran, John Doran, Elizabeth Woehrer, Frederick A. Woehrer, and Louis Weidman, Plaintiffs.

vs.

The City of Asbury Park, a Municipal Corporation, and The Ocean Grove Camp Meeting Association of the Methodist Episcopal Church, body corporate, Defendants.

Answer.

Defendant, the Ocean Grove Camp Meeting Association of the Methodist Episcopal Church, a body corporate of the County of Monmouth, says that.

1. This defendant has no knowledge or information of the various matters set up in the complaint, sufficient to form a belief thereof, except as is herein stated.

2. Defendant admits that it joined with the City of Asbury Park in the construction of a flume, culvert or tank on the east side of Main Street at the head of Wesley Lake, and says that said flume, culvert or tank does not interfere with or retard or reduce the free flowage of water from Wesley Lake Brook.

3. Defendant denies that since the construction of said flume, tank or culvert that the water of said brook in heavy storms has overflowed its banks, or backed water or spread over the premises of the plaintiffs, to any greater extent than before the construction of said flume, tank and culvert, and nothing has been done by defendant that has changed the condition existing surrounding the premises of plaintiffs; that always in cases of severe storms and the heavy fall of rain said Wesley Lake Brook has overflowed its bank, covering in some cases the land immediately west of the railroad, with water for an area of several acres, and has always overflowed its banks and covered for a large space and area, the lands in the rear of the buildings of the plaintiffs, from Main Street to the railroad.

4. Said Wesley Lake is a shallow body of water, and receives the overflow from the surface in Ocean Grove and Asbury Park for a considerable area, in both directions, and in cases of heavy storms rapidly fills up and rises very considerably above its normal level, and on such occasions the water necessarily backs up and overflows at the head of the Lake to the banks of the brook, which flows into the Lake; that this condition of overflow in cases of sever storms has existed for many years, and no new or aggravated conditions have been created because of the construction of the said flume, culvert or tank.

5. Defendant says that if the water has overflowed to the extent, as stated in the complaint, and has flowed into and upon and over the plaintiff's premises as alleged in the complaint, such conditions were caused only by an excessive and unusual precipitation of rain and are only such conditions that would be created and have been created from time to time upon the occasion of heavy storms and an excessive precipitation of rain.

6. Defendant says that the flow of the water through Wesley Lake Brook is not hindered or retarded by the construction of said flume, culvert or tank, but that the water flowing from Wesley Lake Brook has the same free volume of flow as before the construction of said flume, culvert and tank.

7. Defendant says that upon the occasion of heavy storms and severe precipitation of rain, the level of Wesley Lake itself rises considerably, and does not permit the water to flow down into said Lake from said brook, and naturally causes a rise in the level of the brook itself, together with a heavy precipitation of rains, which causes great quantities of water to be drained into said brook, and the level of said water to also rise, and that this condition is only a natural or normal condition which has always existed upon the occasion of heavy rains and severe storms, and the construction of said flume, culvert and tank have not and do not tend to aggravate the normal and natural conditions.

8. Defendant says that the said alleged injuries complained of by the plaintiffs were not caused by any act of this defendant, but are the result of natural causes, beyond the control of this defendant.

9. Defendant says that there is no corporate liability on the part of this defendant, for the acts complained of by the plaintiffs.

10. Defendant says that the plaintiffs have joined in one action, several separate and distinct causes of action, personal to the several defendants and not common to them as a whole, and that said action cannot be maintained.

DURAND, IVINS & CARTON,
Attys. of Deft. The Ocean Grove Camp Meeting Association of the Methodist Episcopal Church.

The plaintiffs replied as follows:

MONMOUTH COUNTY CIRCUIT COURT.

MARY J. DORAN, JOHN DORAN, ELIZABETH WOEHRER, FREDERICK A. WOEHRER, AND LOUIS WEIDMAN,
Plaintiffs.

vs.

THE CITY OF ASBURY PARK, A MUNICIPAL CORPORATION, AND THE OCEAN GROVE CAMP MEETING ASSOCIATION OF THE METHODIST EPISCOPAL CHURCH, BODY CORPORATE,
Defendants.

REPLY.

The plaintiffs answering the answer of the defendants in the above entitled cause say that:

1. They deny the allegations contained in the answer of the defendants.

WARD KREMER.

By leave of the Court the plaintiffs further complained as follows:

MONMOUTH COUNTY CIRCUIT COURT

MARY J. DORAN, JOHN DORAN, ELIZABETH WOEHRER, FREDERICK A. WOEHRER AND LOUIS WEIDMAN,
Plaintiffs,

vs.

THE CITY OF ASBURY PARK, A MUNICIPAL CORPORATION, THE BOARD OF COMMISSIONERS OF THE CITY OF ASBURY PARK, AND HARRY B. WHITE, CLERK OF THE CITY OF ASBURY PARK AND THE OCEAN GROVE CAMP MEETING ASSOCIATION OF THE METHODIST EPISCOPAL CHURCH, BODY CORPORATE,
Defendants.

AMENDED COMPLAINT.

The plaintiffs residing in the Township of Neptune in the County of Monmouth and State of New Jersey, complaining say that:

1. The plaintiff Mary J. Doran before and at the time of the committing of the grievances by the said defendants as hereinafter mentioned was and still is the owner of a certain triangular shaped lot of land and premises situate on the westerly side of South Main Street, in the Township of Neptune in the County of

Monmouth and State of New Jersey opposite Ocean Grove and nearly opposite Wesley Lake which lot is irregular in shape, being thirty-four feet fronting on said Main Street and about sixty feet at its deepest part, and the third and northerly line extending about sixty-eight feet along the southerly bank of a certain brook known as Wesley Lake Brook, a description of which said lot of land is set forth in a certain deed made by the State Mutual Building & Loan Association, body corporate, to Mary J. Doran and recorded in the Monmouth County Clerk's office in Book 767 of Deeds, pages 33, etc.; upon which said lot at the time of the committing of said grievances and for several years prior thereto was a building three stories in height with a cellar under the whole of the first or ground floor, in which the plaintiffs, Mary J. Doran and John Doran, her husband conduct an extensive butcher business, the second and third stories are and were used as living apartments; and that the whole building was and is heated by a hot water heater in the cellar; that said cellar is also used for storage purposes and various other purposes.

2. The plaintiff Elizabeth Woehrer before and at the time of the committing of the grievances by the said defendants as hereinafter mentioned was and still is the owner of a certain lot of land and premises situate on the westerly side of said South Main Street, in the Township of Neptune, County and State aforesaid; the northerly line of which lot is twenty-two feet south of the southerly line of the said tract of Mary J. Doran above mentioned; the said lot of plaintiff, Elizabeth Woehrer extending from the point above mentioned forty-two feet south along the westerly line of Main Street and the tract being sixty feet in depth; upon which said lot at the time of the committing of said

grievances and for several years prior thereto was and still is a building two stories in height with a cellar under the whole and containing two stores; in the northerly of which two stores the plaintiff Louis Weidman conducts an extensive bakery busines on the ground floor under a lease from the plaintiff Elizabeth Woehrer; and in the southerly of which stores the plaintiff Frederick A. Woehrer conducts an extensive shoe business on the ground floor and the second story of each building was and is used as living apartments and the whole building is heated by a hot water heater in the cellar; which cellar is also used for storage purposes and various other purposes.

3. The plaintiffs aver that at the time of the committing of said grievances and for more than thirty years last past prior thereto Wesley Lake Brook, a well defined stream had flowed in a well defined course in an easterly direction past the lot of the plaintiff, Mary J. Doran through a culvert constructed under Main Street and thence east from the said Main Street to a lake known as Wesley Lake; and the plaintiffs say that the City of Asbury Park at the time of committing of said grievances was and still is situate north of said Wesley Lake and that Ocean Grove was and still is situate south of said lake and that the centre line of said lake and brook is the boundary line between the territory of the said Ocean Grove Camp Meeting Association and the territory of the said City of Asbury Park.

4. The plaintiffs further aver that before the committing of the said grievances by the defendants the normal level of the water of said brook west of Main Street where it flowed past the lot of the plaintiff, Mary J. Doran for more than twenty years last past had been

and then was more than eighteen inches below the top of the southerly bank of said brook along the said northerly boundary line of the plaintiff's Mary J. Doran lot as aforesaid; and that before the committing of said grievances as hereinafter stated Wesley Lake Brook was of sufficient capacity to carry and accommodate and did carry and accommodate all the water which flowed therein past, near and from the plaintiffs said lots easterly to Wesley Lake upon all occasions and at all times, and did properly drain plaintiffs said lots, and that the said brook before the time of the committing of said grievances had never overflowed said southerly bank or overflowed into plaintiffs said cellars, and the plaintiffs further aver that before the committing of the said grievances the said defendants had assumed control of and taken possession of said lake for a distance of three hundred and fifty (350) feet easterly from South Main Street and of the easterly end of the said brook where the same flowed into Wesley Lake; and between April 1st, 1911, and July 1st, 1912, and at divers other times, the defendants had filled in said lake for a distance of about three hundred and fifty (350) feet easterly from said South Main Street and had constructed in said portion of said lake so filled in and near the centre thereof, and about half-way between said boulevard and said Main Street a detritus tank, and also had constructed a concrete flume leading from the easterly side of Main Street near plaintiffs said lot to the southwesterly corner of said detritus tank and another flume from the southerly corner of said tank in an easterly direction to the unfilled portion of the lake; also constructed other constructions called catch basins along the side of Wesley Lake Brook at or near the westerly side of Main Street and the whole of said tanks, flumes, etc., were covered with a roof or covering of reinforced concrete; so that

the water of said brook in flowing easterly from along the lot of the plaintiff, Mary J. Doran was forced to flow through the said flume to the said detritus tank at its southwesterly corner and thence in an easterly direction through said tank into the easterly flume leading into the said lake; that on or about the 1st day of May, 1912, the defendants constructed a so-called straightaway or drain connecting with the culvert which carried the water from Wesley Lake Brook across and under the said South Main Street; that the said straightaway has a diameter of four (4) feet, while the culvert above mentioned has a diameter of eight (8) feet; and that the bottom of the said straightaway is about three feet higher than the bottom of the culvert; and that the said sraightaway runs in an easterly direction emptying into Wesley Lake and that the defendants also bulkheaded the lake and that they made certain other improvements including certain drains, sewers, bulkheads, etc., and that they built a road over the part of the lake filled in; and that since the constructioin of the said straightaway last mentioned, the detritus tank and straightaway or flume leading to it were destroyed and abandoned by the defendants and the four (4) foot drain or straightaway last above mentioned has since been relied upon by the defendant to carry the water from said Wesley Lake Brook into said Wesley Lake.

5. Between the 1st day of May, 1914, and the 1st day of July, 1914, the defendants constructed at the easterly end of the said Wesley Lake a certain spill way and gate for the regulation of the water in the said lake to provide for the outlet of the water from said Lake into the Atlantic Ocean immediately to the east of the said Wesley Lake and also constructed certain bulkheads around said lake.

6. By the constructions and regulations provided by the defendants as above mentioned, the normal level of said Wesley Lake was raised to the same height as the level of Wesley Lake Brook and upon any precipitation of water flowing into the said Wesley Lake, it is necessary to open the gates or spill way at the easterly end of the said lake in order to keep the said Wesley Lake Brook from overflowing its bounds, and flowing back upon plaintiffs' lots and into plaintiffs' cellars.

7. And the plaintiffs aver that it was the duty of the defendants in the construction of the said bulkheads, drains, straightaways, tanks, flumes, gates, spillways, and other constructions, to construct or cause to be constructed the same in a reasonable and adequate manner for the purposes for which they were intended and of such dimensions that the waters of said Wesley Lake Brook upon any occasion as they had always previously flowed, before the said constructions made by defendants would flow freely through the same and would not be hindered or obstructed or backed up or dammed up so that it would overflow its banks or either of them or flow upon or over the lands of plaintiffs or into the plaintiffs' cellars; and that the said plaintiffs were then and there entitled to and had the right and still have the right to have the water in said brook run and flow through its original and usual channels past the lands of the plaintiffs as the same had been accustomed to flow and still of right ought to run and flow; and were then and there entitled to and had the right to have the said brook carry off past the lands of the plaintiffs all the water that flowed therein along said lots at all times as it theretofore had been accustomed to do; and that the plaintiffs ought to have and enjoy their said property as they had enjoyed the same prior to the committing of

said grievances, and were entitled to enjoy the same without interference or invasion of their rights by the defendants or any other persons.

8. The plaintiffs aver that it was the duty of the defendants in the construction of the gates, spill ways, drains, straightaways, flumes and bulkheads to use due care in the said construction and to so construct them that the normal flow of water from Wesley Lake Brook into Wesley Lake was not interfered with; and to adopt such plans of construction as would assure a maintenance of this safe condition; and the plaintiffs say it was and has been the defendants' duty to so attend and regulate its gates, spillways and other constructions that when water should come into the said lake from Wesley Lake Brook, said water should be carried off by a proper regulation and construction and by the proper and timely opening of the gates and spillways constructed by the defendants and should not be permitted either through the constructions or defective plans or through the negligent construction or negligent operation of the devices so constructed by the defendants or through the failure of the defendants to properly operate the said devices to become dammed up or to overflow back upon the plaintiffs' lands.

9. The plaintiffs say that the defendants neglecting their duty in that behalf and depriving the plaintiffs of the use and benefit and advantage of their said property and hindering and preventing them from carrying on their said business in so ample and beneficial a manner as they had theretofore done, and of right ought to have done and to injure them in their trade and business of conducting a bakery business, and of running apartments and of conducting a butcher business, and of conducting a shoe business, which they at the time aforesaid exer-

cised and carried on and still do exercise and carry on at the said premises and putting them to great expense and inconvenience while the plaintiffs were so possessed of their respective premises with the appurtenances aforesaid, did by their lawful and duly constituted officers, agents and servants wrongfully and injuriously construct the said drains, tanks, walls, dams, flumes, gates, spill ways, bulkheads and other constructions; and did improperly construct the said drains and other constructions in a negligent and defective manner and did fail to exercise due care in the construction thereof and in the selecting of plans for the construction thereof and did negligently build the said straightaways or drains running from the easterly side of Main Street to Wesley Lake of insufficient capacity to carry off the water from Wesley Lake Brook and did fail to exercise due care and were negligent in the adoption of a system of drainage and that ever since the said 1st day of May 1912, the said defendants with knowledge of the defectiveness of the said constructions and with knowledge of the damage to the plaintiffs, and with notice of the said defectiveness and damage have kept and maintained and continued the same of such dimensions and constructions that the same did not and do not give proper vent to the waters of the said brook which were and are compelled to flow into the said drain or straightaway from said brook or straightaway did not or does not permit said water from said brook to flow from and carry off with sufficient rapidity as otherwise it would have flowed and been carried off and by means of the said insufficient constructions thereof, the defendants have hindered, obstructed and prevented the water in the said brook from flowing with sufficient rapidity through said culvert in south Main Street and from said brook along plaintiffs lands as it had been accustomed to do and thereby caus-

ing the said water at divers times from May 1st, 1912, and until the commencement of this suit to overflow and upon the lands of the plaintiffs and into the cellars of the plaintiffs where the same has remained for a long period of time, and that the defendants by their lawfully authorized agents or servants have actively interfered with and invaded the private rights of the plaintiffs to their damage and that the said damage of the said plaintiffs has been caused by the active and willful doing of the defendants or their lawfully authorized agents and servants.

10. The plaintiffs further aver that the defendants knowing the premises but neglecting their duty in that behalf and contriving and wrongfully and unjustly intending to injure and prejudice the plaintiffs in this respect and to deprive them of the use, benefit and advantage of their said property and to hinder and prevent them from carrying on their said business in so ample and beneficial a manner as they had theretofore done and of right ought to have done have neglected and failed to properly open and regulate a gate or spillway aforementioned at the easterly end of said Wesley Lake at the times when it became necessary to open or regulate the said gate or spillway in order that the waters of the Wesley Lake Brook might be carried off and were carried off before the construction of the said defendants' devices; and that the defendants have negligently at divers times between May 1st, 1912 and until the commencement of this suit permitted quantities of wood sticks, and other refuse to gather and remain in the said straightaway obstructing the normal flow of water through it and damming the same and causing the water to flow back upon the plaintiffs land and into plaintiffs cellars; and that the defendants have negligently and improperly reg-

ulated, maintained, operated and managed the said gate and spillway and that as a result of the said improper regulation by the defendants of the said gate and spill way the waters of the said Wesley Lake have at divers times between the 1st day of May 1912, and the commencement of this suit been dammed by, held up, backed up and the defendants by the acts of their lawfully authorized agents, officers and servants have hindered, obstructed and prevented the waters in said brook from flowing and passing with sufficient rapidity through the said culverts and straightaways and from said brook along plaintiffs lots as it had been accustomed to do theretofore and thereby causing the said water to overflow its banks and to flow over and upon the lands of the plaintiffs and into the cellars of the plaintiffs where the same has remained for a long period of time.

11. Plaintiffs further aver that as a result of the said negligence and defective construction by defendants or their lawfully authorized agents, servants, and officers of the said dams, drains, culverts, straightaways, gates, spillways and bulkheads and that as a result of the raising of the level of the lake and the failure to properly dredge the same, and that as a result of the want of due care on the part of the said defendants in the selection of proper and adequate plans and systems of drainage and improvement and that as a result of the negligence of the defendants or their said servants or agents or officers in the construction and in the operation and maintenance of said constructions and as a result of the negligence of the defendants or their lawful agents in permitting the said drains to become obstructed, and as a result of the negligence of defendants generally in constructing devices insufficient for the purposes for which they were intended and that as a result of the invasion of the plain-

tiffs property and rights and active interference with the same by the defendants acts and of the grievances committed by the defendants as above set forth certain goods, wares, and merchandise of the said plaintiffs then and there being in the said cellars of plaintiffs have become wet, soaked, sodden and covered with a muddy deposit and filth and thereby injuring, depriving and rendering of no value to wit; large quantities of burlap, meat coverings, barrels, boxes and other articles the property of the plaintiffs, Mary J. Doran and John Doran of the value of $50 also said water in said cellar flowed over and about a certain steam heater belonging to plaintiffs, Mary J. Doran and John Doran used for heating said building and apartments and put out the fire in said heater and prevented the same from burning and from thence hitherto prevented and will in the future prevent the plaintiffs, Mary J. Doran and John Doran from heating their said building and apartments, also deposited over and about the same mud, dirt and filth and said water standing and remaining in said cellar deprived the plaintiff, Mary J. Doran and Jorn Doran of said cellar and the uses for a long period of time to wit: from May 1st, 1912, hitherto and will in the future deprive them of the use of said cellar of the value of $30 per month; also damaged and injured the walls and floor of said cellar and the foundations of the said building to the value of $500 and caused great depreciation of the value of the building of the said plaintiffs, Mary J. Doran and John Doran to the value of $2000; also certain goods, wares and merchandise of the said plaintiff, Frederick A. Woehrer then and there being in the cellar of the premises occupied by the said plaintiff, Frederick A. Woehrer thereby having become wet, soaked, sodden and covered with a muddy deposit and filth and thereby injuring and rendering of no value to wit; large quantities of shoe-

makers' leather, shoes, barrels, boxes and other articles of property of the plaintiff Frederick A. Woehrer of the value of $100; and also said water in said cellar flowed over and around a certain steam heater belonging to plaintiff being in said cellar used for heating said building and apartments and put out the fire in said heater and prevented the same from burning and from thence hitherto prevented and in the future will prevent the plaintiff from heating said building and apartments; also deposited over and upon the same mud, dirt and filth; and said water standing and remaining in said cellar deprived the plaintiff Frederick A. Woehrer of the use of said cellar for storage purposes for a long period of time to wit; from May 1st, 1912, hitherto and in the future will deprive him of the use of said cellar of the value of $30 per month; also damaged and injured the walls and floor of said building to wit, of the value of $500; and caused the great depreciation of said building and depreciation of the value thereof in the value of $2000; and also deposited over and about the cellar under the store occupied by the plaintiff, Louis Weidman, dirt and filth; and the water standing and remaining in said cellar deprived the plaintiff, Louis Weidman of the use of said cellar for storage purposes for a long period of time to wit: from May 1st, 1912, hitherto and in the future will deprive him of the use of said cellar to the value of $30 per month to the damage of the plaintiff, Elizabeth Woehrer and also damaged and injured the walls and floor of said cellar and foundation of said building to the damage of the plaintiff Elizabeth Woehrer the owner of said building, and cellar of the value of $500 and also the said water of the said Wesley Lake Brook being hindered, obstructed, dammed up and forced to flow back by reason of the grievances committed by the said defendants as hereinbefore mentioned, did undermine the

foundations of a certain large baking oven constructed by the said Louis Weidman at the rear of the bakery occupied by him on the premises of Elizabeth Woehrer and did cause the stones in the oven to become broken and displaced by reason of the displacement of the foundation to the damage of the said Louis Weidman of the value of $250. And also said back flow of water had caused at divers times a foul and disgusting stench or smell which injured the plaintiffs in their business and rendered the said premises of said plaintiffs in their business and rendered the said premises of said plaintiffs unpleasant, damp and unhealthy to live in to the damage of the plaintiffs.

12. And the plaintiffs say they have suffered as a result of the grievances of the defendants hereinbefore mentioned divers other injuries.

The plaintiffs demand as their damages seven thousand ($7000) dollars.

WARD KREMER,
Attorney for Plaintiffs.

MONMOUTH COUNTY CIRCUIT COURT

MARY J. DORAN, JOHN DORAN, ELIZABETH WOEHRER, FREDERICK A. WOEHRER AND LOUIS WEIDMAN,
Plaintiffs,
vs.
THE CITY OF ASBURY PARK, A MUNICIPAL CORPORATION AND THE OCEAN GROVE CAMP MEETING ASSOCIATION OF THE METHODIST EPISCOPAL CHURCH, BODY CORPORATE,
Defendants.

ACTION AT LAW

ORDER

Upon consent of the parties in the above entitled cause being duly filed, it is hereby on this 17th day of May A. D. 1917 ordered that the process, pleadings and other papers pertaining to the said cause of action be delivered to the Clerk of the Court of Common Pleas of Monmouth County who is hereby directed to file the same in his office and to make an entry thereof in the minutes of the last named court.

It is further ordered that the Honorable Rulif V. Lawrence, Judge of the Court of Common Pleas in and for the County of Monmouth be requested to try the issues involved in the above cause with a jury in accordance with the provisions of an Act of the Legislature of the State of New Jersey entitled "An act relative to Supreme and Circuit Court (Revision of 1900)".

SAMUEL KALISCH,
J. S. C.

This action was tried by consent before Judge Rulif V. Lawrence with a jury at the Common Pleas Court on June 29, July 2, July 3, July 5, and July 6, 1917, in the presence of the counsel of the respective parties.

The case having been heard and submitted to the jury they returned their verdict as follows: That they find in favor of the plaintiffs and assess the damages as follows:

In favor of the plaintiffs, Mary J. Doran and John Doran, three hundred dollars;

In favor of the plaintiff, Elizabeth Woehrer, executrix, eighty dollars;

In favor of the plaintiff, Elizabeth Woehrer, individually, one hundred and sixty dollars;

In favor of the plaintiff Frederick Woehrer, sixty dollars;

And in favor of the plaintiff Louis Weidman, one hundred and fifty-seven dollars and thirty-two cents.

Judgment entered July 6, 1917.

MONMOUTH COMMON PLEAS COURT

May Term, 1917.

11528—19—269

MARY J. DORAN, JOHN DORAN, ELIZABETH WOEHRER, FREDERICK A. WOEHRER AND LOUIS WEIDMAN,

vs.

THE CITY OF ASBURY PARK A MUNICIPAL CORPORATION AND THE OCEAN GROVE CAMP MEETING ASSOCIATION OF THE METHODIST EPISCOPAL CHURCH, BODY CORPORATE.

ACTION AT LAW

Circuit Court Issue Referred to Common Pleas. Judgment by verdict.

Judgment entered July 6, 1917. 5. 15 P. M.

Damages	$757.32
Costs	126.09
	$883.41

WARD KREMER, Atty,

Judgment in the above entitled action was rendered on this sixth day of July in the year of our Lord one thousand nine hundred and seventeen in favor of the plaintiff, Mary J. Doran and John Doran, Elizabeth Woehrer, individually, Elizabeth Woehrer, executrix, Frederick A. Woehrer and Louis Weidman and against the defendants the City of Asbury Park, a municipal corporation and the Ocean Grove Camp Meeting Association of the Methodist Episcopal Church body corporate, action at law, judgment by verdict, for the sum of seven hundred fifty-seven dollars and thirty-two cents damages. Apportion-

ing to the plaintiffs Mary J. Doran and John Doran the sum of Three Hundred Dollars damages.

And apportioning to the plaintiff Elizabeth Woehrer executrix, the sum of eighty dollars damages.

And apportioning to the plaintiff Elizabeth Woehrer, individually, the sum of one hundred sixty dollars damages.

And apportioning to the plaintiff Frederick A. Woehrer the sum of sixty dollars damages.

And apportioning to the plaintiff Louis Weidman the sum of one hundred fifty-seven dollars and thirty-two cents damages.

And for one hundred twenty-six dollars and nine cents, costs of suit.

Judgment entered and signed July 6, 1917, 5.15 P. M.

STATE OF NEW JERSEY } ss
MONMOUTH COUNTY }

I, Joseph McDermott, Clerk of said County, do hereby certify that the foregoing is a true copy of complaint, answer and proceedings in the case of Mary J. Doran, et al, vs. The City of Asbury Park et al, as the same remain on file in my office.

(SEAL) IN WITNESS WHEREOF, I have hereunto set my hand and affixed the official seal of said County this thirtieth day of August, A. D. nineteen hundred and seventeen.

JOSEPH MCDERMOTT,
Clerk.

MONMOUTH COUNTY CIRCUIT COURT

MARY J. DORAN, JOHN DORAN, ELIZABETH WOEHRER, FREDERICK A. WOEHRER AND LOUIS WEIDMAN, Plaintiffs,

vs.

THE CITY OF ASBURY PARK, A MUNICIPAL CORPORATION, THE BOARD OF COMMISSIONERS OF THE CITY OF ASBURY PARK AND HARRY B. WHITE, CLERK OF THE CITY OF ASBURY PARK AND THE OCEAN GROVE CAMP MEETING ASSOCIATION OF THE METHODIST EPISCOPAL CHURCH, BODY CORPORATE, Defendants.

NOTICE OF APPEAL

To WARD KREMER, Attorney of Plaintiffs:

Dear Sir:

Take notice that the City of Asbury Park, a municipal corporation, the Board of Commissioners of the City of Asbury Park, and Harry B. White, Clerk of the City of Asbury Park and the Ocean Grove Camp Meeting Association of the Methodist Episcopal Church, body corporate, the defendants, appeal to the Court of Errors and Appeals in the last resort in all causes, from the whole of the judgment entered in this cause.

DURAND, IVINS & CARTON,
Attorneys of Defendants-Appellants.

NEW JERSEY COURT OF ERRORS AND APPEALS.

Appeal from Monmouth County Circuit Court

MARY J. DORAN, JOHN DORAN, ELIZABETH WOEHRER, FREDERICK A. WOEHRER AND LOUIS WEIDMAN, Plaintiffs.

vs.

THE CITY OF ASBURY PARK, A MUNICIPAL CORPORATION, THE BOARD OF COMMISSIONERS OF THE CITY OF ASBURY PARK, AND HARRY B. WHITE, CLERK OF THE CITY OF ASBURY PARK, AND THE OCEAN GROVE CAMP MEETING ASSOCIATION OF THE METHODIST EPISCOPAL CHURCH, BODY CORPORATE, Defendants.

GROUNDS OF APPEAL

The following are the ground of defendants' appeal, in the above stated cause:

1. The plaintiffs have joined in one action against the defendants, several and distinct causes of action, the right to which action, if any, is several and not joint to the plaintiffs.

2. The trial judge admitted transactions of the

Asbury Park City Council, beginning with December 19th, 1910, relating to the introduction of an ordinance relating to the improvement of Wesley Lake, over defendants' objection.

3. The following questions were admitted over defendants' objection,—

Q. Mr. White, will you refer to the minutes of December 19, 1910, relative to a statement made by Dr. A. E. Ballard, representing the association, to the City Council in connection with the proposed improvement of Wesley Lake?

Q. Mr. White, will you refer to the minutes of March 22, 1911, and read a motion, if there is such a motion, relative to the cleaning of Wesley Lake Brook, stating the page of the ordinance book on which that motion appears?

Q. Will you tell the court what happened at that time?

Q. Will you state what happened on your premises on that date?

Q. When did you if ever make your first complaint to the city officials of Asbury Park concerning the flooding of your cellar?

Q. What was the condition produced in the cellar in the fall of 1911 by the flood of that time?

Q. Will you state, Mr. Doran, what consequences of the flooding you have suffered since July 1, 1912?

Q. How much of the time during the winter, during 1916 to 1917, did you have fire in your furnace?

Q. What do you say you suffered in dollars and cents as the result of that?

Q. What do you say the butchershop occupied by John Doran is worth per month with a cellar?

Q. What is a cellar worth in that neighborhood per year?

Q. Have you a cellar under that house?

Q. When did you build the cellar, Mr. Treat?

Q. From the time of the construction of your cellar up till 1911 will you state whether or not you were troubled by floods?

4. The following question was excluded over defendant's objection,—

Q. So that the head of the lake had filled up with sand and mud that had caused the water to flow back?

5. Plaintiffs' evidence failed to show any liability on the part of the defendants, and defendants' motion for non-suit should have been granted.

6. The trial judge allowed, over the objection of the defendants, an amendment, adding as a co-plaintiff the executrix of Adolph Woehrer.

7. Plaintiffs' evidence failed to show any liability on the part of the defendants, and defendants' motion for direction of verdict for the defendants should have been granted.

8. The Court charged the jury,—

"Now, gentlemen of the jury, the law, however, is perfectly well settled in this state, and the rule of law to be derived from the declarations of the appellate courts applicable to this case is this: 'A municipality has no right by artificial drains to divert surface water from the course it would otherwise take and cause it in a greater

body large enough to do substantial injury on land where but for such artificial drains it would not go.

I may also say that same principle has been reiterated and followed by the Court of Appeals in this state within the past month. And that rule, as I have stated it to you, has been adopted and appears to be specifically stated in this most recent case.

Therefore, gentlemen, you will observe that while the defendants had a perfect right in law—indeed they had the authority in law—to make these improvements, they had no right to so make them as to cast a greater burden, I may say, upon the property of the plaintiffs with the proximate result of causing them substantial injury. You may find it difficult gentlemen of the jury, in determining the preliminary question in the case, because you cannot consider the question of damages until you first determine that the defendants by the construction in question and of which complaint is made, did cause substantial injury to the property of the plaintiffs"

I should say to you, however, gentlemen, before discussing with you the question of damages and the measure of damages that you will apply in this case, that there has been discussed in this case the question of whether or not, in respect to the Dorans, that they have contributed to the injuries—assuming that this flood occurred by reason of the construction complained of—by their cutting into the cellar wall a hole. Mr. Doran, as I recall his testimony, stated that after the flood of August 26, 1911, that hole was cut for the purpose of letting out the water. But there is testimony in the case, which you will recall, on the part of at least one or perhaps more witnesses, that the effect of that hole was to let in the water rather than to let it out. Now if that be so, gentlemen, and that is for you to determine, the proximate cause of the flooding of Doran's cellar was not the construction

in question but the hole in the cellar wall and as I say, if you find that is so, the Dorans are not entitled to recover damages against the defendants.

It is also said by one or more of the witnesses that waterproofing would have protected th Doran cellar from the flood, or the injection of water of which complaint is made. The witness who so testified stated that the expense of such waterproofing, as I recall, would be about $300.

Now, I am obliged to charge you, gentlemen of the jury, that if these plaintiffs have suffered damage as the result of the defective construction complained of and they could reduce their damages by some such protection as waterproofing—I do not know whether you will find that or not, but it is for you to say—and that there was a failure on the part of the Dorans—I do not recall that there is any such testimony in regard to the Woehrer cellar, although I do not withdraw from you the right to infer under all of the evidence, if you think the same rule applies to the Woehrer cellar— that within a reasonable time after the discovery by the plaintiffs of the flooding of their cellars they could have protected themselves, assuming they knew they could have protected themselves, against future flooding by the waterproofing in question, it was their duty to repair their cellars in that respect; and they would be entitled to recover against the defendants, assuming that you find liability of the nature that I have pointed out to you, the expense of that repairing. They should be allowed in your deliberation a reasonable time, assuming that you reach the conclusion that that would have stopped this flooding. In other words, you would not be justified in reaching the conclusion that they could wait from August 26, 1911, to April 2, 1917, without repairing their cellars in the manner suggested, assuming that they knew that

that would be an effective remedy against the repetition of the flood to which their attention had first been called in August, 1911, which charge was erroneous.

9. The charge of the trial judge to the jury on the law applicable to the case was erroneous, and did not properly state the law as settled in this state.

10. The charge of the trial judge as to the negligence of the plaintiffs was erroneous and damaging to the defendants.

11. The charge of the trial judge, that the act of the defendants was the proximate case of the injury to the plaintiffs, was erroneous.

12. The charge of the trial judge, as to the damages to be assessed to the plaintiff Elizabeth Woehrer, was erroneous.

13. The charge of the trial judge, that if notice of the defective condition was brought home to the city officials, or the representatives of the defendants, and the defendants did not remedy the conditions, the jury would be justified in finding liability against the defendants, was erroneous.

Dated, October 6th, 1917.

DURAND, IVINS & CARTON,
Attorneys of Defendants-Appellants.

MONMOUTH COUNTY CIRCUIT COURT.

MARY J. DORAN, et als.,
Plaintiffs,
vs.
THE CITY OF ASBURY PARK, et als.,
Defendants.
ACTION AT LAW

Freehold, N. J., June 29, 1917.

Mr. Kremer. May it please your Honor, in pursuance of a notice served upon the defendants and duly acknowledged, I wish at this time to amend the complaint filed in the action.

The Court. Is there objection, Mr. Carton, to the amendment of the complaint?

Mr. Carton. It has been amended, your Honor. No objection. This was the matter that was brought to the court's attention.

The Court. With reference to new matter? You say there is no objection?

Mr. Carton. I assume they have the right to amend at any time.

The Court. Very well. The amendment will be made. Counsel for the plaintiff moves to amend the complaint in the following particulars.

Mr. Kremer. By adding on the tenth page thereof, in the eight line, after the word "construction" the following: "And as a result of the negligence of the defendants in maintaining and permitting the said various constructions to be in operation after their inadequacy and insufficiency had become known to the defendants and after the defendants had noticed and knowledge thereof."

The Court. The amendment is allowed, there being no objection.

(Mr. Kremer opens for the plaintiffs and Mr. Carton opens for the defendants.)

HARRY B. WHITE, Sworn for plaintiffs.

Direct examination by Mr. Kremer.

Q. Where do you live, Mr. White?
A. Asbury Park.
Q. What is your official position?
A. City Clerk of the City of Asbury Park.
Q. Are you custodian of the minutes and records of the City of Asbury Park?
A. Yes, sir.
Q. Will you produce the minute book showing the transactions of the Asbury Park City Council beginning with December 19, 1910?
A. I have it here.
Q. Will you refer to the minutes of December 19, 1910, and read from the minutes concerning the intro-

duction of an ordinance relating to the improvement of Wesley Lake?

A. Do you want me to read the paragraph here covering this matter?

Q. Yes.

Mr. Carton. If the court please, I cannot see that this ordinance has any relevancy. I do not know what the ordinance is even. It is clear from Mr. Kremer's question clear that it is something that happened in 1910.

Mr. Kremer. The purpose of the question I am about to ask, your Honor, is to show the history in the Asbury Park City Council of the improvements now in operation.

The Court. For the purpose of showing that the city participated in some way in the improvement?

Mr. Kremer. In the improvement.

The Court. The objection is overruled. You may proceed.

(Objection noted for defendant as ground of appeal.)

A. This paragraph is from the minutes of December 19, 1910. The paragraph is: "An ordinance entitled 'An ordinance providing for the laying out, opening and extending of Lake Avenue in a southerly direction from a point of the street in the center line of Wesley Lake in Asbury Park and for the improvement of Wesley Lake and Wesley Brook immediately adjoining the same,' was read and on motion of Mr. Bowd agreed to, adopted by the following vote: "all of the Councilmen voting aye."

Q. Mr. White, will you refer to the minutes of De-

cember 19, 1910, relative to a statement made by Dr. A. E. Ballard, representing the association, to the City Council in connection with the proposed improvement of Wesley Lake?

Mr. Carton. I object; it is a leading question to start with as to form.

The Court. Yes.

Q. Mr. White, will you refer to the minutes of December 19, 1910, and read therefrom any communication made to the Council at that meeting by Dr. A. E. Ballard?

(Objected to.)

The Court. I think I will overrule your objection. He may read.

Mr. Carton. May I state the purpose of my objection?

The Court. Yes.

Mr. Carton. It is objected to for this reason: that it is irrelevant, incompetent and immaterial, as neither of these defendants can be bound by what some municipal officer, a clerk of the city, records that somebody said. If it was a communication over a man's signature—

The Court. I understand the purpose of the interrogation is to bring out information as to some formal action by the Board of Commissioners of Asbury Park. In other words, he is asking now if there was not some

receipt of some communication at a regular meeting of City Council of Asbury Park.

Mr. Carton. Then if that were its purpose it seems to me it would be entirely irrelevant, because what purpose can it have?

(Objection overruled.)

(Objection noted for defendants as ground of appeal.)

A. "Dr. A. E. Ballard, President of the Ocean Grove Camp Meeting Association"—

The Court. What date is that?

Mr. Kremer. December 19, 1910.

The Court. Just fix the pages where these matters occur.

Mr. Kremer. Both of these, the ordinance and this thing we are now on, is page 401 of minute book No. 6.

The Court. Of what?

Mr. Kremer. Of the Council of the City of Asbury Park.

The Court. Do you call it the Council of the Board of Commissioners?

A. It was the Council at that time.

The Court. The Council at that time?

A. Yes.

The Court. Proceed.

A. "Dr. A. E. Ballard, President of the Ocean Grove Camp Meeting Association, made the statement that said association is willing to undertake the work required by said ordinance, accepting from Asbury Park the proposed appropriation of two thousand dollars and the State's appropriation of fifty-seven hundred dollars, and the following resolution:

'Be it resolved, that it is the sense of this Common Council that when it is in a legal position to do so, that they should contribute not more than two thousand dollars towards the expense of filling in the head of Wesley Lake for the purpose of constructing a roadway as a part of the Ocean Boulevard scheme, with the installing of the necessary drainage system required by such road construction,'

Was adopted by the following vote: all Councilmen voting aye."

Q. Mr. White, will you refer to the minutes of March 22, 1911, and read a motion, if there is such a motion, relative to the cleaning of Wesley Lake Brook, stating the page of the ordinance book on which that motion appears?

Mr. Carton. I wish to enter an objection to all this line of questions.

The Court. Of course, Mr. Carton, the case cannot be developed in one question, and if it should appear that this testimony is irrelevant at the close of the plaintiffs' case, or that it is not connected so as to be material at the close of the plaintiffs' case, it will be stricken out.

You may interpose your objection, because it is timely, and the objection will be overruled, with the understanding that the testimony will be stricken out if it is subsequently discovered that it is not relevant.

(Objection noted for defendants as ground of appeal)

Mr. Kremer. May I state my reasons for introducing this line of questions?

The Court. You may.

Mr. Kramer. These various transactions are introduced for the purpose of showing the manner in which the Asbury Park City Council dealt with this problem, with the view of showing that their method of dealing with the problem was negligent and not timely.

Mr. Carton. In view of this statement of the purpose, I wish to offer a further objection that the question now is entirely immaterial. It is answered by whatever the record might show. Because if the purpose is to show that the Council by its action was negligent, my answer to that is that its ministerial officers, in the exercise of their judgment, controlling the situation as appeared best to them, there could be no consequential damage, even if there was a mistake.

The Court. That is a question for argument to the court at the close of the case.

Mr. Carton. I wish to offer it now, the purpose having been stated.

The Court. It is overruled.

(Objection noted for defendants as ground of appeal)

The Witness. Do you wish the meeting of March 22nd?

Q. Yes.

A. According to this book there was no such meeting.

Q. Will you state what meeting was next to March 22nd?

A. There was one on March the 20th, and March 27th, 1911.

Q. Referring to the meeting of March 27th, will you read from the minutes relative to the matter of cleanliness of Wesley Lake Brook, if the same was taken up, stating the page of the minute book on which such motion occurred?

A. I find no such paragraph.

Q. Will you refer then to the meeting of March 20th?

Mr. Carton. If the court please, I wish to offer a further objection. I suppose these minute books have been examined and I think it is not fair to take the court's time, to have the City Clerk going through the minutes to find something that is not there.

The Court. I will not allow him to confuse the situation. The court will exercise its discretion.

A. I have not so far.

Mr. Kremer. I will withdraw it then.

Q. Will you refer to the minutes of the meeting of

July 10, 1911, and read from there the record, if there is such record, of a letter received from the City Engineer relative to the overflow of water at the head of Wesley Lake, stating the page of the minute book?

A. On page 13 of minute book 7, under date of July 10th, I find the following:

"Letter of the City Engineer with reference to the overflow of waters at the head of Wesley Lake was read and motion adopted that it be referred to the Street Committee for consultation with the Public Grounds Commission."

Q. Mr. White, were you subpoenaed to bring with you that letter?

A. Yes, sir.

Q. Have you it?

A. No, sir.

Q. Why not?

A. I couldn't find it in our files.

Mr. Carton. I might state to Mr. Kremer and the court that you subpoenaed a letter from Rufus Savage, Engineer, and we could not find that. Your reference now to the letter is apparently a letter from Mr. Niart Rogers. We have the letter from Niart Rogers. We have no letter from Mr. Savage.

(Mr. Carton produces letter.)

Mr. Carton. Is that the letter which you referred to?

Mr. Kremer. That is the letter to which I refer, a letter from the City Engineer, whom I understood was Mr. Savage at that time. I find that in asking Mr. White to refer to the minutes of March 22, 1911, it was a typo-

graphical error, and that I should have asked him to refer to the minutes of May 22nd.

Q. Will you refer to the minutes of May 22nd and read from there the record, if there is one, as to the cleanliness of Wesley Lake Brook, stating the page of the minute book?

A. I find the following paragraph in minute book No. 6, page 494, under date of May 22nd:

'Complaint of the Board of Health regarding the condition of Wesley Lake Brook and its branches was read and the Sewer Committee was on motion instructed to take up with the Neptune Township Committee the matter of ascertaining the cost of installing a cement drain for the purpose of keeping the brook continually clean."

Q. Will you read the motion on the same day, if there is such a motion, relative to the installation of a bypass?

A. Page 495, minute book No. 6, date of May 22, 1911:

"Motion that a bypass be installed and an improvement in the brook made at the head of Wesley Lake in order that the catch basin may be kept clean without emptying into the lake, such improvement to cost not exceeding $250, one-half of the cost thereof to be borne by the Ocean Grove Camp Meeting Association. So ordered."

Q. Will you refer to the minutes of September 18, 1911, and read therefrom a motion, if there was such a motion, that the City Engineer prepare plans for a spillway?

A. Minute book No. 7, page 40, date September 18, 1911.

"Motion that the City Engineer prepare plans for a

spillway at the foot of Wesley Lake and give an estimate of the cost thereof and that the City Clerk ask the Ocean Grove Camp Meeting Association if it will pay a portion of the cost thereof, was adopted."

Q. Will you refer, please, to the minutes of October 2, 1911, and read therefrom a statement relative to a letter of the City Engineer, if there was one, concerning a report on the storm drains and culverts of Wesley Lake?

A. Page 41 of minute book No. 7, dated October 2, 1911:

"Letter of the City Engineer advising that he would make report and recommendation regarding storm drains and culverts, and upon the proposed outlet for Wesley Lake, were filed."

Q. Were you subpoenaed to bring with you that letter Mr. White?

A. Yes.

Q. And have you that letter?

A. No, I have not.

Q. Has it been lost?

A. I fail to find it in our files.

Q. Will you refer to the minutes of December 11, 1911, and read therefrom the resolution, if there was one, concerning the backflow of water in Wesley Lake?

A. Minute book No. 7, page 74, dated December 11, 1911, the following resolution:

"Whereas, the chairman of the street committee has reported to this Council the progress of the work under way by the City Engineer in connection with the carrying off of the flow of water at the time of heavy freshets, alleged to have caused the backing up of water in Wesley Lake Brook, and having read to this Council in connection with the report of the City Engineer filed with this Council on the 10th day of July, reporting that the City

Engineer has caused to be made certain changes for emergency relief in the walls of the detritus tank erected at the head of Wesley Lake at the time of the erecting of the boulevard, and having also reported that certain property owners have caused to be filed in the Court of Chancery of this state a petition for relief from the backing up of the waters in said Wesley Lake Brook:

Therefore, be it resolved, that the chairman of the Street Committee, with the City Engineer, be instructed and directed to proceed with said work or such additional work as may be necessary to relieve the condition complained of so far as said tank is responsible for same; and that said work be proceeded with to completion forthwith;

Was adopted by the following vote: all Councilmen voting aye."

Q. Will you refer now to the minutes of January 29, 1912, and read therefrom relative to a letter received from the engineer, if there was such, advising of having cut out the baffle and weir walls of the Wesley Lake tank?

A. This appears on page 106 of minute book No. 7, under date of January 29th:

"Letter of the Engineer and Superintendent with regard to the flume and tank at the head of Wesley Lake, advising of having cut out the baffle and weir walls of the tank and cleaned it out and advising that the lake at its present level, with baffle and weir walls cut out, that the water in the brook west of Main Street will not back up any higher than it did before the tank and flume were built, was read and on motion that same be referred to the Street Committee for consultation with the Ocean Grove Association and report at the next meeting."

Q. Will you read from the minutes of March 11, 1912, and read therefrom the complaint of W. P. Steinhauser as to the condition of the lake?

The Court. How do you say that that is material?

Mr. Kremer. Because the motion adopted at that time will show that dredging of the lake was planned.

A. This appears on page 125 of minute book No. 7, under date of March 11, 1912:

"Complaint of Mrs. W. P. Steinhauser of the condition of Wesley Lake was read and on motion adopted that Street Committee at once proceed with excavation of Wesley Lake."

Q. Will you read from the minutes of April 8, 1912, relative to an agreement with Ocean Grove filed concerning construction of the pipe from Main Street to Wesley Lake?

A. This appears in minute book No. 7, page 140, date April 8, 1912:

"Agreement on the part of Ocean Grove Camp Meeting Association to pay one-half the expense of a thirty-six inch concrete or tile pipe to be laid below the surface from Main Street to Wesley Lake, about three hundred and forty feet, providing the City agrees to lay a new sixty inch concrete pipe at a proper depth below the surface and to construct forebay and drain on the west side of the railroad to be so constructed as to keep out all debris from the sixty inch pipe, was read and ordered filed."

Q. Will you read from the minutes of July 22, 1912, and read therefrom a motion, if such there was, that the City Engineer submit plans for Wesley Lake gates?

A. I fail to find that, Mr. Kremer.

Q. I will withdraw the question for the moment. Will you refer to the minutes of November 25, 1912, and read therefrom a motion, if such there was, that Ocean

Grove be asked to pay half the cost of deepening the lake?

A. This appears on page 242 of minute book No. 7, under date of November 25, 1912:

"Motion that the Council enter into an agreement with the Ocean Grove Association to pay one-half the cost of deepening Wesley Lake, the Solicitor to prepare the contract therefor to be submitted, was adopted."

Q. Will you refer to the minutes of December 2, 1912, concerning the tabling, if it happened, of the plans submitted by the City Engineer?

A. This appears on page 244 of minute book No. 7, under date of December 2, 1912:

"Plans for the dam and flume at the foot of Wesley Lake prepared by the City Engineer was tabled."

Q. Will you refer to the minutes of December 16, 1912, concerning the conference between the Ocean Grove Association and Council regarding the matter of the lowering of the lake and the erection of a sluiceway?

A. This appears on page 251 of minute book No. 7, under date of December 16, 1912:

"Motion adopted that the City Clerk write the Ocean Grove Camp Meeting Association that the Common Council do not favor the construction of a walk around the easterly end of Wesley Lake, as was reported to the Common Council as demanded by it, and asking if it would confer with a committee from the Common Council in the matter of the lowering of the level of the lake and the construction of a sluiceway thereto."

Q. Will you refer to the minutes of April 14, 1913, and read therefrom a motion that the City Engineer prepare temporary plans for the repair of the Wesley Lake flume?

A. This appears on page 331 of minute book No. 7, under date of April 14, 1913:

"Motion adopted that the City Engineer prepare temporary plans for the repair of Wesley Lake flume."

Q. Referring back for a moment to the minutes of April 14, 1914, will you read a communication received, if such was received, relative to the flooding of cellars by the overflow of Wesley Lake?

A. This appears on page 330 of minute book No. 7, under date of April 14, 1913:

"Communications of R. V. Lawrence, Louis Weidman and John Doran of bills paid for damages caused by the flooding of cellars of stores of Messrs. Hummell, Doran and Weidman, were referred to the Finance Committee for investigation."

Q. Will you read from the minutes of November 24, 1914, relative to the plans of Engineer Savage, if the same were presented, concerning the Wesley Lake improvement?

A. This appears on page 439 of minute book No. 7, under date of November 24, 1913:

"Engineer Savage presented plans for spillway at Wesley Lake and same was referred to the Wesley Lake Committee to present to the Ocean Grove Committee for the purpose of approval and to ascertain if the Ocean Grove Association would pay one-half the cost."

Q. Is that under date of November 24?

A. November 24, 1913.

Q. Will you read from the minutes of December 8, 1913, relative to the receipt of Wesley Lake plans from Ocean Grove?

A. This appears on page 443 of minute book No. 7, under date of December 8, 1913:

"Chairman McCabe, of the Wesley Lake Committee, presented plans and specifications prepared by the Ocean Grove Association. On motion it was voted that they be referred back, the same being entirely unsatisfactory.

Further action in the matter of Wesley Lake improvement was laid over for one week."

Q. Will you read from the minutes of February 16, 1914, relative to a protest from Messrs. McCabe and others concerning the overflow of cellars and the Wesley Lake condition?

A. This appears on page 491 of minute book No. 7, under date of February 16, 1914:

"Protest of Adrian H. Hummell, A. D. McCabe, Louis Weidman, Gus Woehrer, Fred Woehrer and John Doran, regarding the filling of cellars with water caused by overflow of Wesley Lake, was received and ordered filed. Chairman Winckler reported that the lake had been lowered and immediate relief afforded the parties in question."

Q. Will you refer to the minutes of November 24, 1914, and read therefrom instructions to the City Engineer to prepare new plans?

A. I fail to find that, Mr. Kremer.

Q. Will you read from the minutes of April 20, 1914, report of Chairman Winckler concerning the meeting with Mr. Preston, of Ocean Grove, relative to the improvement?

A. I fail to find that.

Q. Fail to find April 20, 1914?

A. Yes, sir.

Q. Will you refer to the minutes of a meeting of April 22, 1914, and read therefrom the record of the filing of plans by Mr. Winckler?

A. The next meeting is April 27th, after the 20th.

Q. Wasn't there a special meeting on the 22nd?

A. No, sir.

Q. Will you read from the minutes of July 2, 1914, relative to the completion of the Wesley Lake spillway?

A. I fail to find that also. That was July 2nd?

Q. July 2, 1914, that the spillway had been completed.

A. The previous meeting before that is June 29th.

Q. There is a meeting of July 2nd?

A. No, I say the one before July 2nd was June 29th. July 2nd was an adjourned meeting.

Q. Then will you refer to the meeting of June 29th?

A. That does not appear.

Q. Will you refer to the meeting of July 22, 1914, and read from there the record of the payment of the spillway, if such appears?

A. You have the wrong date. July 27th. There is no 22nd.

Q. July 27th. I beg your pardon.

A. This appears on page 105 of minute book No. 8, under date of July 27, 1914:

'Motion adopted that bill of $636.90, for the balance of the construction of Wesley Lake spillway, be paid."

Q. This letter which is from Mr. Niart Rogers, will you read from this letter under date of July 3, 1911, "Received by the Mayor and Common Council of the City of Asbury Park from Niart Rogers, City Engineer," the paragraph on page 2 which I have designated?

Mr. Carton. I object to that as irregular.

The Court. You mean you are entitled to have the entire letter read?

Mr. Carton. Yes.

The Court. I think that is so, Mr. Kremer.

Q. Will you read the entire letter then, Mr. White?

(Letter read by witness.)

Mr. Kremer. I wish to offer the minute books and the letter in evidence.

Mr. Carton. There is no objection to the letter. I do have an objection to the offer of the minute books.

The Court. Upon what ground?

Mr. Carton. Upon the same ground as to the relevancy of the testimony as presented.

The Court. The books and letter will be received and marked and the objection overruled.

(Latter marked Exhibit P 1. Minute books not marked.)

Cross Examination.

By Mr. Carton.

Q. There is just one question I want to ask you. Will you refer to the minutes of December 8, 1914, that you have already spoken of—I think they are in book 7—and tell me the names of the members of Council serving at that time.

A. There is no such meeting as December 8, 1914.

Q. Probably it is 1913. It may be an error. I have it 1914 here

A. Mr. Otto Rhome was President. I will have to go back to the organization meeting. It does not appear here. (refers to minute book.) President Rhome, members Rugarber, Coleman, Hancock, Meyer, Winans and McCabe.

Mr. Kremer. I would like to ask at this time to have permission, if it is proper, to examine the minute books.

The Court. You mean during recess?

Mr. Kremer. Yes.

The Court. You may during recess. They will remain in the custody and control, however, of the Clerk.

Mr. Kremer. And for the purpose of recalling Mr. White if I do discover the records which I thought were there.

NIART ROGERS, Sworn for Plaintiffs.

Direct Examination by Mr. Kremer.

Q. Where do you reside, Mr. Rogers?
A. I live at Bradley Beach.
Q. What is your business?
A. Surveyor and civil engineer.
Q. How long have you been a civil engineer?
A. About twenty-eight years.
Q. Where did you prepare to be civil engineer?
A. My elementary training was at Pennington Seminary. I finished up in regular practice.
Q. Are you City Engineer of Asbury Park today?
A. I am acting in that capacity today.
Q. Have you ever been appointed in that capacity?
A. Well, recently, do you mean?
Q. I mean have you been given an appointment which at present has ceased?

A. I have served the city as engineer from 1893 to 1911 inclusive, and then I was employed again by the Commissioners in 1915.

Q. Referring to the appointment in 1915, were you given an appointment for a certain period of time with a salary or are you just employed for the work as it comes up?

A. I am employed for whatever work I do, without salary.

Q. Have you recently made a diagram showing the boundaries and conditions pertaining at Wesley Lake in Asbury Park?

A. I made a diagram.

Q. When did you make that diagram?

A. Some time during this month.

Q. Will you produce that diagram?

(Diagram produced.)

Mr. Kremer. If your Honor please, I think there is no objection, I offer this merely for ancillary purposes, not to be bound in any way.

The Court. Is there objection to this plan, Mr. Carton?

Mr. Carton. I have not seen it. I should not think there would be. Anything that will help us to see what the situation is. There isn't any objection.

The Court. Very well. You may place it on the board. Well, he has given no explanation of his plan. You merely asked him if he made a plan.

Mr. Kremer. I say I merely offer it at this time for ancillary purposes.

The Court. If you are going to refer to it I think Mr. Rogers should indicate exactly what it contains.

Q. Will you describe to the jury the plan and what it represents, Mr. Rogers?

A. The top of the plan is north, as the arrow indicates, the bottom south, Wesley Lake on the east and the New York & Long Branch Railroad on the west. This shaded portion running from east to west represents Wesley Lake Brook, and by dotted lines continues on down to where it empties into the lake. There is a roadway on the easterly side of the map marked "Boulevard," extending from Bond Street in Asbury Park over to Main Avenue and Main Street, Ocean Grove and Neptune Township, and other streets shown upon it, Main Street, passing through Asbury Park and the township section; and also indicates the position of certain properties adjacent to the brook and along most of the premises in question.

By the Court.

Q. What is the shaded portion at the extreme side of the map?

A. That shows Wesley Lake, extending up to the boulevard.

By Mr. Kremer.

Q. Will you indicate the culvert which extends under Main Street?

A. Almost in a direct line with the part marked "Brook." (Indicating.)

Q. Will you indicate the straightaway connected with the culvert on the west and with the lake on the east.

A. That extends from the culvert on the easterly side of Main Street in an easterly direction until it reaches the lake, passing under the boulevard.

Q. Does your diagram indicate the westerly boundary of Wesley Lake before the improvement?

A. It is shown by the dotted line marked on the map as "Old Shore Line."

Q. That was the westerly boundary of Wesley Lake, was it not, before the improvement and filling in was made?

A. That was the boundary of the lake before the filling in.

JOHN DORAN, Sworn for plaintiff.

Direct Examination by Mr. Kremer.

Q. Where do you reside, Mr. Doran?
A. 3 South Main Street, Asbury Park.
Q. What business are you engaged in?
A. Butcher.
Q. How long have you resided at No. 3?
A. 3, did you say? 1 and 3.
Q. How long have you resided there?
A. Since 1903, in that one location.
Q. Will you state when your house was built?
A. In the fall of 1907 it was started and finished in 1908.
Q. Did you construct a cellar at that time?

A. Yes, sir.

Q. Will you describe that cellar as you constructed it at that time?

A. It was a concrete cellar, 16 inches at the base, running up to 12. It is about 6 feet high and 34 by 60 feet dimensions.

Q. Between the time of the construction of the cellar and the 1st of January, 1911, was your cellar ever flooded?

A. Never.

Q. What was the first time that your cellar was ever flooded?

A. I think it was in August, well, about the 25th or 27th, something like that.

Q. Of August in what year?

A. In 1911.

Q. Will you tell the court what happened at that time?

(Objected to as immaterial.)

The Court. Yes, I think he may describe what the situation was. Of course he has not yet shown the cause. At this stage I think it is competent.

Mr. Carton. I object, no matter what the cause might be, that it would have no importance whatever, what happened to his cellar in 1911.

The Court. August, 1911.

Mr. Carton. August, 1911, is irrelevant, I insist.

The Court. I assume that they are going to show that there was some sort of reconstruction on the part of the

defendants prior to August, 1911. Is that the purpose?

Mr. Kremer. That is the purpose.

The Court. Well, he would have a right to show that.

(Objection noted for defendants as ground of appeal.)

Q. Will you state what happened in your cellar on that date?

A. Well, they had a big heavy rain and they filled up with water.

Q. How deep did the water get?

A. I don't know exactly that time. About twelve inches.

Q. How long did the water stay in your cellar?

A. Until they were opened up down below, about the next day sometime. It oozed out sometime the next day, evening.

Q. Did it go out completely the next day?

A. Oh, no.

Q. How long was it before the water had gone out entirely?

A. Well, we had to bail it out. When it got down about six inches we got down there and bailed it out, so you could walk around with rubber boots nicely.

Q. What was the condition of the cellar after the water had gone out?

A. Well, it was very musty and damp, and on the bottom of the cellar the water that came in, it was mud and it left a great sediment in the bottom, about half an inch. You could slip around just like old grease.

Q. Was there any attempt made at that time by you to open the gates or spillway at the easterly end of Wesley Lake?

A. Well,I don't know as it was that time, but I think it was the next time. There was one three days after that.

Q. That would be—you said the 1st was about August 27th?

A. About the 27th.

Q. That would be about the 30th day of August, would it?

A. Three or four days; I am not positive.

Q. You were flooded out also?

A. Yes, sir.

Q. Did you make an attempt at that time to open the gates or spillway at the ocean end of Welsey Lake?

A. Yes, sir.

Q. As you recall it will you describe the gate or spillway at that time.

A. It was an old wooden structure and it was a very hard thing, no one man could open it; something that I presume Mr. Bradley put there years ago, and it was planked. One plank was dropped down, and drop down one right on top of the other. But the water was so high that they had to saw them out that day.

Q. Saw what out?

A. Saw them planks out. The couldn't pry them out. They were swelled fast.

Q. Who sawed them out?

A. Well, under Mr. Savage, I think, a man by the name of Buck Reynolds.

Q. Was Mr. Savage there?

A. Mr. Savage was there.

Q. Which Mr. Savage are you referring to?

A. The engineer Savage, employed by the city. I don't see the gentleman here.

Q. Is Mr. Savage in court?

A. I saw the gentleman here this morning.

Q. You are referring to Mr. Rufus L. Savage, who was City Engineer?

A. Yes, sir.

Q. What was the result in your cellar when the gates were sawed and opened?

A. When they were sawed open? Well, after a time the water went down, after they got them open.

Q. Do you recall what happened on the 19th day of October, 1911?

A. Yes, sir.

Q. Will you state what happened on your premises on that date?

Mr. Carton. I make the same objection.

(Objection overruled.)

(Objection noted for defendants as ground of appeal.)

Q. You may state what happened.

A. On that same date, or about I think it was that date that we had water in our cellar. It has been a continuous thing right along.

Q. How deep did the water get that time to the best of your recollection?

A. Well, 12 or 15 or 16 inches. I didn't measure them each time.

Q. Do you recall the occasion of February 26, 1912?

A. Yes.

(Objected to as leading.)

The Court. Yes, it is leading.

Q. Will you state what was the next time that you

were flooded after October 19, 1911?

A. Sometime in 1912.

Q. What part of 1912?

A. I just don't know. I think——

Q. Was it in the early part of 1912?

A. The early part; that would be in the winter time. Well, I think—I am not sure whether it was the early part or not.

Q. What do you think? Do you think it was in the early spring of 1912?

A. Yes, I think it was.

Q. What month do you think it was?

A. About February.

Q. And do you think it was the early part of the latter part of February?

The Court. It is not what he thinks, what is his best recollection.

A. Well, that is my best recollection.

The Court. What is your best recollection on the subject?

Q. What is your best recollection, what part of February was it?

A. Well, about the 1st of February, or about the 10th, something like that.

Q. Will you describe what happened at that time?

A. The same thing exactly as it did before.

Q. Will you state when the next flood occurred, according to the best of your recollection, after the flood of February 19, 1912?

A. If they will allow me, I have got a little minute of those.

By the Court.

Q. Can you tell without referring to the minutes?
A. I couldn't remember back that far.
Q. When did you make the minute?
A. Well, some of it has been made years ago. I can show you.
Q. Well, some of it has been made when?
A. Back as far as the other flood, 1911, when we had the other lawsuit.
Q. To which you have already referred?
A. Yes, sir.
Q. What I would like to know is when was this memorandum made with respect to each flood that you complain of?
A. Well, it was taken, we had minutes of it years ago and we had water before, when we had the little trouble with our suit, and we had minutes at that time, and I took them and put them in here.
Q. When did you make this?
A. These have been made lately.
Q. Since this suit was brought?
A. The first ones have not been made since this suit was brought. They were the other suit.

The Court. Are those included in this? They are not, are they?

Mr. Kremer. I don't quite understand the witness.

By Mr. Kremer.

Q. Do you mean that you have taken this record from another record which was made at an earlier time?
A. Yes, an earlier part.

The Court. I think you had better examine the witness as to his best recollection.

Q. Will you state to the best of your recollection when the next flood occurred after the one in February, 1912?

A. Well, it seemed to be—I couldn't tell exactly the exact date, but it was any big rain that would fall, we would have water.

Q. Well, to the best of your recollection do you think it was May?

A. We had about six or seven in the year 1912.

Q. To the best of your recollection do you think the next flood occurred in April in the spring of 1912?

A. Well, I couldn't tell just exactly, Mr. Kremer. I depended on the book, that is what I depended on.

Q. Well, independent of the memorandum which you have made, when do you think, to the best of your recollection, that that flood occurred, in 1912?

A. In 1912?

Q. Yes, after the February flood. Was it May or do you think it was April?

A. I think it was in April. That is about the——

By the Court.

Q. How many did you have in 1912?

A. About two or three.

Q. And in 1913 how many?

A. Well, four or five.

Q. In 1914 how many?

A. Six or seven. It averaged six or seven all the way through.

Mr. Kremer. If your Honor please, I might say it is

rather difficult, as you notice, to bring out each flood, and it would expedite matters very much——

The Court. Well, he says about six or seven.

By Mr. Kremer.

Q. What year did you have the most?
A. In 1916, I think.
Q. How many did you have in 1916?
A. Eight or nine; nine, I think.
Q. How many in 1917?
A. Well, the first one was in January. I can remember that very distinctly because we had three feet of water in the cellar.
Q. What date was that?
A. January 21st?
A. Three feet of water.
Q. Did you at that time go to the Wesley Lake gates, the eastern end?
A. I did.
Q. At what time did you go there?
A. At one o'clock at night.
Q. At what time did your cellar begin to fill?
A. I was down at seven o'clock in the evening and I went down to fix the furnace at eleven o'clock at night and I saw the water oozing in and I went up and I says to my wife, "I am going down to the beach and see the condition." I went down to the beach. There wasn't anybody there. It rained. There was about three or four inches of snow on the ground and it started to rain about eight o'clock in the evening and that was about eleven I went down.
Q. Was the gate closed?
A. The gate was closed and four or five inches of

water running over the spillway.

Q. Did you during that evening call Mr. Bamman or any city official of Asbury Park with reference to opening the gates?

A. No, sir; because in the early part of the evening our cellars were nice, there wasn't no trouble.

Q. Did you open the gate?

A. I certainly did.

Q. What time of night was that you opened the gate?

A. 11.00 o'clock or 11.30, about that I got down there.

Q. Did that bring relief to your cellar?

A. It did in a day or two, a couple days.

Q. Did you examine the man hole at the junction of the culvert and straightaway on the easterly side of Main Street?

A. Yes.

Q. The next day?

A. Yes.

Q. What condition did you find there?

A. I found a lot of woods, baskets, sticks, etc.

Q. Did you notify the city that it was obstructed?

A. Yes, sir.

Q. Whom did you notify?

A. Mr. Bamman.

Q. Was the refuse removed?

A. Not by them.

Q. Who removed it?

A. Nick Ferraro, I think his name was.

Q. Who employed him to remove it?

A. Well, I went to take it out myself, as the water was pretty deep there, and I went to take it out myself and he came over and he had rubber boots on and he got down.

By the Court.

Q. Who was he, a volunteer?
A. Yes, sir.

By Mr. Kremer.

Q. When was this done?
A. The next day.
Q. Was it done one day after the flood?
A. One day after the flood; because it was raining the same day, it was raining yet.
Q. Then he cleaned it out on the 22nd?
A. Well, he must have. I am positive about it being the second day, yes.
Q. But you are sure that he cleaned it out the very next day?
A. Yes, sir.
Q. Do you recall a flood in the early part of March 1916?
A. 1916.
Q. Did you go to the gate at the easterly end of Wesley Lake on that night?
A. Yes, sir.
Q. Did you endeavor to open the gate?
A. I did.
Q. Did you get it open?
A. No, sir.
Q. Why not?
A. Well, a man interfered with me, some employee at the beach. I was down there trying to open it, and the gate has got a screw and a handle and I couldn't open it unless I had a stick to put through the ring to pull it around, and I asked that man to give me a stick, and he said no, he would n't give me any, he didn't want to give

me any. He didn't want me to stay there and so I didn't do anything. So he helped me out, this man did. I don't know who he was, but he was a man employed by the city.

Q. Were you prevented from opening the gate at that time?

A. Yes, I certainly was prevented from opening the gate.

Q. Was the cellar flooded that night?

A. Yes, sir.

Q. Did the water stay in your cellar all that night?

A. Surely, I didn't open the gate.

Q. When did you if ever make your first complaint to the city officials of Asbury Park concerning the flooding of your cellar?

(Objected to as immaterial.)

The Court. How do you say it is material?

Mr. Kremer. I say it is our purpose to show that the city had noticed and they were negligent in maintaining this nuisance after notice.

The Court. Yes, I think it is competent on that ground, as to notice. Proceed. The objection is overruled.

(Objection noted for defendants as ground of appeal.)

A. The first complaint? That was in 1911. I am pretty positive I made it to Mr. Winckler.

Q. You complained to Mr. Winckler?

A. Yes, one Sunday morning I walked down there. I don't know exactly the time or the year or date, but it

was Sunday morning, and I saw Mr. Winckler, as he was in.

Q. What did Mr. Winckler say?

(Objected to as immaterial and incompetent.)

The Court: I think the objection is well taken.

Q. Did you ever make complaint to the Ocean Grove Association concerning the flooding of your cellar?

A. Yes, sir.

Q. When did you make this complaint?

A. By telephone in the early times, right after the detritus tank was put in, the first flood.

Q. How did the water come into your cellar on the occasion of floods?

A. By overflowing the banks.

Q. Did it come in from the rear of your house?

A. Yes, Moreover there is a window or a hole about two feet up from the floor that it went right in that too.

Q. Did you on the occasion of floods examine the manhole at the junction of the straightaway and the culvert?

A. Yes, sir.

Q. What was the condition that you found generally?

Mr. Carton. To which instance are you referring now?

The Court. After the first flood, I understood him to say, didn't you?

Mr. Kremer. No, I didn't. I said generally as to these floods.

Mr. Carton. I object to that as too general.

The Court. Yes, I think it is too general.

Q. Will you refer to the flood of March, 1916, concerning which you have testified. After that flood did you examine the manhole?

A. Yes, sir.

Q. Was the water in the manhole higher or lower than at times when there was no flood?

(Objected to as leading and suggestive.)

The Court. Oh, yes. What was the result of your examination?

Q. What was the result of your examination?

A. Well, I found the water high, away up to the top.

By Mr. Carton.

Q. You say you found it high?

A. Yes.

By Mr. Kremer.

Q. Did you find it higher than at ordinary times or lower?

A. After the flood, you mean, or during the flood?

Q. After the flood.

A. Oh, well, it was lower, of course.

Q. During the floods was it higher or lower than before them?

Mr. Carton. I object for the same reason, that it is too general. I don't know what he is referring to.

Mr. Kremer. I am referring to the flood of March, 1916.

A. What is the question, please?

Q. During the flood on March, 1916, was the water higher or lower than before the flood?

A. Why, it surely was higher.

Q. Did you on this occasion appeal to the city authorities to open the gate?

A. On every occasion I telephoned, on this occasion; always telephone to Mr. Bamman whenever we had any water in the cellar or thought it was coming.

Q. Will you refer back to the fall of 1911? What effect if any did the flood have on the heating apparatus in your cellar?

(Objected to.)

The Court. Yes, that is leading. What was the result of the flood in your cellar?

Q. What was the result of the flood in your cellar?

Mr. Carton. The question is objectionable, as I view it, for the further reason that it makes no difference what happened in 1911. If there was any liability at all it was outlawed by this time.

The Court. For what reason.

Mr. Carton. Well, I assumed that this cause of action is predicated on the proposition of negligence. It is a tort.

The Court. It has not been shown yet, of course, what was the cause of the flood, whether it was due to some construction on the part of the defendants or what.

Mr. Carton. I am conscious of that, but no matter what the cause might be——

The Court. He has testified that prior to August 25, 1911, there were no floods in his cellar, but after that these floods occurred. Now they have not yet developed why it was.

Mr. Carton. Then with your Honor's suggestion I add that as a further reason why it is objectionable and immaterial and incompetent at this time.

The Court. It is merely a question of the order in which the witnesses are called.

Mr. Kremer. Our purpose is to prove by the engineers that it was the fault of the construction.

The Court. If this witness knows why it was that he had floods in his cellar after August 25, 1911, and not before, he can state, if he knows.

Mr. Carton: That was not the purport of the question.

The Court. This question may be withdrawn. I will allow you to interrogate the witness, Mr. Kremer.

Q. What is your information——

The Court. No, not his information. If he has any knowledge on the question he may say so. If he has knowledge he may say what its was.

Q. Do you know what caused the flood of August, 1911?

A. Yes, sir.

Q. What caused that flood?

A. The detritus tank at that time in 1911. It was under the culvert running from north or east to west, was a six foot culvert, and they reduced it to about three when they put the detritus tank in. That was 1911.

Q. What do you mean when you say they reduced it to about three?

A. I mean on the east side of Main Street, the pipe was there only three feet, and under the roadway it is six feet.

By the Court.

Q. You say they reduced it, who do you mean?

A. The Ocean Grove Association and the City of Asbury Park.

Q. Did you see that work done?

A. Yes, sir.

Q. When was the work done?

A. I think 1911.

Q. At what time in 1911?

A. It was in warm weather, the early part.

Q. Now prior to that work being done what have you to say with respect to water in your cellar?

A. We had no water at all.

Q. How long had you occupied the premises at that time?

A. That same premises—we built in 1907, but it was not finished till 1908, but we had no water.

Q. You had no water then until when?

A. 1911.

Q. What time in 1911?

A. After the detritus tank—I can't tell just exactly the time—after that was put in.

By Mr. Kremer.

Q. What was the condition produced in the cellar in the fall of 1911 by the flood of that time?

(Objected to.)

The Court. I think he may state what the condition was.

(Objection noted for defendant as ground of appeal.)

A. Well, at least eighteen to twenty inches of water.

Q. What other damage did the flood do, if any?

(Objected to.)

The Court. It is leading, you mean?

Mr. Carton. It is offensive for that reason, but it is immaterial, no matter what its purport might be.

The Court. Oh, I think he may describe the effect of the flood and the consequences of the water in the cellar.

Mr. Carton. With a view of establishing that as a damage?

The Court. I think so, yes.

Mr. Carton. I object for the reason that even though there was a damage at that time, and even though it was our fault, if it was our fault it was outlawed.

The Court. But you did not plead the statute.

Mr. Carton. We pleaded no liability.

The Court. But you have not pleaded the statute of limitations.

The Court. Well, of course I assumed from your opening you pleaded no liability, because you are not responsible for the alleged injuries by the construction. You say you did not do it at all. But to take advantage of the statute of limitations you should have specially pleaded it.

Mr. Carton. There was nothing in the complaint to suggest that the statute of limitations should be pleaded, because until just now, the amending of the complaint at that time, suggesting dates, there is nothing in the complaint to indicate when the damage was claimed at all. These plaintiffs in any view of the matter could not recover beyond a period of two years.

Mr. Kremer. I think your Honor has hit the nail on the head exactly in stating that the statute of limitations, to be availed of, must be pleaded. Both the amended complaint and the bill of particulars claim from the begin-

ning in the latter part of August, 1911, and continuing up until date, also stating that the plaintiffs were damaged by the deprivation of the use of their property during those five or six years.

The Court. Well, I shall reserve decision upon this application. The witness may answer and if I conclude that the point made by Mr. Carton is well taken then I shall strike his answer from the record.

Mr. Carton. At this time it seems to me if there is any question about the matter, that I have this application to make. As I read the complaint it is very general. It read more like an indictment than it did a bill of particulars. It starts from a certain happening during the year 1912, as I recall it, to the date of bringing suit, and then it refers in one or two words to particular items of damage to the bakery shop and the heater, and everything else claimed for is general. There is nothing in that pleading that would suggest to the defendants that the statute of limitations was necessary to be pleaded. If there is any question, in view of Mr. Kremer's permission now to amend his complaint to include dates beyond that, I ask the right to plead the statute. I don't think it is necessary.

The Court. Well, has the amendment raised that question?

Mr. Carton. I don't think so, your Honor.

The Court. He alleges in his complaint that between April 26, 1911, and July 12, 1911, "they did fill in such lake for a distance of three hundred and fifty feet easterly from South Main Street and obstruct said portion of said

lake or fill in nearer the center thereof"——well, he specifies his dates there.

Mr. Carton. He does not specify any damage, does not claim any damage. He goes on and gives a history of the situation.

Mr. Kremer. If your Honor will permit me to refer to the bottom of the seventh page of the amended complaint, you will find that the plaintiffs contend that ever since the 1st day of May, 1912, the defendants, with knowledge of the defectiveness of the said construction and with knowledge of the damage to the plaintiffs—that is the date on which the new straightaway was built, and that would certainly be notice of the claim. Then the next succeeding paragraph says, "as the defendants' negligence," and showing in what particular the plaintiffs have been damaged.

The Court. But you specify 1912, don't you?

Mr. Kremer. In that particular place. That was when the straightaway was completed, though the detritus tank was completed in 1911. And it is all of those constructions, not any one, which we claim is improper and for which damage is claimed. The bill of particulars also states, I think your Honor will recall, the various dates of flood and the damages claimed.

The Court. Well, you charge in your original complaint from January 1, 1912. When was the detritus tank built?

The Witness. 1911.

The Court. Well, you do charge in your amended complaint from May 1, 1912.

Mr. Kremer. Yes, I notice that, and I am willing to be bound by that.

The Court. Yes, you will be bound by May 1, 1912. Now this question relates to May 1, 1911. You withdraw this question do you?

Mr. Kremer. Yes, I withdraw this.

By Mr. Kremer.

Q. Will you state, Mr. Doran, what consequences of the flooding you have suffered since July 1, 1912?

A. Up to the present time?

Q. Up to the present time.

Mr. Carton. Now I object to that question on the ground, that there was no continuing cause of action, and as a legal proposition the claim is outlawed, if there were a claim.

The Court. The objection is overruled. There is no plea here of the statute of limitations filed. It must be specially pleaded in order to take advantage of it. You may have an exception.

(Objection noted for defendants as ground of appeal.)

Mr. Carton. Now in view of the complaint, the amended complaint—they have had two or three shots at it—if there is any question about that I ask leave at this time to plead the statute.

The Court. Do you claim surprise?

Mr. Kremer. Yes, I do.

The Court. Do you want an adjournment by reason of surprise?

Mr. Kremer. I do not think the amendment of the answer to plead the statute of limitations is proper at this time. I do not think the answer can be amended at this time for that purpose. The statute should be especially set up by the plea.

The Court. Now he asks permission to set up a plea. To the amendment that you were permitted to make he now asks permission to file an amended answer, setting up the plea. Now can you show to me the ground of surprise which would entitle you to an adjournment? I don't know just why you ask for an adjournment for that reason.

Mr. Kremer. An adjournment would avail us nothing.

The Court. Nothing at all. I will allow you, Mr. Kremer, to show me any authority which deprives this court at this time of the exercise of its discretion allowing Mr. Carton at this time the setting up by the answer of the statute of limitations. It is now nearly time for adjournment, and in the meantime you may show me any authorities denying to Mr. Carton the right to amend.

RECESS TILL 1.15 P. M.

(Trial of the cause resumed at 1. 15 P. M.

The Court. The court has had occasion to examine the authorities in regard to the motion made by Mr. Carton to amend his answer by filing the statute of limitations, based upon the motion that two years bars the cause of action in this case. Aside from the fact that the right to plead the statute is a strict right, to be strictly enforced, as is said in the case of West Hoboken vs. Simmons, it seems to be regarded as a strict defence, and if a party lets it slip the court ought not to relieve him. But the primary difficulty with Mr. Carton's motion is, he has misconceived the fact that the statute of limitations in this case is two years. This is an action based upon injury to property, not to person, and therefore the period of limitation after the cause of action arose would be six years. If you care to attempt to distinguish this case which I find, Mr. Carton, I will allow you to do so, in other words, whether the six years does not apply instead of two years. I may refer you to a decision of the Chief Justice in the case of Daly vs. Kiernan, the syllabus of which is that, "The provision of our statute that all actions for injuries to persons which are caused by the wrongful act, neglect or default of others, shall be commenced within two years after cause of action shall have accrued, does not apply to actions brought to recover for injuries inflicted upon a person by damages to his property." That last paragraph appears to be conclusive. If you care to examine it you may do so.

Mr. Carton. I am familiar with the citation, but my view is this: that this appiles to a situation that would amount to a trespass or something of that kind, an injury to property in that way.

The Court. Well, then if that is so the six year provision undoubtedly applies, because the statute is "that in all actions of trespass quare clausum fregit, etc., shall be commenced and sued within six years next after the cause of such action shall have accrued and not after."

Mr. Carton. That is my idea of the application of this case to this situation, a situation that would amount to a trespass where you would go upon a man's property and damage it.

The Court. Then the two year provision does not apply.

Mr. Carton. No, but the point I am trying to make is that in this situation the damage to personal property as contemplated in this case amounts to a damage that is the result of a trespass. My point in this case is that of necessity, the claim here is negligence, a tort, and a tort would outlaw in two years. That is my point.

The Court. Well, I think you have misconceived the statute in that respect. The case which I suggest in which you plead a case of injury to personal property—that was an injury to an automobile, as I understand—and there the Chief Justice held that the cause of action accrued within six years and not within two.

Therefore the motion to amend will be denied, for the reason that the statute of limitations does not apply to this case with respect to the cause of action; the testimony thus far being that the injury complained of occurred subsequent to August 25, 1911, this suit having been brought within the six year period.

JOHN DORAN, resumed.

Direct Examination continued by Mr. Kremer.

Q. Will you describe all the damage which has resulted from the flooding of your cellar subsequent to May 1, 1912?

A. Well, on every occasion or nearly every occasion it has put the fire out, in the wintertime when we had fire in the cellar, making the house very uncomfortable for to live in. In fact, it was not comfortable to live in.

Q. Can you state any other result of the floods?

A. No, I think that is all.

Q. Have you or have you not used your cellar for storage purposes since May 1, 1912?

A. Have I used it for storage purposes? No.

The Court. Well, it does not appear what he used the cellar for, Mr. Kremer, at all.

Mr. Kremer. The purpose of this line of questioning is that he has been unable to use the cellar at all for any purpose.

The Court. Well, what did he use it for before the alleged flood?

Q. What did you use your cellar for prior to August, 1911?

A. Storing things, eatables, potatoes or coal, everything that anybody would want a cellar for.

Q. Have you been able to use your cellar for storage purposes since August, 1911?

A. No, sir.

Q. Have you used it at all?

A. Nothing only for the furnace, and lots of times that fire would be out.

Q. How much of the time during the winter, during 1916 to 1917, did you have fire in your furnace?

(Objected to.)

The Court. How much of the time did you have fire in your furnace? I suppose you want to show how much time it was out?

Mr. Kremer. Yes.

The Court. The objection is overruled. You may answer.

(Objection noted for defendant as ground of appeal.)

A. Why, about one third of the time.

Q. One third of the time?

A. Yes.

Q. Why did you only have fire one third of the time?

A. On account of the water.

Q. Did the water put your fire out?

A. Yes, sir.

Q. Was the heating plant in your house constructed to supply the entire house?

A. Yes, sir; with the exception of the kitchen.

Q. To what have you resorted if anything for heating in the upper stories of your house when your furnace was out?

A. Kerosene stoves.

Q. Will you describe that house briefly?

A. The house on the first floor is entirely open, with a few columns in. The room is 34 feet front running—

Q. Well, not that briefly. Of what material is it built?

A. It is a block house, lathed and plastered, of course.

Q. How many stories?

A. Two stories.

Q. Besides the cellar?

A. Three stories besides the celllar.

Q. Three stories?

A. Yes. The store next door.

Q. How much did it cost?

A. About $5,000.

Q. For the house alone?

A. Yes.

Q. On the second and third floors what have you?

A. The meat market—or do you mean over the meat market?

Q. Over that.

A. Living rooms.

Q. Which floor do you live on?

A. On both. We use the first floor for living rooms and on the top floor we have four bedrooms and a bath.

Q. The first floor is what, the ground floor?

A. What do you mean?

The Court. The street floor.

A. Oh, butcher market.

By the Court.

Q. Who owns the property?

A. My wife.

Q. What is her name?

A. Mary J. Doran.

By Mr. Kremer.

Q. When did you first complain to Mr. Bamman concerning the flooding of your property?

A. Well, I couldn't just tell you exactly the time, but just as soon as the first water came I spoke to Mr. Bamman over the telephone, I dare say a dozen times, maybe fifteen.

Q. As nearly as you can recall when did you first speak to Mr. Bamman about it?

A. Sometime in 1915.

Q. What part of 1915?

A. Well, I couldn't tell just exactly.

Q. Was it early in 1915, to the best of your recollection, or the latter part of 1915?

A. Well, whenever there was a rain. I didn't put it in——

Q. Do you know when Mr. Bamman went into office as Commissioner of the City of Asbury Park?

A. I do. I couldn't tell exactly the date now.

Q. When did he go into office?

A. Well, it must be pretty nearly two years now.

Q. Can you place your conversation with Mr. Bamman any more specifically than that it occurred in 1915?

A. Only I spoke to him over the telephone and he said he would do as well as he could.

Q. Did you call Mr. Bamman more than once?

A. Oh, several times, at least fifteen.

Q. Did you ever clean out the manhole which has been referred to at any other time than on January 21, 1917, or thereabouts?

A. I don't think I did, no.

Q. Have you used your cellar at all since August, 1911?

A. Not for anything.

By the Court.

Q. Did you use it prior to August, 1911?
A. Yes, sir.
Q. For what purpose?
A. Well, heating apparatus, storing things, potatoes and everything that anybody would want to keep in the cellar.
Q. Have you used it for heating purposes since August 1911?
A. We have, very little though. This was the most severe winter we had, this last winter.

By Mr. Kremer.

Q. Can you state anything as to odors resultant in your cellar or other parts of your building, resultant from this flood?
A. Yes, sir.
Q. What can you state as to that?

(Objected to.)

The Court: Did you lay a foundation in your pleadings or odors, on the ground of odors?

Mr. Kremer. Yes, sir.

The Court. Do you expect to show injury to health?

Mr. Kremer. I don't expect to show injury to health, but I expect to show injury to business resultant from it.

The Court. You are getting within the range of personal injury, aren't you, rather than property?

Mr. Kremer. The result, if your Honor please, would be——

The Court. Personal injury?

Mr. Kremer. Personal injury. But my idea is this: that the property would be rendered of less value on account of the fact that there were odors there, that the atmosphere in that property was not what the atmosphere in a normal property should be.

The Court. How do you know it would be less valuable?

Mr. Kremer. Well, that is what I expect to show, that the property is rendered less valuable on that account.

The Court. All right. Of course this witness is not a party to the suit.

Mr. Kremer. He is, if your Honor please.

The Court. His wife is a party.

Mr. Kremer. He is a tenant.

The Court. Is he a party?

Mr. Kremer. He is a party, yes.

The Court Oh, yes, John Doran. He may answer.

Q. What can you state——

Mr. Carton. I want to put my objection to it.

The Court. Yes.

Mr. Carton. For the reason that the testimony in reference to that must be so uncertain and indefinite that it would not amount to anything.

The Court. If they come along subsequently with some one who would be qualified as to the value of the property and show, assuming that there is any liability at all—we do not determine that yet, of course, simply constructing the case as we go along, of course. You can't try a case any other way. Assuming that there is liability, which we have not yet decided, the plaintiffs, if they are able, might show that there had been a depreciation, by competent testimony of real estate experts or those who were competent to testify, that there had been a depreciation in that property—I say assuming that there is a liability, we do not determine that now—through this door. It may be remote, at the same time I think he is entitled to show it.

Mr. Carton. I only wanted to get the objection on the record.

By Mr. Kremer.

Q. What can you state about odors?

A. From the cellar after a rain we would find odors in the second floor. As we have pipes running from our steam heater it would come up that way. And my wife often went out and got oil of lavender and sprinkled around to kill the smell.

Q. In the upper floor?

A. Yes, and hallway.

Q. What can you say as to the odor or absence of

odor in the cellar immediately following the storm of January 21, 1917, and the flood?

A. The odor?

Q. Yes.

A. Pretty rank.

Q. Would this odor follow each storm?

A. If it was large enough. That is, it left water.

The Court. No, that is not responsive. The question is did the odor follow each storm or each flood.

Q. Each flood, I mean.

A. Well, yes.

Q. Do you have this odor in your house when there is no flood?

A. No, sir.

Q. Did you observe the level of the lake with respect to the bulkhead boundary on the northerly end of the lake immediately preceding the storm and flood of January 21, 1917?

A. Yes, sir.

Q. Wha was the surface of the water with relation to the top of the bulkhead?

A. Of the spillway?

Q. No, of the bulkhead on the north side of Wesley Lake all the way along.

A. It was filled up.

Q. Before the flood?

A. No, during the flood.

Q. I ask you what was the surface of the water with relation to the top of the bulkhead before the flood?

A. Normally about twelve inches.

Q. Twelve inches how?

A. Twelve inches down, the water from the top of the bulkhead.

Q. On the occasion of this flood how high did the water rise in the lake?

A. Even with the top of the bulkhead.

Q. How long did it remain at that height?

A. On January 21, I think, and all day the next day.

Q. Did it rise on other occasions of floods?

A. Yes.

Q. And how high would it rise?

A. Often even with the banks.

Q. And how long would it stay at that height?

A. Well, until they got time to take it out. It would stay there until they opened the gates and then finally it would go down, after a long while, three or four or five hours.

Q. Do you recall a visit of Mr. Bamman to your premises in the summer of 1916?

A. Yes, sir.

Q. Will you state any conversations you had with Mr. Bamman at that time as to this condition?

A. Well, I can't state anything. I had him up inside the house and away on the back porch and showed him the condition.

Q. What did Mr. Bamman say?

A. Well, I just disremember what he did say.

Q. You explained the conditions to him?

A. Yes, I explained the conditions, yes.

Q. Did you make a claim at any time to the City of Asbury Park for injuries resultant from damages as a consequence of these floods?

(Objected to as immaterial.)

The Court. That question may be answered. I don't see why you object to it.

Mr. Carton. I don't see any relevancy then, your Honor.

Mr. Kremer. I think it would be admissible on several grounds. It would tend to show notice.

The Court. Yes, I think it is competent. It may be answered.

A. Yes, sir.
Q. What did the City of Asbury Park do with your claim?

(Objected to.)

The Court. He may answer.

A. At one time they paid the claim.
Q. When was that?
A. 1912, I think.
Q. They paid you in 1912?
A. Yes, sir.
Q. Now can you testify absolutely that your cellars were never flooded until August, 1911?
A. I certainly can.

Cross-examination.

By Mr. Carton.

Q. Mr. Doran, you stated when you went on the stand that you lived in Asbury Park. You don't live in Asbury Park, do you?
A. Well, we get our mail in Asbury Park, Neptune

Township, just across, joining Asbury Park. Neptune Township, I think.

Q. The fact is you live in Neptune Township?

A. Yes.

Q. And your place of business that you claim has been damaged is situated in Neptune Township?

A. Yes.

Q. And not Asbury Park?

A. No, not in Asbury Park.

Q. How long have you lived at your present place of residence in Neptune Township?

A. At the present place?

Q. Yes.

A. Present building do you mean?

Q. Yes.

A. Since 1908.

Q. And that was the time, I assume, that you occupied your new building?

A. Yes, sir.

Q. And isn't it a fact that you lived on the same site prior to that time?

A. Yes

Q. For how long?

A. Two years.

Q. What was the character of the construction upon the ground at that time?

A. A small wooden building.

Q. And then two years prior to 1908, in 1906 and prior to 1906, then you had not been living there at all. Is that a fact?

A. Yes, I lived there before that, I think.

Q. Well, I want to know the fact about it. How long had you lived there?

A. I have lived there since 1903. I could tell you. I have got the deed here.

Q. It was before 1906 anyhow?

A. Yes.

Q. You lived in the old building many years before you erected the new building?

A. Yes.

Q. Was there any cellar under the old building?

A. No, sir.

Q. Never had been a cellar there until you put one there in 1907, was there?

A. No, sir.

Q. What was the foundation of the building?

A. I stood on puncheons.

Q. Stood on puncheons.

A. Puncheons.

Q. And you of course never had any water in your cellar during that time, did you?

A. No, we didn't have any cellar.

Mr. Kremer. I object to this line of questioning on the ground that it is not the facts which were brought out on direct examination.

The Court. Yes, I think it is proper cross-examination. The objection is overruled. Proceed.

Q. You conceived the idea that a cellar ought to be erected in 1907, didn't you? And for all the years that you had lived there up until that time you made no use of anything like a cellar?

A. Well, no, it was not my building at that time. I was renting it at that time.

Q. And had you ever known a cellar to be under that building?

A. No, sir.

Q. By any one prior to your time?

New Jersey State Library

A. No.

Q. Your cellar is very close to the bed of the stream, Wesley Brook, is it?

A. Yes, sir.

Q. You are just south of the brook?

A. Yes, sir.

Q. Do you know how deep your cellar is at its bottom as compared with the level of the brook?

A. Yes, sir.

Q. What is it?

A. I think we are fourteen inches higher than the level of the brook.

Q. You think you are?

A. Yes, sir.

Q. Have you ever made any measurement?

A. Yes, sir.

Q. When did you make those measurements?

A. A week or so ago.

Q. Did you make them or some engineer make them?

A. No, the engineer made them.

Q. And the engineer is here to testify in regard to that?

A. Yes, sir.

Q. What have you to say as to the comparison of the level of the entire cellar to the normal level of the brook at the time you erected your building in 1907?

A. When we dug that cellar in 1907 there wasn't a drop of water and it was dug in the fall——

Q. Mr. Doran, you must perceive that that does not answer my question.

A. Well, I will try it again.

(Question repeated.)

A. Just the same as it was today.

Q. The same as you found out a few days ago?
A. Yes.
Q. Fourteen inches?
A. Yes, sir; I think so. Yes.
Q. Well, did you take any measurements then or were you guessing at it?
A. No.
Q. Guessing at it?
A. Yes, sir.
Q. Just describe this brook as it runs by your place. What is it like?
A. Why, I judge alongside of my place, from one end of my building to the other, it is ten feet wide.
Q. An open brook?
A. Yes, sir; right under the building.
Q. Always been open?
A. Always been open.
Q. Before you went there and since?
A. Yes, sir.
Q. And it runs under the building immediately north of you, I suppose?
A. Yes, sir.
Q. And then on through the culvert under Main Street?
A. Under the culvert; yes, sir.
Q. And is there an open brook from the culvert in Main Street by your premises back to the railroad?
A. From the street——
Q. From the street to the railroad is it open?
A. Yes.
Q. Where it goes by your place?
A. Yes, sir.
Q. And about what distance do you say that is approximately?
A. From the front of the building?

Q. No, from Main Street to the railroad.

A. Why, about three hundred feet, I should think, to the railroad.

Q. And your premises run right to and bind on the stream, do they not?

A. Yes, sir.

Q. In fact, runs to the middle of the stream?

A. No, sir.

Q. Doesn't your deed take you to the middle of the stream?

A. No.

Q. Sure about that?

A. Positive.

Q. Looked at it, have you?

A. Yes, sir.

Q. You bind on the stream?

A. Yes, sir.

Q. And does that give you the right to the control of the stream?

A. No, sir.

(Objected to as a conclusion.)

Q. You don't think it does?

A. No.

Mr. Carton. I suppose that is a legal proposition.

The Court. Purely argumentative, of course.

Q. The other end of your property, I suppose, binds on Main Street, doesn't it?

A. Binds on Main Street?

Q. Yes.

A. Yes, sir.

Q. You do understand that gives you the right to use Main Street, don't you?

A. Sure.

Q. Have you ever taken any precautions to barricade the brook beside your premises to keep it from overflowing your cellar?

(Objected to.)

The Court: I shall permit him to answer. The objection is overruled.

A. We have got a twelve inch concrete wall right alongside of it.

Q. Alongside of what?

A. A twelve inch wall of solid concrete.

Q. Alongside of what, the brook?

A. Yes, sir.

Q. And when was that wall erected?

A. At first.

Q. When?

A. 1908.

Q. When you put your building up?

A. When I put the building up.

Q. You at that time erected a wall along your premises where it abuts the brook its entire length?

A. Yes.

Q. An eighteen inch wall?

A. No, I said a twelve inch wall.

Q. I beg your pardon; that is, twelve from the bottom of the wall or twelve from the wharf line of the stream?

A. Twelve inches thick.

Q. And how high?

A. I think it went down to the ground. In the first

place we put a lot of piers, barrels of cement, all along, and then we put this concrete on top of it, making piers.

Q. And what line did you get as the extreme southerly line of the brook when you erected that wall?

A. What line did we get?

Q. Yes, who gave you that line?

A. Niart Rogers.

Q. Did you follow the same line on the shore there prior to that time?

A. Yes, sir.

Q. Now how high is this wall?

A. How high is the wall?

Q. Yes, above the normal level of the brook, the water.

A. Oh, six feet.

Q. Six feet high?

A. Yes, sir.

Q. And that wall is maintained there by you to this time?

A. Yes, sir.

Q. And it runs the entire length of your premises?

A. Exactly.

Q. Now prior to 1908, when you erected the building and also erected this wall, what barrier was there then to keep the water back from flowing over your property?

A. Well, there was a bulkhead made of wood.

Q. Was that still intact at the time you built?

A. No, it was not as good shape as it was years before but——

Q. Well, you thought that the proper thing to do was to erect this wall?

A. Why, certainly we had to erect this wall to build a building on it.

By the Court.

Q. I understand that this wall you speak of is part of the foundation?

A. Yes, sir; simply is.

Mr. Carton. The very last question would suggest that too, your Honor. I am very stupid.

Q. One side of the cellar, I suppose?

A. Yes.

By Mr. Carton.

Q. Well, Mr. Doran, probably I did not ask the question I thought I was asking or you misunderstood me.

A. That might be.

Q. Will you tell us now what you have done towards barricading the southeasterly boundary of Wesley Lake Brook along your premises where your building does not cover?

A. As I told you before, this twelve inch wall.

Q. I don't mean your building.

A. I haven't done anything outside of that.

Q. Well, that is all right. So that is something you haven't come to, the barricading of the brook, only by reference to putting the foundation wall of your building.

A. Exactly.

Q. And you haven't done anything towarls barricading the brook and it does overflow, doesn't it?

A. Sure.

Q. Your neighbor on the south is Mr. Woehrer, isn't it?

A. Yes, sir.

Q. Another plaintiff in this suit?

A. Yes, sir.

Q. Your wife owns the property in question, I think you said?

A. Yes, sir.

Q. So then when you say that you were never bothered with any water prior to 1908 I suppose that is because you never had a cellar; is that a fact?

A. Well, we were not bothered with any water, whether we had any cellar—I told you we didn't have any cellar.

Q. It was pretty damp in there prior to 1908 wasn't it?

A. No.

Q. Never damp?

A. No, I used to keep all my wood under that house. There was no cellar.

Q. It never got wet?

A. No.

Q. What do you suppose this building was ever erected on puncheons for?

A. What did they do in old times along the Bowery? Every one was erected on puncheons, you know that.

Q. It was to keep off the flood, wasn't it?

A. No, to keep off the street.

Q. There was a boat building establishment right around that place, in that business, wasn't there?

A. Not where I am.

Q. On both sides of the brook.

A. A boat what?

Q. A boat building establishment.

A. Yes.

Q. George Ormerod?

A. Yes, they used to run a boat right under there. They can't do it now, though, can they?

Q. I don't know, but they did do it, didn't they?

A. Sure they did.

Q. In the rear of Mr. Treat's?

A. Right where you were standing the other day when you——

Q. When we were taking photographs?

A. Yes, when you were taking photographs.

Q. That is where the boat place was?

A. Exactly.

Q. It was conducted there for a great many years, wasn't it?

A. Surely.

Q. Built boats in there and floated them around and took them down Wesley Lake?

A. No, sir.

Q. How did they get them there?

A. Right down the stream, not around, right down the stream.

Q. But there was never any dampness observed by you during that time?

A. No, sir.

Q. Not even moisture?

A. Not even moisture.

Q. Neither was there ever any dampness observed by you from 1908 till 1911, was there?

A. No, sir.

Q. Never had any trouble with your cellar?

A. No, sir.

Q. Never damp?

A. No, sir.

Q. Never overflowed?

A. No, sir.

Q. Never any water there at all?

A. No, sir.

Q. Sure about that, are you?

A. I am positive.

Q. When did you first observe any overflow of the

banks of the brook there?

A. After the detritus tank was put in.

Q. That was 1911?

A. Yes, sir.

Q. That is your information, 1911?

A. Yes, sir; certainly is.

Q. And then you have been bothered about half a dozen times each year from that time on?

A. Yes, or more; eight times, sometimes.

Q. And the most serious damage happened on January 21st this year?

A. That certainly was a peeler.

Q. That was a peach?

A. Yes, sir.

By the Court.

Q. That was 1917?

A. Yes, that was near by and I can remember that so definitely.

By Mr. Carton.

Q. Was that the time that you went down to the spillway and tried to get the gate open?

A. Yes, one time I went down there and I got the gate open that evening.

Q. That was the time you referred to this morning?

A. Yes, sir.

Q. Who did you meet there?

A. I didn't meet anybody.

Q. You didn't meet anybody?

A. No, sir; it was raining too hard.

Q. For any one else to get out, was it?

A. Yes, sir.

Q. When was it?
A. Eleven o'clock that evening.
Q. January 21st?
A. Yes, sir.
Q. And what was the condition of the weather at that time?
A. Raining like a sundowner.
Q. What was the condition of the lake, whether it was covered with ice or not?
A. No, snow.
Q. How about under the snow?
A. Water.
Q. Wasn't it frozen over? Wasn't it frozen with ice?
A. I wouldn't like to say froze, for what I know, when I walked down Lake Avenue there was about two or two and a half inches of snow water when I walked all the way there. I didn't notice whether there was any ice in the lake or not, and I am not positive of it.
Q. Was that water that you walked down through going down Lake Avenue due to the overflow of the lake?
A. No, sir.
Q. Just ordinary snow?
A. Ordinary snow, when it gets wet, about two or two and a half inches, pretty mushy too.
Q. Had there been a heavy fall of snow and turned into rain that day?
A. Yes, quite a little snow.
Q. Now you have mentioned some time you went down there when some one was there.
A. Yes, sir.
Q. When was that?
A. That was sometime in March or before, I think.
Q. Who did you meet there then?
A. I don't know. It was a man, somebody that was

employed, that gave me orders not to open that gate.

Q. When you went down there what did you tell him you wanted to do?

A. I said, I asked him to give me the stick so I could put it in there and open that gate.

Q. Did he appear to be a man who knew something about it or had something to do with it?

A. Yes, he was one of the——

Q. He seemed to be a fellow that was in charge of that job?

A. Well, he wouldn't let me have it. He was one of the employees.

Q. Did he say why?

A. Yes.

Q. What did he say?

A. He said did I get orders from headquarters to open that gate.

Q. Didn't he tell you that he wouldn't open it because there was no necessity?

A. He couldn't have said that.

Q. Didn't he say that?

The Court. The question is whether he did say it or not.

A. Well, he didn't say it.

Q. What was the condition of the water going over the spillway at that time as to its depth?

A. Well, just running over about an inch or two, two inches.

Q. And it was an inch or two higher than the brook in the spillway?

A. Yes, a couple inches.

Q. And your cellar was flooded how much at that time?

A. Eight or ten inches.

Q. Eight or ten inches?

A. Yes, sir.

Q. Do you know the comparison of the level of the top of the spillway with the bottom of your cellar?

A. I think it is about—we are about twelve inches higher than the top of that spillway.

Q. You are twelve inches higher than the top of the spillway?

A. Yes, sir.

Q. Will you describe this spillway to us as you observed it? First let me ask you where it is located.

A. Located at the lower end of the lake, near the beach.

Q. And what is it, its makeup?

A. Solid concrete.

Q. Was there a dam across—an outlet to the ocean?

A. Yes, sir.

Q. What are the dimensions, the breadth across this?

A. Why, about fifty feet, I suppose, maybe not quite so long; forty or fifty about. I never measured it.

Q. The water runs right over that?

A. Yes, sir.

Q. The level reaches a point to the top of that and then it spills over that, runs over, does it not?

A. Yes, sir.

Q. Is that erected there to maintain the normal level of the lake as you understand it?

A. Well, I don't think——

(Objected to.)

Q. Is that what appeared to you?

The Court. If he cannot answer it he may say so.

A. Oh, I can answer it. Now come again.

(Question repeated.)

Mr. Kremer. I object. It seems to me he is not a proper person to answer that.

A. I certainly can, but I am not an engineer.

The Court. The question is whether you know or not?

A. I do not.

Q. But you do say that you knew the height of that as compared with the level of your cellar?

A. I was told a few days ago.

Q. You just learned that a few days ago?

A. I certainly did.

Q. Well, this spillway, at any rate, appeared to be performing the function of a dam, did it not?

A. Yes, a dam.

Q. And from this overflow it extends into the ocean? That is how it is drained out?

A. Yes, sir.

Q. Now where is this gate that you refer to?

A. In the center—or, well, on one side of that dam, in that dam——

Q. The gate is submerged?

A. Yes, sir.

Q. Below this pipe?

A. Yes, sir.

Q. And when the water rolls over this spillway it goes in a large basin, does it?

A. Yes, sir.

Q. And then it is carried by culverts out in the ocean?

A. Yes, sir.

By the Court.

Q. When was that erected, Mr. Doran, if you know, the spillway that you have been speaking of?

A. I just disremember.

Q. What is your best recollection as to when it was built?

A. I couldn't tell that; three or four years ago.

Q. Three or four years ago?

A. Yes, sir.

By Mr. Carton.

Q. It was erected three or four years ago, as you recall?

A. Yes, sir; I think so. I don't know.

Q. Do you know what means they had for taking care of the situation prior to the erection of this spillway?

A. Yes, sir.

Q. What was that?

A. Old gates.

Q. Regular floodgates?

A. Yes, sir.

Q. And did the erection of this spillway fixing the normal level of the gate improve the situation from your viewpoint, as you observed both of the constructions down there?

A. Well, I don't know but what if they operated it properly but what it would be a good deal better than the old one.

Q. You think if it was properly operated it would be an improvement?

A. Yes, sir; exactly.

By the Court.

Q. Do I understand that you complain of the spillway?

A. We complain of both; yes, sir.

Q. In what respect do you complain of the spillway?

A. It is never taken care of properly.

Q. How?

A. Well, they don't open the gates when a big flow of water comes.

Q. Your idea is that if the gates were opened after a heavy storm or during a heavy storm your cellar would not be flooded?

A. It would help; yes, sir, also the smaller pipe there.

Q. At the west end of the lake?

A. Yes, sir.

Q. Yes, I understood the complaint about that, the smaller pipe.

By Mr. Carton.

Q. Do you know the dimensions of the culvert coming under the railroad?

A. The culvert coming under the railroad?

Q. Yes, into this brook.

A. No, it is a very good size.

Q. You don't know?

A. I don't know the dimensions, but I should think about six or seven feet.

Q. There has a new culvert recently been put in there by the railroad, hasn't there?

A. Yes, sir.

Q. Very much larger than formerly?

A. Yes, sir.

Q. Do you know when that was put in?

A. A couple years ago.

Q. Do you know the dimensions of that culvert before that went in?

A. Yes, sir.

Q. What were the dimensions of it?

A. Three foot pipe.

Q. Three foot pipe?

A. Yes, sir.

Q. What was your observation of it as to whether it was kept clear or half filled with sand and dirt?

A. Well, I don't know that I have ever looked at it, but I think sometimes it was full of water and a little sand in it.

Q. Well, until that new culvert was put in by the railroad a year or two ago, the old culvert was very much smaller than the old culvert running under Main Street, wasn't it?

A. Yes, sir.

Q. So that until that time, at any rate, the culvert under Main Street had more capacity than the preceding culvert under the railroad?

A. Yes, sir.

Q. And does this brook going west of the railroad continue over to Prospect Avenue and on up through the township?

A. Yes, sir.

Q. And are there culverts on Prospect Avenue as well?

A. Yes, sir.

Q. Quite a promiscuous collection of trash goes down that brook in times of storm, does it not, Mr. Doran?

A. Very often.

Q. Well, that is the custom, isn't it, that is the rule?

A. Well, it is very often.

Q. And clogs up in the brook as they go along before it gets down to Asbury Park, doesn't it?

A. Yes, and also in the detritus tank.

Q. And I suppose in these heavy showers when these barrels and boxes are washed into this brook, when they come down to these little narrow streams that forms as a barrier and barricade and holds the water back, doesn't it?

(Objected to.)

The Court. He may answer if he knows.

A. Well, I don't know.

Q. Well, naturally so. That would be so naturally, wouldn't it?

By the Court.

Q. Well, have you seen it?

A. Well, I have seen some wood and stuff in there; yes, sir.

Q. How often have you seen it so barricaded?

A. Why, I don't recollect. I only saw it in this pipe here on the east side of the railroad, I mean the east side of Main Street.

Q. The east side of Main Street?

A. The east side of Main Street.

Q. That is on the Wesley Lake side?

A. Yes, sir.

Q. You have seen it clogged there?

A. Yes, sir.

Q. How often have you seen that?

A. I only seen that once bad.

Q. When was that?

A. That was on the 21st of January of this year.

By Mr. Carton.

Q. And that was the result of a storm bringing down trash from the surrounding premises?

A. Couldn't get in any other way.

Q. And you say that you never saw the brook stopped up with this trash, boxes and barrels, in front of your place?

A. No.

Q. Never saw anything in there?

A. Oh, I have seen stuff in there but never seen it stopped up, didn't stop the stream.

Q. Well, haven't you seen barrels and stepladders and boxes and all sorts of things floating down that stream and getting in its banks in times of storm?

A. Pieces of wood; I never seen any stepladders or boxes or barrels; I seen some pieces of wood that would float.

Q. Floating timbers?

A. Well, sticks, yes.

Q. Well, when they would come under your neighbor's building immediately on the north of you, who has his building erected over the brook, wouldn't they clog up there?

A. No, they would go right on down across the street on the east side and clog up there.

Q. Never clogged up anywhere along your premises?

A. No, never seen it there.

Q. You never observed that?

A. No.

Q. When did you first complain to Mr. Bamman about this matter?

A. 1915, I guess. Well, just as soon as Mr. Bamman took charge I complained to him. I don't know exactly when it was, but just as soon as the first rain come and I

got water, I called Mr. Bamman up. Now I don't know what time it was, but shortly after they went in session themselves.

Q. When did you stop using the heater in your cellar, Mr. Doran?

A. Well, we haven't used it but very little this winter at all. Former winters we used it whenever we could.

Q. Well, at the time of say half a dozen times a year, assuming that one-half of those would be in the winter season, your heater would be put out of business two or three times a winter?

A. Yes.

Q. For a day or two?

A. Yes, for a couple days each time, whenever there would be a heavy rain, it would put us out of commission, put the furnace out.

By the Court.

Q. What do you say you suffered in dollars and cents as the results of that?

Mr. Carton. With all due deference, I want to object to the question.

The Court. I may overrule you. I am going to allow him to answer.

(Objection noted for defendants as ground of appeal.)

Q. What do you estimate your damage as the result of the lack of use of your furnace in dollars and cents?

A. $5,000 wouldn't pay for the inconvenience that we had this winter.

Q. Why?

A. Because it was a severe winter.

Q. What did you do as a substitute?

A. We had to go get kerosene stoves.

Q. All right. Now you bought kerosene stoves. How many did you buy? What did they cost you?

A. A couple.

Q. What did they cost you?

A. $4 apiece, but they didn't give us any warmth of any account. We would be warm in front and our backs would be cold.

Q. That is the old-fashioned way?

A. Yes, it certainly is an old-fashioned way.

Q. .How much oil would you burn in those two stoves?

A. Oh, we wouldn't burn over a gallon a night, a couple gallons; two or three gallons a day, I suppose.

Q. How much?

A. A couple gallons a day.

Q. What was oil worth?

A. Oh, about a shilling.

Q. How much time do you say that your furnace was out, one third of the time?

A. Yes, sir.

Q. What would that mean in days and months?

A. Ten or twelve days a month.

Q. Ten or twelve days a month?

A. Yes, sir.

Q. And during what months? What I want to know is what the damages are. I can't tell the jury anything about it unless I know.

A. All the cold months.

Q. Starting in October?

A. Yes, sir.

Q. And ending when?

A. Winding up in April. But that wasn't it. The inconvenience was the thing, the cold. I couldn't stay there in the wintertime. That was the hard test. You wouldn't want to stay in this great big room with a gasoline or kerosene stove. It was a pretty good sized house.

Q. You say you have had that trouble ever since 1911?

A. Yes; not so much other winters as this one was. But this winter was a very severe one.

By Mr. Carton.

Q. You would like to have the taxpayers of Asbury Park pay you $5,000.

A. I certainly would. You would too.

Q. If I could get it as easy as that I would. When did you first observe these odors that you have referred to?

A. All the time, every time we would have the water.

Q. Since 1911 to the present time?

A. Yes.

Q. Every time you would have water?

A. Yes.

Q. I suppose there never was any odor there beside that brook and beside that dump prior to 1911, was there?

A. Well, we didn't have any cellar. There was no odors near the brook, did you say, or in the brook?

Q. In the brook, that came into your house.

A. No, we didn't have it that time, because—

Q. No odors at all? You never observed odors?

A. No, sir.

Q. These odors didn't possibly come from your butcher shop, did they?

A. No, sir.

Q. You did conduct a butcher shop there?
A. Yes, sir.
Q. Did you ever get those odors?
A. No, sir; nobody ever complained of those things.
Q. You can distinguish the odor from the brook and the butcher shop?
A. Yes, I could and most anybody else.

By the Court.

Q. Were you obliged to rent any cellar for the purpose of storage by reason of these floods? Did you rent any other?
A. No, sir.

By Mr. Carton.

Q. After the floods came what did you use for storage purposes?
A. Well, we had to do the best we could.
Q. Upstairs?
A. Yes, sir.
Q. On the ground floor?
A. Yes, sir; in the rear; an ice-box on the first floor too.
Q. Prior to 1911 you say that you used the cellar for storage purposes?
A. Yes, sir.
Q. Your lot and your building as well is sort of V shaped, a triangular building, isn't it?
A. Yes, sir.
Q. And the building in the form of a triangle?
A. Yes, sir.
Q. It has its base, the broad part, out to Main Street?
A. Yes, sir.

Q. And runs back on the brook to nothing?

A. To a point. It is 34 feet on the front, 68 on one side and 64, running to a point.

Q. Now you have a well or hole chopped in your wall in the cellar, haven't you?

A. Yes, sir.

Q. What is that for?

A. To bail out the cellar.

Q. Just describe that hole in the wall.

A. It is two feet six inches from the bottom of the cellar floor.

Q. And it runs all the way to the cellar floor?

A. No, it is two feet six inches from the bottom of the floor.

Q. And what are its dimensions, that is, the hole itself?

A. About twenty inches.

Q. How long has that hole been there?

A. How long has it been there?

Q. Yes.

A. Well, it has been there since the first flood. After the first flood we had to get some way of bailing the cellar out.

Q. 1911?

A. Yes, then we knocked that hole in there so we could bail the cellar out that way.

Q. You have never filled that hole up since then?

A. No, sir.

Q. Does water flow in through that hole?

A. It has come as high as to flow in that hole.

Q. When the brook overflows its bank it goes right on through that hole, doesn't it?

A. It certainly does.

Q. Don't you think that helps a whole lot to flood your cellar?

A. Well, the water shouldn't have come in that way. If it didn't come in that way it has come around the banks and come in another way.

Q. It would have attained a greater head, wouldn't it, to do that, to come around the banks and come in that way?

A. No.

Q. Well, you are maintaining an opening there beside this brook?

A. Yes.

Q. Where water can come right in?

A. Well, it would be two feet above the normal of the lake.

Q. Well, you have storms down there, don't you, the same as they do in any other place?

A. Yes.

Q. And hasn't it been your observation that brooks and lakes and rivers overflow in time of storms?

A. Yes, sir.

Q. And yet you maintain that, an inviting opening in your cellar?

A. I did that to bail out.

Q. Suppose you never bailed out; it wouldn't have come in?

A. If the water hadn't got that high it wouldn't have come in.

Q. If you had a solid concrete wall it couldn't get in then, if it did overflow you?

A. Yes, it would come in over the bank.

Q. Where?

A. In the rear of the stream.

Q. In the back wall?

A. I ought to have some kind of a window in the cellar to look through, wouldn't I?

Q. You have windows in the cellar, haven't you?

A. Yes.

Q. You didn't use this hole on the north side next to the brook for a window?

A. I maintained that for bailing purposes.

Q. You maintained that for the purpose of throwing the water out after it comes in?

A. Yes, and I have it two feet higher than the bottom of the cellar, and that is fourteen inches higher than the normal of the lake.

Q. I thought that you said you had the water as high as three or four feet in the cellar?

A. Yes, it comes right in that hole.

Q. It would run out again, wouldn't it?

A. Well, it would when it come down to that hole, yes.

By the Court.

Q. Where is that hole, how far from the level of the ground?

A. It is two and a half feet from the level of the bottom of the cellar.

Q. Two feet and a half?

A. Yes, sir; thirty inches.

Q. How high is it outside, from the surface of the ground on the outside?

A. Well, this is along the brook here, which joins another building.

By Mr. Carton.

Q. As compared with the bank, the ditch bank outside, is the bottom of the hole higher or lower than it?

A. Well, I think it is about the same height.

Q. About on the level with the bank of the ditch?

A. Yes.

Q. The bottom of the hole is about on a level with the ground outside?

A. Yes.

By the Court.

Q. That is a natural brook there, Mr. Doran?

A. Yes, been there— 10

Q. Been what?

A. Ever since Asbury Park started and long before.

Redirect Examination.

By Mr. Kremer.

Q. How high from the normal level of the brook is the bottom of the hole in the side of your wall?

A. From what?

Q. From the normal level of the brook. 20

A. We are ten or twelve inches higher than the bottom of my cellar—

Q. You haven't answered the question.

(Question repeated.)

A. It must be three feet.

Q. Now do you know whether the bottom of that hole in the side of your wall is higher or lower than the 30 ground level at the rear of your house?

A. Well, I think it is about the same.

Q. Has water ever come in towards the rear, on the ground, before it came in the hole?

A. Yes.

Q. Does it often do that?

A. Yes.

Q. Is the water sometimes forced in the sides of your cellar before it reaches the height of the hole?

A. Yes.

Mr. Carton. I object. I think it is leading. I move that the answer be stricken out.

The Court. Yes, it is leading. You can't suggest it.

Q. Does the water ever come in your cellar—

The Court. How does the water enter the cellar?

Q. How does the water enter the cellar?

A. I think the first part of it, when the water gets so high on the outside of the cellar it is so heavy that it oozes up under the foundation, some of it first off; but when it is normal it don't.

Q. In what other ways does it come into the cellar?

A. Well, when we have a big flood it will come right in that hole or the back window.

Q. Does it come in the back window before it comes in through the hole?

A. Well, both about the same.

By the Court.

Q. Well, if the window were closed and the hole were closed what effect would it have on the water in the cellar. Do you think it would stop it?

A. No, not when the water gets so high.

Q. How much would it reduce it, if the hole through which you bail the water was closed and the window was closed?

A. Well, it goes over the banks in the rear, over through Woehrer's and through into my place and that way, when it comes very heavy.

Q. That doesn't answer the question. Suppose the hole was not there, how much would it reduce the depth of water in your cellar in time of flood?

A. If the hole wasn't there?

Q. Yes.

A. Why, if it didn't come up to the hole we would have water just the same. We would have water but not quite so much.

Q. You say you have it as high as three feet, the water in that cellar?

A. Yes.

Q. If the hole were not there how much would the three feet of water be reduced, if any?

A. Well, if the hole—it would come in the back way, I tell you, in the window in the rear.

Q. Through the window?

A. Yes. We have got to have some kind of opening there. The other portion of the wall is all solid.

Q. What is the window for, just light?

A. Yes.

By Mr. Kremer.

Q. Did you observe the entrance of the water into your cellar upon the occasion of January 21, 1917?

(Objected to as not proper redirect examination.)

The Court. I don't recall whether he says he saw it come in there or not. No, he was not asked that question. You may answer.

A. Yes.

Q. How did the water first begin to come into your cellar?

A. Well, before it got as high as the hole it oozed through the bottom, and when it gets as high as the hole it will come into the hole.

Q. But it came in the cellar before it came into the hole?

A. Oh, yes, sir. It does lots of times, oozes under the foundation.

Q. Does Woehrer get flooded before you do?

A. Well, no, I don't think he does, because I think he is somewhat higher than I .

The Court. If you don't know say so.

A. Well, he don't. He don't get flooded as soon as I do, because he is somewhat higher than I.

Q. But you have testified that on January 21, 1917, you had water in your cellar and it began to rise before it came in through that hole?

A. Yes, sir.

Q. Can you state other occasions when it did the same thing?

A. Yes, lots of occasions that it didn't come in through that hole when it oozed in.

Q. On most occasions where did it come?

A. Under. We don't always have thirty inches, and it didn't come up through the hole, because the hole is two feet six inches from the bottom of the cellar, and normally, if it didn't come up two feet six inches we wouldn't have any water through the hole. It would be otherwise through the bottom.

Q. You said you had that flood before you cut the hole?

A. Yes, sir; that is what made me cut the hole. I tried to get it is high as I could.

Q. Now you have made certain statements concerning levels and elevations. Did you ever make any observations as to those levels?

A. Not myself.

Q. You just state what you know from what people have told you?

A. Yes.

Q. You don't really know from your own observation what the levels are?

A. No, only just what I was told.

Q. Do you know specifically when the new railroad culvert was built?

A. I think about two years ago.

Q. You are not right sure?

A. No, I think it is about two years.

Q. Might it have been more?

A. I don't think so.

Q. Did you ever observe the brook obstructed by refuse and wood being in Wesley Lake Brook between the railroad culvert and the culvert under Main Street?

A. Well, I have seen some pieces in there, yes.

Q. Was it ever stopped?

A. No, that never was stopped. In between the railroad and my place never was stopped.

Q. Did you ever have any odors in the upstairs of your house before 1911?

A. No, sir.

Q. Did you ever have any odors in your cellar or upstairs between August, 1908, and August, 1911?

A. No, sir.

Q. What damage do you say you suffered from the loss of your cellar for one year?

(Objected to.)

The Court. I will allow him to answer.

Q. Take it the year 1916, what damage do you say you suffered by the loss of the use of your cellar during 1916?

Mr. Carton. I object to it because it does not appear that he is the owner of the cellar. He says he is not.

The Court. Well, I think he is sufficiently qualified as an agent of the owner to answer.

A. $100 a year.
Q. In the last year, the year 1916?
A. Yes, sir.

By the Court.

Q. Why do you say that? How do you know it is $100 a year?

A. Because I think I could get that rental out of it if I wanted to rent it, as my neighbor across the street rents hers for $175.

Q. Do you know that your neighbor across the street rents hers for $175?

A. I certainly do, and she is right here to prove it.

Q. But if you had the use of your cellar—you claim you have been deprived of it—you would use it for your own purposes, would you not?

A. Yes, sir. I could spare it during the summertime or wintertime either, one part of it, anyhow.

Q. And could you have spared it since 1911?

A. Could I have spared it? Well, I suppose I could have rented it, yes, sir.

By Mr. Kremer.

Q. What do you say is your damage as the result of the loss of the use of that cellar for the year 1915?
A. $100.
Q. And 1914?
A. $100
Q. And 1913?
A. $100.
Q. 1912?
A. $100.
Q. And 1917 up to date?
A. Yes, sir; $100.
Q. The same rate?
A. Yes, the same rate.

Recross-examination.

By Mr. Carton.

Q. How much would that amount to in all, $5,600?
A. Well, that is the cellar, yes.

The Court. What is that?

Mr. Carton. He said that before, he would like $5,000 for the water in the cellar.

The Court. I know, but $100 a year since 1911 would not make $5,000.

Mr. Carton. This $600, $100 a year, is added to the $5,000.

The Witness. You might as well add it to it.

Q. How is it you fix this value of $100 a year as the rental value of your cellar?

A. Well, it would be worth it if I wanted to rent it to anybody.

Q. You have got nothing tangible to base that on? You are just speculating, aren't you?

A. No, I am not speculating at all.

Q. You never tried to rent your cellar, did you?

A. Yes, sir.

Q. Who did you try to rent it to?

A. This year a banana man, he went right over to McCabe's and engaged hers for $175, but mine was in a bad condition and he wouldn't take it.

Q. Yours was in a bad condition?

A. No, it was not in a bad condition.

Q. You didn't want to rent it from 1911 to date, did you?

A. No, I didn't want to rent it.

Q. You don't want to yet, do you?

A. Yes.

Q. How would any one get access to your cellar?

A. There is an outside door for it.

Q. Where?

A. Right on the sidewalk.

Q. Is there a stairway erected there now?

A. Yes.

Q. Where do you go from the street?

A. Into the building right down, yes.

Q. What are the dimensions of your cellar down there?

A. 34 by 65 feet.

Q. Running back to nothing?

A. Yes, sir.

Q. How many windows are in it?

A. There is four in the front and one in the rear and the hole we spoke about.

Q. Did the banana man want the hole filled up?

A. I don't know that he did. He didn't say anything about that part and I didn't to him.

Q. Let me understand again, going back a little. Did I understand you to say that sometimes the water comes in on Woehrer's property first and then comes in on you from that side before it comes in from the brook side?

A. Will it come that way?

Q. I understand you that it did do that at times. Is that a fact?

A. Well, when it comes.

Q. Well, is it a fact? Did you ever observe anything like that?

A. Yes.

Q. Well, that is all there is to it then. Woehrer is further south?

A. Yes.

Q. And you are nearer the brook than Woehrer?

A. Yes.

Q. And this brook, when it overflows, runs in on Woehrer's land and down through his land and in on your cellar sometimes?

A. It does when it backs up down there further in the culvert there.

Q. Backs up down there near the railroad?

A. No, no.

Q. Well, when it fills up there is it?

A. No, when it backs up down in that four foot cul-

vert it backs up and goes all around there, Woehrer's too.

Q. That is because the ditch bank opposite Woehrer is lower than it is opposite yours?

A. Yes, sure. It is lower by the railroad than it is up my way.

Q. Have you ever complained to Woehrer because of that condition, that he was not building up his bank?

A. No, sir.

Q. Suppose you closed your windows and filled up the hole that you knocked out; could the water get in then?

A. Yes, sir.

Q. That is the oozing up through the floor?

A. No, sir.

Q. That is the way it would come in then?

A. Yes, sir.

Q. What is the construction of the floor?

A. Four inch concrete.

Q. And you say that you have observed that when there would be freshets or high springs that the water would ooze up through that before it would overflow?

A. Yes.

Q. Come from the ground like?

A. Yes.

Q. Have you ever tried to cure that by proper construction?

A. I thought that the——

Q. Have you ever heard of waterproofing construction, people who live beside lakes?

A. Yes.

Q. Have you ever tried to do that?

A. No.

Q. Still you permit the water to come in and want the city to pay you for your damage; that is the proposition,

isn't it? Why didn't you waterproof your cellar floor and walls and fill the hole up?

A. Because it is not necessary to waterproof them if you have got a flood in there, to let the water come.

Q. Assuming that the flood is there and does come in; don't you think it is desirable to waterproof your floor and walls and close the holes up?

A. You folks have put an obstruction, that is the reason it has done it.

Q. And you are going to stand on that?

A. I certainly am.

Q. You are not going to make any effort to help the situation out at all, are you? You haven't done it?

A. No, no.

By Mr. Kremer.

Q. Was that cellar adequate to keep the water out before 1911?

A. Yes, sir.

RUFUS L. SAVAGE, Sworn for plaintiff.

Direct Examination by Mr. Kremer.

Q. Where do you reside, Mr. Savage?

A. Asbury Park.

Q. What is your occupation?

A. Engineering and contracting.

Q. How long have you been in the business of civil engineering?

A. About ten years.

Q. Where did you prepare to become an engineer?

A. Practical experience, in different parts of the country.

Q. Have you ever been City Engineer of the City of Asbury Park?

A. Yes.

Q. When did you occupy that position?

A. In the years 1912 and 1913.

Q. Did you in the year 1912 supervise the construction of a flume or drain from Main Street to Wesley Lake?

A. I did.

Q. Were you asked to make that construction by the City Council?

A. I was.

Q. Will you state the conditions obtaining in Wesley Lake, at the westerly end of Wesley Lake, which brought about and necessitated the construction?

A. Why, about, I think it was the year 1911, a detritus tank and flume was constructed at the westerly end of Wesley lake, between Wesley Lake and Main Street, to take care of the filth and rubbish that came down that brook, and it did its work so well that it also stopped the flow of water, and during heavy rains the water backed up in the Wesley Lake Brook west of Main Street and overflowed its banks; and it was to overcome that condition that Council authorized the installation of a four foot pipe leading directly from Main Street to the lake, and using the detritus tank and that flume as a bypass to take care of any overflow that might come down that the four foot pipe would not take care of.

Q. Do you know when the detritus tank was constructed?

A. I am quite sure it was finished about July, 1911.

Q. Will you describe that detritus tank?

A. The detritus tank—well, it is a—I haven't seen it

since 1912. If I remember rightly it was approximately 25 or 30 feet wide and probably 50 feet long, with a system of bypasses, weir walls, in it, to catch the refuse that floated down on the water and let the water go through underneath and run out the other end.

Q. Will you describe the drains that lead to the detritus tank to Main Street and from the detritus tank to Wesley Lake?

A. They were concrete culverts. I have forgotten the exact size.

Q. Did that detritus tank carry the water from Wesley Lake Brook into Wesley Lake?

A. Did it carry it?

Q. Yes.

A. It did as long as it was open, yes.

Q. Did it become obstructed?

A. Yes.

Q. And did it cause the water to back up?

A. Yes, it helped to cause the water to back up.

Q. When was that?

A. 1912, the winter of 1911 and 1912, I think.

Q. You say it helped to cause the water to back up?

A. Yes.

Q. What other cause contributed if any to the backing up of the water?

A. Well, in my opinion the real cause of this whole trouble——

Mr. Carton. If the court please, I object to general opinion, on the theory that he is not testifying as an expert, that he has not qualified as an expert.

A. Yes, sir.

By the Court.

Q. Do you know, Mr. Savage, what caused it, independent of your opinion?

A. Yes, I do know.

Q. Actually, have you seen it?

A. Yes.

The Court. He may testify to the fact, what he discovered.

Mr. Carton. I have no objection to his testifying to a fact, but if he is going to take a whole lot of facts, probably within his own knowledge and without his own knowledge, and then upon such a thing give his opinion, as I started to say, I object to that.

The Court. You may nullify his testimony by cross-examination. He is entitled to say that he knows as a fact what caused the backing up of the water. The objection is overruled. I think the question should be withdrawn, or at least his answer to it stricken out. He started to say, "In my opinion." He may state what his actual knowledge on the subject is.

A. My knowledge is this: that the elevation of the water as maintained by the dam at the ocean is so high that it fills the four foot drain leading from Main Street to Wesley lake to about two-thirds of its capacity, so that four foot pipe really has one third of the capacity it should have. Consequently the water in the open brook west of Main Street has to back up high enough to create head enough to force that water through that pipe. If the water level at the ocean end of Wesley Lake were maintained at a low enough level there that they would have a flow between Main Street and the railroad and

this pipe were actually stopped up with debris or something, that would stop the flow of the water.

Q. Are you familiar with the old flood-gate which existed in 1911 and 1912 at the ocean end?

A. I am very familiar with it.

Q. Will you describe that as you recall it?

A. Well, it was an old wooden dam with a couple sluice-gates in there that raised and lowered by hand power with a lever. They became so rotten and had been in there so long that they simply could not be operated; and we used to have to go over to the Casino power house and get bars, iron bars, and take three or four men down to raise them and lower them to let the water out of the lake when it overflowed.

Q. Did you make any recommendation to the Mayor and Council of Asbury Park in your capacity as City Engineer for the reconstruction of the gate and spillway at the ocean end?

A. I did.

Q. What was your recommendation?

(Objected to.)

The Court. He may answer. Did you fix the time when it was?

Mr. Kremer. While he was City Engineer.

Q. You were City Engineer during 1911 and 1912?

A. 1912 and 1913.

The Court. You may answer, what recommendation did you make if any?

A. I made a recommendation and submitted plans for

a flume according to these plans to be constructed down to the ocean end, which would control the water level in Wesley Lake. Just what those plans are now I can't say. I haven't seen them for three or four years. But if I remember rightly——

Mr. Carton. I object to this answer. It is entirely speculation.

The Court. Of course he can only give his observation, but he may give that.

Mr. Carton. I don't think his observation is evidential.

The Court. It may not be worth a cent, I realize that, but if he has any recollection at all he may give it.

A. My recollection is that there were three 48 inch pipes, reinforced concrete pipes, leading from a dam far enough out below the undertow in the ocean to prevent their standing up, and built heavily enough of reinforced concrete and steel to withstand the pounding of the ocean, so they would not be broken up.

Q. Was that recommendation carried out?

A. No.

Q. Do you know why not?

A. On account of the cost.

Q. Did you furnish a plan for the construction of the straightway?

A. Yes. You mean the one between Main Street and the brook?

Q. Yes.

A. Yes.

Q. Did the city adopt your plan?

A. Yes.

Q. Are you familiar with the construction of the present spillway and gate at the ocean end of Wesley Lake?

A. I watched it while it was being constructed. I have really forgotten the dimensions, but I watched it while it was being constructed.

Q. What is the last time that you have seen it?

A. I think during the winter of 1914 and 1915, shortly after the outer end of it broke up. It was broken up by the action of the ocean.

Q. You were familiar with it at the time that it was constructed?

A. I watched them three or four times a week while they were constructing it. I was down there watching them. I was interested in it, to see the outcome.

Q. Was it adequate for the purposes?

Mr. Carton. I object to that, a mere casual observation.

Mr. Kremer. That is a matter of observation. I think he has a right to say. If I saw a thing I would be able to form an idea whether it was adequate or not.

The Court. Likely this was under construction for a month and he was a mere casual observer. He could tell whether it was adequate or not. He may answer.

A. No, the construction was too light. It would not withstand the action of the ocean.

Q. Mr. Savage, do you know why the water backs up into the cellars of the plaintiffs in this suit at present?

The Court. I think he has already answered that.

A. I have already answered that question.

Mr. Kremer. I didn't know it. I have only questioned him regarding the construction of the——

The Court. I understood him it was due to the failure or alleged failure of the defendants to keep proper control over the gate at the ocean end of Wesley Lake.

Mr. Carton. And more particularly its level.

The Court. Yes, its level is too high.

Q. You say that is what causes the trouble?

A. That is what causes the trouble in nine cases out of ten. Once in a while debris coming down the brook will clog the culvert up or the four foot pipe up, and that will cause the water to back up; but very often I have seen that condition down there with the water overflowing and that pipe and culvert were clear; so there was nothing blocking up your water up there that caused it, it was the level of the water as maintained by the ocean end of the lake.

By the Court.

Q. And you say as a result of that level the four foot pipe at the western end of the lake was two-thirds full of water and it had one-third only to carry off the normal flow of the brook?

A. To carry off the normal flow of the brook.

Q. Or the abnormal flow in the case of a storm?

A. Yes.

Q. In case of abnormal flow and in case of storm you say that the result would be of backing up the water?

A. In the brook west of Main Street.

Q. In the brook west of Main Street?

A. Creating a head sufficient to push that water out of the pipe into the lake.

Q. And by the backing up what effect did it have on the cellars, if you know?

A. Floods the cellars.

By Mr. Kremer.

Q. Then do you say the failure to lower the level of the lake and the construction at the ocean end incapacitated the straightaway for the performance of the function which it was designed to perform?

A. I do.

Cross-Examination.

By Mr. Carton.

Q. When were you in the employ of the city, Mr. Savage?

A. I believe it was 1912 and 1913, Mr. Carton.

Q. Those two years?

A. Yes.

Q. Employed under a salary as its regular engineer?

A. Yes.

Q. And devoted your entire time to the service of the city?

A. Yes, practically.

Q. And you severed your connections in 1913, I assume?

A. In 1914.

Q. 1914?

A. Yes.

Q. Do you know anything about the operation of the lake in time of storms prior to your employment by the city as its engineer?

A. Yes.

Q. As a resident in that community?

A. No, I was employed by the city before I became City Engineer to clean out and rebuild some of their sewers, amongst them the Lake Avenue sewer, and also sewers on the west side, west of the railroad; and during that time we had a number of freshets which overflowed Lake Avenue and caused the lake water to flow down in the sewerage system, and in the holes that I had dug along there to get at the sewers.

Q. What year was that?

A. That was 1911.

Q. What time in 1911?

A. In the fall.

Q. Well, prior to that time have you any knowledge of the lake in regard to overflowing its banks in times of storms?

A. I don't think I have prior to 1911. I remember something about it in 1906, I think it was, or 1907. I am not very clear.

Q. And is your recollection of what you recall at that time that it did it in 1906 and 1907, the lake overflowed its banks?

A. I think it did. I won't be certain about that but I think it did. I was building the sewerage disposal plant at the time and I had to take care of the sewage that came down from the centrifugal pumps, and I know at one time there was an extra large amount of sewage, and if I remember rightly the water was running into the sewers up along Lake Avenue at that time.

Q. And it was at any rate prior to 1911?

A. Yes.

Q. Prior to the erection of this detritus tank that you refer to?

A. Oh, yes, it was prior to that.

Q. You indicated that one of the purposes of this detritus tank was called upon to perform was to collect the filth and rubbish that came down the brook. Did you observe prior to the erection of the flume that filth and rubbish did go down this brook in time of storms?

A. Yes, it did.

Q. In considerable quantities, did it not?

A. Yes, great quantities, I should say.

Q. About how wide is the brook itself from West Main Street on to the railroad?

A. It varies, I should judge, from six to twelve and fourteen feet.

Q. A narrow stream?

A. Yes, a narrow stream in normal times.

Q. What are the dimensions of the culvert under Main Street?

A. I can't say off-hand.

Q. You say in 1912 when you were in the employ of the city you were directed by the city to install an additional culvert; that is the four foot culvert to which you refer?

A. Yes.

Q. A culvert in addition to the one that went through the detritus tank?

A. Yes.

Q. And that was erected just south of the other culvert?

A. Just south of the other one, yes.

Q. And what were the dimensions of the pipe, the Main Street pipe, from the tank down into the lake?

A. The one that went through the tank? I have forgotten the dimensions of that. I think it is about three or three and a half by five or six, something like that.

Q. But the one you put in was four feet?

A. Had a greater capacity than the other.

Q. A greater capacity?

A. Yes.

Q. Did you advise the putting in of this pipe?

A. I did.

Q. And suggest the dimensions of it?

A. I did.

Q. And did you consider it ample at that time to take care of the flow of water that came under Main Street through the main culvert?

A. It is ample.

Q. It is ample?

A. It is ample, yes, providing the mouth is kept open.

Q. I don't suppose you know whether the banks of Mr. Doran's property ever overflowed before 1911 or not, do you?

A. I know absolutely nothing about it.

Q. Now you have stated that the original spillway or gate at the other end of the lake, the ocean end, were somewhat out of repair and that you recommended the installation of new ones.

A. Yes.

Q. A new arrangement?

A. Yes.

Q. That was not done at that time, I believe you said?

A. Those plans were not carried out.

Q. Was a spillway afterwards actually put in?

A. Yes.

Q. By the City?

A. Yes.

Q. In 1914, as you recall?

A. In 1913, I believe.

Q. 1913?

A. I think it was the fall of 1913, but it was not put in by Asbury Park; it was built under the supervision or by the Ocean Grove Association.

Q. Well, Asbury Park joined with it, did it not?

A. Joined with it, yes.

Q. Who actually did the construction work?

A. The Ocean Grove Association.

Q. Did you represent Asbury Park in checking up the work?

A. No.

Q. Did Asbury Park pay any portion of the expense?

A. I understand that they paid half of it.

Q. Who checked up the work for Asbury Park before it paid its bill?

A. I have no knowledge of it.

Q. Don't know who did?

A. No, sir; I don't.

Q. Don't you know you did?

A. Sir?

Q. Didn't you approve the bill of Ocean Grove for the cost of this work?

A. I don't think that I did.

Q. Don't think you did?

A. I don't think so, no. If I did I don't remember anything about it.

Q. Now you were the engineer of the city at that time, you say?

A. Yes.

Q. And this spillway was not constructed according to your views or notion?

A. Right.

Q. And you made that manifest to the Council?

A. I certainly did.

Q. And they overruled you?

A. Yes, sir.

Q. What is the difference between the level of the old and new spillway down there?

A. I don't know. I can't tell you that.

Q. Well, you did say that the one they have there now is too high, didn't you?

A. Yes, I do know that.

Q. Is it higher than the old one?

A. I think it is a little, I am not certain.

Q. You don't know about that?

A. No, I don't know.

Q. But the old one was too high too?

A. It was.

Q. Is it your view that if that spillway were lowered and the level of the lake thereby lowered, that all this trouble would stop?

A. Why, certainly.

Q. How much lower would it have to be to cure it?

A. It ought to be eighteen inches lower. If it were eighteen inches lower then the surface of the lake would be about level with the bottom of the four foot pipe where it joins the Main Street culvert.

Q You would open——

The Court. Pardon me, Mr. Carton.

By the Court.

Q. What is the diameter of the Main Street culvert?

A. I don't know. It is larger than the four foot pipe.

Q. It is larger than the four foot pipe?

A. Larger than the four foot pipe; and that other

concrete flume leading to the old detritus tank comes in there on an angle. Both of them lead into the Main Street culvert.

Q. Well, do you know how the four foot pipe is connected with the Main Street culvert? What is the form of connection?

A. It just butts right into it, or right beside it, on the north side, the north side of the four foot pipe. The other culvert comes in but runs off on an angle. The four foot pipe runs straight. So that the old detritus tank and flume now and the bypass take off part of the water and the four foot pipe takes off part of the water.

By Mr. Carton.

Q. You said to his Honor that the pipe under Main Street is larger than the four foot pipe you put in?

A. Yes.

Q. Well, you did say on cross-examination, did you not, that the pipe you put in, with the other pipe in the tank, was ample to take care of the overflow that came under Main Street?

A. Come under the railroad or under Main Street, certainly it is. It is ample to take care of any water that will fall in that locality and come to a given point at a given time.

Q. Then your idea is that the whole trouble is because of the level of the spillway at the other end?

A. Yes.

By the Court.

Q. And you further said that the four foot pipe should be kept open?

A. Yes, the lowering of the ocean end would automatically keep that open.

By Mr. Carton.

Q. And is it your idea that it would be necessary to lower the level at the lower end of the lake in order to keep it open?

A. Yes, that is my idea, it was necessary to do that.

Q. And that ought to be lowered 18 inches at the ocean end?

A. Yes, if it was lowered a foot it would undoubtedly help it a great deal, but 18 inches would be better.

Q. What would happen to that lake if it was lowered 18 inches? It would be a bed of mud there?

A. Yes, that is it exactly. That is the reason the level of the lake was maintained so high, was to do away with the cost of dredging that lake out.

Q. It would not be a lake at all if it was lowered 18 inches?

A. No, unless it was dug out.

Q. How would you keep it cleaned out? It would be full all the time, wouldn't it?

A. No, it wouldn't be full all the time if it was dredged out to any reasonable depth. The cost wouldn't be very much. But if you dig it out by means of teams it would cost a lot.

Q. How would you dig it out?

A. With a dredge, the same as everybody else does.

Q. Do you know how long that level has been maintained?

A. No, I do not.

Q. It has been maintained for years and years and years, has it not?

A. I can't answer that question.

Q. Did you ever look it up when you were doing engineering work for Asbury Park?

A. Possibly I have. I know that the level has not been maintained there. I know sometimes it is a great deal higher and sometimes a great deal lower.

Q. When do you refer to now?

A. When there have been times of storm.

Q. And times of abnormal freshets?

A. Yes.

By the Court.

Q. When did you say the spillway was built, Mr. Savage?

A. If I remember rightly it was the latter part of 1913 or the beginning of 1913.

By Mr. Carton.

Q. I show you a communication purporting to be signed by you, Mr. Savage, dated January 30, 1912, and addressed to James D. Carton, Esq., City Attorney, Asbury Park. Did you forward that communication with the accompanying report to me at that time?

A. Yes, that just bears out what I have been telling today.

Q. Then if that is so what did you mean when you made this reference: "On the west side of tank 5 3-8 inches of water and a distance from the top of the culvert under Main Street to top of water in the brook was 2 feet 8 inches; thus proving that the water in the lake at its present level, with the weir and baffle walls out of the tank, the water in the brook west of Main Street will not back in any higher than it did before the tank and flume were built."

A. With the water at its present level in the lake.

Q. And you suggested that those baffle walls and weir walls in the tank, with those knocked out, that the water would not back up further than it did before?

A. With the water at its present level in the lake.

Q. With the water at its present level in the lake?

A. Yes, the water that level.

Q. Is that what the water was at that time?

A. Well, the lake was undoubtedly low then.

Q. Why low then?

A. Because the water could not get away if it didn't.

Mr. Carton. I ask to have this marked. I offer it in evidence.

Mr. Kremer. I object to this if it is offered on behalf of the plaintiffs.

The Court. No, it is offered on behalf of the defendants. It may be premature.

Mr. Carton. I offer it now for identification.

(Paper marked Exhibit A for Identification.)

Mr. Kremer. It occurs to me at this time that I have served the defendant to produce the plans and specifications for the outlet for Wesley Lake submitted by Rufus L. Savage, City Engineer.

Mr. Carton. We have been for weeks trying to dig out the list of books and specifications you have been calling for, and if we have got them here you are welcome to them.

The Court. He asks now for plans submitted by Mr. Savage in connection with his letter of what date?

Mr. Carton. This case very likely cannot be concluded today any anything we haven't here today we will have here. We will have it here Monday. Mr. White says the only plans they have on file are not prepared by Mr. Savage. (To Mr. White.) You don't find any plans prepared by Mr. Savage?

Mr. White. No, sir.

Redirect-Examination.

By Mr. Kremer.

Q. Do you recall, Mr. Savage, what those plans were?

(Objected to.)

Mr. Kremer. Unless you think that you can find them.

Mr. Carton. The only answer I have is that made by Mr. White, that we find no such plans. But my objection goes further,that the rule admitting secondary evidence does not apply to a situation of this kind, because the question would be irrelevant at any rate. What difference does it make what plan this witness submitted that was not adopted by Council in its judgment? The Council were the administrators of public affairs——

The Court. I suppose there is hardly any use wasting time upon the subject. The witness has testified that he made certain remedial recommendations for the situation

and those recommendations were not accepted. Now it is merely an episode in the history of this case is all.

Mr. Kremer. What I want to bring out is whether those plans embodied his recommendation.

The Court. Undoubtedly they did. I will allow you to ask him that.

Mr. Kremer. The record shows this morning that plans were submitted to the Council and tabled.

The Court. Yes, it does show that.

By the Court.

Q. Mr. Savage, were your recommendations embodied in the plans that you submitted?

A. They were in the plans and specifications.

The Court. That is all you want.

Mr. Kremer. I want to bring out the fact that those plans were not followed.

The Court. Well, they say so. Your record shows that. The recommendations of Mr. Savage were not followed.

Mr. Kremer. Now it seems to me it might be important to my case to show what the plans were.

The Court. He has told you exactly what the trouble was and his plans really embodies the present testimony

in explanation of what you think the cause of the trouble was?

The Witness. Yes.

The Court. He has already testified to that.

By Mr. Kremer.

Q. Did you tell the city officials, the Mayor and Council of Asbury Park, in 1912, that the gate and spillway constructed at that time was inadequate?

Mr. Carton. I object to that as immaterial, anything that this man may have told the city officials.

The Court. I think I shall allow him to answer that.

(Question repeated.)

A. Yes.

Q. Did the city adopt the plans your prepared for the construction of the straightaway?

A. Yes.

Q. Did you advise them that the spillway should be 18 inches lower than it was at that time?

A. I don't remember as to the exact difference in level, but I know it was quite considerably lower.

Q. You know what?

A. It was quite considerably lower than the old level.

The Court. No, the question is did you advise the City Commissioners or authorities that the spillway should be 18 inches lower than the level of the spillway?

A. I don't remember the exact number of inches; I know that I advised them that it should be lower, but as to the exact number of inches I can't say.

By Mr. Kremer.

Q. Did the construction of the straightaway and the new spillway raise the level of the lake?

A. I don't know. The construction of the straightaway didn't raise the level of the lake, I know that; but as to whether the construction of the new spillway raised it or not I don't know.

Q. What can you say concerning the operation and maintenance of the gates of the old spillway during your administration as City Engineer?

A. I know that quite a number of times I was called on on the phone and that I had to get out and get my rubber boots and coat on and go down and open the gates myself or get somebody to help me.

Q. How many times did that occur?

A. About three or four times anyway.

Q. In what year?

A. 1912 and 1913.

Q. Do you know the condition of the lake and are you familiar with the old detritus tank and the spillway existing at that time?

A. Yes.

Q. Was it necessary to open the gate upon rain storms to prevent the backing up of water?

A. Yes, sometimes it was also necessary to dig the sand out outside.

Q. Did you ever observe the outside of the gates or spillway when the sand was not dug out?

A. Quite often.

Q. Did you ever see it in that condition in times of winter storms?

A. Yes, I have had men dig it out.

Q. Did you ever see the water in its passage obstructed as the result of the outside of that gate not being dug out?

A. Yes.

Q. When?

A. In the years 1912 and 1913.

Q. How many times?

A. Oh, I couldn't answer that; possibly three or four times; possibly a half a dozen. I couldn't answer that, how many times.

Recross-Examination.

By Mr. Carton.

Q. You say that you were called upon two or three times in 1912 and 1913 to go down and open the gate?

A. Yes.

Q. That was part of your duty, wasn't it? You had charge of the engineering work of the city?

A. Yes.

Q. And was being paid a salary for it?

A. Yes.

Q. There wasn't anything unusual about that then, was there?

A. No, it was one of my duties when anything like that happened, though the man at the Casino was supposed to take care of the opening.

Q. You mean some employees under you?

A. No, not under me.

Q. Some other employee of the city?

A. Yes.

Q. Do you mean to say that during 1912 and 1913 you neglected to do it and did not always open the gates?

A. I mean that the man that was supposed to look after it didn't, and the people, the residents along the lake and along the Wesley Lake Brook, would call me as being the easiest man to get at, to go down there and open those gates to keep the water from flooding the cellars and streets.

Q. Why didn't you properly look after it, when you were being paid by the city for that purpose?

A. It wasn't by business.

Q. I understood you to say a minute ago that it was your business.

A. It was my business to look after anything that the other employees neglected, but it was their business to look after it first.

Q. You were boss of that situation?

A. No, the men on the beach front.

Q. You had charge of the engineering work of the city?

A. That didn't include the beach front.

Q. That didn't include the beach front nor Wesley Lake?

A. No. It included Wesley Lake, yes.

Q. But not the beach front?

A. No, one of the men that was employed on the beach front was supposed to look after the operation of those gates during storms, and I have gone out at eleven or twelve o'clock and one o'clock at night to go down and open them, called up on the phone.

Q. You say another thing that causes trouble there is the sand that backs up. You mean the sand in the ocean?

A. That is it absolutely.

Q. What was your observation of that in 1913?

A. That the flume should have been built far enough

out in the undertow to keep that from sanding up and built strong enough so that the ocean would not break it to pieces.

Q. You mean the actual situation there at the foot of the lake in connection with the washing in of the sand was not sufficient to take care of the water out of Wesley Lake into the ocean?

A. The natural tendency down there is for the sand to bank up when the wind is to the southeast. I think it is, to bank up and shut the water off from running out of the lake. Now if there were a flume run out far enough into the undertow to get out beyond that sandbank it would carry the water out at all times.

Q. And because that matter was not done did you observe at various times that the action of the ocean would be to pile the sand up in this flume and shut it off temporarily?

A. Yes.

Q. Is that so?

A. Yes.

Q. Did that happen on more than one occasion?

A. Yes.

Q. And would you after that, after your attention was called to it, dig it out?

A. Yes.

Q. Now I suppose nature plays that prank, doesn't it? Has the city anything to do with the operation of the waves in the ocean piling that sand there?

A. It has a means of overcoming it.

Q. In your judgment?

A. In any engineer's judgment.

Q. The condition to which I have just referred, this sand being washed in by the ocean, is a natural condition, is it not?

A. A natural condition.

Redirect Examination.

By Mr. Kremer.

Q. Could that opening be kept clear by diligence on the part of the city employees?

A. Certainly.

Q. Did you advise that the construction out onto the beach be made?

A. I did.

Q. Did you have anything to do with the employment of the man whose duty it was to get the gate open at the proper time?

A. Absolutely nothing.

Q. You were City Engineer; your functions were of an advisory capacity, were they or were they not?

A. Well, I was City Engineer and superintendent of streets and waters and sewers, but the man who was supposed to keep the flume in condition was employed by the old Beach Company, and I had no supervision at all over him.

Q. He didn't take orders from you?

A. No, he didn't.

Q. You didn't appoint him?

A. No.

By the Court.

Q. Do you know whether any orders were actually given by any person with respect to the flume by any one in authority in the city government?

A. Yes, I do.

Q. Who gave the orders?

A. Dr. Bennett, in my presence.

By Mr. Kremer·

Q. Who was Dr. Bennett?
A. He was the mayor.

By the Court.

Q. To whom were they given? Do you remember the man's name?
A. No, he was an employee of the Beach Commission that worked around the Casino, and I wouldn't like to say just what his name was, because I might be wrong.

By Mr. Kremer:

Q. What was the order?
A. The order was to keep those gates open in the time of floods.
Q. Mr. Savage, how long did you say you had been a civil engineer?
A. I have been working at the business for ten or twelve years.
Q. Are you engaged in that business now?
A. I am.
Q. Have you been engaged in that business continuously during those years?
A. Engineering and contracting, yes, continuously for fifteen years.
Q. Did you attend any university or college to prepare to be an engineer?
A. I did not.
Q. Have you any diploma or certificate of your capacity as an engineer?
A. I have not. I got my education and experience from practical work.

Q. Have you ever held any other municipal office as a City Engineer?

A. No.

Recross Examination.

By Mr. Carton.

Q. The fact is you are not an engineer at all, Mr. Savage, are you.

A. No, that is not a fact, Mr. Carton, I am one.

Q. Well, you are not a graduate from any technical school of engineering, are you?

A. No, I am not, but that does not make an engineer.

Q. You are a contractor, are you not?

A. I am an engineering contractor.

Q. Well, you have arrogated the words and title of engineer——

A. No, but I have accomplished enough engineering to have other people call me that without giving myself that title. For instance, I can hire all the technical graduates, all the young engineers that I want, for $60 to $75 a month, but I wouldn't think of working for that myself.

Q. Contracting is a more profitable business.

A. Engineering and contracting combined are a very profitable business.

Redirect Examination.

By Mr. Kremer.

Q. Now the city employed you as its engineer?

A. Yes.

Q. They accepted your plans for the construction of the straightaway?

A. Yes.

Q. They relied on you absolutely in the construction of that?

A. Yes, and other work too.

GEORGE K. ALLEN, Sworn for plaintiffs.

Direct Examination by Mr. Kremer.

Q. Where do you reside, Mr. Allen?

A. Red Bank, New Jersey.

Q. What is your occupation?

A. Civil engineer.

Q. Where did you prepare to be a civil engineer?

A. Princeton.

Q. When did you graduate at Princeton?

A. 1896.

Q. Did you obtain the degree of C. E.?

A. I did.

Q. Have you been engaged in the engineering business since then?

A. Yes.

Q. What official positions, if any, municipal positions as engineer, have you held?

A. I was County Engineer two years of Monmouth County.

Q. County Engineer of Monmouth County?

A. Yes, and I have been Borough Engineer for the last two years, and two years about four years ago I was Borough Engineer of Red Bank.

Q. You are Borough Engineer of Red Bank today?

A. Yes.

Q. How many years in all do you say you have been

engaged in practical engineering?

A. About twenty-one years.

Q. In your opinion, Mr. Allen, in the case of an area of 600 acres on which rain falls for one half an hour at the rate of one inch per hour, what would be the average fall of water per minute?

Mr. Carton. Now I object. Now you see counsel is conscious of the fact that I am not an engineer and I could not keep anywhere with that unless I was.

The Court. But the trouble with the question is that it is based on a hypothesis that is not yet in evidence.

Mr. Carton. A hypothetical question without any hypothesis.

The Court. There has been no evidence that there is any quantity of rain falling upon this acreage for any length of time.

Mr. Kremer. It is my purpose to produce the evidence after the question is asked. I realize that that process is irregular, but not prohibited necessarily.

The Court. Mr. Carton is entitled to cross-examine upon the premises before you discuss the result.

Mr. Kremer. I will conclude the other part of the examination first.

Q. Have you made any observation or examination as to the conditions obtaining at present at Wesley Lake in Asbury Park?

A. Yes.

Q. When did you make that observation?

A. June 15, 1917.

Q. Did you examine a straightaway running from the westerly side of Main Street into Wesley Lake?

A. I examined one end of it.

Q. Do you know the size of that straightaway?

A. Yes.

Q. Will you tell the jury the size of that straightaway?

A. 48 inches in diameter.

Q. Did you examine the culvert running under Main Street?

A I examined the western end of the culvert. I couldn't get at the eastern end.

Q. Do you know the dimensions of that culvert?

A. Yes.

Q. Will you state them?

A. May I read my notes?

By the Court.

Q. Are you unable to tell us without reference?

A. There are so many of those dimensions——

Q. Well, if it is necessary to refer to your memorandum. Were they made at the time, Mr. Allen?

A. Yes.

The Court. You may refer to them.

A. 6 feet 2 inches wide and 4 feet 4 inches high.

By Mr. Kremer.

Q. Did you examine the culvert under the railroad track of the New York & Long Branch Railroad?

A. Yes.

Q. Will you state, if you know, what the dimensions of that culvert are?

By the Court.

Q. What is that culvert, an ellipse?

A. It is an arch, a flat arch.

By Mr. Kremer.

Q. The dimensions of the one under the railroad?

A. 7 feet 6 inches wide and 5 feet 8 inches high.

Q. Can you tell the area of the straightaway?

A. The area of a 48 inch diameter circle, 12.577 square feet.

Q. Can you state the area of the culvert under Main Street?

A. Approximately 22 square feet, I calculated it.

Q. Do you know the area of land accommodated by Wesley Lake Brook?

A. I made a calculation from a geological map, 600 acres.

Q. In the case of an area of 600 acres, upon which rain falls for one-half an hour at the rate of one inch per hour, what would be the amount of fall per minute?

Mr. Carton. I object, on the ground that there has not yet been any such hypothesis shown. There is no evidence in this case as to any particular time, any particular rain, how long it lasted nor the inches of water that fell or anything of that kind.

The Court. The only thing is, he said that Wesley Lake Brook serves an area of about 600 acres.

Mr. Kremer. The other point I will admit has not been brought out in actual proof yet.

The Court. You are premature.

Mr. Kremer. However, I had an idea that the court would take judicial notice of an ordinary rainfall.

(Question repeated.)

The Court. You had better reform your question.

Q. In the case of an area of 600 acres on which rain falls at the ordinary rate for one-half hour what would be the average amount of water falling per minute?

Mr. Carton. I think the question is still objectionable. There has been no foundation laid.

The Court. I am afraid it is well taken. You are premature with it.

Q. Did you take the elevation of the culvert?

A. Yes.

Q. Will you state the elevation of the culvert, the cellar floor of Doran's cellar and the straightaway?

A. I have the list made of the elevations, but they are not in the order you ask me.

The Court. I will allow you to give the elevations in the order in which you took them. State what they were.

A. I assumed the elevation of sea level as the apron, that is, the bottom of where the outlet, the overflow from the dam, falls on that concrete platform. I was told that

that was sea level, it was intended to be built as sea level, and I took that as a basis. These are all on that same basis, so it doesn't matter what elevation you assume, but for simplicity I assumed that as sea level. I found the bottom of the brook in Doran's building was one foot above that level, above sea level, and the top of the cellar entrance to the Doran building in the rear is 6.24 feet above sea level. Doran's cellar floor was 2.61 feet above sea level. Woehrer's cellar floor was 4.29 foot above sea level. The bottom of the Main Street culvert on the west side was .34 foot below sea level. The bottom of the connection on the east side of Main Street—that is at the east end of the culvert—the four feet connection, was .22 feet below sea level. And the bottom of the inlet at the west end of the lake was .31 feet below the sea level. The level of the water in the lake when I took the elevation at the west end was 2.49 feet above sea level, and the top of the weir at the east end of the lake, that is where the water flows over, was 2.5 above sea level.

By the Court.

Q. Mr. Allen, how did you find the four foot pipe connected with the straight drain?

A. There is a manhole just east of Main Street.

Q. How was the connection made with the drain under the street and this four foot pipe?

A. It was a circular pipe and the manhole was about four or five feet east of the street. There must have been some distance before it got to the end. I couldn't get in that eastern end of the culvert.

By Mr. Kremer.

Q. Was there any water in the straightaway on that day?

A. Yes.

Q. How much water?

A. 2.7 feet in depth.

Q. Was there any flow of water from the culvert or brook into the lake?

A. It seemed to be stationary.

Q. How much higher on that date was the top of the spillway than the surface of the lake?

A. The top of the spillway?

Q. The gate or spillway at the ocean end, than the surface of the lake.

A. The water was going over the spillway. It was slightly lower, about one-eighth inch lower.

Q. Did you observe the gate or spillway?

A. I did in the morning.

Q. And what dimensions was it?

A. I didn't measure it.

Q. Did you observe the gate itself?

A. Simply that it was a square gate, looked to be about three feet square. I expected to go down in the afternoon to take the dimensions, but the tide had banked up the sand on the ocean side and filled up the basin so I couldn't get at it.

Q. Now assuming the conditions to be as you found them on that day, and assuming a heavy rain suddenly precipitating a large amount of water into the lake, what would be the result if the gate were unopened?

A. The water would back up west of the opening in the east side of the Main Street culvert.

Q. Would the straightaway, in the condition in which you found it, be adequate to carry off the waters coming to the culvert?

A. I would not.

Q. Why not?

A. It was not large enough.

Q. Would the opening of the gate at the easterly end of Wesley Lake immediately bring full relief?

A. I don't think so.

Q. Do you think the gate is large enough to accommodate all the water which might come through the brook?

A. No, sir.

Q. You have observed that the straightaway is smaller than the culvert. Would water in ordinary or large quantities coming through the culvert and striking the entrance to the straightaway be retarded and backed up because of the difference in area between the straightaway and the culvert?

A. It would to a certain extent.

Q. Would it have been possible and practicable to build the straightaway larger than it is at the time of its construction?

A. Yes.

By the Court:

Q. And if it had been what would have been the result with respect to abnormal flows of water?

A. There would have been no flooding if it had been made large enough.

By Mr. Kremer.

Q. If that straightaway were larger would it carry off the waters in the case of a severe fall of water and a severe flood?

A. Yes.

Q. Would obstructions in the straightaway such as refuse hinder the free passage of water to any appreciable extent?

A. Yes.

Q. Would the construction at the westerly end of the straightaway of a forebay or grating prevent refuse from getting into the straightaway from the culvert or brook?

A. Yes.

Q. To what did you attribute the flooding of the cellars of the plaintiffs in this action?

(Objected to.)

Mr. Kremer. I think it has been proven that there was flooding.

The Court. Hasn't he testified to the effect of the construction as he saw it? Isn't that quite as far as he may go?

Mr. Kremer. He has testified to that. It seems to me in view of his capacity as an expert, he might testify to the cause of the flood.

The Court. I think I will allow you to ask it: assuming that the cellars were flooded, does he know the cause.

A. By the brook overflowing the bank.

Q. What caused the brook to overflow the banks?

Mr. Carton. The same objection.

(Objection overruled. Objection noted for defendant as ground of appeal.)

A. The water backed up in the Main Street culvert.

Q. In the Main Street culvert?

A. Yes.

Q. Is the Main Street culvert inadequate?

A. I don't think so.

Q. Is the straightaway inadequate?

A. I think it is.

Cross Examination.

By Mr. Carton.

Q. Mr. Allen, you made these observations and measurements just recently, on June 15th, I think you said?

A. On June 15th.

Q. You were employed by the plaintiffs for that purpose?

A. Yes.

Q. Now you have given the dimensions of the straightaway pipe, so-called, that is, the pipe hooking on to the east side of the culvert under the bridge, as 48 inches?

A. Yes, sir.

Q. And what do you say the dimensions of the culvert under the bridge are?

A. On the west end?

Q. How much?

A. The west end of the bridge, 6 feet 2 inches wide.

Q. And what at the east end?

A. I couldn't get to it. I didn't measure it.

Q. Well, the straightaway pipe, so-called, erected by Mr. Savage, was hooked up on the east end and not on the west end, wasn't it?

A. Yes, I measured the diameter of the straightaway but I didn't get in the——

Q. But you don't know what the measurements of the easterly end of the culvert are, do you?

A. I do not, no, sir. I assume that they are the same

thing throughout. They are usually built that way. I never saw one that was not.

Q. You heard Mr. Savage on the stand, did you not, stating that he put that straightaway there and butted it up to the easterly end of the culvert and that it was ample to take care of the water that came through the culvert? You heard that, didn't you?

A. Yes, sir.

Q. Do you assume from that that the pipe that he put in was of the same dimensions as the culvert under the bridge?

A. No, I do not. I presume it was a 48 inch pipe leading to the westerly end. I didn't measure the easterly end.

Q. That is what you assume from what Mr. Savage said when he said it was ample, this pipe would be the same demensions as to the pipe to which he hooked it up?

A. I didn't understand Mr. Savage to say that the eastern end of the culvert was equivalent to a 48 inch diameter pipe.

Q. Did you hear him say that it was sufficient to take the water from the Main Street culvert?

A. I heard him say he thought it was sufficient.

Q. You don't agree with him?

A. No, sir.

Q. And are you basing your reason for not agreeing with him because you didn't take measurements of the east end but only took measurements of the west end?

A. No, sir; I am basing my judgment on the capacity of a 48 inch pipe, how much water it will take care of.

Q. Did you make any observation as to what portion of the culvert under Main Street was working, that is, what portion was open and what portion was filled with sand?

A. No, sir; I simply took the present bottom of the

Main Street culvert to the top, which is four feet four inches.

Q. I mean now the culvert under Main Street at its westerly end, where you took measurements.

A. Yes, I measured from the top of the culvert down to the bottom of the bed of the stream below the surface.

Q. Down to the water?

A. No, sir; not down to the water.

Q. Down to the bottom?

A. Down to the bottom, the mud.

Q. And those dimensions were what?

A. 4 feet 4 inches high and 6 feet 2 inches wide.

Q. What is the length of that culvert under Main Street from the west to the east side?

A. I don't know.

Q. Did you make any examination at the easterly side of Main Street there to determine what portion of the flow going through Main Street culvert was taken care of by the pipe going to the detritus tank?

A. I did not. I was told that the detritus tank was out of operation and I didn't consider it at all.

Q. Somebody told you that?

A. Yes.

Q. You didn't observe that there was a pipe there the same as Mr. Savage referred to?

A. I didn't see anything about a 48 inch outlet. I didn't see two outlets.

Q. You didn't look for the other outlet to the detritus tank at all?

A. I did not; no, sir.

Q. Some one told you that was not working?

A. No, sir.

Q. You suggested that this matter could be remedied by the erection of some contrivance to prevent the refuse from going into the Main Street culvert?

A. I didn't suggest anything.

Q. What do you say?

A. I did not. I was asked if there could be a construction to prevent the refuse from going in.

Q. I understood you to say that there could be something?

A. Yes, there could.

Q. And what was it that you had in mind?

A. There could be a screen there.

Q. A screen?

A. A screen could be placed there.

Q. That is, a screen across the mouth of the pipe at the west end of Main Street, where the water from the brook ran through?

A. Yes, but I didn't recommend it. I said it could be there.

Q. You would recommend most anything like that, wouldn't you?

A. Yes.

Q. That would be one of the worst things that could be done, wouldn't it?

A. It would impose too much of a duty on some one to keep it clean, keep the refuse away.

Q. If there was not some one there constantly that very thing would cause this thing to dam up when the refuse came down, wouldn't it?

A. Yes.

Q. Did you make any examination of the dimensions of the piping of this brook under Prospect Avenue?

A. No, sir.

Q. In the block west of the railroad?

A. I only went to the railroad.

Q. Now about your elevations, Mr. Allen. You took those yourself, I suppose?

A. Yes, sir.

Q. Are you sure about your elevations?

A. I think I am; yes, sir.

Q. What did you take as a basis? What did you figure?

A. They are all on the basis of what I call the apron; that is, the bottom of the chamber that the water flows into after it leaves the weir at the eastern end of the lake. I took that as being sea level. They are all on that basis; they are above sea level.

Q. How many feet is that basin below the top of the wall?

A. The top of the weir, that is, the point where the water flows over, is two and a half feet, 2.5 above that.

Q. You took the bottom of that basin to be sea level and you used that as a basis?

A. Yes, sir.

Redirect Examination.

By Mr. Kremer.

Q. Mr. Allen, was the bottom of the straightaway on the day of your observation higher than the bottom of the culvert?

A. The bottom of the straightaway was a little higher than the bottom of the culvert at the west end. I didn't take the elevation at the east end, because I couldn't get it.

Q. Would that fact cause sand and dirt to gather at the bottom of the culvert?

A. Yes.

Q. Is it customary to build a culvert wider at one end than at another?

A. No, sir; usually the same size.

Q. Did you ever know of one wider at one end than the other?

A. No, sir.

Recross Examination.

By Mr. Carton:

Q. You won't say though that this culvert on the east side of Main Street is as wide as it is on the west side, will you?

A. I can't say so, no.

By Mr. Kremer.

Q. You took the dimensions on the westerly end on the assumption that it was the same width at both ends?

Mr. Carton. That is what he said.

A. Yes.

The Court. We will adjourn now till Monday.

Mr. Carton. I wanted to offer the photographer to prove some photographs.

The Court. Show them to Mr. Kremer. Perhaps he will admit them.

(Mr. Kremer examines photographs.)

Mr. Carton. I offer the photographs now and ask that they be admitted.

The Court. What do they show?

Mr. Carton. They show Wesley Lake at various points from Main street west.

The Court. Why do you object to them?

Mr. Kremer. I don't know what objection. I am willing to admit that this man took them.

The Court: And that they correctly represent what they purport to show?

Mr. Carton. That is what I say, your Honor.

The Court. They will be admitted for that purpose and it will be admitted that they were taken by the photographer at the instance of the defendants and that if called the photographer would say that they correctly represent the conditions existing on the day that he took them, on the 27th day of June, 1917, and are a correct representation of the physical conditions and environments which they purport to portray.

Mr. Kremer. Subject to the right of the plaintiffs to show they do not set forth such conditions.

The Court. Subject to that right and subject to objection as to their materiality.

(Photographs marked Exhibits D 1, D 2, D 3, D 4, D 5, D 6, D 7, D 8, and D 9.)

(Adjourned till Monday, July 1, 1917, at 9.30 A. M.)

Freehold, N. J., July 1, 1917.

(Trial of the cause resumed at 9.30 A. M.)

Mr. Kremer. If your Honor please, I wish at this time to request that the complaint be amended in accordance with the fact, that is, that damages have accrued since the 27th day of July, 1911, instead of, as alleged in the complaint, on the 7th page, on the 1st day of May, 1912.

The Court. Is there objection?

Mr. Carton. There is, your Honor, yes, sir. I think an amendment going back prior to the time that you allege ——

Mr. Kremer. The plaintiffs allege that the floods began on July 27, 1911, and the bill of particulars also alleges floods from that time. The new straightaway was not built until 1912, so that the complaint, possibly through an inadvertence, has stated that the defendants, with notice, have maintained this situation since 1912, when it might better have stated that it was from 1911.

The Court. What is your purpose now?

Mr. Kremer. That the complaint be amended by stating that since the 27th of July. 1911, they have maintained this condition, so that the plaintiffs may be entitled to damages. I do not see how there can be any surprise, because they have in fact maintained floods there all those years.

Mr. Carton. I do not think the application is proper, and even if it would be proper I do not think it is timely. I do not think a motion should be made to amend the complaint to have it meet the proof, until the case is in. And further than that, I think it is objectionable for the reason that it is setting up a new cause of action, a series of separate causes of action which we have not been apprised of at all, and it is objectionable, as I view it, your Honor.

The Court. I shall reserve the decision on the motion until the close of the case.

EDWARD GIFFORD, Sworn for plaintiffs.

Direct examination by Mr. Kremer.

Q. Where do you live, Mr. Gifford?
A. 612 Lorraine Avenue, Bradley Beach.
Q. What is your business?
A. Contracting mason.
Q. How long have you been in that business?
A. About twelve or fifteen years.
Q. Have you specialized in any branch of that business?
A. Well, concrete, mason work in general.
Q. Did you build the cellar of John Doran on South Main Street?
A. I did.
Q. Did you build the cellar of Fred Woehrer?
A. No, I didn't.
Q. Just built Doran's cellar?
A. Yes.

Q. When did you build that cellar?
A. Well, I really can't remember the year.
Q. Can't remember the year?
A. About eight years ago, I think, as near as I can remember.
Q. That would be 1908 or 1909?

Mr. Carton. 1907 he built it.

The Witness. Maybe that was it. I don't recall just now.

Q. Will you describe the construction, briefly, as you made it?

Mr. Carton. If the court please, I do not see the relevancy of this, the construction of Mr. Doran's cellar under the building.

The Court. What is the purpose?

Mr. Kremer. The purpose, if your Honor please, is to develop the fact that the water came and did, as the result of the observation of this witness, seep through the cellar, and didn't come in the hole.

The Court. I will allow it.

A. It was regular concrete foundation work, made in between forms.
Q. Have you observed that cellar recently?
A. Yes, sir.
Q. When?
A. This morning.
Q. Will you state what your observations revealed?

A. Well, it looked as if there had been seeping through for I should judge about two feet up from the bottom, it looked as if it had been coming through gradually, the same as it would through any concrete wall that water stood behind.

Q. It was coming through the sides of the wall?

A. It looked as if it had been. It wasn't just then but it looked as if it had been.

Q. What traces did you find of that fact?

A. Well, it looked just as if seeping through, had been seeping through.

Q. Did you find any traces of water coming through the floor?

A. Well, it was very damp, but you couldn't describe it, being walked on all the time.

Q. But you could detect evidence of the water having seeped through the sides of the wall?

A. Yes, sir.

Cross examination.

By Mr. Carton.

Q Did you see the hole on the north side of the wall, Mr. Gifford, when you were there this morning?

A. I did.

Q. And you constructed the whole Doran building as well as the cellar, didn't you?

A. Yes, sir.

Q. You didn't waterproof the cellar walls, did you?

A. No, I didn't.

By the Court.

Q. What is the size of that hole?

A. Well, I should judge as near as I can remember about eight inches in diameter.

Q. Eight inches in diameter?

A. Yes.

Q. And where is it with respect to the cellar?

A. It is on the north side, about the northwest corner, I should call it.

Q. Is that anywhere near the brook?

A. Yes, you can look out and see the brook running by.

Q. And how high is it above the bank of the brook, if you know?

A. Well, I didn't look outside, no.

Q. How high is it from the floor of the cellar?

A. Somewheres around two feet six inches.

Re-direct examination.

By Mr. Kremer.

Q. Were the seep holes which you noticed below the level of the bottom of that hole?

A. Yes.

Re-cross examination.

By Mr. Carton.

Q. What do you mean by seep holes?

A. It looks as if water had been running there.

Q. You mean on the floor.

A. No, on the wall down through the floor.

Q. Did yon notice any holes on the floor where water had oozed up there?

A. No, I didn't notice. It was damp all over.

LOUIS WEIDMAN, Sworn for plaintiffs.

Direct examination by Mr. Kremer.

Q. Where do you live, Mr. Weidman?
A. 11 South Main Street, Asbury Park.
Q. What business are you engaged in?
A. Baking business.
Q. When did you move there?
A. April 10, 1911.
Q. From whom do you rent?
A. Mr. Woehrer.
Q. From April, 1911, the time that you moved there, until the latter part of July were there any floods in your cellar? Was there any water in your cellar?
A. In the latter part of July? No, sir.
Q. Do you recall a flood in the middle of the summer of 1911?
A. This summer?
Q. The summer of 1911.
A. I do.
Q. Will you state when that flood occurred?
A. The first flood we had was August 26, 1911.
Q. Will you state what happened to the cellar under your store at that time?
A. Why, the water came in one night—I had my men working in the night and they called me up at two o'clock in the morning they said there must have been a water pipe bursted somewheres because the sewer was full—

The Court. Never mind what they said, only what you yourself saw.

A. Well, I went down there and I seen about a half

a foot or a foot of water in there, I don't know exactly how much.

Q. How long did the water stay in there?

A. About twenty-four hours.

Q. When was the next flood, if there was one?

A. About two weeks after.

Q. Was there another one during the year 1911?

A. There was one, but I can't remember the date.

Q. How many were there in 1912?

A. Eight.

Q. 1913?

A. Eight.

Q. 1914?

A. Six.

Q. 1915?

A. Five.

Q. 1916?

A. Eleven.

Q. 1917?

A. Four.

Q. How long would the water stay in the cellar——

The Court. Well, Mr. Kremer, you will be confined to those in 1917 happening prior to the institution of this suit. The suit was started April 2, 1917.

Q. How many were there in 1917, up until April 2, 1917?

A. Three.

Q. Do you recall the occasion of January 21, 1917?

A. I do.

Q. Will you state what happened in your cellar at that time?

A. Well, we had the highest flow we ever had. We had over twenty inches of water.

New Jersey State Library

Q. Did you observe the gate or spillway at the eastern end of the lake at that time?

A. I did not.

Q. Are there any holes in your cellar?

A. No, sir.

Q. Did you ever complain to any member of the Council of the City of Asbury Park concerning the flood?

A. Yes, sir.

Q. To whom did you complain and when?

A. Charlie Rugarber.

Q. And when?

A. 1913.

Q. What did Mr. Rugarber say to you?

A. Why, I sent a bill in for damages for stuff I lost in the cellar.

Q. Did you do it?

A. I sent a bill for $170 for goods I lost.

Q. Was the bill paid?

A. Yes, part of it.

Q. By whom?

A. By the City of Asbury Park. They paid $50 on the $175 bill.

Q. Will you describe any construction that you may have made on the rear of your store?

A. The construction on the rear of my store in the bakeshop, you mean?

Q. Yes.

A. Why, I built a building 26 feet long, with a concrete foundation, with a brick wall around it, with the Middleby patent.

Q. What did you build?

A. What did I build?

Q. Yes.

A. I built the foundation, the chimney, the oven, the company put up and the put the building up.

Q. When did you build that oven?
A. In 1911, in April.
Q. Has the overflow of water damaged that oven?
A. It has.
Q. Will you state when and how?

The Court. Don't lead the witness, Mr. Kremer, any more than you have to.

Q. State what effect if any has the flood had upon the oven.
A. Why, the foundation started in to settle in 1914, over towards the south, and those tiles—those ovens are built out of tiles, out of fire tiles, and they interlock, and wedge from one side to the other, and it only takes about an inch and a half to throw the tiles out of gear. The consequence was that some of the tiles fell down and I had to go put in new ones. And that happened three times, and the oven is such, the condition now, that it is liable to fall down again.
Q. Did you have the oven repaired?
A. Yes.
Q. How much did you spend to have it repaired?

(Objected to. Objection overruled.)

A. I have the bills here.
Q. Have you the check vouchers?
A. Yes, sir.
Q. Will you state who repaired it?
A. Why, Mr. R. E. K. Rothfritz, and the bills I bought of the oven company.

By the Court.

Q. What did it cost you?
A. Altogether?
Q. Yes.
A. I don't know. I have the bills here.

Mr. Carton. I object, because it seems to me that we are entitled at least to see the bills and examine the man who did the work to ascertain what he did, whether it was work done additional to what would have been necessary.

The Court. He may say generally what it did cost him and you will have the right to cross-examine and have the bills.

By Mr. Kremer.

Q. Have you the bills?
A. I have the checks. The bills are not here.
Q. Who did the work?
A. The Metropolitan sent the work and sent a man up here, and Rothfritz done all the rest of the work. I had four jobs altogether.

Mr. Kremer. I assume that these checks vouchers paid to these people would be the best evidence.

The Court. You may show those to him and have him identify them.

Q. I show you a check dated November 15, 1915, to the order of P. E. Rothfritz, for $20.25, and ask you if that is your signature.
A. Yes.
Q. Was that check paid for work done in this repair?

A. Yes.

Q. I show you a check dated November 22, 1915, made to the order of P. E. Rothfritz, for $5.42, and ask you if that is your signature?

A. Yes.

Q. Was that check paid for work done on this repair?

A. Yes, sir.

Q. I show you a check dated April 24, 1916, to the order of the Metropolitan Oven Company, for $10. Was that made by you?

A. Yes.

Q. I show you a check dated May 16, 1916, to the order of R. E. K. Rothfritz, $27.15, and ask if that is your signature.

A. Yes, sir.

Q. Was that paid for this repair work?

A. Yes.

Q. I show you a check dated August 12, 1916, to the Metropolitan Oven Company, for $10, and ask if that is your signature.

A. Yes, sir.

Q. Was that for other repair work?

A. Other bills.

Q. I show you a check dated December 4, 1916, for $9.15, to the Metropolitan Oven Company, and ask you if that is your signature?

A. Yes, sir.

Q. Was that for work done in repair of this work?

A. That was tiles I paid for.

Mr. Kremer. I offer these in evidence.

The Court. Well, Mr. Kremer, I think you should produce some vouchers here. You will have an opportunity to do it.

Mr. Kremer. Very well, your Honor, I will do so.

Mr. Carton. I object to the checks.

The Court. The checks may be marked for identification.

(Checks marked Exhibits B, C, D, E, F, and G for Identification.)

The Court. The defendants are entitled to know whether these repairs were caused because the oven was out of repair or whether it was damage caused by the flood. You cannot take it generally without proof.

Mr. Kremer. By consent I am offering a photograph, if your Honor please, made by Cole & Company, of the condition at present.

Q. Mr. Weidman, how high is the ground in back of your building and Doran's building from the level of the brook at present?

A. Well, I should judge 22 inches above.

Q. Will you state whether there is any difference between the level of the ground over the brook now and the level of that ground a year ago?

A. Why, yes. It was even with the brook a year ago. I filled it in.

Q. How high was it over the brook a year ago?

A. Even, with the level, pretty near. There was some kind of a slant to it, about a foot.

Q. About a foot up?

A. Partly in front, not in the back.

Q. What do you mean when you say in front? You mean right at the south end of the brook?

A. Right in the east end of the brook, by the oven, where I built that oven.

Q. Right behind Doran's house?

A. No, sir.

Q. How high was it off the brook?

A. It was even with the brook?

Q. I show you a picture purporting to indicate the condition there at the present time and ask you if you will indicate what the level of the south side of the brook was one year ago.

The Court. Just take it down to the jury. Let him go down and show.

(Witness exhibits to jury.)

A. One year ago, gentlemen, it came to here. You see them tiles; that was the tiles I had laid around there and I put them there and then I filled this up with ashes. I took all the ashes I used. I used at the rate of three tons of coal a month, and I had those ashes sifted and filled this up. I thought that would keep the water away from it. It is 22 inches higher now than it has been a year ago. This is the level of the brook.

Mr. Carton. I would suggest, if your Honor please, that Mr. Kremer or Weidman should state when the photographs were taken, in the absence of the photographer. I consent that that particular be told—from what point the photographs were taken. They are close up pictures, each from a different position.

Mr. Kremer. I might state that the photograph was taken——

The Court. Let Mr. Weidman state. Were you there?

The Witness. Yes.

By Mr. Kremer.

Q. From what point was that photograph taken?
A. It was taken from the north side of the brook, at Mr. Treat's building.
Q. And how wide is the brook?
A. The brook runs there between 6 and 14 feet.
Q. And how far would you say the camera was from the south boundary of the brook?
A. I should judge about six feet.

By the Court.

Q. How far was the camera from your cellar wall?
A. From my cellar wall?
Q. Yes.
A. It was about 30 feet.

Mr. Kremer. If the court please, the picture does not indicate the cellar wall.

The Court. I don't know what it does indicate. I haven't seen it.

By the Court.

Q. How far do you say the camera was from this bank?
A. Six feet.
Q. Just across the brook?
A. Just across the brook. There was another little

path there and we drove a board across the brook and took his camera over there and took the picture, just as you see it there.

The Court. I suggest that Mr. Kremer offer the picture and suggest that he indicate that the testimony has reference to exhibit so and so.

Mr. Kremer. I ask that this be marked for identification at this time.

The Court. You may mark it as an exhibit.

(Photograph marked Exhibit P 2.)

By Mr. Kremer.

Q. Did you observe the hole in Mr. Doran's wall?

A. I have.

Q. Do you know the relative height of the bottom of the hole in Mr. Doran's wall to the level of the ground in the rear before you filled it in?

A. Before I filléd it in?

Q. Yes.

A. Two and a half feet.

Q. That does not answer the question.

A. About two and one-quarter to two and one-half feet. You mean the difference between the hole and the level of the brook ——

Q. I want the difference between the hole in Mr. Doran's wall and the level of the ground in back of the house before you fill it in.

A. Before I filled it in?

Q. Yes.

A. Well, I have never seen that hole in that building until lately.

By the Court.

Q. In other words, you didn't see it until after the filling in?

A. After the filling in, yes. I didn't see it before.

The Court. He is not able to answer the question.

Mr. Kremer. I thought he could tell the level of the ground before it was filled in, because it shows right on that picture.

The Court. He says he didn't see the hole until after it was filled in.

A. I haven't seen the hole, because it was kind of boxed in until I went in there and seen the hole.

Mr. Kremer. The hole is in the same place it was. Now if he could stand and see the level of the hole today and see— —

The Court. He can state where it is now.

By Mr. Kremer.

Q. Can you state the difference in the level of the ground before you fill it in and the level of the hole?

A. Yes.

Q. What was that difference?

A. About two and a half feet.

Q. Which was higher and which was lower?

A. The hole was higher than the level of the ground. There was a difference between the level of the brook and the hole. The hole was two and a half feet higher.

Q. This hole was two and a half feet higher than the level of the ground before you filled it in?

A. Yes, sir.

Q. Since August, 1911, what use have you made of your cellar?

A. Well, I used it partly.

Q. Have you or have you not been able to use it?

A. Well, I can only use it for some things. They got spoiled, some of them, half of them, most of the time on account of water and dampness.

By the Court.

Q. Did you have occasion to rent any other cellar?

A. No, sir; not around there.

By Mr. Kremer.

Q. Were you a tenant of Woehrer's?

A. Yes, sir.

Q. What did you do for storage purposes for your goods?

A. Well, I kept what I could in the shop and bought in small quantities as I could buy. And after the first water I built shelves along and boxes on the concrete floor and put my stuff on there and kept the windows open.

By the Court.

Q. That you have continued to do, have you?

A. I have so far.

By Mr. Kremer.

Q. Were you able to go down there at all times?

A. When there was no water in it. But the water got in so high sometimes that it lifted up those boxes and lifted those planks off the boxes and those goods were all perishable goods.

Q. Did you since August, 1911, lose any goods?

A. Since 1911?

Q. Yes, since the claim which you say was paid.

A. Yes, I have. Every once in a while the water gets so high that I lost a lot of goods in there.

Q. Will you describe any damage that occurred on January 21, 1917?

A. Why, yes; the water got twenty inches high and I lost a lot of goods I had down there, such as cinnamon, cocoanut, chocolate, lemon peel, raisins.

Q. Have you bills for those goods?

A. Yes, I have the bills. I bought them from month to month, because I bought as little as I could after that on account of the water.

Q. Have you the bills here for the goods that you lost?

A. I bought them from month to month.

The Court. That is not the question. Have you bills showing the cost or value of the goods that you say you lost as a result of the floods?

A. Yes, sir.

Q. Will you produce the bills of goods which you had on hand showing the values in January, 1917, and state what goods you lost?

A. Well, I have brought the checks.

Q. What are those, checks or bills?

A. Checks.

Q. You have no bills?

A. I have bills but I didn't bring bills; you said I should bring checks.

Q. You have check vouchers?

A. Yes, sir.

Mr. Kremer. I ask that I be given an opportunity to produce those bills at the same time that Mr. Rothfritz does.

The Court. Yes.

By the Court.

Q. What do you say the damage was on loss of goods?

A. I couldn't state just exactly, your Honor. You know some of those bags I have half full.

Q. Have you anywhere near an approximation of the loss?

A. Why, yes, say about $200 the last time. And I lost off and on from $50 down to $25 more or less all the time.

By Mr. Kremer.

Q. What do you say your total damage has been for the loss of goods during the period from August, 1911, up to April, 1917?

A. I judge I have lost $500, I lost in that cellar, directly and indirectly. The stuff got mouldy.

By the Court.

Q. You mean $500 in goods?
A. Yes, easy.

By Mr. Kremer.

Q. You have observed the building which stands at the south edge of the brook now, have you?
A. The south edge of the brook?
Q. Is that the same building that stood there in 1911?

The Court. Do you intend to produce those bills, Mr. Kremer?

Mr. Kremer. If your Honor please, I will make an effort to.

Q. Is the building which stand on that property now the same as has stood there since 1911?
A. My oven, do you mean?
Q. No, I mean the building to the south of the brook.
A. That little building in the back? Yes.
Q. Is that a new building there?
A. Yes.
Q. Will you state when that new building was built?
A. That was built in 1915. I moved in there in 1916. the 1st of January, 1916.
Q. Will you described what was there before that building?
A. It was a frame building there with a concrete foundation, a drugstore.
Q. Will you describe the cellar construction, the rear wall as it came down to the ground on the south side of the brook?
A. On the south side of the brook? I couldn't say.

By the Court.

Q. When did you take possession of the property?
A. 1911.
Q. You have no knowledge of the conditions existing prior to 1911?
A. No, sir; I have not.

By Mr. Kremer.

Q. Do you know what stood there before this new building was built in 1915?
A. Yes, sir.
Q. I am asking you to describe that.
A. Well, it was a frame building with a concrete foundation, a concrete cellar with a header in it.
Q. What was the shape of the rear wall of that building?

The Court. Change your word "shape." What was the condition of the rear wall?

Q. What was the condition of the rear wall of that that building?
A. I couldn't say.
Q. Did you observe it?
A. Yes, there was a step went down to the backyard and a concret foundation.
Q. Were there windows in that cellar wall?
A. Yes.
Q. How many?
A. Two large windows.
Q. How high off the ground were the bottom of those windows?
A. The bottom of the concrete floor, you mean?

Q. How high off the ground were the cellar windows?

A. About four feet.

Q. And did the concrete wall run right down to the level of the ground?

A. Yes, sir.

Q. And you say the level of the ground was slightly above the level of the brook?

A. Yes.

Q. Was that cellar flooded?

A. All the time.

Cross examination.

By Mr. Carton.

Q. Mr. Weidman, this building that you have referred to as having been erected a couple of years ago, with a concrete cellar that is always flooded, what building was that?

A. You mean the old building? It was Mr. Hummell's building.

Q. The Woolley property?

A. The Woolley property, yes, Stephen Woolley.

Q. Is that the building you have been describing now that has this cement wall, that was flooded all the time?

A. Why, yes.

Q. That is not your building, is it?

A. Why, no, this is a new building now. That building burnt down.

Q. Is that the building you occupy?

A. Yes.

Q. That is the building that you occupy?

A. It is a new building.

By the Court.

Q. Which building do you occupy, the Hummell building?

A. Yes, sir.

Q. You occupy which floor?

A. Living apartments upstairs. That is the new building.

Mr. Carton. I am confused about it.

The Court. Yes, I am not clear.

The Witness. Well, I couldn't explain that, your Honor.

Q. Which building did you take possess of in 1911?

A. Mr. Walters', my bakeshop.

Q. The bakeshop?

A. Yes.

Q. Where were you living at that time?

A. Up South Main Street, 71 South Main Street.

Q. When did you move to the living apartments over the Hummell drugstore?

A. January 1, 1916.

Q. 1916?

A. Yes, sir.

Q. Now the building that you have been talking of with respect to the windows being four feet from the ground, were the windows of what building?

A. The old building, Mr. Woolley's building.

Q. The Hummell store?

A. Yes, the Hummell store.

By Mr. Carton.

Q. Is your bakeshop in that building?

A. No, sir.

Q. You have living apartments upstairs in that building?

A. Yes, sir.

Q. Now let's see where your bakeshop is. You rent from Mr. Woehrer, do you not?

A. Yes, sir; I do.

O. The shoe man?

A. Yes, sir.

Q. And what rooms in the Woehrer building do you rent, what floors or rooms?

A. Of Mr. Woehrer?

Q. Yes.

A. Well, I rent the store, that is all.

Q. That is the store level, the store that is on the street level?

A. The store including the cellar.

Q. Including the cellar?

A. Yes, sir.

Q. And is that the same property you have always been in since 1911?

A. Yes, sir.

Q. You had no rooms upstairs over that?

A. No, sir.

Q. Neither had you any rooms in the Woolley building next door to the north until a year or so ago and then you rented apartments upstairs?

A. I did.

Q. Is it a fact that the Woolley building intervenes or is in between your building and the Burns building?

A. Yes, sir.

Q. What time in 1911 did you take possession of the Woehrer property?

A. What is that?

Q. What time in 1911, what time in the year?

A. In 1911?

Q. Yes, when you first went there.

A. April, 1911.

Q. Where was your bake oven at that time?

A. At the same place w here it is now.

Q. Or had there been a bakery before you?

A. Oh, no, I built it myself.

Q. Now will you describe whether you built the oven on the main floor or down in the basement?

A. On the main floor.

Q. In the rear of your bakeshop?

A. In the rear of Mr. Woehrer's lot. I went to work and I extended the building and I built a new building and got a foundation built for the oven and built a Middleby oven on top of that.

Q. The fact is there wasn't any construction there for a bake oven at all; you erected the foundation of the building for it?

A. Yes.

Q. That was a part of your hire of the place, I suppose, to erect your own oven?

A. That was the contract I had with Mr. Woehrer.

Q. How did you erect the oven? What is the structure beneath?

A. I went to Mr. Rothfritz.

Q. No, I don't mean that. I mean what material, what the construction was.

A. I can't tell you that, Mr. Carton.

By the Court.

Q. Was it concrete, brick, wood or what?

A. It was two feet of concrete underneath and the rest of it is a square brick wall.

By Mr. Carton.

Q. What does this oven sit upon?

A. Well, it sits on that wall, on the girders, on the wooden girders, what we call the beams.

Q. And piers all the way under it or solid foundation?

A. No, sir; solid foundation; solid foundation, that is, a beam runs right straight around to keep up—put in for safety, in case it should sag down in the center.

Q. What are the dimensions of the oven, how wide? What are the dimensions both ways?

A. It is 12 by 14 feet.

Q. And you have a cement wall all the way round on the four sides?

A. Oh, no brick.

Q. Then is there anything in the middle, piers or puncheons or anything to hold up the weight underneath?

A. Oh, yes.

Q. What have you under there?

A. Well, three posts.

Q. Three posts?

A. Yes.

Q. And they sit down in the ground?

A. Yes.

Q. That ground is rather soft and mucky there, isn't it?

A. Well, I will have to explain that.

Q. It is soft and mucky, isn't it?

A. It is soft and I went and filled it up with concrete and brick. The foundation of those posts is brick and cement.

Q. And under the brick and cement it is yet mucky down below and squashy, isn't it? Black muck down there, isn't it?

A. No, sir; there is no black muck down there. It is all hard ashes and stuff, you know, which has been thrown in for years.

Q. Well, the ashes that you have throw upon it?

A. No, not there.

Q. Well, somebody put ashes there, it is true?

A. I suppose so.

Q. Is that the same building that you have described now, the oven, is that the oven you erected when you first went there?

A. That is the oven.

Q. Is that the same oven you have at this time?

A. Yes, sir.

Q. Do you know the weight of that oven?

A. Yes, sir.

Q. What is it?

A. 18½ tons.

Q. And those piles or posts that you put up under the oven have not been able to carry this weight, have they?

A. Oh, no, they ain't got nothing to do with it.

Q. They haven't, eh?

A. No, the rafters run from one side of the brick wall to the other.

By the Court.

Q. What material were the rafters?

A. They are wood, about that high and that wide (indicating), and they run about half a foot apart. I went to the contractor and I told him to build me a foundation and put the rafters on there to hold thirty tons. The foundation is supposed to hold thirty tons.

By Mr. Carton.

Q. But it only is eighteen tons total?

A. That is all.

Q. The level of this oven, the bottom of the oven, is that below the floor level of your store or above it?

A. Even with the store.

Q. Even with the store?

A. Pretty near.

Q. With regard to the cellar underneath that you complain of?

A. It is even with the yard.

Q. Even with the yard?

A. Yes, there is no cellar dug. It is even with the yard.

By the Court.

Q. Do you mean that the building is built so high that it provides a cellar on the surface?

A. On the surface of the yard; yes, sir. There is no cellar dug at all. The cellar is even with the ground. It is just bricked in.

Q. How high is the cellar?

A. The cellar is I should judge about six feet high.

By Mr. Carton.

Q. You have given us the dimensions of your oven. What are the dimensions of the cellar itself in which the oven is contained?

A. The cellar is 14 by 76

Q. And what use do you put this cellar to?

A. All material what is used in a first-class bakery, to run the cakes and so on.

Q. You don't store your flour down there?

A. I can't. Its get mouldy.

Q. You never did?

A. Yes, I did.

Q. How long did you do that?

A. When I first got there.

Q. Well, you found out that was a bad place to store flour, didn't you?

A. I found out it got spoiled on me once and I didn't take it down there, and I had to buy it in such quantities to keep it upstairs.

Q. What things you did keep down there were raisins, chocolate, cocoanut and so forth?

A. Things of that kind.

By the Court.

Q. Is that the cellar you say flooded, this cellar that was even with the ground?

A. Yes, that is the cellar.

Q. How much water?

A. The highest I have ever seen was twenty inches. That was the 21st of January this year, and that is where I lost a lot of goods.

Q. The first flood, as I understood you, occurred on the 26th of August, 1911?

A. 1911.

Q. What was the condition of the cellar prior to August, 1911? You went in in April, 1911, didn't you?

A. Yes, sir. What the condition of the cellar was then?

Q. Yes, between April, 1911, and August, 1911.

A. The same as it is now.

Q. What do you mean?

A. The cellar is just the same as all the cellars.

Q. Well, any accumulation of water in it?

A. Why, no, there never was no water in it until August 26th or 27th, 1911.

Q. What was the condition of the cellar, was it dry?

A. It was perfectly dry. I rented that place off of Mr. Woehrer under those conditions, that I would have a dry cellar; and the man told me he was in the place for twenty-five years and he never had a drop of water in that cellar.

Mr. Carton. I move that that be stricken out.

The Court. Oh, yes, strike it out.

By Mr. Carton.

Q. Have you got a written lease with Woehrer?

A. Yes, sir. I rented it for five years with the privilege of renewing it for another five years.

Q. Did Woehrer stipulate in this lease that the cellar was waterproof and dry?

A. Not in the lease at all. We just made it——

Q. Why didn't you have it put in there if you questioned about it?

A. We never had any doubt about that cellar.

Q. You must have had some doubt about it before you rented it to talk about it.

A. A baker would naturally do that. This is a thing we naturally would ask.

Q. Why did you assume to ask? Did you think it might be wet?

A. No, I didn't think it might be wet. I thought it might be damp, which is just as bad as now.

Q. It is damp all along there, the head of the lake, isn't it?

A. Now it is.

Q. Has been for years, hasn't it, always?
A. It wasn't when I first got there.
Q. It wasn't when you first got there?
A. No, sir; it was perfectly dry.
Q. You knew it was right alongside of the brook?
A. No, sir; it is not right alongside of the brook.
Q. It runs back to the brook?
A. No, sir.
Q. Woehrer's does?
A. Woehrer's does, not mine.

By the Court.

Q. How far are you from the brook?
A. The furthest end is 25 feet from the brook.

By Mr. Carton.

Q. You referred in your testimony to some filling on the bank on the south of the brook. When did you say you did that?
A. It was since I have rented that new place, the living apartments.
Q. The Woolley property?
A. The Woolley property.
Q. What is the fact, that when the Woolley property burned down, when they carried out the rubbish and cinders and ashes they dumped them along the lake?
A. Not along the lake, they put it in the brook.
Q. Along the brook?
A. Yes, sir; along the brook.
Q. And that raised the banks outside your place a foot or two higher?
A. A little.
Q. And until that filling in was done how high do you

say the bank was above the brook?

A. The bank?

Q. Yes, the bank of the brook.

A. It slanted a little bit.

Q. The bank a foot higher than the brook?

A. Not quite a foot higher. In front it was that much higher. In the back it was level with the brook.

Q. Now the fact is that beyond back of Woolley's property and on Woehrer's property that is very low back there, isn't it?

A. Not so very low.

Q. Well, isn't that the course the water takes when it comes down the brook, that it can't get over the bank into your place and it goes over Woehrer's property and through Woehrer's property into your bakeoven?

A. No, it comes right on the end, on the end of that brook there, right in the point.

Q. What do you mean by the end of the brook there?

A. Well, it runs into a point, don't it?

Q. This picture that you have referred to, Exhibit P 2, this photograph, where do you say that was taken from, or what does it show, rather?

A. It was taken from the Treat building.

Q. That was the north side?

A. Treat building, the north side of the brook.

Q. Now let me inquire, what is this gray background here?

A. Ashes.

Q. That is a portion of your backyard, isn't it?

A. Yes, sir.

Q. And Woehrer's property is just south of that again?

A. South.

Q. And isn't it a fact that it is very much lower further west up the brook than it is down here in front of

your property, that is, the bank is much lower?

A. Yes.

Q. And isn't it a fact that when the brook fills up that it goes around in this low place and in Woehrer's cellar and then down in your place?

A. Yes, partly.

Q. And doesn't it do that rather than go over this bank and roll into your cellar?

A. Yes.

Q. That is the course it takes then, isn't it?

A. No.

Q. What course does it take?

A. Comes right in back of the oven.

Q. But I mean when it leaves the brook what point does it first leave the brook over into Woehrer's property?

A. The hole in there was filled up.

Q. The hole in there was filled up, back towards the railroad there?

A. Yes, up until about 40 feet in.

Q. So that when Woehrer had his lot filled in further west the water couldn't come in there, could it?

A. Oh, yes, it could, the water comes right in through the floor if it gets high enough.

Q. Well, suppose the water was not premitted to leave the brook and was contained in the brook; it wouldn't come in then, would it?

A. Yes, it would.

Q. Why?

A. The building is higher than the brook and the water has got to raise thirty inches before it gets into my cellar.

Q. My question is, isn't the first place the water leaves the brook west of your lot and from the rear of the lot into the cellar?

A. No, that doesn't fill up Woehrer's lot. It fills up the lot next to it.

Q. What do you mean by next to it?

A. A fellow named Levine owns it.

Q. Is that still further south?

A. That is still further south.

Q. And does Levine run on back of the brook too?

A. Back to the railroad.

Q. Now let us see if we can find out the location of those properties down there. Take the brook on Main Street. There is a poolroom directly over the brook, isn't there, Mr. Staples there?

A. Yes.

The Court. Would that map be of any assistance, Mr. Carton?

Mr. Carton. I think that only shows the fills—oh, yes, I think probably it does. This is Main Street, so marked and attested by Mr. Rogers, that these heavy lines are the brook, and that is the railroad. Now as that brook is marked there is that true, to the best of your recollection?

A. Yes.

Q. There doesn't seem to be anything marked for the brook. As a matter of fact it is a building right over the brook there, isn't it?

A. No, sir; it is a foot on this side of the brook.

Q. Isn't it a solid line of stores all down South Main Street?

A. Yes, sir.

Q. And there is a building over the brook, isn't there, where the ool room is? That is a fact, isn't it?

A. Yes, right here. (indicating.)

Q. And the next building after the poolroom is that Mr. Doran's?

A. Yes.

Q. Where it is marked 'Doran"?

A. Yes, sir.

Q. Now the next building is marked "Woolley"?

A. Yes, sir.

Q. And there is where the fire was and where the new building has been erected and where you have rented apartments upstairs?

A. Yes, sir.

Q. That runs back to the brook there according to the map?

A. Yes, sir.

Q. Now the next further south is Woehrer. I mean you rent from Woehrer, but it is shown Woehrer on that property. Now just outline on the map and put your initials to it about where your store is, that is, any portion of the Woehrer property that you rent.

A. Well, the brook——

Q. No, you don't rent from the brook. I mean where your store is, the portion that you rent.

A. The portion I rent for the store?

Q. Yes.

(Witness indicates on map.)

Q. Now will you indicate which portion of that you have outlined is store and which portion is bakeshop or cellar?

A. This is the store. (Indicating.)

Q. How far back does the store go?

A. The store goes back to about here. (Indicating.)

Q. And from there back is the bakeshop?

A. Yes.

Q. Just put W in there.

(Witness marks on map.)

Q. The portion of the Woehrer lot shown in the photograph is where I am marking now, immediately over the word "Brook," isn't it?

A. Right from here to there.

Q. That is the portion that the photographs shows, Exhibit P 2?

A. Yes, sir.

Q. And that is the portion that was filled in when the Woolley building was erected?

A. Partly.

Q. Well, it is filled in more now than it was formerly?

A. Yes .

Q. And Woehrer has a shoe store here, hasn't he?

A. Yes, sir.

Q. Where it is marked "Woehrer"?

A. Yes, sir.

Q. He has a garden back here?

A. Yes, sir.

Q. Now the next property seems to be further south, Mr. Thompson's. It that the property referred to as Lavine's?

A. Yes.

Q. Levine owns that now?

A. Yes, back to here.

Q. That runs back to the railroad and then Applegate is a neighbor further south?

A. Yes, sir.

Q. Now which is the lowest point along the brook or

the lowest part starting from the railroad east to Main Street?

A. The lowest point?

Q. Yes.

A. The lowest point is right in here (indicating) between Woehrer's and Thompson's.

Q. That is the lowest point?

A. Yes, sir.

Q. So that when the brook fills up the water starts in here first, does it, starts overflowing?

A. Naturally it comes and fills that up partly. When it gets too high it runs into Mr. Woehrer's lot and runs right in here back here into the store.

Q. Now that is exactly the course that the water takes?

A. No, sir; the course of the water is down; yes, sir. When it gets too high, before we get water there, it oozes in through the cellar.

Q. That is because the spring dries, isn't it?

A. The spring?

Q. Yes.

A. No, because the water gets too high. As soon as the water gets over the level of my cellar it has got to go somewheres and it comes in.

Q. But when the brook overflows its bank, and when your cellar is overflowed from that source, it is from the water that comes in over here, and there leaves Woehrer's lot and into your cellar, isn't it?

A. Some of it.

Q. Well, the stream that runs, that is the course it takes, isn't it?

A. No, sir; not all of it. It comes in through the ground when it is high enough.

Q. I mean the stream that is above the ground, that you see, that is the course it takes, isn't it?

A. Yes, some of it.

Q. Then in addition to that——

A. Oozes through the ground.

Q. Is there any change in the condition of the back end of Woehrer's lot and Levine's lot as to filling up than when you first went there in 1911?

A. They are about even, about the same as they were when I first got there, only one was about a foot higher.

Q. About a foot higher?

A. Yes, sir; used to be lower but I filled that up with ashes.

Q. What did you fill it up for? What was your purpose in filling it up?

A. In the first place I thought it would make a little difference in the water in coming into my yard.

Q. To keep the brook from overflowing its banks?

A. To keep it back principally, yes; and it was a good place to get rid of my ashes too. I put in a lot of ashes—

The Court.—There is no question now.

Q. You have said, Mr. Weidman, that those things in your cellar that were damaged, the damage amounted to about $200. You state that in your complaint, the amount of $11, don't you?

The Court. No, I think he charges $100 as I read it.

Mr. Carton. I see $11, to the cinnamon, cocoanut and so on.

Mr. Kremer. I think that is one specific item.

Q. What things were damaged that you had in mind when you suggested your damage as $200?

A. $200.

Q. Yes.

A. When?

Q. When you were examined by Mr. Kremer.

A. Oh, I guess that just about could cover for the last two years, you know.

Q. You are guessing at it? Is it your judgment?

A. Oh, sure.

Q. And when you say your total damages amounted to $500 what other things had you in mind, Rothfritz's bill and the other man's bill?

A. No, only good what I had down there. One winter I lost 2,600 macaroons down there from the flood.

Q. Macaroons?

A. Yes.

Q. Little cakes?

A. Little macaroons, you know. You know what they are. You have had them.

Q. Yes, they are good too. You don't keep macaroons down there in that cellar, do you?

A. I made them for Christmas and New Years. I had to work ahead and I put them in flat cakes down there to cut them up the way I needed them, and I came down one morning and the whole shooting match was lying on the ground in water.

Q. As a baker do you know whether it is a fact that you are not allowed to have a bakeshop in a cellar in this state?

A. That is not a bakeshop, it is only a storageroom.

Q. Where you store the products of a bakeshop?

A. I don't; raw materials mostly.

Q. Well, macaroons are not raw materials, are they?

A. Well, sure, I had to put them out of the way. I put them down in the storeroom.

Q. You produced several checks signed by you to

Mr. Rothfritz, to the oven people and others. Are you prepared to say which of those checks or what items were paid by you as the result of damages to this cellar by reason of the water?

A. Why, yes.

Q. Well, what?

A. For what? For labor.

Q. What portion?

A. What portion of the oven?

Q. Yes.

A. Roof tile.

Q. Roof tiles?

A. Roof tiles and fire clay, Phoenix brick .

Q. Why did you have to have roof tile and fire clay?

A. You can't build an oven like that without roof tile.

Q. You don't want anybody to pay for the oven, do you? I am talking about the repairs.

A. About what?

Q. The repairs you say Mr. Rothfritz made to this oven, some of it in there.

A. Yes.

Q. What portion of the bills, the checks that you identify here, represents repairs that you had done to this oven because of the flood?

A. Why, there is a check there for $20 and some odd cents.

Q. What was that for?

A. For labor.

Q. Labor for what?

A. For fixing up the oven.

Q. Well, how did they fix it up?

A. Why, taking the sand off the top of the oven takes half a day.

Q. Taking the sand off?

A. Yes.

Q. Why was it necessary to take the sand off?

A. They can't fix it unless they take the sand off.

Q. What was the trouble?

A. The tiles busted.

Q. Because the weight was too heavy and it sagged down?

A. There it no such thing as being too heavy.

Q. Tell us how it broke.

A. Pressure from the oven; from the north to the south there was a crack along the tile. The tile is joined together and when the pressure gets too heavy the tiles will go and naturally they break off and they fall down.

Q. And that is the trouble that you had improved?

A. Partly.

Q. What else did you have improved at that time?

A. Why, the back wall. The same thing happened to the back wall. They fell out.

Redirect Examination.

By Mr. Kremer.

Q. What proportion of those checks did you have to pay out for damage consequent from the flood?

(Objected to.)

Mr. Kremer. It is the same question Mr. Carton asked.

Mr. Carton. On his cross-examination I had a right to have him identify, if he could, the items.

The Court. Well, I think he has sufficiently done it anyway. As a matter of fact, on his direct examination

he said it cost him certain items which he says are covered by these several checks, amounting to $82.32. He said that.

Q. Mr. Weidman, you have indicated that the point at which you filled in the south shore of the brook was about that point? (Indicating on map.)

A. No, sir; here is the line up to here.

Q. Where did you fill in the ashes? Will you indicate on that map which part of the brook you put ashes on?

A. From Woolley's building back about to here, as far as that lot runs of Mr. Woolley.

Q. Now before you put the ashes on that ground did the water come over the bank at that point?

A. Yes, sir.

Q. And into your cellar?

A. Yes, sir.

Q. And when did you put the ashes there?

A. Last summer.

Q. The summer of 1916?

A. Yes, sir.

Q. Did you store flour in the cellar from April, 1911, until August?

A. Yes, sir.

Q. Did you have any trouble with it?

A. No, sir.

Q. Are there floods in the cellar in the new Woolley building?

A. Yes, sir.

FREDERICK A. WOEHRER, Sworn for plaintiffs.

Direct Examination by Mr. Kremer.

Q. Where do you reside, Mr. Woehrer?
A. 13 and 15 South Main Street.
Q. How long have you lived there?
A. I have lived there since 1880, except two years.
Q. What business are you engaged in ?
A. I am in the shoe business and shoemaker's supplies.
Q. Is there a cellar under your house?
A. Yes, sir.
Q. When was it built?
A. The present cellar was built in 1908, the spring of 1908.
Q. From the time of the construction of your cellar up until the middle of 1911 were you or were you not troubled with floods?
A. Yes, sir.
Q. Has that cellar ever been flooded?
A. No, sir.
Q. I say has it ever been flooded?
A. Since that time it has.
Q. When was it first flooded?
A. In the latter part of August.
Q. What year?
A. 1911.
Q. Will you describe what happened at that time?
A. Well, I know water came in that morning, the latter part of August. That morning I guess it got to a depth of 14 or 15 inches, the first time we ever had water in that cellar.
Q. How long did it stay in that cellar?
A. The water itself stayed in there a pretty good

depth twenty-four hours, but it took about a week to dry up anything at all before we could use it. It was nowhere near dry.

Q. Was there another flood after that?

A. Yes, directly afterwards.

Q. When?

A. Two of them right there together, two the latter part of August, two right there together.

Q. Was your cellar flooded again in 1911?

A. Yes, sir.

Q. How many times?

A. It was flooded at that time about three times, that year.

Q. Three times, including the two you have mentioned?

A. Yes, the latter part of 1911.

Q. Was your cellar flooded in 1912?

A. Yes, sir.

Q. How many times?

A. I can't say exact, but anywheres from six to eight times, anyway, something like that.

Q. Was it flooded in the year 1913?

A. Yes, sir.

Q. How many times?

A. About the same.

Q. How many?

A. Somewheres from six to eight times.

Q. In 1914?

A. Well, it was flooded in 1914 too.

Q. In 1915?

A. Yes, it was flooded several times in 1915.

Q. How many times?

A. I don't know. I would say about five or six times, something like that.

Q. Any in 1916?

A. Yes, sir; that is the worst year we ever had. We had anywheres from nine to ten times anyway, that year.

Q. And in 1917, until April 2, 1917, how many times was your cellar flooded if any?

A. Up until April 2nd?

Q. Yes.

The Court. Up until April 2, 1917.

A. About three times, up until April 2nd, and we have had one since.

Q. You say you run a shoe business?

A. Yes, sir.

Q. From 1908 until 1911 did you or did you not use your cellar?

A. Yes, sir.

Q. For what purpose did you use it?

A. For storing rubber boots, rubber shoes, soleleathers, even put leather shoes down there at that time.

Q. Have you been able to use your cellar since 1911?

A. We have to a certain extent but not the full benefit of the cellar.

Q. Why not?

A. On account of the water coming in to a certain depth, I wouldn't risk having anything in the back end of the cellar, because if I wanted to put anything in it I wanted to put it up close to the door in case the water got high I could get it out from there.

Q. Have you been able to use your cellar for the purpose of storing shoes since 1911?

A. No, sir.

Q. Why not?

A. Because water comes in there and gets too damp and the shoes get damp and mouldy. I couldn't put any shoes in there at all any more.

Q. Will you describe the heating apparatus in your house, if any?

A. Well, we built the present cellar in 1908, the spring or summer of 1908. The first winter after that we didn't have any heat in the cellar at all, the first winter after that.

Q. After what?

A. After the winter we built.

Q. Didn't put any heating apparatus in right away?

A. Not right away.

Q. When did you put it in?

A. Put it in the following fall, 1909.

Q. Do you have heat in that cellar in the winter now?

A. No, sir.

Q. Why not?

A. Because if you put heat in there the water comes in and comes up and puts the fire out and the heaters get rusty. The heater in it now is rusty and broken. We haven't used it since 1912, the last time we used it.

Q. What time in 1912, the fall or spring?

A. In 1912 we quit using it, right about after the holidays.

Q. Which holidays?

By the Court.

Q. 1912, December?

A. December of 1912 we stopped using it, right about the middle of the winter we stopped using it.

Q. What substitute did you provide?

A. We put a big coal stove, a large stove, in the shop in the back end of the building to help heat up the shop and store together.

By Mr. Kremer. Q. You have had no heat in the cellar range since that time?

A. No, sir; we have not.

Q. How long would the water stay in your cellar when it would come in?

A. Well, it depends on the depth of the water. In some seasons there would be more water into it than others, and of course it takes longer to run out. But sometimes it will run out in twenty-four hours and sometimes stay there three or four days.

Q. When it ran out what would the condition of the cellar be?

A. Oh, be mud and muck, dirty muck, and the odor from it was something awful.

Q. How long would it take for that sediment or whatever you call it to dry up?

A. Well, it won't dry for a good while.

Q. How long?

A. Well, it won't dry sometimes for weeks. I have got some of it back in the cellar that ain't dry now, and it has been there about three weeks. If anybody wants to see it I can show it to them.

The Court. Never mind. Strike that out.

A. I did show it to Mr. Niart Rogers. He was in there the other day.

The Court. There is no question now.

Q. Have you ever observed the gate or spillway at the ocean end of the lake?

A. Yes, sir; I have.

Q. The new spillway?

A. Yes, sir; I have.

Q. When did you observe that spillway?

A. I have been watching it right along pretty nearly ever day since Decoration Day.

Q. Have you ever at any time in the case of rainfall and flood asked any of the city officials of Asbury Park or officials of Ocean Grove to open that spillway?

A. I have not, not personally; no, sir. Mr. Doran must answer that.

Q. What damage have you been caused by the loss of use of your cellar for one year?

A. Well, what use I make of that cellar wouldn't be less than $100 a year anyway.

Q. How much much damage have you suffered for lack of heat in your store for one year?

The Court. Why do you speak of one year?

Mr. Kremer. There are a certain number of years for which we claim damage.

The Court. Oh, you mean the rate per year?

Mr. Kremer. Per year.

(Question repeated.)

A. Well, of course if we had the heater in the cellar we wouldn't have to cart the ashes down from the store and the coal up.

By the Court.

Q. Well, have you paid any one to take out your ashes?

A. No, sir; I done it personally .
Q. Did it yourself?
A. Yes, sir.
Q. Did you ever have occasion to employ any one to take out the ashes under such circumstances?
A. No, sir; generally do it myself.

By Mr. Kremer.

Q. What damage do you say you have suffered per year as the result——

The Court. Of lack of heat, rather not lack of heat but inconvenience, I suppose you mean. Whether that is an element of damage or not is another question.

Mr. Carton. I don't think it is, in view of Mr. Woehrer's statement.

The Court. I will allow the question, whether the plaintiff claims damages by reason of the inability to use the furnace in the cellar, and if so what. Of course it is merely speculative, and I shall have to tell the jury that they cannot consider merely speculative damages. It is a matter to be considered.

By the Court.

Q. What damage do you say you have suffered by reason of your inability to use your furnace in the cellar per year?
A. Well, about $25 per year.
Q. Why?
A. Well, it is worth that much to run up and down stairs for coal and ashes to anybody.

By Mr. Kremer.

Q. Do you consider that the store is depreciated in value to that extent?

(Objected to.)

The Court. Not what he considers, but what it is.

Q. Has the store depreciated in value?

The Court. No, don't lead him. What has been the damage to the building?

A. To the building?

The Court. Yes.

A. Well, damage to the property.

By the Court.

Q. Well, what do you approximate your damages in dollars and cents.

A. That would be hard to estimate. I couldn't say exact. I wouldn't know what to estimate the damage on that.

Q. So that really, Mr. Woehrer, you claim damages at the rate of $100 a year for the loss of the use of this cellar for storage purposes and $25 for the loss of the furnace; that is substantially what your damages are?

A. Yes, the inconvenience.

Q. At least what you claim?

A. Yes.

Q. And for what period of time, since August, 1912?

A. Since August—no, since the water came in, in 1911, since we have had water.

Q. Since 1911?

A. Yes.

Q. That is practically six years, isn't it?

A. Yes, six years this August.

Q. So that the total damage you claim is $125 a year for approximately six years?

A. Yes, sir.

By Mr. Kremer.

Q. Have you ever suffered any other damage as a result of the floods in the cellar?

A. Well, of course the first flood we got damaged. I had sole leather down there and I didn't get down there in time to get it out before the water overflowed it. I had about fourteen pairs of rubber boots that got wet inside and out, and of course it took me about three weeks to dry them out good. I sold them and got my value out of them, but it was the inconvenience I suffered on them.

Q. Have you ever suffered any other damage any time?

A. Yes, this year.

Q. State what that damage was.

By the Court.

Q. Prior to April 21st.

By Mr. Kremer.

Q. When did that occur?

A. The 21st of January this year.

Q. What was damaged at that time?

A. Sole leather.
Q. What was your damage at that time?
A. It figured up about $72.

By the Court.

Q. Sole leather?
A. Yes, sir.
Q. Is there any hole in your cellar, in the wall of your cellar?
A. No, sir; there is not.

By Mr. Kremer.

Q. Now, Mr. Woehrer, do you remember the culvert and the level of the Wesley Lake Brook when the Main Street culvert first existed in 1908 and 1909 and 1910?
A. Yes, sir.
Q. I heard Mr. Carton mention somebody going through there in a boat. Did you ever go through there in a boat?
A. Yes, I have, numbers of times.
Q. In those years?
A. Not in those years, in years previous.
Q. When did you last go through there in a boat?
A. The last time I was through there in a boat must be about fifteen or sixteen years ago, something like that.
Q. Could you go through there in a boat in 1908 or 1909?
A. Yes, you could.
Q. What was the normal headway?
A. The headway at that time under that culvert, under Main Street?
Q. Yes.
A. From the water to the top?

Q. The top of the culvert.
A. I judge about three feet and a half.
Q. In 1908 or 1909?
A. Yes, sir.
Q. And you say you could go through there in a boat then?
A. Yes, sir; I could. I could sit right in a boat and put my hands on the wall and shove right on through to the other end.

Mr. Kremer. I want at this time to offer the other photographs.

By the Court.

Q. How did you get under Main Street?
A. The culvert is under Main Street.
Q. You mean that the culvert is large enough to admit a boat?
A. Yes, sir.
Q. Going through into Wesley Lake?
A. Yes, sir; I do.
Q. When was that, Mr. Woehrer?
A. Prior to the filling in of Wesley Lake head.
Q. When was that work done?
A. In 1911, the second tank was put in.
Q. The detritus tank was put in?
A. In 1911; yes, sir.
Q. In 1911?
A. Yes, sir; that spring.
Q. What time that spring?
A. In the spring of 1911.
Q. Prior to that you say you could go through into Wesley Lake?
A. Yes, sir.

Q. By boat?

A. Yes, sir; by boat. The present little house that stands right along the creek now, the corporation yard, they use it sometimes—they use it now for pounding dogs in—Mr. McGowan had his boathouse there. The boathouse stood south of the brook at that time. He used to make boats in there and put them in the brook and go right down the brook into the lake.

Q. You say that was stopped up or narrowed up by the improvement?

A. Yes, sir; I do.

Q. And filling in?

A. Yes, sir; I certainly do.

Q. Was your cellar flooded prior to 1911?

A. No, sir; it was not.

Q. Never was?

A. No, sir; never was.

Q. Never by the overflowing of the banks of Wesley Lake Brook?

A. No, sir; the bank was a good deal lower at that time.

Mr. Kremer. If the court please, I wish at this time to offer in evidence a picture, by consent, taken of the culvert, showing the level of the lake as it exists today.

The Court. Any objection? If there is no objection it may be marked.

(Photograph marked Exhibit P 3.)

By Mr. Kremer.

Q. I show you a picture purporting to show the cul-

vert and the level of the brook as it is to-day, and I will ask you to indicate——

The Court. Just take it down and show it to the jurors.

Q. Will you indicate the place, if any, at which you state in 1911 you could go through the culvert in a boat?

A. This one right here. (Indicating.) (Referring to photograph Exhibit P 3.) This culvert right here.

Q. Have you recently observed the level of the brook under that culvert?

A. Yes, sir.

Q. When?

A. Here the last couple days.

Q. What was the headway in this culvert at this time?

A. At this time about two feet, maybe two feet and three or four inches, something like that.

Q. What was the capacity of the culvert? What is the entire capacity?

A. You mean the width of it?

Q. Yes.

A. Six feet high.

By the Court.

Q. You say there is only two feet of headroom in it?

A. There is now.

Q. You mean the water is standing in the pipe now?

A. Yes, sir; up to about two feet four or five inches from the top.

Q. In other words, thus six foot pipe, four feet is now filled, four feet with water?

A. Yes, water and mud. The bottom is filled with mud.

Q. Where was this photograph taken, Mr. Woehrer?

A. That photograph, the west side of Main street and under the poolroom, where the brook runs under the poolroom and barbershop.

Q. A flashlight photograph?

A. Yes, sir.

Mr. Kremer. A time exposure.

Q. What is the portion of this picture where I am indicating now?

A. The upper portion is the brook.

Q. What is that, is that the culvert to which you have been referring?

A. Yes, that is the culvert. And Main Street, the west side of Main Street goes through here to the east side of Main Street, where the new four foot one connects with it.

Q. How is that new four foot pipe connected with that, do you know?

A. Yes.

Q. Just describe. How is it physically connected with it?

A. Well, it connects right up four feet and goes right up into the end of the one under Main Street, and filled in. It is four feet and then a little out south of the center, runs a little bit more south than it does to the north. There is a big obstruction on the north side of the four foot pipe.

Q. What do you mean by a big obstruction on the north side?

A. Well, there is about two and a half or three feet obstruction, where it goes down, where it closes up tight, a solid wall.

Q. What is the material?

A. Concrete, I suppose.I am not sure about the material.

Q. Only what you saw. Did you see it? Have you seen it, have you?

A. It was where this four foot pipe connects with the six foot pipe.

Q. Where the connection was?

A. Yes, sir.

Q. What I want to know is what sort of a connection is that?

A. I couldn't say exactly what sort of connection it is. I know it runs up to that and then it is connected and filled in.

Cross Examination.

By Mr. Carton.

Q. Mr. Weidman, is one of your tenants, the last witness?

A. Yes, sir.

Q. And you occupy the shoe store next on the south?

A. Yes, sir.

Q. And what is the construction of your cellar that you are complaining about?

A. The cellar?

Q. Yes.

A. Concrete bottom and brick walls.

Q. Do you know the dimension of the concrete on the bottom of your cellar?

A. No, I don't.

Q. Don't you know how thick it is?

A. I couldn't tell you how thick it is; no, sir.

Q. Does water come through it in time of freshets?

A. Yes, heavy rainwater comes through.

Q. Comes up through the floor?

A. Dampness comes right through; yes, sir.

Q. How high up the side of the wall do the bricks extend?

A. Right up to the first floor.

Q. Right up to the first floor?

A. Yes, sir.

Q. Solid bricking from the sills down to the bottom of the cellar?

A. Yes, sir.

Q. Cemented in, of course?

A. Yes, sir.

Q. Windows in the cellar?

A. Yes, there is a window in the back of the cellar.

Q. One window in the back of the cellar?

A. Yes, and a door.

Q. And a door?

A. Yes.

Q. Where is the door? Does it go out back?

A. Goes out into the yard.

Q. And is that level with the ground where it goes out in the yard?

A. Yes, sir.

Q. So that in the rear of your building or your cellar you walk right out on the ground?

A. Yes, sir.

Q. And the fact is that the water comes in from the brook through your backyard and through Levine's backyard and goes right into your cellar, doesn't it?

A. When it gets high water it will, yes.

Q. When it gets high enough for that purpose?

A. Yes.

Q. Do you know how high, if any, your cellar door is above the level of the brook?

A. The level of the brook? Yes, I can tell you.

Q. How high?

A. 22 inches, Rogers told me.

Q. Rogers told you 22 inches?

A. Yes, sir.

Q. You haven't measured it yourself?

A No, sir; I haven't.

Q. Just look at the map on the wall behind you. Look it over and see if you are familiar with the situation; Main Street and the brook and over there Thompson and Woolley here. Do you recognize the location of your premises on the map?

A. Yes, sir.

Q. Where it is marked "Woehrer," that is your place?

A. Yes, sir.

Q. Mr. Weidman has marked that where it is rented?

A. Yes, sir.

Q. That is right?

A. Yes, sir.

Q. And your premises run back here to the brook?

A. Runs back to the brook; yes, sir.

Q. And Levine now owns Thompson's property, does he not?

A. Yes, sir.

Q. And that runs back to the brook?

A. Back to the brook; yes, sir.

Q. Where it is marked "Brook" on the black line, this is just back of where Mr. Thompson's place is, that is filled in quite high there, is it not?

A. Yes, sir; it is.

Q. With ashes about a year or so ago?

A. Yes, sir.

Q. And it is very much lower back on your lot towards the railroad, is it not?

A. Yes, a trifle lower.

Q. And it is still lower on Levine's lot?

A. Yes, lower back here.

Q. So that when the brook overflows the water first starts coming in from your back yard and from Levine's back yard, does it not, and down into your cellar?

A. The first flooding of the ground would be there.

Q. I don't mean it percolates through the ground, but where the brook overflows the bank, it starts in the rear, the back of your lot and Levine's.

A. Yes.

Q. And goes down into the cellar and also goes in Weidman's cellar, does it not?

A. Yes, it does.

Q. That brook is most of the time filled up with trash and sticks and bottles and barrels, is it not?

A. Yes, sir.

Q. Coming down from Neptune Township?

A. Yes, coming from the city property there too across the railroad.

Q. Coming from the city property too?

A. Yes, sir.

Q. Coming from all over down there?

A. Yes, the dumping ground over there.

Q. This brook really divides Asbury Park and Neptune Township, does it not?

A. Yes, sir; it certainly does.

Q. It is the dividing line?

A. Yes, sir.

Q. Have you observed these timbers and sticks and boxes as they come down through that brook?

A. I certainly have; yes sir.

Q. They have a tendency to retard the flow of the water, do they not?

A. To a certain extent, yes.

Q. And when they catch in the Main Street culvert

they have a further tendency to block it?

A. Yes, still more blocked there.

Q. I show you a picture said to have been taken in June, 1912. Have you ever observed a situation like that in the brook?

A. In June, 1912?

Q. Well, irrespective of when it was taken, have you ever seen a scene like that?

A. No, sir; not in 1912. That picture has been taken long back of 1912.

Q. Does that represent a portion of the brook?

A. A portion of it; yes, sir.

Q. What does it show?

A. Well, it shows the old boathouse on this side here.

Q. Does it show your property?

A. Shows partly our property, but the water is not on our property there though, on the back end of it.

Q. It shows Doran's building, does it?

A. Yes, sir.

Q. You say the water is not on your property there?

A. Only on the real back end of it.

Q. Those buildings are here?

A. Yes, on the back end.

Q. Well, with relation to these boxes and wagon wheels coming down the stream, you have seen that in times of heavy freshets?

A. Yes, still do it.

Q. They come down there yet?

A. Yes, I say still do it.

Q. You observe that situation up to the present time, do you?

A. I do yet, yes.

Q. I suppose as a matter of fact more comes down now than in former years, since the railroad people have

enlarged the channel under the track; is that a fact?

A. Don't come any more but just as much.

Q. Well, I suppose this opening through the railroad now, admits of larger obstructions coming through, doesn't it?

A. Well, some will naturally; well, of course some, yes.

Q. And there is all sorts of trash on the westerly side of the railroad, beside the track?

A. Yes, sir.

Q. And could get in the brook, of course?

A. Certainly; yes, sir.

By the Court:

Q. Did you observe that debris coming down prior to 1911?

A. What is that?

Q. I say did you notice this trash coming down before 1911?

A. Oh, some before 1911; yes, sir.

Q. You have lived there since 1880, you say?

A. Yes, sir.

Q. And during that time you noticed the trash?

A. Well, of course in my younger days I might not have noticed it so much, but I have now later years.

Q. Has that increased with the increased building in the section?

A. I suppose it has.

Q. And development of the territory back of your property?

A. Yes, sir; and of course the dumping of it too, right alongside the brook. The city allows it right west of the railroad, they have got a regular dumping ground there now, the railroad property; all kinds of trash and junk.

Q. How long has that dumping ground been there?

A. They have been dumping it there now for several years.

Q. Does the city own that property?

A. No, it belongs to the railroad. It is within the city limits, though.

By Mr. Carton:

Q. You mean where the railroad company is filling in their property there?

A. Yes, sir.

Q. Filling it in on the Asbury Park side and on the Neptune Township side as well?

A. Yes, sir.

Q. Well, for blocks on back there beyond the railroad it is the same situation, isn't it?

A. Yes, but not the condition just exactly one block west of the railroad today.

Q. The railroad company, according to your understanding, owns the land a block west of its track out on Prosepect Avenue?

A. Yes, it certainly does.

Q. And they are filling in there?

A. Yes, sir.

Q. How long have they been doing that, a year or two?

A. Oh, it has been going on now for several years.

Q. You don't mean to say that it is only since they started filling in that this trash started coming down the brook, do you?

A. No, before that.

Q. But the fact is that this brook and the culvert under Main Street and Wesley Lake itself had been gradually filling up, the same as any other stream, hadn't it?

A. Yes, to some extent.

Q. Do you know how deep the mud is in the culvert under Main Street?

A. Under Main Street?

Q. Yes.

A. Well, about three weeks ago I shoved a stick down and it went in about a foot anyway, I guess.

Q. Got down that far and don't know whether you struck bottom or not, did you?

A. I don't know whether I struck bottom then or not.

Q. That culvert has not been used as a passageway for boats for a great number of years, has it?

A. Not lately; no, sir; because there ain't been any boats built up there lately.

Q. The culvert built by Asbury Park on the east side of Main Street which you say hooks right into the Main Street culvert ——

A. Yes, sir.

Q. That is a four foot culvert?

A. That is a four foot culvert; yes, sir.

By the Court:

Q. Do you say that that is an obstruction?

A. Yes, sir.

Q. Why?

A. Because it is not large enough to carry the water down.

Q. You have seen that pipe?

A. Yes, sir.

Q. You have seen both the culvert and the pipe?

A. Yes, sir; I have seen it all blocked up with trash and boxes and lots of lumber, two or three pieces of sticks be crossways in there and block up everything that come in that place, right in the culvert and all.

By Mr. Carton:

Q. You have observed that in the culvert under Main Street, too, haven't you?

A. Yes, under Main Street, in that four feet.

Q. You have observed those timbers and boxes blocking up the Main Street culvert in question, haven't you, in dams?

A. Yes, sir.

Q. And that dams up the brook and overflows your property?

A. Yes, sir.

Q. Have you ever cleaned out that culvert?

A. Yes, sir.

Q. To allow the water to go through?

A. Yes, sir.

Q. And that helped it, didn't it?

A. Helped it to some extent.

Q. Did you ever clean out the brook in front of your place?

A. Yes, pulled out boxes and barrels lots of times and carted out of the brook myself.

Q. When these boxes and barrels come down through Wesley Lake Brook they stop it up, especially when they strike Main Street culvert?

A. When they strike Main Street culvert in the four foot way is where it stops.

Q. You mean to say that the capacity of the four foot pipe east of Main Street is not equal to the present capacity of the Main Street culvert?

A. No, sir; it is not.

Q. It is not?

A. No, sir; it is not.

Q. How much headway do you say there is now under the Main Street culvert?

A. Well, I judge about two feet and four or five inches, at the most.

Q. And you say this 48-foot culvert on this side is not sufficient to take that?

A. 48 inches, not 48 feet.

Q. Four feet?

A. Four feet exactly; yes, sir.

Q. Mr. Woehrer, you haven't been keeping anything in your cellar except rubber goods, have you?

A. Mostly rubber goods; yes, sir.

Q. You did have some leather down there?

A. Yes, sir; sole leather I have kept down there, but not leather shoes.

Q. You haven't any particular items of damage, have you, any particular items of goods that you can direct my attention to?

A. Well, only the amount for that sole leather that was damaged that year.

Q. What did you say that was, $72?

A. $72, yes.

Q. What was that, what you paid for it?

A. Yes, sir; what I paid for it.

Q. What became of the leather after it was damaged?

A. What became of it? I got about—there was eight bents of it; there is five bents down there yet. I used some of them in the shop, but they were not saleable.

Q. What became of the other three?

A. Used some in the shop for building up heels, that got waterlogged.

Q. You used three and have five of them yet?

A. Yes, sir; five of them yet.

Q. And the whole cost of them was $72?

A. The whole cost was $72; yes, sir.

Q. Then that leather is not a total loss to you?

A. No, sir; not a total loss.

By Mr. Carton:

Q. It isn't any loss yet, is it?

A. No, sir. I have got the other down there waiting for what I can get for it.

Q. And you will make it up into heels or toes or something else, won't you, when the trade comes along?

A. Use it for building up heels; can't use them for the top of heels; it is not good enough.

Q. This heater, you say you have not had a heater in your cellar since when?

A. We have not had the use of the heater since the middle of 1912.

Q. And what part of your building did this heater serve?

A. It served the basement of the store.

Q. The basement of the store?

A. Yes, sir.

Q. Well, you didn't need any fire in the basement, did you?

A. We would if we kept stuff down there.

Q. You would if you kept stuff down there?

A. Yes, leather goods, etc.

Q. And instead of using this heater now you have a stove upstairs?

A. Yes, we have a stove upstairs.

Q. You ought to give the city credit for that then, the saving you have in coal. You have saved a lot in coal, haven't you?

A. Yes, and made me a lot of running up and down, too.

Q. You did all the work yourself?

A. Yes, sir.

Q. And you have saved on your coal bills, haven't you?

A. No, I don't think so.

Q. Considerable, haven't you?

A. I don't think I have.

Q. It doesn't cost as much to run this stove as it does to run the heater, does it?

A. I don't know. We have a pretty big stove there.

Q. And it doesn't cost half as much as to run the heater, does it, take half as much coal?

By the Court:

Q. Do you live in the apartments above?

A. Yes, sir.

Q. What did that heater do?

A. Just heated the store part.

Q. Only the store?

A. Yes, sir; the storeroom only.

Re-direct examination.

By Mr. Kremer:

Q. Now, Mr. Woehrer, before the filling in was done by Mr. Weidman did water come in at that point, at the point which has now been filled in? Did the water from the brook come over at that point?

A. It did to a certain extent; yes, sir.

Q. Did you get water in the cellar in other ways than from the point at the westerly end of the low which Mr. Carton indicated?

A. No, sir; it gets in the cellar before it gets around there.

Q. Then you do get it in other ways?

A. Yes, sir.

Q. Where do you get it, get it in the cellar before it comes in from that point?

A. Yes, sir; we do. It takes an extra high water to come over that bank, because the ground gets higher as it gets nearer the building.

Q. You have described the debris and sticks that used to come down in years gone by?

A. Yes, sir.

Q. Did that go right through into the lake?

A. Yes, sir.

Q. Did the Main Street culvert at that time become obstructed?

A. No, sir.

Q. It went right on through?

A. Went right on through in the head of Wesley Lake, yes, sir.

Q. Which flume is it that becomes obstructed today, the Main Street culvert or the straightaway from Main Street to the lake?

A. Right where the connection with the four foot of the culvert, right where the connection is, where she stops.

Q. Where the culvert reaches the straightaway?

A. Where it comes together, where it meets the straightaway, yes; where they block, yes.

Q. Were your cellars ever flooded before 1911, in August?

Mr. Carton. He said so.

The Court. He said they were not.

Mr. Carton. He said they were not, I mean.

Re cross-examination.

By Mr. Carton:

Q. How many times have you observed the condition of the stopping up of the mouth of this 48-inch pipe east of the culvert? How many times have you ever been in there and seen that situation?

A. Twice.

Q. When was that?

A. Yesterday morning was one of them, and here in January was another time, this year.

Re-direct examination.

By Mr. Kremer:

Q. And you have observed the Main Street culvert before the new construction was made?

A. Yes, sir.

Q. How many times did you observe it?

A. Observed it, oh——

Q. Often?

A. Often.

Q. Did you ever find the Main Street culvert so obstructed that the water would not pass into the lake?

A. No, sir.

By Mr. Carton:

Q. You don't claim you ever found it so since, do you?

A. What is that?

Q. You don't claim you ever saw it obstructed since so that the water would not get into the lake, do you?

A. I didn't catch that.

By the Court:

Q. You don't claim that you have seen it obstructed since so that the water could not get in the lake?

A. Oh, since?

Q. Since the construction.

A. Well, the four foot hole has been.

Q. The question is since the four foot pipe was put in have you seen it obstructed so that the water could not get into the lake?

A. I have seen obstructions so it would not carry that flow of the water, yes.

By Mr. Kremer:

Q. Are you speaking now of the old culvert or the new?

A. The new.

Q. My question related to the old.

The Court. Yes, I understood that.

Q. You have seen it obstructed so it would not carry the flow?

A. Yes, sir; I have.

JOHN DORAN, recalled for plaintiff.

The Court. What is it, an omitted question?

Mr. Kremer. An omitted question, and further examination on the various conditions.

Direct examination by Mr. Kremer:

Q. Mr. Doran, do you know the measurement of the eastern end of the Main Street culvert?

A. Yes, sir.

Q. Will you state what it is?

A. It is about square. It is 6 feet one way by 6 feet 6.

Q. Is it the same dimensions then at both ends, the western end and the eastern end?

A. Yes, sir.

Q. Do you know the condition of the junction of the new straightaway and the culvert?

A. Yes, sir.

By the Court:

Q. Will you describe it exactly?

A. Yes, sir; it is on the south side of the new straightaway. It comes out right even with the south side of the old culvert; that is, 4 feet from there to there (illustrating); and then there is a junction of 2 feet 6 inches on this side that obstructs the water from coming through.

Q. There is an offset there?

A. On offset there on one side.

Q. I wish you would draw the Main Street culvert and then show how——

A. There it is right there. I drew it, Judge. (Exhibits drawing.)

Q. Just draw it here and show how that four foot pipe is located in connection with the culvert.

A. This is the old culvert running through under Main Street. It is 6 feet 6 inches by 6 feet high, and it is oval shape, like that, rounding at the top. On this end here the new straightaway that they put in, they ran it

right straight up with the southerly side of that, leaving this break right in there. This is the old culvert. This is the new one, showing that much break. This goes all the way through. This is the four foot manhole. This has got an oval top.

By Mr. Kremer:

Q. The sides of it are straight or round?
A. It is straight down with the ovals.
Q. Have you ever been in the straightaway?
A. Yes, sir.
Q. When were you in it?
A. Yesterday.
Q. How much water is lying in the straightaway?
A. 11 inches in the mouth of the easterly end. I have only seen 11 inches in it from the top of this here. I mean there was all but 11 inches. It was full all but 11 inches.

By the Court:

Q. In other words, there was 11 inches of leeway for any additional water to come through; that is what you mean, isn't it?
A. Yes, sir.

By Mr. Kremer:

Q. Was there water lying in the Main Street culvert?
A. Yes, sir.
Q. Were there any obstructions in the straightaway?
A. Yes, sir.
Q. Will you state what?

A. A box 3 feet by 14 inches by 18 inches.

Q. How was that lodged in the straightaway?

A. It lodged in the straightaway about that shape, in this straightaway kind of cat-a-cornered.

Q. Was there anything else in the straightaway?

A. One large plank, and seemingly it was a sign-board, a sign about 10 feet long, one inch board with a border around it two inches.

Q. Do you know how far along the entrance to the straightaway, starting from the manhole, that Main Street, is the entrance to the old flume that led to the detritus tank?

A. I couldn't find it yesterday. What I mean, I looked but there was quite a lot of water in it and it was only 11 inches and I didn't see it.

Q. Do you know how long it is?

A. I should think about 20 feet.

Q. 20 feet along the line of the new pipe is the junction that comes into the old——

A. Now I didn't see this, but I think that is about it.

The Court. Strike it out.

Q. Did you feel along the sides of the straightaway for it?

A. Yes, sir.

The Court: Why don't you ask him what he did do? Don't lead him.

Q. Did you find any junction to the——

A. I didn't find it.

Q. Did you observe the exact junction of the straightaway in the Main Street culvert, where you went down the manhole?

A. Yes, sir.

Q. Was there an entrance in the old flume at that time?

A. What do you say?

Q. Was there an entrance from the Main Street culvert to the old one?

A. I didn't see any.

Q. Can you testify definitely as to whether or not there was?

A. I think not. I couldn't see any. It was dark in the culvert, pretty dark under there.

Q. What else did you find, if anything, in the straightaway?

A. Nothing only this refuse. There was a lot of brush, small stuff, on top.

Re-cross examination.

By Mr. Carton:

Q. How did you get in what you call the straightaway?

A. There is a manhole.

Q. Did you enter from the Main Street culvert?

A. There is a manhole right at the junction with the Main Street culvert and the straightaway, as we call it, a manhole that is east of Main Street.

Q. And you opened that and went down?

A. Yes, sir.

Q. How far down the straightaway did you go?

A. All the way from one end to the other.

Q. Clear to the lake?

A. All the way; went in at one end and come out at the other. And I had some job.

The Court. Strike it out.

Q. Did you attempt to go the other way, go west, walk from the culvert back to your place?

A. Oh, no. I could see back there, just right through.

Q. Why didn't you walk that way?

A. Because I saw this box down that end. It was about 20 feet down there. I shoved it right out.

Q. Went all the way through then at that time?

A. Yes, sir.

Q. And you say there were about how many inches of opening from the water up to the pipe?

A. 11 inches at the lower end.

Q. There was that open capacity there yet?

A. Yes, sir.

Q. And about how much capacity was there from the top of the water to the top of the arch under Main Street, a similar distance?

A. Oh, no.

Q. A similar distance?

A. No. I think it was about 16 inches up there.

Q. A little more up there?

A. Yes, sir.

Q. The archway under Main Street is half filled with mud or more, isn't it?

A. No. I was there and I put my foot outside of that straightaway leading into the arch and I sank down about eight inches, I should judge. I put a foot rule over my head like that and it just touched the top of the arch, so I couldn't have sunk very much. I mean there couldn't have been much dirt in it, say only about 8 inches. I judge it is above my shoetops.

Q. And this straightaway that you went through that was the straightaway that your witness Mr. Savage said that he erected, wasn't it?

A. I think so; yes, sir.

Q. When he was engineer?

A. Yes, sir.
Q. And you criticised that construction, did you?
A. I surely did.

By Mr. Kremer:

Q. Was there any mud in the straightaway?
A. Yes, sir; about eight inches, all the way down.

JOHN EXEL, sworn for plaintiffs.

Direct examination by Mr. Kremer:

Q. Where do you live, Mr. Exel?
A. 405 Prospect Avenue.
Q. Asbury Park?
A. Asbury Park.
Q. What business are you engaged in?
A. Shoemaker.
Q. Did you ever reside at the house of Mr. Woehrer on South Main Street?
A. I was employed there in 1899 and 1913.
Q. In what capacity were you employed there?
A. I was shoe repairer.
Q. You are not working there now?
A. No.
Q. From 1899, when you went there, until the middle of 1911 did you ever know the cellar of Mr. Wochrer to be flooded?
A. There was no water in there, never seen any water in the cellar.
Q. Did you go in the cellar often?
A. Pretty nearly every day.
Q. Every day?

A. Yes.

Q. When do you recall the first flood in Mr. Woehrer's cellar?

A. The poolroom was built and the tunnel was made and the water couldn't come in.

The Court: That is not responsive.

By the Court:

Q. When did you see the first flood?
A. When the poolroom was built.
Q. After this?
A. I don't know when it was built.
Q. Well, how many years ago?
A. 1911. I don't know.

By Mr. Kremer:

Q. Do you know that there was no water in that cellar before that time?

A. I know there was no water in it before.

No cross-examination.

CHARLES RUGARBER, sworn for plaintiffs.

Direct examination by Mr. Kremer:

Q. Where do you reside, Mr. Rugarber?
A. Asbury Park, 705 Sunset Avenue.
Q. How long have you resided there?
A. In Asbury Park about twenty-one years.

Q. What official position, if any, have you ever occupied in Asbury Park?

A. Councilman.

Q. What years?

A. In the years from January 1, 1911, to January 1, 1915.

Q. Were you Street Committeeman?

A. For two years.

Q. Which years were you Street Committeeman?

A. 1912 and 1913.

Q. Were you a member of Council at the time that the improvements and filling in of Wesley Lake referred to was made?

A. I was.

Q. And you say you were Street Committeeman from January 1, 1912?

A. Yes.

Q. During that year from January 1, 1912——

A. Yes.

Q. Did you direct the construction of the straightaway built in 1912?

A. I didn't direct it; no, sir. You mean leading from Main Street to Wesley Lake?

Q. Yes.

A. No.

Q. Do you recall that construction having been made?

A. Yes, sir.

Q. What was the purpose of that construction?

A. Well, the brook was an open brook east of Main Street to Wesley Lake, and they decided to culvert it, so that they could fill in and make a roadway at the head of the lake.

Q. And then what was built by the Council?

A. What was built by Council? I think it was a four

foot drain from Main Street to the head of Wesley Lake, the westerly end.

Q. At the time that drain was built you were chairman of the Street Committee?

A. I think so.

Q. Did you advocate the building of that four foot drain?

A. Well, the entire Council did.

Q. The entire Council did? Who prepared the plans?

A. That I am not sure of, whether Ocean Grove did or whether Asbury Park did.

Q. Was Ocean Grove consulted in the matter?

A. Ocean Grove paid half the amount.

Q. And who advised the construction along those lines, Asbury Park or Ocean Grove?

A. I think Asbury Park and Ocean Grove both took the matter up.

Q. In committees?

A. In committee.

Q. Do you recall complaints being filed with Council by the property owners along there, Main Street, during your tenure?

A. Several.

Q. When was the first?

A. I think the first was in 1912, if I can recall.

Q. Did you take up those complaints with the Ocean Grove Association?

A. We did.

Q. What was your decision in the matter?

(Objected to.)

Q. What did you do in consequence of the complaints?

(Objected to.)

The Court: I think they are entitled to an answer to the question as to whether complaints were made, and then what they did. I presume he will say that this plan or scheme was determined upon.

Mr. Carton: I don't think that is the purport of the question at all.

The Court: Isn't that what you had in mind?

Mr. Kremer: That is the idea.

The Court: I will allow the question to be asked.

Q. What did you do with the plans?
A. Figured out a remedy to overcome the flooding.
Q. And what was that remedy?
A. We thought that the lower end of the lake was not properly taken care of. The old gates were inadequate, they were unable to be moved, old wooden construction. The way I felt, if the lake was relieved during a heavy downfall it would relieve the water at the western end and let it out faster.
Q. And did you then construct a new spillway down there at the foot?
A. We did.
Q. In what year did you construct it?
A. It was 1912 or 1913.
Q. And isn't it a fact that your engineer advised the construction of a new spillway in 1911?
A. Yes, sir.
Q. Why was it not done until 1914?
A. Well, we had to bide our time with Ocean Grove until they got ready to go in on it with us. We felt that

we were not in a position to handle the proposition ourselves and we consulted Ocean Grove on it.

Q. Did you consult them immediately following the engineer's advice?

A. Immediately; yes, sir.

Q. And then what happened?

A. Well, they considered it would cost too much, and unless they could have their own plans and ideas of constructing the lower end they would not pay half of it. So that the entire thing was turned over to Ocean Grove.

Q. And was the new spillway built according to their ideas or the City Council's?

A. Entirely to Ocean Grove's ideas.

Q. Was it made according to the plans and recommendations made by Mr. Savage?

A. It was not.

Q. Why not?

A. On account of the cost.

Cross-examination.

By Mr. Carton:

Q. Mr. Rugarber, you say after you received these complaints that you then got together and figured out a remedy?

A. Yes, sir.

Q. And that you concluded that the gates as then constructed at the foot of the lake were not adequate?

A. Yes, sir.

Q. And you took the matter up with your engineer, I suppose?

A. Yes, sir.

Q. And new gates or a new spillway was afterwards erected, was it not?

A. Yes, sir.

Q. When was that done?

A. That was 1912 or 1913, I am not positive.

Q. And you were a member of Common Council of Asbury Park at that time?

A. Yes, sir.

Q. And did the city pay one-half the cost of this work?

A. Yes, sir.

Q. And yet you say it was not done according to the idea of the City of Asbury Park?

A. Not according to the idea of the Asbury Park City Engineer at that time.

Q. Who was that, Mr. Savage?

A. Yes, sir.

Q. Mr. Savage was not an engineer at all, was he?

A. Well, he was engineer enough to command $100 a day from the City of New York as consulting engineer.

The Court: That is not the question.

Mr. Carton: He says he is not an engineer at all—from practical experience.

The Court: I understood your question whether Savage was at that time in the employ of Asbury Park as an engineer. Was that your question?

Mr. Carton: No, whether he was an engineer at all.

Q. You know he was not educated for that; isn't that a fact?

A. I don't know about that.

Q. Did you think that the plan that you afterwards consented to construct and pay one-half of was a proper plan?

A. I didn't at the time. I objected to it.

Q. You didn't at the time?

A. No, sir.

Q. Did a majority of your colleagues consider it was?

A. They did.

Q. And they outvoted you on that subject?

A. They did.

Q. And the city as a whole, the Council as a whole, approved of this work and did it?

A. Yes, sir.

Q. It didn't meet your approval?

A. No, sir.

Q. And didn't meet Mr. Savage's approval?

A. No, I think there was two or three listened to us.

Q. Well, the majority of them thought otherwise?

A. Yes.

Q. You have referred to the straightaway built by Mr. Savage in 1912?

A. Yes, sir.

Q. Was that a pipe that was built in addition to the regular pipe that went from the Main Street culvert to the detritus tank and into the lake?

A. Yes, sir.

Q. What was that pipe put there for?

A. Well, it was an open brook there; it was built from——

Q. No, I mean what was this additional pipe put there for?

The Court: The four foot pipe, you mean?

Mr. Carton: Yes.

Q. The continuous pipe under Main Street to the head of the lake. That was put there after the other work had been completed, wasn't it?

A. Which other work?

Q. The detritus tank, and running the roadway across Bond Street.

A. No, I think they were going on about the same time.

Q. Wasn't that put in there a year afterwards?

A. I don't know.

Q. Well, see if this helps you to recall. Mr. Savage was not the engineer or street superintendent in 1911 at all, was he?

A. No, not until 1912 or 1913.

Q. So he testified. And Mr. Niart Rogers was engineer in 1911?

A. Yes, sir.

Q. And he was the engineer when that improvement was made, except the straightaway, was he not?

A. He must have been.

Q. So that it was a year after that this straightaway, so-called, was put in, under Mr. Savage's supervision, wasn't it?

A. I don't recall.

Q. Wasn't that put in as an additional conduit to help the other conduits that ran through the detritus tank?

A. That is what I said, a continuous conduit under Main Street.

Q. But it was put in additional, it was put in a year after that, wasn't it?

A. A year after what?

Q. After the improvement was made at the head of the lake.

By the Court:

Q. In other words, was it a part of the original plan or was it devised after the original plan was finished?

A. No, it was not a part of the original plan at the head of the lake.

Q. It was supplemental to the original plan, was it?

A. I believe so.

By Mr. Carton:

Q. And did Mr. Rogers represent to you and bring to the attention of the Council that something additional should be done?

A. He did.

Q. And then did you determine upon this 48-inch pipe?

A. 48-inch, hollow tile drain, yes.

Q. And you had the thing installed and paid for it?

A. Yes, sir.

Q. And did it by the exercise of your judgment as to what the proper thing was to be done at that time?

A. Well, it did to a layman. We knew nothing about it.

Q. What do you say?

A. We took our engineer's word for it.

Q. He advised you that that was the thing to do to help you?

A. Yes.

Q. And you did it?

A. Yes.

Q. And paid for it?

A. Yes.

Q. You don't mean to say that you left anything undone at that time to help the situation, do you, to help the situation as best you could?

A. Not that I know of.

Q. During the whole time that you were in Council, from 1911 to 1915, did you always use your best judgment as a Councilman in taking care of this lake?

A. I always did, yes.

Q. And the other members of Council as far as you know?

A. As far as I know, yes.

By the Court:

Q. Mr. Rugarber, you do know that prior to 1912 that another source of water, or water from another source, went through this culvert at the head of Main Street. Wasn't this the water drained down Railroad Square, down the west side of Main Street, along into the brook by Treat's, on the west side of the culvert?

A. Yes, sir.

Q. And your Council did something to cure that situation, did they, to relieve the stream?

A. Yes, sir; I think they did. I believe that was done before my time, though.

Q. Before your time?

A. Yes.

Q. Well, you do remember that improvement, do you not?

A. Yes.

Q. And do you remember the Council running a large storm sewer from Railroad Square down Main Street to Lake Avenue and thence down Lake Avenue to the lake itself, without going through the pipe?

A. Yes.

Q. And the pipe under Main Street was relieved of that stream of water in time of freshets?

A. The water from Main Street proper, yes.

Re-direct examination.

By Mr. Kremer:

Q. Mr. Rugarber, do you recall the first construction of flumes and detritus tank in 1911?

A. Yes, faintly.

Q. Why was it necessary, do you know, to construct the new straightaway?

A. Well, they couldn't very well fill in there unless that stream was covered in some manner.

Q. But they built the old detritus tank and flumes and then filled in in 1911, didn't they?

A. Yes.

Q. Then was it necessary in 1912 to build a new straightaway?

A. I don't think there was any new straightaway built.

Q. There have been two straightaways leading from Main Street to the lake?

A. Oh, that was to relieve the first one. One acted as a bypass.

Q. Was the first one satisfactory?

A. It couldn't have been if they thought that it was——

Q. Do you recall whether the first one was adequate or whether it caused any difficulty?

A. I believe there was some difficulty caused in the tank.

Q. What was that difficulty?

A. It collected debris, had a tendency to choke up.

Q. You say that in the construction of the new straightaway you followed the advice of your engineer?

A. Yes, sir.

Q. You adopted his plans?

A. Yes.

Q. And he had been appointed City Engineer of Asbury Park?

A. Yes.

Q. He recommended at that time immediately the construction of a new spillway?

A. Yes.

Q. Why didn't you do it? You say that the Council did everything in its power to remedy the situation. Why didn't you immediately build that spillway?

A. Well, as I stated before, we took it up with the Ocean Grove Association and they moved slow.

Q. Do you know how long it takes to build a spillway and gates?

A. How long it takes? Why, I think it took about sixty days, something like that, is all.

Q. Do you recall when that was recommended by Mr. Savage?

A. The exact date? No.

Q. Do you know when it was built?

A. Built in 1912, I think; 1912 or 1913.

Q. Do you know the cause of the present flooding of the cellars on the west side of Main Street?

A. Well, I don't know the cause, but I feel that if the——

(Objected to.)

The Court: Oh, no, if you don't know.

Q. Do you know what causes the water to overflow, back up?

A. In my opinion, if the water in the lake were removed——

(Objected to.)

The Court: Yes, you are not here to give opinions.

Re-cross examination.

By Mr. Carton:

Q. As a matter of fact, Mr. Rugarber, you are quite in some doubt, in your recollection, at least, about the whole situation, aren't you, the detritus tank and pipe?

A. Candidly, Mr. Carton, the entire thing was left to the Ocean Grove Association, and when that was done we lost all interest in it.

Q. So you wish to say now, as a representative of the city at that time, that you lost all interest in the thing and turned the matter entirely over to the Ocean Grove Association; is that the fact?

A. That is the fact, because with the understanding that unless they did have entire control over it they would not pay their half of the construction.

Q. That was your view of it, and the minority members of Council's view; the majority of the members of Council decided to do this work and pay for it, didn't they?

A. Certainly; they had to do it.

Q. You lost interest in if they outvoted you and agreed to do the work?

A. Oh, no. They had to agree to the Ocean Grove proposition or not do it at all.

Q. You could have done it yourself?

A. Yes, but they wouldn't stand for $600 or $700 expense.

Q. You were the City of Asbury Park, weren't you, at that time?

A. Yes.

Q. Why wouldn't you stand for it?

A. They didn't feel that they had that money to

spend, when they were equally liable.

Q. Did you have that much money to spend?

A. Yes.

Q. Why didn't you spend it then?

A. I don't know. I suppose I was only one out of seven.

Q. You remember the improvement in general, this boulevard link at the head of the lake?

A. Yes.

Q. Extending from Bond Street in Asbury Park over into South Main Street?

A. Yes.

Q. And you as a member of City Council investigated this situation before you decided to do the work, didn't you?

A. That too was left entirely to Ocean Grove.

Q. Well, didn't you vote for the ordinance to do this work?

A. Yes.

Q. Well, you knew what you were talking about when you voted for that ordinance; you know what the ordinance contemplated, didn't you?

A. Yes.

Q. Well, then you knew what this work was going to be?

A. We knew what it was going to be, yes.

Q. You were going to extend that street across there?

A. Certainly.

Q. And you thought it was the proper thing to do?

A. Certainly.

Q. That was nothing but a mudhole here at the head of the lake at that time?

A. Yes.

Q. You did that as an improvement?

A. Right.

Q. And the whole thing was done by Asbury Park as an improvement?

A. Right.

RECESS TILL 1.20 P. M.

(Trial of the cause resumed at 1.20 P. M.)

MRS. ELIZABETH WOEHRER, sworn for plaintiffs.

Direct examination by Mr. Kremer:

Q. Where do you live, Mrs. Woehrer?

A. 13 and 15 South Main Street, Asbury Park.

Q. Do you own the premises there?

A. I do.

Q. Do you own both the store occupied by Frederick S. Woehrer and the store occupied by Louis Weidman?

A. I do.

Q. Do you recall the construction of the cellar of that building?

A. Yes.

Q. Can you state when the cellar was built?

A. The cellar was built long before we had the flood. It must have been 1908 or 1909.

Q. 1908 or 1909?

A. Yes, exactly I can't tell.

Q. Between the date of the construction of the cellar and the middle of 1911 did you have any water in that cellar?

A. No, we never had no water in the cellar at all until first the flood came in 1911. We never had any water.

Q. When was that first flood?

A. That was the 28th of August, 1911.

Q. And how many more floods did you have in 1911?

A. I can't remember. We had a good many floods then. We had every little while we had a flood.

Q. Do you recall how many you had in 1912?

A. Well, I can't tell. When Mr. Woehrer was living he was attending to those kind of things and I can't remember them. But we had a good many floods then.

Q. Have you been able to use your cellar since the floods began in 1911?

A. Well, the floods—all was dirt and dirty water, and we can't hardly do anything with it except for rubbers, rubber boots, and also then we have to put it up high on boxes, so the water don't reach it.

Q. What damage have you suffered as the result of the loss of your cellar under the shoe store for one year?

A. $175. Well, the first flood——

Q. A year?

A. Yes. The first flood that we had, we had so many leather and rubber boots and shoes in the store, me and Mr. Woehrer and the young man, we went down in the cellar and saved what we could, and they was all damaged.

Q. That is all. That does not answer the question. What damage have you suffered as the result of the use of the cellar occupied by Weidman per year?

A. $150.

Q. $150 a year?

A. $150 a year.

By the Court:

Q. Why do you say $150, madam?

A. This was next door——

Q. I understand, but why do you fix the amount as $150?

A. That is just fixing this and cleaning and everything else. When I sell the property now——

Q. You mean you expended $150 for cleaning up the cellar and fixing it?

A. Yes, and when I sell the property now and I am honest with the people nobody wouldn't give me the price for it.

By Mr. Kremer:

Q. You mean it is worth that much less on account of the fact that you cannot use the cellar?

A. Certainly. Nobody wouldn't have it, if I be honest and tell the people when they ask me, "Does there water come in the cellar?" I can't swear that water does not come in the cellar, and I say no, that brings damage to me. What can I do?

Q. Do you recall what kind of a heating plant was there in the house?

A. Well, we can't have any heating plant now at all, because the water comes in the cellar.

By the Court:

Q. Are you the owner of the property?

A. I am the owner of the property now, sir.

Q. How long have you been the owner?

A. Since my husband is dead, in September, two years; buried in 1913, he died.

Q. Before that your husband owned the property?

A. Yes, sir; and now he is dead in September two years.

By Mr. Kremer:

Q. What do you say has been your damage per year on account of the fact that you can have no heat in your store?

A. Well, I count it as $300 a year. Everything then, we have everything upside down; so we keep everything in straight order.

Cross-examination.

By Mr. Carton:

Q. You claim that your damage would amount to $175 a year from the loss in the cellar?

A. Yes, sir.

Q. How do you make up that amount?

A. Well, I tell you, Mr. Woehrer would have that lot in the back there many dollars since the flood was, and he would have to spend a good many dollars in the first place, as it was about $500 that we lost, and we never got a cent of it. And Mr. Woehrer he went all over and complained about it, and he didn't get no answer.

Q. Now won't you tell me the items going to make up the $175 loss which you sustained by reason of the damage to the cellar?

Mr. Kremer: She has stated that, that the property deteriorated in value to that amount.

The Court: Mr. Carton is entitled to cross-examine her as to how she fixes her claim.

Q. How do you fix that claim?

A. Well, we have to fix it and do everything, and it costs—I can't do all. We have to have some help and

do it. You can't put anything in the cellar there.

Q. Tell me what sum you have expended to hire help to have it cleaned or fixed.

A. Yes, we have it fixed and have it cleaned. Every flood that comes in we have to clean it.

Q. A couple times each year?

A. Yes.

By the Court:

Q. How much do you pay to have it cleaned, $2 each year?

A. We have to cart the truck away——

Q. I know, but how much do you pay?

A. I don't know. Mr. Woehrer paid the bills up to the last two years, but my husband is dead.

Q. You haven't answered the question yet. In the last two years since you have owned the property how much have you paid to any one for cleaning the cellar?

A. Anyhow $25 or more.

By Mr. Carton:

Q. $25 a year?

A. Yes, in the whole.

Q. For the last two years you say you spent $25 a year to clean the cellar?

A. Yes, more than that. I can't keep track of everything, because we have help in the cellar and all over.

Q. You were not obliged to clean the cellar last year on account of the injury to this cellar, were you?

A. Well, we have to use some for my own use, for rubbers and leather. Where could we store it all?

Q. Well, you haven't hired a cellar anywhere else, have you? You are getting along with the present cellar?

A. Well, we have to put it all up in everyplace we get and put things up.

By the Court:

Q. Just answer the question. Have you been obliged to rent a cellar anywhere else?

A. No, not yet.

By Mr. Carton:

Q. Not yet?

A. No.

Q. How do you fix the damages to Weidman's cellar as $150?

A. We had to clean that too and fix it. Every time the flood comes you get damage on the house and damage on the basement. You have to fix it.

Q. Well, this same man who cleans yours for $25 a year cleans Weidman's cellar, doesn't he?

A. Well, I can't tell you, but we clean all the buildings, clean the other buildings for the men. We have to clean that story.

Q. Is the same man who cleans your cellar, which costs $25 a year, also cleaning Weidman's cellar for you? You haven't made any other expenditure for cleaning the Weidman cellar outside of what you have referred to, have you?

A. Well, it is a good bit what we don't count.

Q. Well, can you tell me one dollar you have ever spent to repair the Weidman cellar in the last two years since you have owned it?

Mr. Kremer: We are not claiming for any money spent for the repair of the Weidman cellar.

The Court: No, but you do claim, at least she has testified, that the damage for the loss of the use of the cellar was $175 a year. Her son said it was $100 a year. Now Mr. Carton is entitled to know upon what she bases her claim. It appears that among the items was the amount expended for cleaning. Therefore you did inferentially, by indirection, claim that one item, that your damage is cleaning the cellar.

Mr. Kremer: Doesn't her particular answer state upon what she bases her answer? She said for the deprivation of use. She said $175.

The Court: Mr. Carton is entitled to know upon what it is based. You cannot simply say, "We have suffered $175 damages," and then not tell us how it is done. She might just as well say $1,750.

Mr. Kremer: She said the cellar is worth that much per year.

Q. Can you tell us one dollar you have spent for cleaning this cellar after these floods?

A. I spent a good many dollars.

Q. Can you tell to whom you have spent it?

A. Well, we spent a good many hundreds of dollars.

By the Court:

Q. As a matter of fact, Mr. Woehrer has had charge of this until two years ago?

A. Yes, sir.

Q. And since then your son has had charge of it?

A. Mr. Woehrer has had charge.

Q. Young Mr. Woehrer?

A. He is dead two years ago.

Q. Young Mr. Woehrer is your son?
A. Yes.
Q. So that he has had charge of it since your husband died?
A. Yes, Mr. Woehrer died and left it to me.

The Court: Then why spend time inquiring about it?

By Mr. Carton:

Q. You are one of the plaintiffs in this suit, are you not? You are one of the plaintiffs bringing this suit?
A. Mr. Carton, I will tell you——

By the Court:

Q. Just answer the question yes or no. We can't waste time. You are one of the parties bringing this suit?
A. Yes, sir.

By Mr. Carton:

Q. And from what time do you claim damages, since your husband's death or before?
A. 1911.

Mr. Carton: I want to fix the time when damage would start if damage did start.

The Court: I can tell you that and she can too. She says her husband died in 1913 and she has been the owner of the property since that time; therefore her damages would run from 1913.

By Mr. Carton:

Q. And you can't tell us one dollar that you have expended because of this damage, can you? How do you fix the heat item as $200 then, the loss of heat?

A. Well, when you can't get no heat what can you do?

Q. You have got heat up there; you have got a stove?

A. We have got a stove but the furnace is rusty and broke all to pieces. You can't get heat out of that. You have to fix it first.

Q. No, but you fixed it.

A. That is what made you get no heat.

Q. I understood your son to say that when he was not using the heater downstairs he would use the stove upstairs. That is so, isn't it?

A. It is broke.

Q. It doesn't cost you any more to run a stove upstairs than to run the heater downstairs, does it?

A. Yes, but who do the work?

Q. Does it cost you more?

A. Yes, my legs was because of my running up and downstairs. Pretty soon I be played out. You know that very well.

Q. Your son said he did that.

A. Yes, he do that Christmas and I do it too.

By the Court:

Q. Then you have both done it, have you?

A. Early in the morning and late at night.

By Mr. Carton:

Q. Do you carry the coal up and downstairs?

A. More than once.

Q. Your son is there all the time?

A. Yes, the son is in the store. He can't carry the coal up all the time.

Q. Where do you keep it, in the coal cellar?

A. The coal is in the cellar just at the high point.

Q. The coal is in the cellar?

A. You go down cellar and there is a high point where you put our coal, or else some days we couldn't get in, and we put boxes there on planks so we get coal.

By Mr. Kremer:

Q. Couldn't you get more rent from Mr. Weidman if the cellar was good under his store?

(Objected to. Objection sustained.)

Q. You can't use your cellar, can you?

A. No, not now.

Q. Can Weidman use his cellar?

A. Well, once in a while he uses it when it is dry; and when it ain't dry he can't use it.

Q. Do you claim that the loss of the cellar is worth $175 a year to you?

A. Just exactly.

WILLIAM C. COTTRELL, sworn for plaintiffs.

Direct examination by Mr. Kremer:

Q. Where do you live, Mr. Cottrell?

A. Asbury Park.

Q. What is your business?

A. Architect.

Q. How long have you been engaged in that business?

A. About forty years.

Q. Did you construct the spillway at the eastern end of Wesley Lake in Asbury Park?

A. I did.

Q. When did you build that, Mr. Cottrell?

A. 1914.

Q. How long did it take to build it?

A. Oh, I don't know, two or three months.

Q. Who ordered it?

A. The City of Asbury Park and Ocean Grove.

Q. Both ordered it?

A. Yes.

Q. Will you describe that spillway briflly as it exists today, or as you built it, rather?

A. Well, there is a tumble-dam across the foot of the lake, seventy-five feet long, built of reinforced concrete, with a catch-basin between the bulkhead and the dam, with a sluiceway running from the catch-basin to the ocean.

Q. Now when you say the ocean do you mean it ran to the undertow?

A. It was built to the undertow, yes.

Q. What was the sluiceway built of?

A. Reinforced concrete.

Q. Go on if you haven't finished.

A. I had finished.

Q. Do you recall the spillway and gates that stood there before you put in your spillway?

A. I do.

Q. Is your spillway any higher than the one that stood there before?

A. There was no spillway there.

Q. Wasn't there a gate?

A. There was a gate, yes, and dam.

Q. Was the dam or spillway any higher than the one you put there?

A. Ours is five feet lower.

Q. Yours is five feet lower?

A. Yes, sir.

Q. In the bottom?

A. Yes, sir.

Q. You are quite sure of that?

A. Yes, sir.

By the Court:

Q. Then you say that the spillway you built is five feet lower than the old gates, the dam?

A. The gates fit in the dam from the bottom to the top. When they were down they were in planks eight inches wide, and they come up as high as they put in the plank.

Q. Now you say the spillway is five feet lower than——

A. The top of the old dam.

Q. The top of the old dam?

A. Yes, sir.

By Mr. Kremer:

Q. That is not exactly what I mean. Did the effect of your dam lower or raise the level of the lake?

A. Lowered it.

Q. How much?

A. Four inches.

Q. You say you are an architect?

A. Yes.

Q. You are not a civil engineer?

A. No.

New Jersey State Library

Cross-examination.

By Mr. Carton:

Q. You had charge of the engineering in this matter?
A. I did.
Q. For Asbury Park and Ocean Grove?
A. Yes.
Q. And that was built in 1913 and 1914, was it?
A. I think it was in the spring of 1914.
Q. And that scheme of improvement was conceived by you to improve the conditions of that lake, I suppose, was it not?
A. To make the level of the lake permanent.
Q. And it had the general effect of making the level of the lake some four inches lower?
A. Yes.
Q. Where do you live in Asbury Park?
A. Lake Avenue, 415.
Q. And is Lake Avenue beside Wesley Lake, the lake in question.
A. It is.
Q. How long have you lived there?
A. Twenty-six years.
Q. You know something about the action of the lake then, I suppose, in times of storms?
A. Some.
Q. What has been your experience in that regard?
A. Well, before the dam was built we had floods along the lake in severe storms.
Q. And get some floods yet, do you?
A. No, I don't think we have ever had any since it has been in there.
Q. Is it your experience as you are living on the lake that conditions with regard to floods have been better since the dam was built than before?

A. Oh, yes.

Q. You say you are in the general architect business in Asbury Park?

A. Yes.

Q. And have you constructed buildings on both the east and the west side of the railroad track?

A. I have.

Q. Have you ever constructed any buildings west of the railroad in the vicinity of Wesley Lake Brook?

A. Well, out on Springwood Avenue.

Q. That is just one block north, isn't it?

A. Yes.

Q. What construction can be taken care of there with regard to cellars?

A. There can be no cellars there without being made of waterproof material.

Q. If a cellar is put in it must be waterproof?

A. Yes.

Q. Why is that so?

A. The water level on Springwood Avenue is about three feet from the top of the curb.

Q. That is the natural level of the water?

A. The natural water level.

Q. That is because of the geographical location there?

A. The swampy condition of the ground.

Q. It is like a swamp and wet in that section, is it not?

A. Yes.

Re-direct examination.

By Mr. Kremer:

Q. Whereabouts on Springwood Avenue did you build this house that you speak of?

A. On both sides of Springwood Avenue, two or three blocks from the railroad.

Q. West of the railroad tracks?

A. West of the railroad tracks.

Q. You say conditions have been better in Wesley Lake since your spillway was built?

A. Yes.

Q. What do you mean when you say they have been better?

A. Well, the water cannot rise only just such a height.

Q. You don't know anything about the conditions on South Main Street where the plaintiffs in this action live before and after this improvement, do you?

A. Not at all.

Q. How far are the buildings that you refer to on Springwood Avenue, where cellars cannot be built, from the houses of the plaintiffs in this action, if you know?

A. Anywhere west of the railroad.

Q. But how far is that point that you speak of from these houses?

A. A block.

Q. Will you indicate on the map? You see Springwood Avenue there?

A. Anywheres in here. (Indicating.)

Q. How far would you say that was? Several hundred yards, isn't it?

A. I would say it is one hundred and fifty feet. I don't know. I couldn't tell.

Q. One hundred and fifty feet?

A. From the west of the railroad to here is low ground. (Indicating.)

Q. But you don't know how far it is from where you built these houses?

A. I should say about three blocks.

Re-cross examination.

By Mr. Carton:

Q. Springwood Avenue runs parallel with Wesley Brook, does it not?

A. Yes.

Q. One block north of it?

A. One block north——

Q. Of the brook?

A. Yes.

Q. It is all low where the plaintiffs own, is it not?

A. In the rear between the railroad and Main.

Q. Between the railroad and Main Street?

A. Yes.

Q. Where Treat's and Doran's and Woehrer's property is that is on low property, isn't it?

A. On low property.

Q. Would you consider as an architect or would you advise the construction of a building at Doran's or Woehrer's of putting in a cellar without waterproofing it?

A. I would not.

Q. It would not be practical, would it?

A. It would not.

Q. The cellar would be of no use unless that were done, would it?

A. Not at all.

Mrs. Mary Doran, sworn for plaintiffs.

Direct examination by Mr. Kremer:

Q. Where do you reside, Mrs. Doran?

A. No. 3 South Main Street.

Q. How long have you lived there?

A. Since 1903.

Q. Are you the owner of the premises at that location?

A. Yes, sir.

Q. And when was that house built?

A. In 1908, I think it was.

Q. Is there a cellar under the house?

A. Yes.

Q. Was that cellar built when the house was built?

A. Yes.

Q. Now between the time of the construction of the cellar in 1908 and the middle of 1911 were you troubled with floods in your cellar?

A. No, sir.

Q. Have you ever been troubled with flooding in your cellar?

A. Not until after 1911.

Q. Will you state when the first flood occurred?

A. I think it was in August. I can't remember dates very well.

Q. In August of what year?

A. Of 1911.

Q. And will you tell the jury what happened at that time?

A. Well, we were just flooded, that is all I can say.

Q. How long did the water stay in your cellar?

A. Well, the storms usually are a couple days or three days.

Q. And when were you flooded the next time?

A. I can't remember the dates. I didn't pay any attention to the dates.

Q. Well, from the time of the first flood until the 1st of January, 1912, how many floods did you have?

A. I couldn't say for sure.

Q. How many did you have in the year 1912?

A. I couldn't tell you the dates.

Q. Well, how many did you have in that year, do you remember?

A. No, sir; I don't.

Q. What is the best of your recollection on that subject?

A. Well, six or eight.

Q. In that year?

A. Yes.

Q. And how many did you have in 1913?

A. I think about seven or eight.

Q. Any in 1914?

A. I wouldn't say for sure, because I didn't pay any attention.

Q. To the best of your recollection how many?

A. About the same amount, I think.

Q. And in 1915 what is the best of your recollection as to the number you had in 1915?

A. Well, they average from five to eight or nine, and sometimes ten in a year. That is the best I can say.

Q. In which year did you have the ten?

A. I think we had ten in 1916, ten or eleven.

Q. What was the effect of the floods on your cellar?

A. Put our fires out. We were cold.

Q. With relation to the fire, when did it put your fire out?

A. Every time there was a flood.

Q. Did you have fire in your cellar during this winter?

A. We had fire about one week a month.

Q. About one week a month?

A. Just about one week a month.

Q. What other effect did the floods have on your cellar?

A. We couldn't keep anything down there that we should.

Q. Any other effect? What other result did the flood bring about in your cellar, if any?

A. Just the putting the fire out and keeping us from the use of the cellar.

Q. What was the condition in the cellar after the water would go out?

A. It would be that much mud in the bottom of it. (Indicating.)

Q. And how long would that mud stay there?

A. It would stay there and be dried up a little bit. They would sweep it up, clean it up.

Q. Was there any change in the condition of the atmosphere in your house before and since the flooding of 1911?

A. Yes, a big change. The house was musty all the time.

Q. The house is what?

A. Musty.

Q. What do you mean by musty?

A. Well, from the dampness. It is blue mould on the paper in the hall.

Q. Is there any change in the atmosphere in the cellar?

A. Yes.

Q. What is the effect, if any, on the atmosphere in your cellar because of the flood?

A. It is musty and damp down there all the time: smells musty.

Q. What do you mean by smells musty?

A. Well, dampness always creates a musty smell in the house.

Q. Will you describe the house in which you have your butcher shop, on the upper two floors?

A. The second floor is all open, just arches, with the

exception of the kitchen, between the kitchen and the dining-room.

Q. And what have you on the third floor?

A. And on the third floor we have four bedrooms and a bath and a hall.

Q. Will you describe the heating system in your house?

A. The heating system is hot water.

Q. Is it built to accommodate the entire house?

A. The entire house, every room, with the exception of the kitchen.

Q. What damage do you say you have suffered as the result of the loss of your cellar for one year?

A. Well, I don't know. Money could not replace the suffering I have had from colds.

Q. How much damage do you say you have been caused?

A. I consider it a couple hundred dollars a year.

Q. The use of your cellar?

A. Yes.

Q. And what damage do you say you have been caused as the result of the deprivation of the heat in the upper part of your house?

A. I don't know. Money couldn't pay for it, that is all.

Q. What damage do you say you have suffered in dollars and cents?

A. I should think about three hundred dollars.

Q. Per year?

A. Per year.

Q. Have you taken any steps to alleviate the musty condition in your house?

A. I used oil of lavender, oil of wintergreen, anything any one told me.

Q. Why did you use them?

A. To kill the musty smell.

Cross-examination.

By Mr. Carton:

Q. Mrs. Doran, with regard to your damage now, what items do you say make up the $200 a year?

A. The loss of the use of our cellar.

Q. Why do you think that now?

A. Well, the loss of the fire, coal floating around in water. I can't keep my canned fruit there and other items that belong to the cellar of a house.

Q. You can't keep your canned fruit in the cellar?

A. No.

Q. Do you keep coal in the cellar?

A. Well, we have to buy it by small quantities, because it is mostly always covered with water.

Q. If hanging shelves were erected in the cellar like other housewives have couldn't you keep it?

A. Certainly I could. But how could I get to it?

Q. I understood from your husband the cellar only flooded on an average of half a dozen times a year. You could get to it at other times, couldn't you?

A. Well, perhaps just at that time would be the time I wanted to get it.

Q. You couldn't use it for that purpose?

A. Only the first few years.

Q. You did use it formerly for that purpose?

A. Yes.

Q. And for other purposes?

A. Yes, sir.

Q. Because you cannot keep your canned fruit there and have difficulty in getting your coal, for those two reasons you think your damages amount to about $200 a year; is that right?

A. Yes, sir.

Q. You think that the heat would damage it about $300 a year?

A. $300 wouldn't pay for it.

Q. How do you recokn that?

A. Well, if you were cold all winter long you would know how to reckon it.

Q. And that is the basis then you are using when you are fixing that $300 as a basis, because you are cold all winter?

A. Well, that has something to do with it, I guess.

Q. Well, the house can be heated otherwise, can it not?

A. No, sir; there is only one chimney in the house, and that is in the kitchen.

Q. Well, this condition has been existing since 1911, you say?

A. Yes, sir.

Q. And you have never attempted to make any change for heating since that time?

A. Well, we thought that the new people would help us out and we wouldn't have this every winter.

Q. You thought the city would take care of the matter?

A. Yes.

Q. And pay all the damages?

A. Not exactly pay all the damages, but keep the water from our cellar.

Q. When you had your building erected why didn't you have this cellar waterproofed?

A. We didn't need it waterproofed.

Q. And that is the reason you didn't have it done?

A. Yes.

Q. You haven't any other items you can tell us any better how you make up this $300 a year other than what you have referred to, have you?

By the Court:

Q. Had there been any floods at the time you had erected this new building?

A. There had been floods but they didn't affect us any.

Q. Didn't affect you?

A. No. In the old house there was no cellar.

Q. That is what I mean, in the old house there was no cellar?

A. No, there was no cellar.

By Mr. Carton:

Q. The old house was put up on stilts?

A. Yes, sir.

Q. No cellar under it?

A. No.

By the Court:

Q. You built your house in 1908?

A. Yes, sir.

By Mr. Carton:

Q. These odors, did they come because of the damp, mucky condition around the brook, all the cellars around there?

A. Yes.

Q. Caused generally by the overflowing of this brook in your cellar and other cellars, I suppose?

A. Yes.

By the Court:

Q. Do you say there had been floods prior to 1908?

A. Yes, sir.

Q. Where were they?

A. Well, it was all open under the house and they didn't affect us at all.

Q. Then did the water run under your house?

A. No, it seemed to go right on through. There was a big opening there, it went right on through. Of course an awful big rain there would be some water in the backyards.

Q. Your yard?

A. No, we haven't any backyard.

By Mr. Carton:

Q. The fact is, you have seen the backyards, your place back of your building, before the new building was erected, flooded, haven't you, Mrs. Doran?

A. Yes, all the yards have been flooded.

Q. What do you say?

A. At extra big rains they have been flooded a little

Q. And that was before 1911 as well as since?

A. Yes, sir.

Q. And you have seen Mr. Woehrer's yard flooded, haven't you, before that time?

A. In the back has been flooded a little, but nothing like it is now. It is a regular lake when there is a flood.

Q. Sometimes when there is a very heavy rain there much more water comes in than did before?

A. Very much more water stays there.

Q. What is the reason that you ascribe for its staying longer now than it did formerly, because of its volume?

A. No, sir.

Q. Can't get away as well?

A. Can't get away as well, that is what I have been told.

Q. Was that the reason your husband knocked the hole in the cellar?

A. Yes, the water was in and he couldn't get it out.

Q. You did know then when you erected your cellar in 1908 that the water did flood that place there, didn't you?

A. Yes, but when our place was built they told us that no water would come in.

Q. Who told you?

A. The contractor.

Q. The contractor told you that, eh? Did you have a talk with him about that?

A. We had a talk with him to find out if we could have a cellar.

Q. You were conscious then, I suppose, of the fact that water did flow over that ground and you wanted to know whether it would come in the cellar or not?

A. Yes.

Q. You understood it, didn't you?

A. It didn't in Mr. Woehrer's or Mr. Woolley's.

Q. And for that reason you didn't bother to have your cellar waterproofed?

A. We didn't think it was necessary.

Q. You didn't think it was necessary because of what the contractor told you?

A. The first year we had it we didn't have any water.

Q. Then prior to erecting the building at all the reason why you didn't have it waterproofed was because the contractor told you it wouldn't come in?

A. Before we had this house we didn't have any water at all.

Q. But before you had this house erected you were conscious of the fact that the ground there overflowed with water in time of rain?

A. Yes.

By the Court:

Q. I suppose the reasonable question would be why didn't you have your cellar waterproofed? Why didn't you have your cellar waterproofed?

A. Because we expected each time that they made a complaint that the city would take hold of it and fix it up.

Q. No, you don't answer my question. When the house was built why was it you didn't have it waterproofed?

A. We didn't think it necessary because no water came in the neighbors' cellars.

Q. Had your neighbors' cellars been built before that?

A. Yes, Mrs. Woehrer and Treat.

Q. Are they next door to you?

A. Yes, Mrs. Treat is next door, right along the lake

Q. Just immediately next to you?

A. Well, Stephen Woolley owns that property.

Q. The drug store?

A. Yes.

Q. And you say there was no water in either of those cellars?

A. In neither of those cellars.

By Mr. Carton:

Q. Did you refer to Mr. Treat's cellar?

A. Yes, Mr. Treat had no water in his cellar.

Q. Were you ever in Mr. Treat's cellar?

A. No, but I have heard Mr. Treat speak of it.

Q. And were you in Mr. Woolley's cellar?

A. Only got their word for it.

Q. So what you know about it then is mere hearsay?

Mr. Carton: Therefore I move that that all be stricken out.

The Court: Yes, excepting her answer to my question as to her own knowledge.

Re-direct examination.

By Mr. Kremer:

Q. You built your cellar in 1908?

A. Yes.

Q. And you did have no water until the lake was closed up?

A. No.

Q. You had no water for the first three years?

A. No, sir.

Q. And the cellar was satisfactory during that time?

A. Yes, sir.

By the Court:

Q. Now what do you mean by satisfactory, Mrs. Doran, for three years from 1908 to 1911? What was the condition of your cellar?

A. It was perfectly dry. We could use it for anything we wished to put in it.

Q. Did you in fact use it for any purpose?

A. Yes.

Q. What did you use it for?

A. Well, we kept our potatoes in it and coal, we kept all the canned fruit, and from the meat market they kept their burlap and all different things concerning the market.

Q. And when do you say was the first you began to experience this trouble with the water?

A. Why, in 1911.

Q. What time in 1911?

A. I think the first heavy storm was in August.

By Mr. Kremer:

Q. And can you use your cellar now in connection with the store on the first floor for storage purposes?

A. No, sir.

WILLIAM C. COTTRELL, recalled.

Direct examination by Mr. Kremer:

Q. Mr. Cottrell, you say when you built the spillway that you built a sluiceway to the undertow?

A. Yes.

Q. Is that sluiceway there now as it was when you built it?

A. No, the end has been broken off by the tide.

Q. When was it broken off?

A. I couldn't tell you.

Q. Has it ever been replaced?

A. I couldn't tell you.

Q. You don't know whether it has or not?

A. No.

Cross-examination.

By Mr. Carton:

Q. Just let me ask you a question. This sluiceway runs directly into the ocean, doesn't it?

A. Yes.

Q. What is the action of the waves, whether it does

or does not bring up sand there in front of this sluiceway at times, the ocean?

A. It does.

Q. Banks it up several feet at times, does it?

A. Yes.

By the Court:

Q. How could that have been avoided, Mr. Cottrell?

A. The backing up of the sand?

Q. Yes.

A. You will have to ask somebody different from me. I don't know that.

By Mr. Carton:

Q. That is a condition that exists in Shark River, Manasquan River and all along, doesn't it, every inlet?

A. All along the coast.

Re-direct examination.

By Mr. Kremer:

Q. Couldn't that sand be cleaned away from in front of the sluiceway?

A. Oh, yes, they often clean it away.

Q. Then the condition of stoppage could not be avoided?

A. It could not be avoided, it could be remedied.

Re-cross examination.

By Mr. Carton:

Q. It could not be cleaned away when a storm is pil-

ing it up there to any extent, could it?

A. No.

By the Court:

Q. That is, you mean it is a continuing remedy, has to be done at every tide?

A. Has to be applied and cleaned away at certain periods in order for it not to stand in front of it.

By Mr. Carton:

Q. How did the erection of the spillway remedy it in front of your property and along the lake generally?

A. The water can't rise over two inches higher.

Q. What was the condition of the neighborhood along the lake before the spillway was built?

A. We had water all over Lake Avenue.

Q. Your cellar was flooded?

A. Not the cellar.

Q. Had water on Lake Avenue?

A. Yes, over the street.

Q. And that water came back from down in the Park?

A. No, came down from the skies.

Q. Wasn't it resultant from the lake overflowing its banks?

A. I don't think so. I think it was the whole city, the water coming to the lake from the whole city.

Q. Doesn't that spillway accommodate Lake Avenue as well as the lake?

A. Yes, accommodates the whole city, in the city from Asbury Avenue down.

By the Court:

Q. You mean there is a natural water shed there and Wesley Lake is the basin?

A. That is the basin. All the streets flow to the lake and culverts.

Re-direct examination.

By Mr. Kremer:

Q. It all flows into Wesley Lake?

A. Yes.

Q. And before that spillway was built where did it flow?

A. Flowed to the sewer.

Q. Flowed into Wesley Lake?

A. Yes, but if the gates were raised it would go over the race. Now there are no gates, so it goes over the spillway.

Q. If the gates were raised it would raise up all the lake and back in that culvert, wouldn't it?

A. Yes, sir.

Mr. Kremer: When I asked the City Clerk to refer to the minutes there were certain entries that he did not have, and I have since found them and I would like to recall him.

The Court: You may recall him.

HARRY B. WHITE, recalled for plaintiffs.

Direct examination by Mr. Kremer:

Q. Mr. White, will you refer to the minutes of July

22, 1912, and read therefrom a motion, if such there be, that the City Engineer submit plans for the Wesley Lake gates, stating the volume and page from which you read?

A. This is in minute book No. 7, page 188, under date of July 22, 1912:

"Motion was adopted that Engineer submit plans for Wesley Lake gates."

Q. Will you refer now to the minutes of February 24, 1914, and read therefrom an instruction to the City Engineer, if there was one, that specifications and plans for Wesley Lake improvement be prepared, stating the volume and page?

A. Minute book No. 7, page 495, under date of February 24, 1914:

"Motion adopted that the City Engineer be instructed to prepare new plans and specifications for Wesley Lake improvement."

Q. Will you refer to the minutes of April 20, 1914, and read therefrom the report of Chairman Wynkoop as to the meeting with Mr. Preston, of the Ocean Grove Association, in regard to Wesley Lake improvement, stating the volume and page?

A. This is in minute book No. 8, page 35, under date of April 20, 1914:

"Chairman Wynkoop reported a meeting with Mr. Preston in the matter of the Wesley Lake improvement and advised that new plans would be drawn."

Cross-examination.

By Mr. Carton:

Q. Have you produced the ordinance for this improvement as requested by Mr. Kremer?

A. Yes, sir; I have it here.

Q. Will you produce it?

The Court: I think there is no question about it. You will put it in by consent, won't you?

Mr. Carton: Yes. He has not produced it yet.

The Witness: This is not the original. This is a certified copy of the original.

Q. You are City Clerk, are you not?
A. Yes.
Q. Did you compare that with the original in your book?
A. I did.
Q. And you produce that instead of the original?
A. Yes.

By Mr. Kremer:

Q. That is the ordinance of December 19, 1910, is it?
A. Yes.
Q. The one I served notice to produce?
A. Yes, sir.

(Ordinance offered in evidence and marked Exhibit P4.)

MARY SARAH MCCABE, sworn for plaintiffs.

Direct examination by Mr. Kremer:

Q. Where do you reside, Mrs. McCabe?
A. Asbury Park, corner of Main and Lake Avenue.
Q. Will you indicate on the map where your residence is? Is it right here?

A. It is the corner of Main and Lake.

Q. How long have you lived there, Mrs. McCabe?

A. I think I moved there in about 1900, as near as I can remember.

Q. Have you a cellar under the house where you live there?

A. Yes, sir.

Q. When was that cellar constructed?

A. I think we built the building in 1898.

Q. You built the cellar at the same time?

A. Yes.

Q. From 1898 until 1911 were you troubled with flooding in your cellar?

A. I never knew of any water in the cellar.

Q. Have you ever had any water in your cellar up to the present date?

A. I don't know when they first filled in the head of the lake. I have lived there a good many years, but they filled in, they took the water away and put in dirt and we have always had trouble since the dirt was there in place of the water.

Q. Is your cellar waterproof? It can't be, of course.

A. I couldn't say. I was not the builder nor had charge of it.

Q. Is your cellar rented today?

A. Yes, sir.

Q. For what purpose?

A. They hang bananas from the ceiling, the banana man. The work is done from the ceiling with gas jets.

Q. What are the dimensions of your cellar?

A. My building is 30 by 60 feet.

Q. And how much per annum is the rent of the cellar?

(Objected to.)

A. I object to telling my business to a public court-house. Is that proper, Judge?

The Court: Oh, yes.

A. Well, I asked $250. I don't want to tell you how much I got.

By the Court:

Q. Well, you got less than $250?
A. For my cellar, yes, Judge.
Q. I think you had better tell us what you got. Counsel is entitled to your answer.
A. I received $175.

By Mr. Kremer:

Q. Per year?
A. Yes.

By the Court:

Q. The size of that cellar is what?
A. It is 30 by 60 feet.

By Mr. Kremer:

Q. You say that up until the filling in at the head of the lake you never had any water in your cellar?
A. No, I never remember any water, but for a couple of years we had water.

Cross-examination.

By Mr. Carton:

Q. Well, Mrs. McCabe, what do you mean? You say you don't remember any water. Do you mean to say that you didn't have any water prior to 1911 or not?

A. My husband took charge of the lower part of the house and I took charge of the upper. There were many times I never had my foot in the cellar.

Q. As a matter of fact I suppose you know nothing about the condition of the cellar until subsequent to your husband's death?

A. Well, I know how my husband——

Q. I mean of your own knowledge.

A. Yes. That is all right, isn't it.

Q. Mr. McCabe died when?

A. The 14th of December, 1916.

Q. And you do know that since that time you have been down in the cellar and there is water in it at times?

A. When Asbury Park and Ocean Grove first filled the lake in we had some trouble, but I couldn't tell you anything that happened last winter.

Q. You haven't been bothered very much, have you? You are much higher there, aren't you?

A. I think we are.

Q. You live on the Asbury Park side?

A. I live on the Asbury Park side.

Q. But after the filling in——

By the Court:

Q. What is the character of your building, Mrs. McCabe?

A. It is the best built private building in town, three story and basement.

Q. Oh, that is what they call the Atlas Hotel, is it?

A. Yes.

By Mr. Carton:

Q. Corner of Lake Avenue and Main Street?
A. Yes.

By the Court:

Q. It is a brick building, as I recall?
A. It is a brick building. But what I wanted to say is we watched the lake, we watched the water, and when Mr. McCabe was alive he would lead me to the window and say, "Mamma, they are going to have trouble over on the west side."

By Mr. Carton:

Q. Well, I didn't ask you that. I thought your husband was referring to what you knew. The fact is that Mr. McCabe was a member of Council for some time, wasn't he, Mrs. McCabe?
A. I really don't know.

The Court: The Asbury Park Council?

Mr. Carton: Yes.

A. But I don't think so.
Q. You were not interested in his political activities?
A. I keep a furnished room house, and it takes all my time to take care of my furnished rooms.
Q. You don't recall whether Mr. McCabe was an official?
A. Mr. McCabe was, I think, a Street Superintendent. That would not be an official, would it?
Q. He was also a member of Council some time, wasn't he?

A. That I don't know.
Q. With Mr. Rugarber?
A. That I don't remember.
Q. Walter D. McCabe, your husband was?
A. My husband was Albert D. McCabe.

Re-direct examination.

By Mr. Kremer:

Q. Do you know whether there was water in your cellar, whether there were floods in your cellar before the head of the lake was filled in?

A. I was trying to tell you, we never had any trouble, I should say, ten—the first nine or ten, the first ten years we lived there I never heard of any trouble.

Q. Do you know that?

A. Yes, I know it.

Re-cross examination.

By Mr. Carton:

Q. You know that because no one complained to you that there was any water in the cellar?

A. I know my husband so well, when my husband had any complaints he would come and tell me and I had to stand and listen to him.

Q. That is the basis of your statement?

A. Yes.

Re-direct examination.

By Mr. Kremer:

Q. Did you ever go in the cellar those years?

A. Yes.

Q. Did you ever see any water in the cellar?

A. No.

Q. Before the head of the lake was filled in?

A. No, sir. When my husband was ill I took care of the furnace. The idea has been since 1911, since they filled in the lake.

Q. And you say you know there was no water in that cellar before that time?

A. I certainly know it.

By Mr. Carton:

Q. You maintain the furnace in the cellar at the present time?

A. Yes, sir.

By Mr. Kremer:

Q. Does the water cause any trouble to your furnace?

(Objected to.)

A. No.

The Court: Well, I think she may answer. It is not very material. It has some slight bearing.

A. Well, I do say—I will have to get my head straight. Will you ask it again?

Q. The question is whether your furnace is interfered with by the water coming in your cellar.

A. Since when?

Q. Since 1911?

A. Oh, yes.

Q. Since the filling in of the lake?

A. Yes.
Q. What effect would it have on the furnace?
A. It would put it out.
Q. Has your furnace been put out since 1911?
A. Yes.
Q. How many times?
A. That I can't say, because the heat don't bother me.
Q. Heat don't bother you?
A. No, I don't worry about it.

By Mr. Carton:

Q. It has not been put out since you have had charge the last couple years, has it?
A. No, sir.

GEORGE K. ALLEN, recalled for plaintiff.

Direct examination by Mr. Kremer:

Q. Mr. Allen, assuming that the sluiceway from a spillway at the ocean end of Wesley Lake is constructed of concrete, would you say that that construction was proper or that iron construction would be preferable, or which?

Mr. Carton: I object to the question, whether that would be proper or not.

The Court: It is not a question of preferance, it is a question of adequate construction.

Mr. Kremer: Is it objectionable?

The Court: Yes, I think it is merely a question of comparison.

By the Court:

Q. What have you to say, Mr. Allen, as to the construction of this spillway of concrete?

A. It could be of concrete and be all right, properly constructed.

By Mr. Kremer:

Q. What have you to say as to the distance into the sea which the sluiceway should run?

A. I wouldn't like to say. I haven't any experience in building sluiceways in oceans.

Q. In your experience as an engineer what have you to say as to what is an adequate construction of a drain to take care of the rainfall on a six hundred acre tract?

Mr. Carton: That question, your Honor, is objectionable, for the first reason because I do not understand it—in his opinion as an engineer what he should say as to so and so.

The Court: There has been some testimony that Wesley Lake Brook west of Main Street is the conduit, as it were, of drainage for about six hundred acres of land west of Main Street. His question now is what in his opinion would be an adequate outlet for such a drainage. Is that your question?

Mr. Kremer: That is my question.

The Court: The acreage of six hundred acres west of Main Street.

Mr. Kremer: That is my recollection here of some witness saying.

The Court: The total acreage in some six hundred acres draining into the lake?

The Witness: Eight hundred.

Mr. Carton: I think Mr. Rogers suggested the area, not only west of the lake but east of the lake.

The Court: That makes it all the more difficult.

Mr. Carton: The east of Main Street——

The Court: You may modify your question in respect to the west side of the lake.

Mr. Kremer: I don't quite understand what modification you want.

The Court: You said west of Main Street.

Mr. Carton: It also says it is east of Main Street.

Mr. Kremer: It would characterize the place where it was. I have just said draining that tract.

The Court: Why don't you formulate your hypothetical question along the brook line, assuming that Wesley Lake Brook is an outlet for six hundred acres of land into Wesley Lake?

Q. What would you say, taking the words of the court, what would you say would be an adequate drain to take care of the rainfall on that tract?

Mr. Carton: I object, because it seems to me that the question that is pertinent, if there are any questions that are pertinent, is whether or not we have in the exercise of our judgment erected a proper construction. If he wants to criticise our construction, I suppose, well and good; but I suppose a dozen different engineers might advance a dozen different problems, any one of which would be substantial.

The Court: Mr. Allen has already testified in criticism of the present construction, and he has said it was inadequate to carry off the drainage.

Mr. Carton: Mr. Allen criticised the bypass in the head of the lake.

The Court: If you want to do that I will permit you to do it. Ask if it is adequate and if not why not.

Mr. Kremer: Wouldn't he naturally, in answering, tell what his opinion would be?

The Court: Yes.

Mr. Kremer: That is what I am asking. May he answer?

The Court: Yes.

Q. You may answer.

The Court: I would say to a proper question.

Mr. Kremer: To the question that was asked?

The Court: Yes. Just strike it all out now and ask

the question and get started properly.

Q. Will you state why the straightaway running from the easterly side of Main Street to Wesley Lake is not adequate to accommodate the six hundred acre tract which it has been built to accommodate?

The Court: The drainage.

Q. The drainage of the six hundred acre tract which it has been built to accommodate.

A. It is not adequate because a forty-eight inch pipe has only a certain capacity, and the capacity of a forty-eight inch pipe is about one-third of what it should be. I have the figures if you would like to have me read them. I have figured it out.

By the Court:

Q. What capacity do you say that there should be there?

A. There should be a pipe sufficient to carry 45,258 gallons a minute. That takes care of one inch of rainfall per hour.

Q. For six hundred acres of land per hour?

A. Yes, sir.

Q. What do you say the capacity of a forty-eight inch pipe is?

A. 18,086.

Q. What was the other, 45,000?

A. 45,258.

Q. You say it is 27,000 gallons short in capacity?

A. Yes, sir; according to my judgment.

Q. Covering a rainfall of one inch?

A. One inch per hour.

By Mr. Kremer:

Q. And that is what should be anticipated?
A. It is.

Cross-examination.

By Mr. Carton:

Q. That is what should be anticipated for what?
A. Size of pipe.
Q. Do you know what area drains through that pipe?
A. I have made an estimate.
Q. And what did you figure the estimate to be?
A. Six hundred acres.
Q. And what territory do you take in in that estimate?
A. I take in about very nearly a square mile below and on the west of Main Street.
A. Yes, sir.
Q. How far north of Main Street in Asbury Park did you run in your estimate?
A. I took it from a geological map. It was about—I don't remember the exact streets—I think it was about to Asbury Avenue.
Q. And then ran west?
A. Yes, then ran west, back and around.
Q. You ran south over in Neptune Township?
A. I didn't say the township. I took the area from the scale of the map.
Q. You figured this out in your office from some map?
A. Yes, sir; from a geological map.
Q. You didn't know as a matter of fact when you were doing that that a good portion of that territory is being drained through a pipe down Main Street and

Railroad Square and does not go through this culvert at all, did you?

A. No, sir; I did not.

By the Court:

Q. Then you based your conclusion on the assumption that this pipe did drain the six hundred acres in question?

A. Yes, the contours shown on the geological map would show it to be drained to that point.

By Mr. Carton:

Q. Do you know when the map was made?

A. I think it was 1902.

Q. Then any changes that have been made since that time would upset your reckoning, wouldn't they?

A. Well, it would add to it.

Q. If any portion of the water draining from that territory had been diverted would it add to it?

A. No, it wouldn't then.

Q. What do you say?

A. No, sir; if the water had been diverted.

Q. That would detract from it, would it not, assuming that a portion of this area was drained by artificial means to Wesley Lake east of Bond Street and didn't go through this culvert at all; that would detract of necessity from the water going through this flume?

A. Yes, sir.

Q. And what would you have to say with regard to the character of the soil of this area, whether it was clayey bottom or sandy? Would that have anything to do with it?

A. Yes, have a good deal to do with it. I took that into consideration.

Q. What character of soil did you figure this area was?

A. Sandy soil.

Q. And you figured on that, that a given portion would seep through the sand, I suppose?

A. Yes, sir.

Q. Now your premises contemplated the fall of an hour's rain?

A. One inch; yes, sir.

Q. What you had in mind was——

A. The maximum fall of one inch.

Q. The maximum fall of one inch in an hour?

A. Yes.

Q. Have you heard any evidence in this case saying there ever was such a fall of rain down there?

A. No, sir; that is customary, to take an inch fall.

Q. Haven't you often known that as much as an inch of rain will fall in twenty minutes in a heavy shower?

A. I have heard of it, but I never saw it.

Q. You never saw it fall an inch an hour, did you? You have only heard of it?

A. I think it is very rare in a minute.

Q. That is your opinion; you can't controvert it, can you?

A. No.

Q. Have you investigated the matter?

A. I have never made any actual experiments. I have looked up the statistics. An inch rainfall in an hour is taken as a maximum.

Q. An ordinary fall of rain?

A. It is not an ordinary fall of rain, it is an unusual fall of rain.

The Court: It is the maximum fall.

Q. It is the maximum fall for an ordinary rain, isn't it, an hour?

A. Well, I don't know what you mean.

Q. Well, I can't explain to you any other way.

The Court: Well, he says it is not an ordinary rain that produces an inch in a hour, it is an extraordinary rain.

Q. You got that from some statistics that you have looked at?

A. Yes.

Q. Did your satistics tell you anything about any unusual falls of rain to that extent in a shorter period?

A. Yes, sir; the statistics said out West it has been known to fall eight inches in an hour.,

Q. Out West, yes, in cloudbursts. You haven't any statistics or haven't any knowledge of any heavy showers like they have in the summertime where there has been the precipitation of as much as one inch in twenty minutes?

A. No, sir.

Q. You haven't?

A. No, sir.

Mr. Carton: If the Court please, in view of Mr. Allen's statement now that his premises were not correct, basing an assumption that does not seem to be true on the area flowing through this pipe, I ask that his testimony be stricken out.

The Court: Yes, I think, Mr. Kremer, in view of the fact that he was basing it upon an assumption that all of the area in question drained through this particular pipe, a forty-eight inch pipe, or through that sluiceway, and there is no testimony in the case as to whether there is or

is not any other system of draining the six hundred acres, that it has very little value in the case.

Mr. Kremer: I don't think the fact has been controverted. Mr. Carton began on cross-examination whether he knows as a matter of fact that there is any other culvert or drain, or what it may be called. But there has been no proof of that fact and I expect to be able to show——

The Court: But you are seeking the affirmative effect of his statement that from such premises such a result follows. The assumption is, of course, that that is the only drain.

Mr. Kremer: And his observation is, and his diagnosis, that that was the fact.

Mr. Carton: Further may I suggest this before you conclude the matter? Mr. Kremer's own witness, Mr. Rugarber, has laid a foundation for my suggestion, that there is this pipe taking care of this other drainage.

Mr. Kremer: And another witness stated there were eight hundred acres taken care of.

The Court: Mr. Rugarber testified to another pipe?

Mr. Carton: To the installation of another pipe taking care of that water coming on down the railroad and down Main Street, instead of going into the west side of Main Street, going across and down below on Lake Avenue and emptying into a twelve-inch pipe.

Mr. Kremer: There has been testimony that eight or

nine hundred acres were in this watershed, brought out by Mr. Carton himself.

The Court: Really this testimony is merely cumulative anyway. There have been several witnesses who have already testified, including this witness, after a personal inspection of the present construction there, that the forty-eight inch pipe is insufficient at the time of flood to carry off the water. Now what particular value has this?

Mr. Kremer: Only as an additional effort on my part to get into my case everything I can to show the construction is not adequate.

The Court: I think it is cumulative and in view of the fact that it is not based on whether there is or is not any other pipe——

By the Court:

Q. Mr. Allen, assuming there was another drainage pipe there of eighteen inches, would that make any difference in your answer?

A. No, sir.

Q. It would still be the same?

A. Yes, sir.

Q. You would still say that the forty-eight inch pipe would be inadequate?

A. The forty-eight inch pipe and the eighteen inch pipe together would be inadequate.

The Court: What seems to be the objection, Mr. Carton?

By Mr. Carton:

Q. Assuming that this other pipe that I have spoken of as an eighteen-inch pipe were a thirty-inch pipe, would that make any difference?

A. No, sir.

Q. It would not?

A. It would still be inadequate.

By Mr. Kremer:

Q. Assuming it would rain for a half hour at one inch per hour, would the pipe there be adequate to take off the rainfall?

(Objected to.)

The Court: I think you had better let it be rather than complicate the situation. I am afraid the jury will be confused.

LEONARD HULIT, sworn for plaintiffs.

Direct examination by Mr. Kremer:

Q. Where do you reside, Mr. Hulit?

A. In Bradley Park, Neptune Township.

Q. Have you ever occupied any official position in Neptune Township?

A. I have.

Q. What position have you occupied?

A. I have been Committeeman continuously since 1905.

Q. Have you served on any committee with refer-

ence to the condition of Wesley Lake Brook?

A. I have; yes, sir.

Q. What committee have you served on?

A. Well, I have been appointed by the committee to wait on the different municipalities, Ocean Grove Association and Asbury Park, in relation to the conditions exisiting.

Q. Will you refer to the early part of 1916? Did you make any observation at that time of the cellar of John Doran on South Main Street?

A. I did.

Q. Will you state what your observations were?

A. Mr. Doran requested me to go down in the cellar and see the conditions that were there. I did so. I found at that time about two feet of water in the cellar. The water at that time had been higher, as shown by the water on the wall, the marks.

By the Court:

Q. When did you say that was?

A. It was the last week in February or the first week —might have been the first week in March, 1916. I found a rusty heater there. The water at that time was almost up to the mouth of the feed pipe of the heater.

By Mr. Kremer:

Q. What did you do then, if anything, in regard to the matter?

A. Well, at that time I waited on the Asbury Park officials in relation to getting relief. Mr. Bamman and I went over the ground. I don't recollect whether Mr. Bamman went down in the cellar or not, but we went over the ground and the matter was talked of that it was too

bad that people had to be subjected to such things. We were promised relief.

(Objected to.)

The Court: Strike that out.

Q. Just state what you did.

A. We made a review of the whole situation, went over the backyards and over to the railroad.

Q. Did you confer with any official of the Ocean Grove Association about it then?

A. Not at that time. I did before that.

Q. When did you confer with him?

A. I think about two years before that, with Mr. E. N. Cole, who was then supervising manager of the association.

Q. And with any one else?

A. Later on he requested me to meet with Mr. Preston, which I did.

Q. When did you meet with Mr. Preston?

A. Well, it might have been two months after that.

Q. What year do you think this was?

A. I think it was in 1914. I had no way of establishing it exactly, but about that time.

Q. And you had a conference with Mr. Preston?

A. Yes, sir.

Q. What was the purpose of that conference?

A. Well, Mr. Preston acknowledged——

(Objected to.)

The Court: On the question of the complaint made to the association, it does not appear who Mr. Preston was with respect to the association.

Mr. Carton: No question about Mr. Preston being connected with the association. These mere matter of the evidence of the compalint I am not objecting to, but the statement. This witness has no interest in this suit, is not a party to it.

The Court: Statement of what?

Mr. Carton: Statement of declaration made by Mr. Preston to this witness, in the absence of any parties in interest or anything of the kind.

The Court: It seems to me that the question is perfectly competent. It goes to show notice to the Ocean Grove Association.

Mr. Carton: No objection to it as far as that is concerned.

The Court: I was thinking of it with respect to notice to the association. I think they are entitled to have that testimony.

Mr. Carton: He has stated that he gave notice to them; now he is going to tell what they said, and that I object to.

By the Court:

Q. As a result of your conversation with Mr. Preston was anything done by the association, Mr. Hulit?

A. I cannot say that there was.

By Mr. Kremer:

Q. Do you know whether there was or not?

A. Not that I ever saw at the time, but it was just following this conversation that this straightaway pipe was put in, this straightaway pipe that has been under discussion was laid.

Q. Have you at any time observed the spillway at the ocean end of Wesley Lake?

A. Only casually.

Q. Only casually?

A. Casually, yes.

Q. Did you ever see it any time in a flood or storm?

A. I have.

Q. Has the gate been open or closed?

A. I never saw it when it was opened.

Q. And you have observed it in times of storm?

A. Yes, sir.

Q. When?

A. Well, during the last five years particularly. These universal complaints were coming in and we made observations from time to time as best we could.

Q. How many times can you testify that you have seen the gates closed in times of rainstorms?

A. It was a very difficult matter to find out where that gate was. I never knew. But I never saw any gate raised above level tide that would look as if the gate was up.

Q. Are you speaking of the new gate?

A. I am speaking of the old condition before.

Q. The old condition?

A. Yes, the old condition before. Now since this new one was put in I have not been down there but twice.

Q. In storms?

A. Yes, once just after a severe storm.

Q. Was the gate open then?

A. I couldn't see any indication of it.

Q. Was it night or day?

A. It was daytime.

Q. How long after the storm was it?
A. Possibly ten or twelve hours.
Q. Ten or twelve hours?
A. Yes, sir.
Q. Do you know what is the cause of the backing up of the water in the cellars of the plaintiffs in this action?
A. I have a very clear idea.

(Objected to.)

The Court: If he knows he may state. Why do you object?

Mr. Carton: Now if he puts him on as an expert he may ask his opinion as an expert, but when he asks what it is I object to this being asked of this witness, with his qualifications to date.

The Court: As I suggested to you yesterday, if he actually knows, not based upon technical knowledge at all. If I go and look at it and know and can say what it is I am competent to tell you what it is.

Mr. Carton: If there is any brick wall or anything that caused him to know it we would be glad to have it.

The Court: Whether it involves technical knowledge or not—it must necessarily involve technical knowledge—the question is do you know the cause of the backing up of the water. He might have discovered some brick wall put up there or something of that sort. Now that is a mere question of fact.

Mr. Carton: Now, after all, your Honor, it seems to me it resolves itself down to the opinion of an expert.

The Court: No, I shall see whether it does or not.

By the Court:

Q. Do you know the cause of the backing of the water in the cellars?

A. I have a very clear idea of it.

Q. What is it?

A. An inadequate outlet.

Q. You have seen it, have you?

A. Yes.

By Mr. Kremer:

Q. What were you referring to when you said an inadequate outlet?

A. Why, the extreme ocean end has never been properly attended to, in our judgment, or people that have been down there to observe the water, the precautions taken to let the water go when it began flooding.

By the Court:

Q. In your opinion, or at least not in your opinion, but in your observation, it is a mere question of opening the gates at the ocean end of Wesley Lake?

A. At the extreme outlet; yes, sir; at the ocean end.

Cross-examination.

By Mr. Carton:

Q. Even now that is your opinion as township committeeman, that that is the cause of all this trouble?

A. I think in these floods it is the principal trouble.

Q. Is that all the trouble?

A. I don't think so.

Q. What is the cause of it?

A. The cause of it is the straightaway up there is not sufficiently large to carry away the water that comes through Main Street.

Q. Anything else?

A. Well, just at this moment it is a very flat flow of water all the way down that can be relieved.

Q. What flat flow of water, from where to where?

A. I am taking from Main Street to where the water runs through, and then just beyond the boulevard, down towards the outlet, the channel is very level and there is not room there for a quick flow of water.

By Mr. Kremer:

Q. You mean there is no pitch to it?

A. There is no pitch to it.

By Mr. Carton:

Q. Well, the brook that ran through there before was very flat too, wasn't it? You wouldn't change the course, would you?

A. I am not talking about changing the course, I mean changing the level of it.

Q. Nature fixed that stream, didn't it?

A. Yes, I think so. It has been interfered with some by the acts of man, I think.

Q. Wesley Lake Brook has always been an inactive, slow-going stream, has it not?

A. No, sir; not as much so as now.

Q. When do you say it became less active?

A. Well, at the time when this new construction was put in it became notably so.

Q. When did you notice it then?

A. My attention has been called more particularly to the damaged condition of these properties in Main Street.

Q. And because your attention was called to the fact that these properties had been damaged you concluded that the lake was less active, the stream, is that it?

A. Yes, I think justly so.

Q. Now the principal part of the trouble is this flume at the foot of the lake?

A. I think so.

Q. And that is because they didn't open it quickly enough; is that the idea?

A. That is my judgment. When you open that up isn't that presumptive? You ask me to presume.

Q. No, you are criticising what is being done. How would you open it?

A. As soon as I noticed that the streams were beginning to enlarge and flood rapidly, I would open the gates and let the water go, providing a common level at all times.

Q. Don't you know that the spillway that is fixed there now controls the level of the lake and it is the same level as it has always been, only a little lower?

A. No, I don't know.

Q. Doesn't the water run right over that when it is raised to a certain height?

A. I presume it would. I have never seen it run over.

Q. What are the times that you refer to when the gates have not been opened and you saw the water run over?

A. You are talking about ordinary conditions. I am talking about flooded conditions.

Q. You have seen it running at flooded conditions?

A. Yes, one occasion.

Q. That is what we are talking about here, floods.

A. No, ordinary levels.

Q. You mean to say that the level of this spillway is all wrong under ordinary conditions?

A. I would not pass on that, because I am not expert enough to pass on it.

Q. You don't say it is not right, do you?

A. My judgment is it should be lower; that is my judgment in the matter.

Q. You think lower?

A. Yes.

Q. There wouldn't be any lake there at all if it was lower, would there?

A. Oh, yes.

Q. When are these occasions that you have referred to that you didn't see the gates sticking up in the air and concluded they were not open?

A. At all occasions I have been there.

Q. When was that?

A. Three or four visits there in the last five or six years before this spillway was built and since. I never knew where these gates were.

Q. Didn't they open oceanward?

A. I couldn't tell you.

Q. And because you didn't see them sticking up you concluded they didn't exist?

A. Yes.

Q. The fact is you never went around and examined the condition at all, did you?

A. Oh, yes, I did. I told you so.

Q. Where does Neptune Township divert the water that comes down from Neptune Township, Corlies Avenue, to the railroad?

A. Which side of Corlies Avenue?

Q. Well, any side, the north side.

A. Well, the north side is diverted and goes down into Wesley Lake.

Q. Then you have something to do with the filling up of this brook, do you?

A. Maybe so.

Q. You haven't been sued, have you?

A. You mean our citizens?

Q. The inhabitants of the Township of Neptune.

A. No.

Q. What did you do towards filling up this lake?

A. This year we cleaned it out.

Q. Cleaned out what?

A. Cleaned out these brooks going down to this culvert that goes into the lake.

Q. Well, just give us the course of the culverts and brooks that run into this lake.

A. There are a good many.

Q. The ones nearest the railroad.

A. The one nearest the railroad runs down Prospect Avenue to Wesley Lake Brook, running over that.

Q. Is that an open stream?

A. Yes, sir.

Q. How big a stream?

A. Possibly an average of four feet in width.

Q. What depth of water usually runs through that?

A. Well, if the ice plant is running there it contributes largely to the flow of that. There will be seven or eight inches. I have seen as high as ten inches.

Q. The ice plant is located in Neptune Township, isn't it?

A. Yes.

Q. It is running constantly in the summertime, isn't it?

A. Generally.

Q. And there is a constant flow of water running from the ice plant into this brook, isn't there?

A. Yes, sir.

Q. That runs into Wesley Lake Brook at Prospect

Avenue west of the railroad?

A. Yes.

Q. And there is also a culvert coming down Corlies Avenue down through Story's blacksmith shop into this brook, isn't there?

A. Yes.

Q. What is the size of that?

A. That is a twelve-inch pipe, I think.

Q. Where does that drain from?

A. Drains along Corlies Avenue.

Q. How far back?

A. I can't say how far back. It was put in by the freeholders. I don't know just how far its does go.

Q. It is a twelve-inch culvert, isn't it?

A. I think so. I may be wrong, but I think so.

Q. And it comes down Corlies Avenue and then over the railroad?

A. One block.

Q. And then turns in that and runs down and gets into this brook?

A. Yes, sir.

Q. And then of course all the territory back in the township, that drains in this brook as well?

A. You mean in the Wesley Lake Brook proper?

Q. Yes.

A. Oh, yes.

Q. Its source is Neptune Township and Asbury Park, in fact?

A. I think the direct source of it is back in Asbury Park proper, as the territory is divided now, the real source.

Q. I don't understand you.

A. I think the real source of Wesley Lake Brook is in Asbury Park proper, the real source of it.

Q. Do you know where its real source is?

A. It is very difficult to define, Mr. Carton, because it

runs across and drains a considerable part of West Asbury Park.

Q. And Neptune Township west of that again?

A. Oh, yes.

Q. That is really where its source is, in Neptune Township west of Asbury Park?

A. I said that I believe the true source of Wesley Lake Brook is in Asbury Park.

Q. Tell us what you have been doing in Neptune Township to help this condition there.

A. Kept these brooks cleaned out as well as we might.

Q. That is, the brooks running down to Wesley Lake Brook?

A. Yes.

Q. You make every effort to get the water down to this brook; what do you do to clean the brook out?

A. We have our supervisor of roads who goes there and cleans all the debris out of these brooks.

Q. What do you do in times of heavy storm when it carries brush and everything down?

A. Look it over. He has instructions to go there and clean it out.

Q. You don't know that he does it?

A. I do.

Q. He has instructions to go there and clean it out this year?

A. No, his instructions are to go there and clean it out when he finds it obstructed, no specified time.

Q. You say these complaints are coming in all the time. Who complained to you of trouble?

A. Mr. Doran has complained to me repeatedly and Woehrer has complained. I don't know—different ones along there.

Q. How long did you have complaints to you, the township?

A. We had them for a period of five years most pronouncedly.

Q. I show you a picture, D1, showing the brook west of Prospect Avenue, dividing Asbury Park and Neptune Township. Do you recognize that stream there, a pretty dirty looking brook?

A. That is looking from the rear?

Q. Looking from Prospect Avenue, yes.

A. And from Prospect Avenue west?

Q. Yes.

A. Oh, yes.

Q. This is the brook dividing Asbury Park and Neptune Township?

A. Yes.

Q. Apparently full of brush in there, isn't it?

A. Quite some in there, yes.

Q. This was said to have been taken on the 27th of June. It doesn't bear any indication of having been cleaned then?

A. It has not been cleaned this year, because this is part of Asbury Park debris.

Q. You distinguish which debris comes from Asbury Park and which from Neptune Township, I suppose?

A. No, I say it is part of it.

Q. Well, the fact is, over the line of this brook in Neptune Township west of the railroad there is trash all the way back kept by the property owners, isn't there, anywhere near the railroad company?

A. Yes, sir.

Q. Just lined with trash, a dumping ground on each side?

A. There is a whole lot of stuff in there at times.

Q. It is now, isn't it?

A. I haven't been there for a few days.

Q. Don't you know what the condition is east of the railroad now?

A. I couldn't say. I haven't been there.

Q. Used for a dumping ground, isn't it?

A. I couldn't say, but there is considerable stuff there some of the time.

Q. Look at this picture and say what you think of it. Look at photograph D4, which shows both sides of the brook west of the railroad. What does that look like as far as trash is concerned and dumping ground?

A. This is a view of the dumping ground of the railroad. They are filling that in.

Q. Both in Neptune Township and Asbury Park?

A. Yes, this flat is being filled in, this piece of meadow.

Q. With what?

A. Broken brick and I think concrete walks.

Q. Everything?

A. A great deal of stuff. It is being filled in to build on.

Q. Have you taken this matter up with Asbury Park in recent years?

A. In recent years?

Q. Yes.

A. Oh, yes.

Q. With whom?

A. Mr. Bamman.

Q. You haven't spoken to Mr. Bamman about it in several years, have you?

A. Oh, yes, Mr. Bamman and I were over the ground a year ago last March.

Q. When have you last taken it up with the Ocean Grove Association representative?

A. Not since the time I told you of, with Mr. Cole.

Q. He has been dead about two years, hasn't he?

A. I think so. It was just before his death.

Re-direct examination.

By Mr. Kremer:

Q. Now, Mr. Hulit, referring to this picture, will you state how far the canal or brook out there at that point is from the plaintiffs' houses?

A. This brook is looking west, as I take it. This is from Prospect Avenue looking west, as I observe it. The beginning of this would be around about two hundred feet.

Q. From the plaintiffs' houses?

A. Yes, sir.

Q. Now you say that west of the railroad track there is considerable debris and wood in the brook?

A. Yes.

Q. Wouldn't that retard the flow of the water?

A. Certainly would.

Q. Wouldn't that cause less water to come down to the point where the plaintiffs' houses are?

A. Naturally. It couldn't avoid it.

Q. When you say that the object of the straightaway culvert should be changed, are you referring to conditions on the easterly side of Main Street or west?

A. On the westerly side.

Q. On the westerly side you say a change should be made?

A. That is what I have had recommended to me.

Q. Do you know whether or not the cellars of the plaintiffs were flooded before 1911?

A. I couldn't say they were. I never had my attention brought to it.

Q. Have they ever complained to you before 1911?

A. I don't think they have.

Q. Have they complained to you since?

A. Repeatedly.

PETER F. DODD, sworn for plaintiff.

Direct examination by Mr. Kremer:

Q. Mr. Dodd, where do you live?
A. Neptune Township.
Q. What business are you engaged in at present?
A. Real estate at the present time.
Q. Are you a member of the Neptune Township Committee?
A. No, sir.
Q. In an official capacity have you ever at any time had anything to do with the condition of Wesley Lake Brook?
A. That depends upon the year.
Q. At any time, I said.
A. At any time? Yes, I did at two different periods of time.
Q. Since 1911?
A. Not since 1911, no. They were both prior to that time.
Q. Do you know anything of the condition of Wesley Lake Brook and the construction of the culvert and straightaway under Main Street?
A. Pretty familiar with it; yes, sir.
Q. Have you observed the connection of the culvert and the straightaway?
A. Well, I don't know just exactly what you mean. The straightaway, you mean the pipe that was put in?
Q. By the straightaway I mean the pipe that leads from the easterly side of Main Street to Wesley Lake. Have you observed the brook, the culvert under Main Street?
A. Yes, sir.
Q. Do you know the reason why the water of Wesley Lake backs up into the plaintiffs' cellars?

Mr. Carton: The same objection.

The Court: If he knows as the result of personal observation he may state.

A. I should say——

By the Court:

Q. No, have you seen it?
A. Yes, seen it.
Q. Do you know what caused it to back up?
A. I think I do, if I may say that.
Q. Well, do you know?
A. Well, I will say yes.

By Mr. Carton:

Q. You will say yes because you think you do?
A. Yes.
Mr. Carton: I object to it.
A. I watched the construction of it and I watched it afterwards. I have got my opinion.

By the Court:

Q. You have watched it in operation during a flood?
A. Yes, sir.
Q. You may state what you saw.
A. I saw the water back up from the culvert when the culvert itself was not entirely full, at least the culvert, if you call it that, under Main Street was not entirely full.
Q. Is this since 1911?
A. Yes, sir.
Q. Proceed.

By Mr. Kremer:

Q. Go on, Judge.

A. I don't just remember the date that it took place, but I imagine it is somewheres about—well, several months ago. I wouldn't want to say exactly what time it was.

Q. You say the culvert was not entirely full?

A. Was not entirely full.

Q. And where were you standing when you made this observation?

A. Well, I was standing on one of the lakes or streams, whatever it might be called, before it reached the lake, and then back across the railroad property and then down through to the culvert under the main street.

Q. You were standing there, a position at which you could look into the culvert as it went into Main Street?

A. Yes, sir.

Q. And it was not full?

A. Not entirely full.

Q. Was the water running on into the straightaway or stopping?

A. I wasn't able to tell whether it was stopped or running.

Q. You say it backed up into the culvert?

A. The culvert wasn't entirely full to the roof.

Q. Could you see the straightaway from where you stood?

A. No, sir; I couldn't. It would be impossible to see it, because it is below that.

Q. Was the water passing on rapidly into the straightaway or was it jammed?

A. Bubbling.

Q. Bubbling?

A. Bubbling up.

Q. Are you a member of the sewer committee of Neptune Township?

A. Yes, sir.

Q. Has the backing up of the water of Wesley Lake into the brook had any effect on the sewers of Neptune Township?

A. Several hundred dollars.

Mr. Carton: I ask that the answer should be yes or no. I move that the answer be stricken out.

The Court: Yes, strike it out.

Q. Has it had any effect on those sewers?

A. Yes.

Q. What effect, if any, has it had?

(Objected to.)

The Court: How is it material?

Mr. Kremer: I simply wish to show as a matter of relevancy that the water backing up has caused damage in Neptune Township.

The Court: In other words, you attempt to show by this witness that the water does back up?

Mr. Kremer: That the water does back up.

The Court: And as one evidence of the fact that it does is the effect upon the sewer system?

Mr. Kremer: Yes.

The Court: You may state what effect it has had upon the sewer system.

Mr. Carton: If the Court please, I wish to enter an objection to it, because it seems to me this can have no relevancy to the suit of the plaintiffs.

The Court: I think it has some slight bearing upon the general claim of the plaintiffs that this construction does result in backing up the water upon their system.

A. What was the question?

Q. What effect has the backing up of the water had upon your sewers?

The Court: If any?

A. Run into our sewer, filled our septic tank, forced the solids over the baffle wall of our septic tank, and the solids run down the outlet pipe to the sea.

Q. When did this happen?

A. I couldn't say positive as to the date, but I think it was in March, I am not positive.

Q. Of this year?

A. Of this year.

Q. Of the present year?

A. I think it was March of this year.

Q. How far is the sewer, the septic tank which you mentioned, from the Main Street culvert?

A. Well, that would depend—well, the manhole near it, that would be on Prospect Avenue, about one hundred feet from the stream of Wesley Lake.

Q. One hundred feet from it?

A. About one hundred feet, I think it is.

Q. You mean the stream of Wesley Lake Brook, don't you?

A. Yes, sir.
Q. You say you are in the real estate business?
A. Yes, sir.
Q. Are you familiar with rental values along South Main Street where the plaintiffs live?
A. Well, somewhat; not an expert exactly.
Q. What do you say the butcher shop occupied by John Doran is worth per month with a cellar?

Mr. Carton: I object. I do not see any basis for that question.

Mr. Kremer: I think it is perfectly relevant to show his opinion as to real estate values in that neighborhood.

The Court: Why don't you ask what cellars are worth in that neighborhood per year?

Q. What is a cellar worth in that neighborhood per year?

The Court: If you know.

Mr. Carton: I object to that question. Mr. Doran's evidence of damage was not that he had to rent a new cellar, but that he was deprived of the use of the cellar which he had gotten along without. And it seems to me it can have no potential force what the rental values of cellars are on South Main Street.

The Court: It might have some application to the Woehrer case.

The Court: I think it applies equally to Woehrer's case, because they have got along without it.

(Mr. Kremer replies.)

The Court: I am going to allow him to answer it simply as some slight basis for an estimate. Otherwise I shall charge the jury upon this question of damages and direct the jury to distinguish between the pertinent testimony and that which is not conclusive.

(Objection noted for defendants as ground of appeal.)

Q. What is the value of a cellar along Main Street—was that the question that your Honor directed?

The Court: For renting purposes.

Mr. Carton: I don't want to take too much time, but along Main Street is entirely unimportant. What is the value of his cellar in this particular place?

Q. What is the value of Doran's cellar for rental?

A. Well, I don't know that I could answer that unless it was with the store. If you ask me with the store I could give you an answer, but without the store I cannot give you the answer.

Q. Can you give us an answer with the store?

A. Yes.

Q. What is that?

A. I can say this: that the store itself would possibly rent for from $300 to $350; with the cellar from $450 to $500.

Q. Then the cellar is a difference of $100 to $150?

A. I should so think, but I do not think it could be rented separately very easy.

By Mr. Kremer:

Q. What would you say as to the value of the Woehrer store with or without a cellar?

A. Well, Woehrer's store, for anything else except what it is practically used for now, would be almost useless for any business.

Q. Well, it is a shop of a certain capacity, isn't it, just as big as the next shop along the street?

A. Well, it is built in such a way that I couldn't answer that intelligently.

Q What can you say as to the value of Weidman's store with and without a cellar?

A. I don't know that I can answer that, from the mere fact that I do not think they have an outside entrance to their cellar. That makes a vast difference. I am not positive whether they have got one or not.

The Court: He says he can't answer it.

Cross-examination.

By Mr. Carton:

Q. Have you been into and examined the Doran and Weidman and Woehrer cellars?

A. No, sir.

Q. Never?

A. No, sir.

Q. Then you are making a mere guess as to what you think the difference in rental value is with and without a cellar, aren't you?

A. It has nothing to do without examining the cellar.

Q. Well, do you think it would be necessary to examine a cellar to know what it was, to be in a position to say what it was worth for renting purposes?

A. If you mean that I have seen the cellar, yes; but

I have not been in to examine it for this damage.

Q. You know where the Woehrer cellar is, don't you?

A. Yes.

Q. You know all these places are low along there?

A. No, sir; I don't.

Q. Which are the high ones?

A. These places stand on the ridge of a hill that comes out of Ocean Grove.

By the Court:

Q. What place?

A. This place of Woehrer's, running down to the lake.

Q. Doran's?

A. Yes, sir.

By Mr. Carton:

Q. On a hill?

A. Yes, on a knoll. These are on the west side of Main Street. I know where they are, exactly, and it is on a knoll where you come down and out of Ocean Grove gate, over around Main Street and into West Asbury Park, and that knoll came across the street.

Q. Then they are higher than they are further up Asbury Park and further down Main Street; that is, at this particular point?

A. Yes, sir.

Q. They are?

A. Yes, sir.

Q. They are higher than Treat's store?

A. Yes, comparatively.

Q. And higher than where your office is or down where the township offices are?

A. Oh, no, it don't have to be that.

Q. You say now, as a real estate man and an official of Neptune Township, that these lots are located on a knoll?

A. I do, higher than those which adjoin it on the lake side.

Q. Either way?

A. They are higher than the places either north or south of them on Main Street.

The Court: Higher than the McCabe property, for example?

A. Yes, higher than the McCabe property and two and a half feet higher than Mr. Cottrell's on Lake Avenue.

By Mr. Carton:

Q. Well, they are on a knoll at any rate. We will leave it that way. You are one of the Sewer Commissioners of Neptune Township?

A. Yes, sir.

Q. Have been for a number of years, haven't you?

A. Ever since we had one.

Q. Well, that has been a great number of years, hasn't it?

A. Twelve.

Q. And do any of the drains from Neptune Township to your knowledge culvert into this Wesley Lake Brook west of Main Street?

A. Any of what?

Q. Any of the drains from the surface water from Neptune Township; do you know any particular drain carrying surface water from Neptune Township into Wesley Lake Brook?

A. Oh, nearly all Corlies Avenue empties into that

lake. It is the only drain that there is.

Q. I ask if you know of any particular drain or culvert or pipe carrying water down there.

A. Only that which goes there under the street.

Q. Where are they?

A. One on Corlies Avenue and Story's Alley, as we call it.

Q. A pipe goes from Corlies Avenue?

A. Yes, sir; goes across and runs down by Story's shop and down through Charles Lewis' lumber yard, around by his mill into the ditch that runs into Wesley Lake Brook.

Q. What is the diameter of that pipe?

A. Twelve inches.

Q. Do you know how far back that drains, how far west?

A. Yes, Atkins Avenue, one block.

Q. Where is your septic tank that you have referred to?

A. Well, between what would be 11th and 12th Avenue on the railroad.

Q. 11th and 12th?

A. On the railroad.

Q. Where is that with reference to the brook, how many blocks?

A. Well, that is a considerable distance from Wesley Lake.

Q. I don't know where it is, Judge, and the jury don't. Tell us.

A. It is in front of Fletcher Lake.

Q. Oh, that is at the head of Fletcher Lake?

A. Fletcher Lake.

Q. That is well on to half a mile south of the brook, isn't it?

A. It wouldn't be half a mile, possibly.

Q. Well, it is south of Green & Hegaman's lumber yard and the freight depot?

A. Well, no; north of the freight depot.

Q. What was the action caused to this bank because of the overflow of this brook?

A. It was filled up with water in the overflow of Wesley Lake, overflowed and ran in Prospect Avenue.

Q. How did you come to that conclusion?

A. How did I come to that conclusion? Because we went there and seen it. I approached it and got soaking wet to the hide.

Q. Saw the brook?

A. Yes, when it overflowed.

Q. And because Wesley Lake Brook was overflowing you assume it overflowed the tank?

By the Court:

Q. You haven't been talking of Wesley Lake Brook, but of the brook overflowing.

A. It is the only tributary to the lake along there and it certainly backed up and went over into our sewer.

By Mr. Carton:

Q. And because Wesley Lake Brook overflowed you said it overflowed your septic tank?

A. No, I didn't say that. It was overflowing our manholes which went to the septic tank.

Q. Where are the manholes?

A. The manholes are on the corner of Heck and Prospect.

Q. And that is quite near the brook?

A. That is near the brook, I said, one hundred or one hundred and fifty feet.

Q. How high is it above the level of the brook, if

you know, the top of the manhole?

A. Well, I don't know as I could say. The top of the manhole possibly was three feet and a half above the bed of the brook.

Q. Above the bed of the brook?

A. Yes.

Q. Is the top of the manhole above the ground or above the street or level with the street?

A. Level with the street.

Q. And is it in the street?

A. In the street.

Q. In Prospect Avenue?

A. Yes, sir.

Q. Now when did you see that overflowing, that manhole?

A. My best remembrance was that it was in March.

Q. Just past?

A. Yes.

Q. What was causing it to overflow?

A. What was causing it to overflow?

Q. Yes, in your judgment.

A. My judgment was the contraption they had in the east side of that culvert that went under Main Street, whatever they may call it; I don't know what they call it.

Q. You heard some one complain of that and you assumed that was the trouble?

A. No, I didn't hear the complaint.

Q. The whole place was overflowed around the railroad?

A. It was at that time; yes, sir.

Q. You have seen that flooded over there for twenty years or more, haven't you, Judge?

A. No, sir.

Q. The meadows back of the railroad there?

A. At times, yes.

Q. Long before 1911 you saw that even, didn't you?

Mr. Kremer: I object. It seems to me that what went on west of the railroad track is not pertinent in this matter.

The Court: Yes, I think it is very pertinent, in view of his declaration that the manholes were flooded.

Q. West of the railroad is in the same neighborhood, isn't it?

A. Oh, I wouldn't call it the same neighborhood.

(Objection withdrawn.)

Q. You have seen that brook flooded over there for twenty years, haven't you, Judge, in time of storms?

A. No, not for twenty years.

Q. Well, how long back have you seen it flooded?

A. Well, if you will give me time and if possibly I can think, I think it was in 1898.

Q. 1908 or 1898?

A. 1898.

Q. You have seen it flooded as far back as that?

A. That was, I think, the first time I ever seen it flooded.

Q. And from that time on to the present you have seen it flooded on lots of occasions, haven't you?

A. Yes, I possibly have seen it several different times.

Q. You have seen them use boats out there?

A. Yes, I have had to take people things in boats.

By the Court:

Q. Prior to 1911?

A. Prior to 1911; yes, sir.

By Mr. Carton:

Q. And that would be both on the east side and west side of Prospect Avenue would be flooded; assuming that that is Prospect Avenue that runs parallel with the railroad, one block west?

A. Well, yes, these lateral streams have been flooded out on the west side.

Q. It has been your experience that in later years it has not filled up there as much as it did former years, has it, the west side there?

A. It didn't fill up prior to 1911 but very little.

Q. All this flooding that you have seen has been since 1911; is that so?

A. Not all of it, I say back as far as 1898.

Q. You have seen it back as far as that?

A. Yes.

Q. From that time up to the present time?

A. No, you can't say off and on, because at that time that was a corn-field and was growing crops all through there, that part of the land.

Q. Take ten years ago; it flooded over ten years ago, didn't it, so they used boats out there?

A. It is more than that.

Q. Down as late as ten years ago didn't it flood all over there?

A. I am saying it overflowed there in March of this year.

Q. But I mean ten years ago it did the same thing, didn't it?

A. Well, I won't say that it did ten years ago.

Q. But it did in 1898?

A. Yes, sir.

Q. Was that the only one time that you remember?

A. That was the only one time I ever remember it to be flooded as it was then.

Q. That is not what I asked you at all. I asked you if you haven't known that place to flood on both sides of Prospect Avenue for twenty or thirty years last past; the brook to overflow its banks and those lots and fields to be overflowed?

A. Yes, time and again.

Q. Yes, time and again; you have seen people use boats in there, haven't you?

A. Only that once.

Q. That is the only time you ever used boats?

A. Yes, that is the only time they ever was used. Overflowing the banks and overflowing culverts is a different thing.

Re-direct examination.

By Mr. Kremer:

Q. Now that you have referred to the place that you have seen floods as far back as 1898, you mean the territory west of the railroad tracks; you are not referring to the territory between the railroad tracks and Main Street, where the plaintiffs' houses are, are you?

A. No, the plaintiffs' houses at that time were not flooded.

Q. But I mean have you seen floods and boats running around where the plaintiffs' houses are between the railroad track and Main Street?

A. Never was so. I shouldn't say so. It wasn't possible.

Re-cross examination.

By Mr. Carton:

Q. Is it your idea, Judge, that in 1898 and since that,

that this was all flooded, the brook on both sides and west of the track, and there wasn't any flooding on the east side of the track near Doran's property?

A. No, sir; there was not.

Q. There was not?

A. No, sir; the lake itself was there at that time.

Q. What lake itself?

A. Wesley Lake. Wesley Lake ran under Main Street in those days to the railroad.

By the Court:

Q. You mean 1898?

A. Yes .

By Mr. Carton:

Q. Well, it runs under there today?

A. No, it was the lake in there. It ran in back of Doran's house, clean up to where Ed Schlossbach's house is. There was a building in there and boats.

By the Court:

Q. That was eighteen years ago?

A. I may be mistaken as to the exact date of that.

Q. Eighteen or nineteen years ago?

By Mr. Carton:

Q. Well, that condition existed at that time, did it not?

A. Well, it may have been filled in from time to time. I don't remember the exact date that they commenced to fill in.

Q. You remember the time when east of the railroad,

between there and Main Street, that that was a lake around there; they built boats in there?

A. No all of it.

Q. What portion of it was not covered by water?

A. The stream that went through under the main street went back beyond the line of the buildings. Now there were banks there that didn't fill up, and circled in around there, the railroad track, where the boat building house was.

Q. Back of Treat's and Doran's there?

A. Not back of Treat's at all.

Q. Back where then?

A. But back of Doran's place and back of that stream that went up alonog the railroad track. That didn't affect the houses along the street.

Q. Back towards Applegate's stable?

A. Yes, further up than that.

Q. Further up than that?

A. Yes; that is, there was a slough that ran out.

Q. You are familiar with the map? This is Main Street, this is the culvert under Main Street, this is Doran's, Treat's and Woolley's and Thompson's and Applegate's. There is the railroad. Indicate on that map which portion was covered with water some years ago, twenty years ago or whenever it was, as you recall it at this time. This is the main street, this is the brook, this is Treat's, this is Doran's, that is north, this is south. Look at the names, Applegate and Treat, then you will probably get an idea better of the area.

A. What do you want me to say?

Q. Just indicate with a circle, lead pencil or whatever you will, where it was covered by water years ago.

A. There was a slough right over here. Can I point it?

Q. Go up towards the railroad, whatever course it took, all around it.

(Witness marks on map.)

Q. It didn't extend out to the railroad? This is the railroad, this is the culvert under the railroad. If you just keep in mind the situation from your own recollection, this is Main Street, this is Doran's, this is the railroad, this is Treat's.

(Witness marks on map.)

Q. And did it go north on Treat's side, do you know? Is this where they had the boats, where the boats were built in there?

A. Back in there.

Q. Will you put your finger in there where you have marked your lines?

A. I am not going to put these lines as correct.

Q. Of course not, Judge. It is your idea that years ago—about how long ago do you say that was that that was covered with water there, approximately?

A. What do you mean?

Q. How many years ago was it?

A. Since the old lake went in through there, you mean?

Q. Yes.

A. Well, it went through there in 1899 and 1890 and continued on up, went up a little off and on, but I don't remember just what year the boat house was torn out of there, but it seems to me it was along in there for twenty-five or twenty-six years.

Q. Twenty or twenty-five years ago?

A. I know I had trouble there keeping my boats from going down and going under the culvert into the lake.

Q. And they would go down and go through the culvert into the lake?

A. Yes.

Q. And where you mark the lines in lead pencil is about the territory that you recall was covered with water?

A. Yes. I ain't giving some of the exact dimensions of it in there, because I can't.

Re-direct examination.

By Mr. Kremer:

Q. Judge, you say that was twenty-five years ago?

A. Well, about in that neighborhood.

Q. At that time was the property on which the Doran and Woehrer houses are now built dry or was that under water also?

A. It was all dry along there. They were all on stilts.

Q. Dry land, though?

A. Mr. Carton said they were on stilts. They were on puncheons, because there were no lands bought there then; it was leased land.

Q. The land itself was dry?

A. Yes, where the buildings was.

By the Court:

Q. Why were those houses on stilts?

A. Because they were all on leased land, the whole estate. There was no buildings on owned land; the land was leased. The buildings were put on puncheons so they could be taken away. Most of them had been taken away.

Q. Was it because they couldn't dig cellars, too wet?

A. There wasn't any necessity of digging cellars. They put the puncheons up and put the buildings up and they had a cellar there already without digging any.

Q. That is, the enclosure around the puncheons made the cellar, is that it?

A. Yes, perfectly dry. They nailed boards on the outside of the puncheons and had good dry cellars under there.

By Mr. Kremer:

Q. Do you recall the condition of the brook in the place you have referred to in 1906 or 1907?

A. I couldn't tell the particular year. I never kept any particular account.

Q. Do you recall the construction of the Doran house?

A. Yes, sir.

Q. At the time the Doran house was built do you know whether or not the brook had its present boundaries or not?

A. No, it didn't, not quite.

Q. Were the boundaries those that you have indicated?

A. Well, the creek running in there was somewhat wider than it is at the present time.

Q. It was a little wider than it is now?

A. Yes, it had been filled in but not as much as it is today.

Q. But the land on which they built was perfectly dry, as it always had been previously?

A. Yes, always had been dry.

Re-cross examination.

By Mr. Carton:

Q. I omitted to ask you a question. You stated on your direct examination, as I recall, that at one time there

was this flooding and you went down to the culvert and there was a limited space there under the culvert that had not yet filled; is that so?

A. To the best of my recollection.

Q. How large an opening was there there then?

A. Oh, possibly six inches.

Q. And was the water then backing up on Doran's property and these other properties?

A. Well, I won't say it was then, because that was during the rainstorm, and it was already over.

Q. It was overflowed then?

A. It was overflowed then because I walked through to get over there on the west side.

Q. And was the water running in this culveret?

A. Well, there was plenty of water to go through there, but it was only possible—it wasn't running as it should run.

Q. Where was it bubbling, on the east end or on the west end of the culvert?

A. It was bubbling on the west end.

Q. Well, it hadn't gone through, hadn't filled it up, had it? There was capacity there yet for the water to go through?

A. The pipe?

Q. No, the culvert.

A. Only the culvert under the main street, I could see.

Q. That hadn't yet filled, had it?

A. That hadn't yet filled?

Q. Yes.

A. Well, no; I say about six inches. It was then over Prospect Avenue was what caused me to go over there in the rain.

Q. When was that?

A. I think that was in March, if I remember rightly.

Q. Just last year?

A. Yes. I first went up to the building that I was building and found some timbers floated half way down to Prospect Avenue and had to gather them up and then went down to see about the culvert.

Q. And the water was overflowing back as far as Prospect Avenue at the same time?

A. Oh, yes, clear up to the edge of the bank, all the way up to this five hundred feet and Atkins Avenue. Charlie Lewis' house was surrounded.

Q. Do you remember when Fees Brothers had their restaurant there in that location?

A. Yes.

Q. It was all water at that time then, wasn't it, in the backyard?

A. Well, it is in the back yards. The brook was up here in the day I speak of, when he built there. That was in my time.

Q. Who occupies the present site of the Fees Brothers restaurant?

A. Doran, I think, Weidman or Woolley. I don't remember which one it is.

Q. There was no water in the cellar then because they were up on stilts, up on puncheons?

A. Yes.

Q. And how high were those puncheons, do you know?

A. Well, they would run about, I should say—I don't know as I can particularly say as to what Fees' was, because I don't know that I ever saw back in his cellar.

Q. Well, any of those buildings that you saw back in that location upon puncheons.

A. Well, they ran anywhere from six to eight feet, possibly, the length of them; possibly might have been two feet in the ground.

Q. Well, from the top of the ground up to the bottom of the building how high were the puncheons?

The Court: Four to six feet, he said; two feet of the puncheons in the ground.

A. Possibly that. I couldn't say. There was fairly good head room in there.

Q. So people could walk under?

A. Yes; possibly in some places you might have to stoop a little.

Q. Now, Judge, remembering that circumstance again, do you still want your testimony to go that those buildings in that location were built on puncheons from four to six feet high while they were located on a knoll?

A. Positively; yes, sir.

By the Court:

Q. How many cellars are there along there, starting with Treat's grocery store, do you know?

A. I don't know that I know of any particular cellars along there except those which were on puncheons, excepting Doran's and Woehrer's.

Q. You think they are the only cellars, do you?

A. Well, that is the only ones that I know of that have built cellars, excepting those that are on the surface.

Q. On puncheons?

A. Those that are on puncheons. Matthews had a workshop on his puncheon. That was dry and always has been, never been anything else.

By Mr. Kremer:

Q. Doesn't Woolley have a cellar?

A. I never was in that building, I don't know what he has got.

Q. You say the former houses were put on puncheons

because the land was leased and they couldn't build cellars; is that the reason?

A. Yes, sir.

ABRAM J. PALMER, sworn for plaintiffs.

Direct examination by Mr. Kremer:

Q. Where do you reside, Mr. Palmer?

A. Ocean Grove.

Q. Are you a member of the Ocean Grove Camp Meeting Association?

A. Yes, sir.

Q. What position do you occupy in the association?

A. Secretary.

Q. And you are custodian of the minutes?

A. Yes, sir.

Q. Will you refer to the minutes of the association in your minute book at page 375 and read therefrom with reference to the agreement between the City of Asbury Park and Ocean Grove Association for the improvement of Wesley Lake, if there is such entry, and will you kindly state the page from which you read?

A. I have page 375. "The President suggested that a conference committee be appointed in regard to the bridge at the head of Wesley Lake from Asbury Park to Lawrence Avenue, in the Grove, and on motion the matter was referred to the Highway Committee to confer and report."

Q. Under what date is that?

A. October 21, 1909.

Q. Will you refer to the minutes at page 377 and read the entry therefrom with relation to the improvement and filling in of Wesley Lake?

A. "Dr. Olney, Sanitary Officer, presented his report, which he read. It treated more especially of the sewage disposal tank recently built and the condition of Wesley Lake. After discussion of the lake matter as presented by Dr. Olney, Dr. Morgan suggested and moved that a committee be appointed to confer with a like committee from Asbury Park to take the matter before the State Board of Health, which prevailed. The President appointed Mr. Preston, Mr. Olney and Mr. Stokes, of the committee."

Q. Under what date is that?

A. The same date, I take it, October 21, 1909.

Q. Will you refer to the minutes at page 396 and read the entry therefrom with reference to the improvement of Wesley Lake?

A. 396 I don't see anything.

Q. 398, I beg your pardon.

A. "The Association reconvened at 2.30. The President stated the present status of the boulevard."—I take it that comes in there—"At several meetings the matter had been considered and finally the original road across the head of the lake and down Main Street was decided upon in connection with Lawrence Avenue, which it was decided was necessary as a return route. We had the co-operation of Asbury Park, which has appropriated two thousand dollars as its share of the expenditure, which, with the fifty-seven hundred dollars appropriated by the State, will be available for the improvement. It is very desirable and will enhance the property values. We are asked to dedicate Lawrence Avenue to the public, also the land on the park in question for a highway boulevard. On motion of Dr. O'Hanlon, seconded by Mr. DeKay (?) the deed as prepared by our attorneys was ordered to be executed.

On motion of Dr. Olney, seconded by Dr. O'Hanlon, the sum of two thousand dollars was appropriated as our

share of the expense of construction of the culvert and catch-basin for the lake."

Q. Under what date was that, please?

A. October 20, 1910.

Mr. Kremer: That is all at this time. I wish to offer the books in evidence.

The Court: They may be received.

No cross-examination.

THOMAS J. PRESTON, sworn for plaintiffs.

Direct examination by Mr. Kremer:

Q. Where do you reside, Mr. Preston?

A. In South Orange, New Jersey.

Q. Are you a member of the Ocean Grove Association?

A. I am.

Q. How long have you been a member of the association?

A. Since 1892.

Q. Were you connected in any way in your official capacity with the improvement of Wesley Lake and the filling in of it?

A. What part of the filling it?

Q. The filling in of the westerly end of Wesley Lake.

A. I was not on that committee.

Q. Do you recall the proposition being up before the Ocean Grove Association of the construction of a detritus tank?

A. I was not present at that meeting.

Q. You were not present?

A. No.

Q. Was the matter placed before you, the matter of the construction of a detritus tank?

A. Not until the contract had been let and the work was in progress. I was away, absent, I think in Europe at that time.

Q. What business are you in?

A. Nothing; retired.

Q. What business were you formerly in?

A. Manufacturing linseed oil and chemicals.

Q. Were you in the dredging business?

A. Well, no. I have had a good deal of dredging done for me, but not in that business.

Q. Didn't you advocate and recommend the dredging of Wesley Lake?

A. I did.

Q. To whom did you advocate that?

A. To the members, some of the members of our association.

Q. Was that before the construction of the detritus tank?

A. I don't recall whether it was or not.

Q. Why was the lake not dredged?

A. We didn't have the money to spare for that purpose at that time.

Cross-examination.

By Mr. Carton:

Q. As a matter of fact, Mr. Preston, the lake is dredged or cleaned out every year, is it not, the bottom of the lake?

A. Some of the weeds that grow there are taken out

every year, but not the deposit.

Q. Are you familiar with the situation, whether or not the deposit is or is not taken out every year or two?

A. Yes, I am somewhat familiar.

Q. Do you know how long, for what length of time the association or Asbury Park has cleaned out from time to time the bottom of the lake?

A. It never has been cleaned out.

Q. It never has been cleaned out?

A. To my knowledge.

Q. The fact is that was being cleaned out this spring, wasn't it?

A. Not the bottom of it, only a little at the westerly end.

Q. That is what I am referring to, the westerly end, nearest Main Street.

A. Yes, that has been cleaned out.

Q. Cleaned out this spring?

A. I don't know about this spring, but it was last spring, has frequently been taken out.

Q. For years that has been taking place?

A. Yes.

Q. Before and since 1911?

A. Oh, yes.

Re-direct examination.

By Mr. Kremer:

Q. You say the bottom of the lake has never been thoroughly cleaned?

A. Not all the way through, but the westerly end of it.

Q. Didn't you recommend the dredging of a channel through the bottom of the lake?

A. No, I recommended the dredging the whole lake

out and deepening it to four and a half feet deep.

Q. Why did you recommend that?

A. Because I thought it would cause a more sanitary condition of the water.

Q. Would that facilitate the flow of water into the ocean?

A. I personally believe there is abundant room now for the flow of water. It didn't interfere with that at all.

Q. But you gentlemen never have dredged the bottom of the lake and never have cleaned it out thoroughly?

A. Not all the way through.

Re-cross examination.

By Mr. Carton:

Q. But you do say, however, that you advised the dredging of the lake from a sanitary standpoint?

A. And to deepen it to prevent the accumulation of the vegetable deposit, which would not get so high in the summertime.

Q. But entirely from a sanitary standpoint?

A. Sanitary and probably improve the appearance.

Q. The beauty of it, the appearance?

A. That was all.

Q. Not for the water flow?

A. No.

(Adjourned till July 3, 1917, at 9.30 A. M.)

New Jersey State Library

FREEHOLD, N. J., July 3, 1917

(Trial of the cause resumed at 9.30 A. M.)

NIART ROGERS, recalled for plaintiffs.

Direct examination by Mr. Kremer:

Q. Did you construct the flume and detritus tank at the western end of Wesley Lake which has been referred to in this case?

A. I had supervision over the construction.

Q. When was that detritus tank and flume completed?

A. Sometime during the summer of 1911, I think it was in June.

Q. You think it was June, to the best of your recollection, in 1911?

A. Yes.

Q. Have you taken the elevations of Wesley Lake before and since the completion of that detritus tank and flume?

A. Yes.

Q. Can you state whether or not the level of the surface of Wesley Lake is any higher now than it was before the construction of the spillway erected in 1914?

A. The normal stage of that lake surface prior to 1911 was seven feet above mean tide level of the Atlantic Ocean; and from levels recently taken I found the dam to be slightly higher than that level, although the water was but very little more.

Q. How much higher is the dam?

A. The top of the dam proper is about three inches above the normal stage. And then there is a weir twelve and a half feet long nearly in the center of the dam, which is about an inch and a quarter above the normal stage.

Q. Then the level of the lake, the surface of the lake, has been raised a little over an inch above what it was before the construction of the spillway?

A. Yes.

Q. Mr. Rogers, will you indicate the distance from the westerly side of this boulevard—I believe it is known as Lawrence Avenue—to the easterly side of Main Street?

Q. On what line, Mr. Kremer?

Q. From the point I am indicating to the flume.

A. Along the old flume?

Q. Yes.

A. The 1911 flume?

Q. Yes.

A. I will have to scale it. (Scales map.) About 280 feet.

Q. Do you know what the area was of the ground filled in between the westerly side of the boulevard and Main Street?

A. No, I can't tell exactly.

Q. Have you any estimate of that?

A. I can give the general dimensions from the map. I can't tell the quantity or area. Probably 100 feet in width, the lake was at that point, the average; by 200; about half an acre, possibly.

Q. Could the boulevard have been built without filling in the territory there?

Mr. Carton: The question is objected to as immaterial for the purpose of this case.

The Court: I think that is true, Mr. Kremer. It is not a question of whether it could have been built, but it is a question of what was actually done, of which you complain that damages resulted.

Cross-examination.

By Mr. Carton:

Q. You have referred to the change in the elevations, and did you fix the time in 1911, when the spillway was built, Mr. Rogers, or was it built some years later?

A. In 1911 there wasn't anything but wooden gates at the lower end of the lake controlling the level of the lake surface. The concrete dam was built probably in 1914, 1913 or 1914.

Q. Is that the dam that was prepared and advised by Mr. Cottrell, the witness yesterday?

A. Yes, sir.

Q. And you say the weir wall; is that the spillway?

A. That is the portion of the dam lower than the regular top of it or crest where the water is to pour over.

Q. You say that that maintains the lake an inch and a quarter higher than formerly?

A. Yes.

Q. And this weir wall or spillway in the dam, what are the dimensions across the dam, how wide?

A. About twelve and a half feet in length, and the width of the wall, two feet or two and a half feet in width, as to the thickness of the dam, and twelve and a half feet in length and about an inch and a half lower than the other part of the dam.

Q. The purpose of that wall and this weir, I suppose, is to fix a standard level of the lake?

A. I think so.

Q. Well, when the water raises to that point it overflows as a weir?

A. Yes, it didn't rise to that point the day I made the observation. It was even lower that that, probably due to a leakage around the gate in the dam.

Q. There are also gates under this wall, are there not?

A. In the bottom there is a gate at one side of the weir of which we speak, operated by a worm, so that it can be opened and shut. It is below the top of the dam considerably.

Q. For use in time of heavy storms?

A. It is for that purpose and for drawing the water off the lake.

Q. If the lake needed repair or anything of that sort?

A. Yes, sir.

Q. Have you had occasion to observe the result down there from the action of the tides of the ocean at the mouth of that flume?

A. No, I never made any particular observation as to that.

Q. Well, you have made general observations of these inlets along the coast, have you not, the arms of the sea?

A. Yes, I am familiar with the action of the surf along the beach.

Q. What is it?

A. A tendency to pile up sand, close up inlets and flumes.

Q. Is that tendency very pronounced in the time of the southeast storms?

A. I think so.

Q. To what extent have you observed the ocean as at times during storms fill up those inlets and shut them off?

A. To such an extent that it is necessary to open them by artificial means.

Q. After the storm has subsided?

A. Yes.

Q. And great deposits of sand are piled up by the action of the waves, are they not?

A. Very large quantities at times.

Q. Have you known that situation to happen at places other than the foot of Wesley Lake, for instance, Shark River Inlet and Manasquan Inlet?

A. Yes, and Deal Lake flume.

Q. Is there a flume also at Deal Lake?

A. Yes, a flume there and there is a small flume at the foot of Sylvan Lake in Bradley Beach, between Bradley Beach and Avon.

Q. And have you noticed about the same action as resulted in all those lakes at various times, fill them up?

A. It seems to be a general thing along that shore, so far as I have observed it.

Q. What did you state was the level of the lake in feet and inches, the elevation of it?

A. The normal stage of the lake's surface is seven feet above mean tide of the Atlantic Ocean. My last observation was 7.05.

Q. When did you make that observation?

A. The 28th day of June and on Saturday last, the 30th.

Q. As I recall, the elevation given by you now differed from that given by Mr. Allen. Did you hear his testimony?

A. Well, he assumed a base at the spillway, as I understood his testimony, but I am working from the United States Coast and Geodetic Survey, in taking my base referred to the mean tide of the Atlantic Ocean.

Q. And is that the official or standard, as far as you understand?

A. Yes, that is the standard for all work of that character. I have used it over twenty-five years.

Q. Did you in taking these levels that you refer to compare the level of the lake and the brook with the level of the cellar of Mr. Doran?

A. Yes, sir; I took a survey of levels beginning at the ocean end of the lake and continuing on up through the flume to the brook, up past the railroad as far as Prospect Avenue. I took some levels in 1911, after the trouble first complained of, of the relation of the brook or lake to Mr. Doran's cellar and Mr. Woolley's cellar adjoining it, and took the same levels practically the other day.

Q. What did you say they were?

A. They were identical. The level found in Mr. Doran's cellar was between two and three inches above the normal stage of the lake.

Q. This map that you have made some reference to, is that the map showing the improvement made when this boulevard was constructed over Bond Street?

A. The map is intended to show in general the location of the pipe leading from the culvert into Wesley Lake.

Q. A map prepared by yourself?

A. Yes, sir.

Q. And you gave a distance to Mr. Kremer, I think, of the pipe from Main Street to the boulevard as 280 feet.

A. That was measured in a line along the 1911 construction.

Q. What do you mean by the 1911 construction?

A. That was the concrete flume and detritus tank which was constructed at that time.

Q. Will you indicate on your map, Mr. Rogers, which of the lines is intended to show that pipe, the 1911 outlet pipe?

A. That is shown in broken lines, about the central portion of the map, lying to the north of the one indicated as the new flume marked "Old Flume Catch Basin."

Q. And then there was, it has been testified to, installed another pipe in 1912 by Mr. Savage. Is that pipe shown on your map?

A. Yes, that is indicated as the new flume.

Q. Also by these dottted lines, broken lines?

A. Dotted lines drawn in a straight line from the culvert, on the eastern end of the Main Street culvert, to Wesley Lake.

Q. You were the engineer, I think, that advised that arrangement of the pipe and culvert in connection with this brook, weren't you?

A. In 1910 and 1911.

Q. And did you in your judgment as an engineer, representing the city and Ocean Grove, deem the provisions you had made there to take care of the situation ample and sufficient?

A. Yes, we did at that time.

Q. And you have also examined this additional or straightaway pipe that has been put in since, have you not?

A. Well, not through its entire length. I know its location from having observed the end at which it begins and enters the lake.

Q. First tell us the dimensions of the pipe connecting the Main Street culvert with the detritus tank put in by you in 1911. What are the dimensions of that pipe?

A. It was a semi-circular arch with the bottom six feet in width and having a height of three feet to the crown. The crown of that flume was constructed on the same level as the culvert under Main Street.

Q. And connecting up with it?

A. And connecting with it the full width. It then

passed eastwardly and into a catch-basin having compartments and baffle walls made for the purpose of catching floating matter.

Q. And then continued to the lake?

A. And then went out at the other end of the basin directly to the lake, of the same dimensions throughout.

Q. And in addition to that pipe or culvert installed by you there is in operation now the new four foot pipe installed by Mr. Savage in 1912?

A. Yes.

Q. Have you a plan showing those elevations that you refer to, Mr. Rogers?

A. I prepared such a plan.

Q. Will you produce it? (Plan produced by witness.) Mr. Rogers, can you put up that map above the other somewhere, or below it?

(Witness places the map on the board.)

Q. This map that you place on the wall, you made it, did you, Mr. Rogers?

A. Yes.

Q. When?

A. I made this map on the 28th of June, after I had taken the elevations referred to.

Q. The 28th of June, 1917?

A. Yes.

Q. Now will you describe your map to the jury and tell us what it shows?

A. This drawing shows the diameters of cross-section of the various culverts, including the Prospect Avenue, and extending to Wesley Lake, also the flume leading from the lake into the ocean. The one on the left of the map shows the culvert going from Prospect Avenue, one block west of the railroad, each of which is three feet in diameter; the shaded line at the bottom of

the section indicating the high water in the pipe as of that day. The next and larger one is the culvert under the New York & Long Branch Railroad Company, installed within the last two years. That has a diameter of 7 feet 6 inches, with a height varying from 5½ to 6 feet above the bed of stream. The third one is the culvert under Main Street as it exists at the present day, an arch with perpendicular walls, 6 feet 2 inches apart, with a semi-circular crown upon it. The shading shows the depth of water in the arch as of that day, June 28th. The line connecting the same at the top is the normal stage of the lake which has been maintained for a number of years past. The next two culverts shown indicate the 48-inch pipe constructed in 1912 and the flume of which I have already testified, constructed in 1911.

Q. Tell us which is the 1911.

A. The circular one is the one that was made in 1912, and the 1911 pipe is shown in the section at the right of it and the depth of water in each is shown by the shaded markings.

Q. And what are the holes shown on the extreme right of your map, the other end?

A. That shows the opening entering into the ocean below the dam or spillway, a twin culvert, 4 feet 6 inches each in width and 3 feet in height.

Q. These openings are below the top of the spillway?

A. Yes, those openings are entirely below the top of the dam.

Q. What is there just beyond the spillway towards the ocean?

A. A boardwalk.

Q. And a basin?

A. Well, there is a basin below the dam which we call a spillway, I believe. It enters into these two culverts. It is about 20 or 25 feet in width. It is between the dam and the culvert.

Q. Where do these culverts run to from the dam?

A. They extend out to the Atlantic Ocean.

Q. And are those the culverts that at times you say because of the action of the ocean fill up with sand?

A. Yes, an outlet to the ocean is sometimes stopped by sand.

Q. With regard to the relative capacity, that is, of the culvert under Main Street and the 1911 culvert running to the detritus tank, what is the difference, if any?

A. The Main Street culvert, taking its entire section, would have a greater area than the 1911 flume; but if the level of the lake were maintained at its normal stage as at present maintained, all of that section would not be available for the discharge of water.

Q. All of the section——

A. Of the old culvert.

Q. Taking the capacity of the two culverts, the 1911 and the 1912 culvert together, how do they compare with the capacity of the Main Street culvert?

A. If they were all running full the combined capacity of the 48-inch pipe and the 1911 flume would be about the same as the culvert under Main Street; 24 square feet area, in the Main Street culvert and about 26½ feet in the other two combined. It would be slightly greater.

Q. How does the combined area of the two culverts under Prospect Avenue compare with the two culverts running from Main Street to the lake?

A. Well, about 14 square feet in those two culverts.

Q. And how many square feet in these two?

A. 26½.

Q. These have considerably more?

A. That is on the assumption that they were all running full.

Q. I understand that. As I understand, the top of

this dotted line or this place in blank shows the normal level of the water in the lake and in the brook, comparing it with the present level of the lake at the foot of the lake, the present standard?

A. Yes, the level is the same throughout, extending from the dam at the outlet end of the lake to the railroad.

Q. Including the level of the brook going by the plaintiffs' properties?

A. It is the same.

Mr. Kremer: If your Honor please, I want to interpose an objection at this time to the introduction of this evidence now. This is not a part of my case and if Mr. Carton wants to make him——

The Court: Of course you are not objecting.

Mr. Kremer: It is a question whether it is proper cross-examination.

The Court: Yes, whether it is proper cross-examination.

Mr. Kremer: There is nothing on the direct examination that would allow him to bring it in.

Mr. Carton: I think it is proper cross-examination, for the reason that Mr. Kremer examined Mr. Rogers on the levels of the lake that he had recently taken, and had him explain the map above. Now it seems to me this is a matter growing out of the same evidence brought out by him and it is proper cross-examination, and as there has been no objection to it we have gone into it.

The Court: Of course your objection comes late.

Mr. Kremer: I feel this way: that I do not want to

be bound by his testimony on this question, because I have not asked pertaining to it.

The Court: I understand that, but your objection comes late. You did introduce the map.

Mr. Kremer: I only asked who built the culvert. I only asked a few questions.

The Court: You offered the map, didn't you?

Mr. Kremer: No, not this one. I offered the one above.

The Court: You asked him to produce this map?

Mr. Kremer: No.

The Court: That was irregular, Mr. Carton. Do you desire to make him your own witness?

Mr. Carton: If there is anything I have asked that is not cross-examination I consent that it stay to be used as my evidence. My insistment is, however, that in view of Mr. Kremer's examination the testimony is proper cross-examination, but if that be found not to be so it may go in as my proof.

The Court: It is really inconsequential anyway, and the record may show that Mr. Rogers was made a witness of the defendants for the last examination with respect to the map.

Re-direct examination.

By Mr. Kremer:

Q. Mr. Rogers, do you know as a matter of fact whether both the straightaway and the flume you built are in operation today?

A. No, I don't know.

Q. Is the capacity of the 48-inch pipe line as great as that of the culvert under Main Street?

A. No.

Re-cross examination.

By Mr. Carton:

Q. You say you don't know as a matter of fact whether both of those pipes are in operation at this time. Do you know of any reason why they should not be in operation, both of them?

A. No.

By the Court:

Q. Do you say they are not in operation?

A. I can't say.

By Mr. Carton:

Q. They are in operation as far as you know, aren't they?

Mr. Kremer: I object to that if he doesn't know.

(Objection sustained.)

Q. What I want to know——

The Court: Well, he says he can't say.

Q. I want to know if you have any reason to believe they are not both in operation at this time.

The Court: That won't do? You might ask me. I would say I suppose they are both in operation because they are there. If they are both there what are they both there for except to use? That would be the result of the substance of the testimony.

Q. They have not been closed up by you as City Engineer, have they?

A. No, sir.

By Mr. Kremer:

Q. You didn't build the second one, you only built the first one?

A. I had nothing to do with the 1912 pipe.

Mr. Carton: If the Court please, at this time I don't think either of these maps have been offered. I think they should be formally offered; that is, the map at the top of the board and the one now put up by Mr. Rogers.

JOHN DORAN, recalled for plaintiffs.

Direct examination by Mr. Kremer:

Q. Mr. Doran, you testified yesterday that you went through the straightaway on Sunday?

A. Yes, sir.

Q. At the junction of the straightaway with the culvert under Main Street did you make any observation to ascertain whether the old 1911 flume also joined the culvert?

A. Yes, sir.

Mr. Carton: I object, for the reason that Mr. Doran was examined and testified on this yesterday and said he did not see it at that time.

The Court: Yes, I must exercise some control over witnesses going out and coming back the next day and swearing. That won't do.

Mr. Kremer: The only reason I offer him at this time is that Mr. Carton has opened it by Mr. Rogers. I will offer it in rebuttal.

The Court: You had better recall him in rebuttal.

DR. AARON E. BALLARD, sworn for plaintiff.

Direct examination by Mr. Kremer:

Q. Doctor, you are President of the Ocean Grove Association?

A. Yes.

Q. Do you recall the filling in of Wesley Lake in 1911?

A. Yes.

Q. Do you recall the construction of the detritus tank and flumes at that time?

A. Yes.

Q. Will you state what connection the Ocean Grove Association had with that construction?

A. You mean our arrangement with Asbury Park?

Q. Yes, what was that arrangement, Doctor, if you please?

A. That we united together in the project. That is what you are referring to just now?

Q. Do you recall the result of the construction of the detritus tank and flumes?

A. I recall the effect of its construction; yes, sir.

Q. Do you recall whether or not that construction was found satisfactory?

A. I don't know that I know how to answer that Satisfactory to whom?

Q. To yourselves.

A. Yes, sir.

Q. It was satisfactory?

A. Yes, sir.

Q. Do you recall complaints being made to you by any persons in South Main Street in connection with it?

A. Not personal ones; no, sir. I heard that there were complaints, that is all.

Q. Did you take the matter before the association?

A. No.

Q. Did you take the matter up with the association?

A. No. You mean about the complaints?

Q. Yes.

A. No.

Q. Did you also co-operate with Asbury Park in the building of a new straightaway in 1912?

A. Yes, sir.

Q. You co-operated with them in all the constructions that have been made at the western end of Wesley Lake?

A. Yes, sir.

Q. Do you know of the difficulty that was experi-

enced or alleged to have been experienced by people on South Main Street?

A. Nothing more than common rumor.

Q. You heard of it through common rumor?

A. Yes, sir.

Q. What did the association do in connection with those alleged complaints?

A. You mean the ones that came to court, or whether it was made a subject for trial?

Q. Yes.

A. Yes, sir; I know what we did.

Q. What did you do?

A. I will have to say it this way, I think. They asked my advice what we had better do in regard to these complaints that were then formally made, and I said that those were very costly and that litigation was generally more costly than it would have been to pay some small sum for what they had suffered, and so we paid it.

Q. What year was that, Doctor?

A. I haven't put down anything for dates, but that is the time that you are referring to.

Q. Was there any new construction made by the association after the payment of those claims?

A. I don't recall it.

Cross-examination.

By Mr. Carton:

Q. You say that the association of which you are President co-operated with Asbury Park in making this improvement at the head of the lake, Doctor?

A. Yes, sir.

Q. It seems that the work was done along in 1911. Do you know of your own knowledge whether your association or its representatives, with the authorities of

Asbury Park, made any investigation prior to doing the work with regard to ascertaining what was the best way to take care of that situation?

A. Investigations were made by our superintendent.

Q. Was an engineer also employed by the two places, Asbury Park and Ocean Grove?

A. Whatever engineer was employed was simply by common consent and agreement of both.

Q. And Mr. Rogers, the engineer, was employed for that purpose, was he not?

A. Yes.

Q. And his plan was carried out?

A. Yes. I selected Mr. Rogers because of his full knowledge of all the surroundings and circumstances, and being a surveyor that knew all about the places around about. I selected him and Asbury Park accepted him.

Q. What conditions existed at the head of Wesley Lake where this improvement was made at the time that suggested to the parties that the improvement should be made?

A. It was pretty much of a mudhole where that brook flowed into Wesley Lake, around that region was pretty much of a mudhole, and in most any rain the waters flowed back I can't tell you how far, but they flowed all around.

Q. So that the head of the lake had filled up with sand and mud that had caused the water to flow back.

(Objected to.)

The Court: That is not proper cross-examination, Mr. Carton. All that the Doctor has testified to on direct examination was the activity and the participation of the association in this improvement, that is all.

Mr. Carton: Yes, your Honor, that is as I recall it.

The Court: But the effect of the improvement was not examined upon at all.

Mr. Carton: It is my contention, your Honor, that we have a right to cross-examine to ascertain from this witness the condition surrounding this situation that warranted these municipalities in making this improvement.

The Court: Oh, no.

Mr. Carton: In view of Mr. Kremer's examination that the improvement was made.

The Court: No, the objection is sustained. You may make the Doctor your own witness if you see fit, if you want him to get away, to accommodate him and so on; I will permit you to do that.

Mr. Carton: Will your Honor allow an objection to that ruling?

The Court: You may have an exception.

(Objection noted for defendants as ground of appeal.)

The Court: Now do you desire to make the Doctor your own witness while he is on the stand?

Mr. Carton: No, I desire to cross-examine him first.

The Court: All right, you may. You may cross-examine him on matters germane to the direct examination.

Mr. Carton: Of course I will try to confine myself to that, your Honor.

Q. What have you to say, Doctor, with regard to the sanitary condition existing at this point prior to making the improvement you have referred to?

Mr. Kremer: The same objection.

The Court: The objection is sustained. 10

Q. Were the sanitary conditions such at that time, prior to making this improvement, that your municipality or board, with Asbury Park, deemed it necessary to make the improvement?

(Objected to. Objection sustained.)

Q. Had the health boards of the surrounding municipalities taken up the condition at the head of the lake at 20 that time?

A. Yes, sir.

Q. Was the fact that they had taken the matter up any inducement to the authorities down there to proceed with the making of the improvement?

(Objected to. Objection sustained.)

Q. What boards of health, if any, complained about this situation, Doctor? 30

(Objected to. Objection sustained.)

Mr. Carton: Your Honor, I do not want to appear to continue right on asking questions in the same line——

The Court: You are attempting now to put in your defence, Mr. Carton.

Mr. Carton: No, I think it is proper cross-examination.

The Court: It is perfectly clear that this witness was examined merely as President of the Ocean Grove Associated upon the question of whether or not the Ocean Grove Association joined with Asbury Park in making the improvement. The necessity for the improvement was not made a subject of examination at all. It is perfectly obvious that the Doctor was brought here by Mr. Kremer only as a sort of cumulative proof. I do not feel the necessity for it at all. But it is cumulative proof that the association joined with the City of Asbury Park in making this improvement, in respect to showing any alleged liability which may exist. That is all there was to it. The minutes of the association certainly show that, Mr. Kremer, anyway.

Mr. Carton: There isn't any question in the world about it.

The Court: No question about it, practically admitted. As I recall the answer, it is admitted.

Mr. Carton: No question about it.

The Court: Then the Doctor's examination is a waste of time.

Mr. Kremer: Well, I attempted to show by him also the question of notice.

The Court: Yes, the question of notice. That is two

things. So it is perfectly obvious the examination was on those two points, and now you are attempting to examine the Doctor on the line of your own evidence, and I shall have to debar it.

Mr. Carton: No, I am attempting to show by this witness, if I can, that there was something that made it necessary, the fact that the improvement was made.

The Court: That is your defence.

Mr. Carton: It seems to me I have a right to go into that.

The Court: No.

The Court: May I state on the record what my idea is so there may be no question about it?

The Court: Yes.

Mr. Carton: I insist that this and similar questions on the same line are proper cross-examination, that is, anything to show the condition existing at that time that made this improvement necessary, in view of the fact that it has been brought out on direct examination that the witness and his association were instrumental in making the improvement.

Q. Now, Doctor, you said some one made a complaint some time ago and brought an action of damages, I think you said, did you not?

A. I so understood it; yes, sir.

Q. And you took the matter under advisement and thought that a small settlement was better than hiring lawyers and trying a suit; is that the idea?

A. Yes.

The Court: Mr. Carton, I shall charge the jury in respect to this bit of testimony, that they must not regard that as an admission of testimony on the part of the defendants. The Doctor has said that in the exercise of its discretion the association settled for the alleged damages involved in that particular complaint. Naturally evidence of the compromise of a claim is never admissible, and I shall charge the jury that that is not to be regarded as any admission of liability on the part of the defendants, so we won't waste time on it.

Mr. Carton: I assumed that your Honor would do that, but Mr. Kremer having brought it out I only wanted to fix the time.

The Court: The fact of the complaint, of course, is competent testimony.

Q. Do you recollect when that was, Doctor?

A. No, sir.

Q. These same parties or some of them were plaintiffs in that suit, or don't you recall?

A. I don't recall it at all.

Mr. Carton: I think I will adopt your Honor's suggestion while the Doctor is on the stand and make him my own witness.

The Court: You may do as you like, and put the Doctor on for your defence while he is here.

Further examination on the part of the defendant.

By Mr. Carton:

Q. Will you tell us now the circumstances leading up to the doing of this work by your board and Asbury Park in 1911?

A. The condition of the surroundings largely were the brook entering Wesley Lake and all around there.

Q. And what were those conditions, Doctor?

A. That the water had made the surroundings, left them in a kind of pool, and the pool became largely contaminated, and I suggested or requested a meeting of the boards of health of Asbury Park, Ocean Grove and Neptune Township together to decide whether that was prejudicial to health or not.

Q. And was such a meeting by these boards of health afterwards held?

A. Yes, sir.

Q. And what conclusion did they come to?

A. That it was a menace to the health of the people around up there and that some method ought to be provided, they thought, to carry away all this water.

Q. And did this action of the boards of health have anything to do with the subsequent doing of the work by the municipalities down there?

A. I don't quite catch your meaning.

Q. Did that fact, that it had been condemned by these boards of health, induce you to make the improvement?

A. It aided in that.

Q. Was the matter taken up with the State Board of Health, do you recall?

A. No, sir.

Q. Was it taken up with the State of New Jersey, do you recall?

A. Taken up by the Highway Commission of the State.

Q. And did the State, through its Highway Commission, participate in this improvement?

A. Yes, sir; they appropriated $5,700.

Q. They contributed $5,700 to the improvement?

A. Yes, sir. The first of all I had the plans made by Mr. Rogers, submitted those plans to the association and were found correct, they thought, and then I submitted those plans to the State Commission and they approved them and afterwards came through and the work was completed and accepted and reapproved and paid the money.

Q. All those proceedings were had before this work was actually done, all this approving of the plans?

A. Yes, sir.

Q. And the work was carried out according to that plan as finally approved, except the last?

A. Yes, finally approved by the State and by us and by the commissioners, who came there themselves and examined it and approved it.

Cross-examination.

By Mr. Kremer:

Q. Doctor, just one question. The money that the State gave was used for the purpose of paying for the building of the street, was it not?

A. I don't quite catch it.

Q. Was the money which the State Highway Commission gave you used for the purpose of the construction of the new street?

A. I can hardly say that. It was to make the general conditions of the road better.

Q. Of the road? Thank you.

A. I supposed that was it.

Mr. Kremer: Your Honor, in the matter of the proof of the work done by Mr. Rothfritz on the improvement of the oven by Louis Weidman, Mr. Rothfritz is under a physician's care, having an ulcerated leg, under Dr. Wilbur; and I should like to have the opportunity to produce the bill and produce Mr. Rothfritz at a later time. The matter does not relate to liability in any respect.

The Court: Will this case be completed today, gentlemen?

Mr. Carton: If the motion that I expect to make at the conclusion of the plaintiffs' case is entertained it will be concluded very shortly, your Honor. If I should not be so fortunate it will not conclude today, I do not think, your Honor.

The Court: Since Mr. Rothfritz's examination would relate to the damages anyway, Mr. Carton's motion would relate to the original liability, which would not involve damages, and I will give you an opportunity to produce Mr. Rothfritz in the event that Mr. Carton's motion is not granted.

Mr. Kremer: And at the same time may I produce Mr. Weidman with his bills at that time?

The Court: Those bills have been put in for identification anyhow.

Mr. Kremer: Only the checks, I believe.

The Court: Well, all right.

Mr. Kremer: In that event I rest.

PLAINTIFFS REST.

MOTION FOR NON-SUIT.

Mr. Carton: If the Court please, I wish at this time to make a motion for a non-suit of the plaintiffs' cases for various reasons. As the case has proceeded, as the evidence has been developed by the plaintiffs' case, it has appeared to me that the first reason I should advance for the motion is because of non-joinder, on account of Neptune Township not being made a party defendant to this suit. It appears by the plaintiffs' case—I do not pretend to go into it specifically—that if there is liability and damage being done these plaintiffs, actionable damage, that Neptune Township is one of the tort feasors, or one of the contributing parties, because it has had its drainage, particularly by the drainage of the Corlies Avenue section and this twelve-inch pipe down through Story's alley, artificially, helped and assisted to clog up and dam up this brook.

The main reason for my motion, your Honor, is this: that there is no liability on behalf of either of these defendants for the cause of action as set out in the plaintiffs' complaint. As I understand the law, there is no liability on behalf of a municipality for an action of this kind or for damages generally, unless some statute particularly makes it so. I am unable to ascertain or find any statute in the State of New Jersey making a munici-

pality liable for an action of this kind, and unless my opponent is unable to show such a statute it seems to me we must conclude that there isn't any.

Now in the absence of such statutory liability I insist, your Honor, that there should be a non-suit. The evidence in this case to date shows—the plaintiffs' evidence—that the thing causing this trouble—assuming for the purpose of this argument that there is trouble, and that this work stopped up this brook and overflowed these plaintiffs' property—that that work was done as a part of the general improvement, a general improvement on behalf of these municipalities, Asbury Park, a municipality, and Ocean Grove, a quasi-municipality, for the purpose of this suit exercising all municipal functions, and is in the same category exactly as Asbury Park. There is no question about that under the act under which it is operated. That it did this for a public good, for no private gain, nothing running to the personal benefit or advantage of any of the individual members of the Council or for the city as a city; that is, they had received no return or no profit; it was not engaging in any enterprise by which it went to make an improvement and thereby injured some third party, whereby there might be a liability, the same as any other person would be. This appears by the evidence as it has gone through as a part of a general public improvement for the general public good, not for any private gain. The municipality received no private gain and it was a big public expense in which the whole public participated; and as it has been brought out, not only these two adjoining municipalities but the State of New Jersey contributed, by the evidence in this case, some $5,700 for this particular improvement.

So I just mention this, your Honor, to show that it is a public improvement and in the doing of this work as a public improvement, even though the officials representing the State of New Jersey or representing the City of

Asbury Park or representing the Ocean Grove Association, even though they made a mistake and did not do it willfully—they of course did it with the best motives, good motives, and doing what they thought was proper under the circumstances—there would be no liability for any consequential damages of such result of that mistake, even though that were true.

Moreover, even though its employees—these officers would be employees and itself originally would be liable —even though they made a mistake, if they had reason to believe that the engineer was competent and had advised this scheme as being the best thing to take care of that situation, even though a mistake happened, there cannot be any liability for consequential damages, your Honor, as I view the cases in this State.

Now this is not a situation where the municipality did something that might almost amount to what would be considered willful or wanton, where it made some improvement where it diverted a course, diverted a stream, took it from one course and diverted it directly through another course, that would be a direct injury to a particular individual. But this is a part of a general improvement, a public improvement, a public highway, a public lake, which was an artery and in effect a public highway. And further, your Honor, even though there was a liability on behalf of these defendants, even though there was a liability for a wrong, it would be a public wrong, one that would have to be redressed by indictment. It would not be a private wrong, it would not be a wrong to an individual or such a wrong that an individual would have a right of action; because I take it that a municipality in performing public work, not private work, public work, making public improvements, if it makes a mistake and the public are thereby injured, that no civil action arises; that the only way to redress that wrong is by public indictment. I think the cases in this State hold

that. Now it cannot be said in this case, your Honor, that this is a private injury running to these three parties. The mere fact that there are some five bringing suit in this action negatives that proposition. But if there is any damage at all, if there is any damage done at all the public are being damaged. One person might be the public, two persons, ten persons might be the public. The plaintiffs come in and say that this lake is stopped up and overflows its banks, overflows my property, your property and the other fellow's property; it not only does that but it causes a stench to arise from the accumulation of muck and mud in the cellars about there; all going to show that it is a public injury; and if there were such an injury, your Honor, it must be by indictment and the municipalities cannot be sued individually for damages.

Now this is a very unusual suit. These are unusual suits, rather. Here are suits brought by property owners against municipalities and for consequential damages as the result of these municipalities doing a public improvement; not any experiment in taking care of any public proposition, but doing what they thought was necessary for a public improvement to help this situation through. Your Honor recalls the situation about this lake. It is a very small body, the lake bottom. It drains a great area of country, going about Asbury Park, Ocean Grove and Neptune Township. It all centers down through this little archway going through Prospect Avenue and under the railroad, a little narrow six or eight foot brook, into Wesley Lake; that these parties have built their cellars immediately beside the back of this brook, entirely a foolhardy business. Your Honor would not be concerned with that, but the jury would be concerned with it. They attempt to build these stores beside this lake. And no one should do a thing of that kind, especially without taking proper precautions by way of waterproofing, etc. Why, your Honor, if the law of contributory negligence applied

in this case—and I am not sure that it does not, and I advance that as one of the reasons in this particular matter—if that law applied—and assume that it does apply—these defendants are absolutely concluded by contributing to this thing themselves. Your Honor will recall the testimony of Doran and Woehrer particularly on the stand. They had no cellar there before, those buildings were built on puncheons four to six feet high. The water overflowed this place, being in there, Mr. Doran describes, long before his cellars were built. And they take the stand, "We erect these cellars, we don't use any protection, any waterproofing or anything else;" and as Mr. Doran says, "We just sit down and do nothing and rely on the city to pay us for damage." He has neglected it absolutely, willfully. Even though we were liable in this matter, and even though we contributed to it and there was consequential liability from this thing, it did not relieve Mr. Doran from himself protecting his own property. That is the first rule. That is the first thing he should do. And he has gone on the stand himself, and Mr. Woehrer, and said, "We did not do a thing but we simply stood by and are going to hold the city and make the people of Asbruy Park pay for it." As to Mr. Doran's testimony on the stand on the proposition of contributory negligence, he stood by and punched a hole through the side of the building so the water could come in, and said, "If there is any damage we are going to sue Asbury Park."

Now, your Honor, this matter, as I look at it, is rather an interesting proposition from the legal standpoint, and your Honor as I have no doubt, as you do in all matters, probably, have investigated the matter and given it a great deal more thought and consideration than I have. I have in mind cases covering the situation. There has been a very recent case to which your Honor's attention lately has been called; that is the case of Joralemon

against Town of Belleville, a recent case in the Court of Errors and Appeals, which may be advanced by my opponent as an authority opposed to what I contend the law is on this matter. It is my contention, your Honor, that the situation in that case does not apply to our case.

(Continues argument and cites authorities.)

(Mr. Kremer replies.)

The Court: The rule of law applicable to this question is laid down in Bisbing vs. Asbury Park, which was cited by counsel for the defendants, a case in the Court of Errors and Appeals, and that rule is this:

"The principle underlying the exemption in favor of a municipality is rested upon the fact that a duty is owed to the public, the neglect of which forms the basis of action, although such neglect may be exercised in varying degrees to every individual composing the public. Where, however, the duty is specifically owed to an individual as an individual, he has a right of action whenever the breach of that duty has occasioned injury."

There is a clear distinction between the liability of a municipality to an indictment and the liability of a municipality to a civil action at the instance of the individual.

In disposing of this motion it is of course to be understood that liability as a fact on the part of the defendants is not being considered, and the disposition of this motion, therefore, in the presence of the jury, is not to be regarded as any opinion of the Court upon the facts with respect to ultimate liability. This motion necessarily assumes that the defendants did construct at the place in question a dam and a spillway, or a straightaway, as it is called, which did result, in case of freshet, in backing up upon the property of the plaintiffs in this case a larger

quantity of water than had been accustomed to be cast on the premises of the plaintiffs prior to the construction in question.

I think the principle of law which must apply here is that the defendants owed a duty to the plaintiffs in this case in altering or controlling the flow of water through Wesley Lake Brook into Wesley Lake in such a manner as not to cast an additional quantity of water in case of storm upon the property of the plaintiffs. There is a line of cases which I think support that view. The most recent case in which the question is discussed was decided in the past ten days by the Court of Appeals, that of Joralemon vs. the Town of Belleville, where it was held that "a municipality has no right by artificial drains to divert surface water from the course it would otherwise take and cast it in a body large enough to do substantial injury on land where but for such artificial drains it would not flow."

While this case had in view surface water, I see no distinction between the control of artificial drains of surface water and the control of the normal, natural flow, in times of flood, of water in a running brook such as Wesley Lake.

Now I do not know whether the result of the construction of the spillway and straightaway in question caused the injuries to the properties of the plaintiffs complained of. That is a question of fact entirely for the jury to determine, excepting as it must be assumed, for the purpose of this motion and the disposition of the motion, that such construction did cast a greater burden upon the property of the plaintiffs. The fundamental principle back of all the liability is the denial of the right of a municipality to take private property for public use without compensation. Therefore, in view of the line of decisions in this State holding that where there is a duty owing to an individual property owner on the part of the

municipality not to create a greater burden by an improvement that was formerly cast upon it—and I may say further, in view of a case which I have in mind, in which I represented the County of Monmouth, a suit on the part of property owners in the neighborhood of Water Witch, in this county, against the Township of Middletown, the Borough of Atlantic Highlands and the County of Monmouth, where the three municipalities engaged in a plan of better controlling the flow of surface water from the hills back of Water Witch in the interest of the highways down there into Raritan Bay—I remember very well that in that case the same motion was made by me to Vice Chancellor Garrison—there the suit was for injunction to restrain from further diverting streams from their accustomed flow. And the Vice Chancellor there held that since it appeared that by reason of the plan or scheme in which the municipalities had engaged, a greater burden, a greater body of water had been cast upon the property owners—complainants—than was accustomed to be cast in the ordinary way in which those surface waters would normally flow, that there was liability.

Therefore I think I must hold under the law that on this motion there is sufficient evidence to go to the jury and the motion for a non-suit must be denied.

The question of non-joinder is considered by the Court in this aspect: that since joint tort feasors are, civilly, jointly and severally liable and there is in law no contribution between them, and there was insufficient in the plaintiffs' case in any event to suggest the liability of any other party, that the motion in that respect is also denied.

(Objection noted for defendants as ground of appeal.)

Gentlement of the jury, the Court's recent action in disposing of this motion for non-suit is not to be con-

sidered by you in any wise as determining any fact in this case. It is for you peculiarly to determine what the facts are in this case, and the Court's action did not in any way indicate its belief as to the liability of the defendants in this case. That is entirely your province and you will not be influenced at all by the Court's action. It is simply one of the motions which must be disposed of, and it is in accordance with the usual legal procedure.

DEFENDANT'S TESTIMONY

MAJOR JOHN C. PATTERSON, sworn for defendants.

Direct examination by Mr. Carton:

Q. Major Patterson, you live in Ocean Grove?

A. I do.

Q. How long have you lived there?

A. About forty-four years.

Q. You were in the employ of the Ocean Grove Association in some capacity for some years, were you not?

A. I was.

Q. What was your position?

A. Well, I was employed as Chief of Police and afterwards as superintendent of the outdoor work.

Q. Outdoor work such as street construction, etc.?

A. Yes, sir.

Q. And you are familiar with the body of water known as Wesley Lake, I suppose?

A. Well, pretty well familiar with it.

Q. You have had to do with the cleaning of Wesley Lake, I suppose, in years gone by?

A. Yes, I have.

Q. Are you familiar with the condition of Wesley Lake and Wesley Lake Brook, that is, the brook running through West Park and Neptune Township to Wesley Lake, familiar with that location?

A. I am.

Q. And were familiar with it prior to the year 1911?

A. Yes, sir.

Q. How long have you been about the situation there?

A. About Wesley Lake Brook and lake?

Q. Yes.

A. Oh, thirty-five years, I think.

Q. Prior to 1911 did you know anything about the action of the brook in overflowing its banks or otherwise? I mean now with regard to where it runs through from Main Street to the railroad.

(Objected to as leading.)

The Court: Oh, no, I think he may answer that.

A. Do I know anything about it?

Q. Yes.

A. Yes, sir.

Q. Tell us what your recollection is about it.

A. Well, my recollection of the brook, in heavy falls of rain it overflowed its banks, and from the debris that collected it stopped up the outlet under the turnpike.

Q. That is, at Main Street you call the turnpike?

A. The Main Street culvert. And I have seen it stopped partly, not entirely stopped, but so the flow of water could not get under and into the lake.

Q. That is prior to 1911?

A. Prior to 1911.

Q. And when it would be so stopped did you observe what territory beside the brook it overflowed?

A. Why, it overflowed the ground back of the turnpike and in the rear of the property that has been named in this case.

Q. By Mr. Doran and Mr. Woehrer, their property?

A. I have seen that ground there covered with water from the overflow of the lake.

Q. Have you noticed that condition on more than one occasion?

A. Yes, sir.

Q. Very many occasions?

A. Well, probably a dozen times.

Q. And at the time of heavy rains?

A. In heavy rains, yes.

Q. Do you know when the culvert under Main Street was erected by Monmouth County?

A. I cannot call the year. I remember when it was done.

Q. And this overflowing that you have referred to has happened since that culvert was put in?

A. Yes, sir.

By the Court:

Q. That is to say, Major, you mean since the culvert was put in and before the spillway and this improvement we are talking about now?

A. I mean when the lake came up to the turnpike, before there was any filling.

By Mr. Carton:

Q. Do you know whether there has been any artificial filling in of the properties now owned by Doran or Woehrer, or whether there is any change from what its situation was years ago?

A. My recollection is that the White Brothers, that

owned the property there, did fill in on the south side of Wesley Lake Brook:

Q. That is where Doran's and Woehrer's properties are located?

Mr. Kremer: I object and move that that answer be stricken out unless he states whether he knows or not.

By the Court:

Q. Do you know that to be so?

A. I know that. I saw the wagons carting brick there and unloading it.

By Mr. Carton:

Q. Do you remember this, Mr. Patterson, the fact that there was at one time a boat building establishment there?

A. I do remember that.

Q. Who conducted that establishment?

A. George Ormerod.

Q. And where was that located?

A. It was located just west of the culvert under the turnpike, alongside and near now where the cellar is at Treat's store, on the north side of the brook, and part of it on the south side of the brook.

Q. And was the brook wider there at that time or was there any basin there or anything of that sort?

A. A basin of water?

Q. Yes.

A. Oh, yes, so it would float boats.

Q. Where these boats were built they were floated in this basin and on down in the stream?

A. Went down under the culvert into the lake.

Q. Do you remember the character of the construc-

tion of the building erected on the property of the plaintiffs prior to the present building?

A. Well, I remember that the buildings were there and I remember well that they were placed on piling.

Q. You remember that from your own observation?

A. I saw them.

Q. Were you still acting as superintendent for Ocean Grove and its outside work in 1911, when this improvement was made, Mr. Patterson?

A. I was.

Q. And had something to do with the general overseeing of this work, did you?

A. I had the overseeing of the work of the grading of the ground there and placing the roadway and leveling the filling, but not with the engineer's part of the spillway.

Q. There was an engineer on the job, I suppose?

A. Niart Rogers.

Q. And was his plan and scheme followed out in making this improvement?

A. I presume it was, to my knowledge. I don't think it was changed. To my knowledge it was carried out as he made the plans.

Q. And as a part of that plan Bond Street, connecting up with Main Street in Neptune Township, was constructed across the lake, was it not?

A. It was.

Q. And in doing that it was necessary to fill in or bridge the lake?

A. It was necessary to fill in.

Q. What was the character of the lake at that point at that time that you thought necessary to fill it in, as you say?

A. Well, to my understanding and recollection of it it was the complaint of the condition of the head of the lake.

Q. What was the cause of the complaint, if you know?

A. The cause was the gathering of all kinds of debris that would come down the stream in case of light rain and ordinary flow of the brook, and when the wind was east it would gather on the upper end of the lake next to the turnpike and become very objectionable to people coming in and looking at the lake.

Q. And outside of the objectionableness from the viewpoint was it objectionable, do you know, from a sanitary standpoint because of odors emitted from it?

A. Yes, I know that there was complaint made that it was objectionable on account of health.

Q. Were there complaints from the property owners to that effect?

A. I think there were. I think so. I am not positive about that.

Q. How long had that condition that you have just described been complained of by the people down there before the improvement was made in 1911?

A. Well, I couldn't remember just the years, but a number of years.

Q. And before the work was actually done had the treating and curing of that situation been contemplated for some years?

A. Yes.

Q. By Ocean Grove and Asbury Park?

A. By Ocean Grove, I know, and I think Asbury Park. I won't be positive about that.

Q. You say Ocean Grove as you were employed in Ocean Grove?

A. Yes.

Q. When the work was actually done it seems that Asbury Park joined with it. That is your understanding, is it not?

A. Yes.

Q. Do you know whether the State joined in that improvement, building that road across there?

A. I do.

Q. And did it?

A. Yes.

Q. Did the work that was done by you have the effect of curing the objectionable condition from the standpoint of view and the standpoint of health that you have referred to?

A. I believe it did.

Q. Did you have anything to do with the constructing of the spillway at the outlet of the lake at the ocean, Mr. Patterson?

A. I did not.

Q. There always has been a dam there, has there not, as far as you know?

A. Yes, always been a dam and wooden gates.

Q. There was a new dam or spillway built there in 1913 or 1914, I believe?

A. I remember when it was built.

Q. Have you ever observed, Mr. Patterson, the action on that outlet there in regard to its being filled in with sand because of the freaks of the ocean?

A. I have.

Q. What has been your observation?

A. My observation has been that in heavy storms, especially what we call southeasters, it would fill the outlet to the sea from the end of the flume and cause or make it necessary to do a great deal of digging to get the water out.

Q. And when that sand would fill in from the ocean would it have the effect of stopping up the mouth of the lake and making the lake overflow its banks?

A. It would.

Q. Referring to this map, Exhibit P5, showing the boulevard, that has been described as Main Street, Mr.

Patterson, this is the railroad, this is Main Street in Neptune Township and this is the boulevard running from Main Street in Neptune Township over to Bond Street in Asbury Park. Is this the boulevard and improvement that you had charge of?

A. Yes.

Q. Will you indicate on the map where this objectionable condition existed at the head of the lake?

A. Well, it existed from the south side of the boulevard to the east side of the culvert under the turnpike.

Q. Now, Major, will you just describe the condition of the lake there at the brook, or whatever it was, running from the culvert down to this part of the lake, whether it was an open lake filled with water or whether there was simply a stream running down through the center of it or what?

A. Well, there was a stream that ran down through that part of the lake, but when the lake was filled to the ordinary level of water the stream did not show below the culvert.

Q. In the time of heavy rains this whole place would fill up with water?

A. That would be full of water.

By the Court:

Q. That was a running stream, was it, Major, Wesley Lake Brook?

A. Yes.

Q. How long have you known it?

A. Wesley Lake Brook? Forty-three years.

Q. Has it always been in the same location?

A. The same location, the same brook, running in the same place.

Q. The same brook overflowing in time of freshet?

A. The same brook overflowing. I have removed the

obstructions a good many different years before 1911.

By Mr. Carton:

Q. In order to relieve this brook back there?

A. Yes, and to relieve it at the foot. I have dug it out a dozen times at the foot of the lake.

Q. Dug out the sand?

A. Yes, sir.

By the Court:

Q. Well, when there were freshets, Major, what land would be overflowed?

A. Why, the land between the turnpike and the railroad would be overflowed.

Q. You have seen all of that overflowed?

A. I have seen it overflowed there—well, not all of it; all the lower part of it.

Q. Are you familiar with the location of the Doran property and Woehrer's?

A. Yes, pretty well.

Q. And these other properties of the plaintiffs'?

A. Yes.

Q. Have you seen those overflowed?

A. I have seen water over some parts of the ground where Doran has built.

Q. Which part, as you recall?

A. The northwestern corner of the land that his cellar occupies.

Q. That would be what, the backyard, the present backyard?

A. The back corner of the yard back of it. I have seen ducks paddling in the water there. There was water there, I know, plenty of it.

Q. How often do you think you have seen that, Major?

A. Oh, I suppose—it is hard to say just now just the exact number.

Q. Well, I don't ask you the exact number—the number of times you have seen it.

A. Sure eight or ten times.

By Mr. Carton:

Q. Of course you never made it a point to go up there in any freshet to see whether it was overflowed or not?

A. No, I didn't.

Q. Just casually when you would go by or your business would take you there you would go?

A. Oh, sometimes you would have to go and see what was the matter, when the water was backed up. That flow between the railroad and the turnpike sometimes would slack away because the tunnel under the railroad would be stopped up and shut the water off above.

Q. And what has been your observation as to the effect on the block back of the railroad, west of the railroad?

A. I have seen it a lake so you could use boats.

Q. Do you know that within the past few years, since 1911, at any rate, that the railroad has taken occasion to increase the size of its capacity some two or threefold, its culvert?

A. Yes, I think three times as large now——

The Court: The capacity of its culvert, you mean?

Mr. Carton: Yes, the capacity of its culvert.

A. Three times as large as it was.

Q. And naturally the result of that would be to let the water flow through more quickly from the west side?

A. More quickly.

Q. Now with regard to its getting back again to this place again between the boulevard and Main Street, can you indicate on the map just what course the thread of the stream or the brook took when the lake was not filled?

A. Well, the course of the brook——

Q. This is the brook, this black mark, this is the culvert under Main Street and these are the pipes.

A. Well, the brook of Wesley Lake, when the water was lying in the lake so you could notice the course of the stream from the culvert going east, it ran along the bank of the lake on the Ocean Grove side for a distance of probably seventy-five yards and then turned out in the middle of the lake and went on down in the center of the lake.

Q. And that stream ran along where there were maintained or grew for years willow trees?

A. Yes.

Q. On the Ocean Grove line of the lake?

A. Yes.

Q. And is it or is it not a fact that in more recent years, now, say prior to 1911, the action of this brook did or did not fill up the head of the lake there; in other words, if it has not been filled up more in recent years, prior to 1911, than it was some twenty or thirty years back?

A. Yes, the action of the stream in a great flow of water would naturally whirl to the north and fill the lake.

By the Court:

Q. Made a sort of whirlpool there?

A. Yes, made a whirlpool as it came out from under the culvert. It was close to the south shore until it would whirl the other way and then it would flow and settle and fill the lake.

By Mr. Carton:

Q. And did that condition become more pronounced in later years, prior to 1911? 10

A. Became more pronounced every year to my knowledge.

Q. And had a tendency to fill up that end of the lake more?

A. It did.

Q. And when the water subsided did it leave that part of the lake unsightly?

A. Very much so.

Q. And because it did so fill in more prior to 1911, was that the reason why it was decided to make this improvement and fill in and bridge it? 20

A. Yes.

Q. This end of the lake is really just east of the highway known as Main Street which runs from Spring Lake to Long Branch, is it not?

A. Yes.

Q. And all the traffic going up and down the shore were obliged to use that road prior to this boulevard link, were they not?

A. That was the main travel on that road. 30

Q. Was there any other purpose had by those in charge of the work in making this improvement and putting in the boulevard other than improving the sanitary and sightly conditions at the head of the lake? I mean now with regard especially to the easing up of the traffic.

Mr. Kremer: I object to his stating what other people's purposes were.

Mr. Carton: No, what the board's purpose was in that municipality.

The Court: If he knows.

A. I think I know.

Q. Will you explain, Mr. Patterson?

A. It was to relieve the traffic which went up Lake Avenue to Main and then turned down Main Avenue going south. The boulevard was to relieve this dangerous traffic.

Q. Do you know whether the traffic was dangerous at that street at that time?

A. I believe it was. I know it was.

Q. So that in addition to curing the situation from a sanitary standpoint the improvement also had for its purpose the facilitating of traffic up and down the coast?

A. The relieving of what was really a dangerous traffic around the corner from both ways.

Cross-examination.

By Mr. Kremer:

Q. Now, Major Patterson, you say that you have seen the ground between the turnpike and the railroad flooded many times?

A. Yes.

Q. When did you first see that ground flooded?

A. Well, now, I can't remember the year.

Q. During what years are you testifying to when you say that you saw it flooded?

A. Well, that was the years before 1911.

Q. But how long before?

A. Eight or ten years.

Q. Eight or ten years before 1911?

A. Yes, during that time.

Q. Then that would be in about 1900 is the last time you ever saw that land flooded?

A. The last time?

Q. Yes, that is what I want.

A. No, not the last time.

Q. When was the last time, Major? 10

A. When I saw it flooded—I can't remember the dates. I have no dates.

Q. But to the best of your recollection when was the last time when you saw that land flooded?

A. 1908.

Q. Where were you standing when you obesrved it in 1908?

A. Back on the railroad track.

Q. Could you see there was water back in the rear of Mr. Doran's house? 20

A. Water opposite the rear of the northwest corner.

Q. At this time you are testifying about had Mr. Doran then built his new house?

A. No, I don't think he had. I won't be positive.

Q. You say you didn't see water directly on the land where Doran's house now stands?

A. On the higher part of it next to the south corner of the building, there was no water on that, but there was water opposite the corner, the northwest corner of it, a little higher ground there. There was no water on that 30 but there was water right around the northwest corner.

Q. The northwest corner?

A. Yes.

Q. That would be about where his backyard is?

A. That was where his backyard and where his cellar now is.

Q. How much ground where the cellar is did you see covered with water?

A. I had no measurements to tell, but quite a good deal of it.

Q. Where was this boathouse that you referred to, Major?

A. Why, that was where Mr. Treat's store is now, part of it.

Q. That was not on the property where Doran is?

A. No, it was on the north side of the brook.

Q. On the north side of the brook?

A. That is where the brook runs now.

Q. And that was simply a boat building establishment built alongside the brook?

A. Yes, and there was a lake of water there that the boats floated in.

Q. To the north of the brook?

A. Well, north of the brook, where the brook was, and a little south of the brook.

Q. And how long ago was that?

A. Well, I couldn't give the exact date, but I should judge about twenty-five years.

Q. Twenty-five years ago?

A. I should think so.

Q. It was not there in 1908, was it?

A. No.

Q. Was the lake still there in 1908?

A. Was what?

Q. Was the lake which the boathouse used still there in 1908?

A. No.

Q. The boundaries of the lake were the same in 1908 as they are now?

A. Well, nearly so, I should judge.

Q. You say before the filling in of the lake there used to be a great deal of refuse coming into the lake?

A. Yes.

Q. And then you filled in the lake?

A. Yes.

Q. Where does that refuse go to now?

A. Comes to the spillway or culvert leading into the tank and out into the lake.

Q. It still goes into the lake just the same?

A. It stops in this tank; it is supposed to stop in this tank, the receiving tank.

Q. What they call the detritus tank?

A. Yes.

Q. How big were some of these obstacles that you used to see coming down?

A. Well, they was all kinds. I have seen step ladders and pieces of ladder, hoopskirts, baskets and old broken crates.

Q. Would the building of the straightaway at the junction of the Main Street culvert cause that refuses to stop there and becomes congested?

A. Well, it might. I couldn't tell about that. But the culvert was intended to lead the debris into this septic tank.

Q. When did the railroad enlarge their culvert?

A. I haven't the knowledge of just the year they done it.

Q. Just about a year ago?

A. I don't know about that. I saw it after it was done.

Q. To the best of your recollection when did they do it?

A. I couldn't give you the time.

Q. Were you ever in Doran's cellar?

A. No.

Q. And you don't know what the condition was in Doran's cellar between 1908 and 1911?

A. No.

Q. Have you ever been in there since?
A. No.

RECESS TILL 1.10 P. M.

(Trial of the cause resumed at 1.10 P. M.)

MAJOR JOHN C. PATTERSON, resumed for plaintiffs.

Further cross-examination by Mr. Kremer:

Q. Major, you said this morning that you saw water on the land under what was occupied by Doran's house?
A. Yes, sir.
Q. Will you describe the rear construction of Doran's house as you recall it at that time?
A. Well, the construction of it, the house that he occupied, or the building that was there, was on puncheons, and where the northwest corner of that building was it was a sort of a point, and there was water on the ground.
Q. And from the ground floor under the puncheons was open?
A. Yes, sir; it was open.
Q. Wasn't there a wooden construction that came right down to the ground?
A. Well, I say open—there was plank nailed on but you could see in and see it.
Q. See through the plank?
A. There was cracks into it.

Q. And you stood back on the railroad track?

A. Oh, I was right down by it more than once.

Q. And you looked through the cracks?

A. That is my recollection of it, that I could see. I know I could see through the cracks in some of those cellars. I think that was one of them.

Q. You are not sure of it?

A. I wouldn't be sure of it, but that was my impression.

Q. Wasn't it planked up?

A. They had planks nailed on the puncheons.

Q. They came right down to the ground?

A. Yes.

Q. So if you stood back on the railroad making an observation of this condition you couldn't tell whether there was water under the house or not?

A. I was closer by than that, and I judged by the water on the outside, I judged there would be water on the inside.

Q. But you didn't see it?

A. I didn't see it only through the cracks in the plank.

THOMAS J. WINCKLER, sworn for defendants.

Direct examination by Mr. Carton:

Q. Mr. Winckler, where do you reside?

A. Asbury Park.

Q. What is your business?

A. Confectioner and baker.

Q. How long have you resided there?

A. Thirty-four years.

Q. Been in business there during all that time?

A. Been in business thirty-two of the thirty-four years.

Q. At any time during that period have you held any official position in Asbury Park?

A. I have, yes.

Q. What position?

A. I was Councilman for eleven or twelve years.

Q. During what period?

A. I was elected first in the fall of 1901 and took my seat January 1, 1902, and I continued—that was a continuous service until December 31, 1911.

Q. So that you were in Council then during the whole of the year 1911?

A. Yes, sir.

Q. Went out the 1st of January, 1912?

A. Yes, sir.

Q. As a matter of fact you have served since then too, haven't you?

A. I served until the new commission was elected, from January 1, 1914, until the new commission was elected. I was re-elected the second time.

Q. You were actively engaged in performing your duties as a member of Council, I suppose, during the time you were in there?

A. I was.

Q. Did you have charge of any particular branch of the work in any of the different years?

A. Yes, I was Chairman of the Street Committee a number of years. I was President of Council three years.

Q. You know where Wesley Lake is located, I suppose?

A. I surely do.

Q. And know where the brook is located?

A. Yes, sir.

Q. Well, that lake and that brook have caused half

of your official activities during the time you were there?

A. A lot of it, yes.

Q. Tell us something about it, Mr. Winckler.

A. Well, in the first place from the time I was elected in 1901 until the time that I went out in 1912 we had had dozens of complaints on the overflow of the brook. Now of course that was caused in my judgment by the debris that would gather in the brook and at the flume that goes under Main Street.

Q. And these dozens of complaints that you received, were they received before the improvement, so-called, was made in 1911?

A. Yes, sir.

Q. And these complaints came from whom, property owners?

A. Property owners, yes, sir. In the early part of my councilmanic duties Mr. Treat was also a member of the Council and was the owner of a property at the head of the lake.

Q. On the north side of the brook?

A. Yes, sir; and I know that he has brought the matter up repeatedly, and he had a cellar under his building which he had to abandon at that time.

By the Court:

Q. Prior to 1911?

A. Oh, yes; yes, sir; as early as 1903 and 1904 he had to abandon that cellar, from the fact that every time it rained the water would flow in there, the water would overflow the banks of the lake and flow in there.

Mr. Kremer: I object unless he states he knows the water would flow in there.

The Witness: I do know it.

By Mr. Kremer:

Q. Did you ever see the water in Mr. Treat's cellar?
A. I did.
Q. Prior to 1911?
A. Yes.
Q. You state positively that you did?
A. Yes.

By Mr. Carton:

Q. You are familiar with the location of the property owned by Mrs. Doran and Mrs. Woehrer, are you, Mr. Winckler?
A. Yes, sir.
Q. This map, Exhibit P5, on the wall, shows the plan of the improvement, the boulevard, Main Street, the railroad and the brook, and this is marked "Treat" north of the brook. Is that the property owned by Mr. Treat, who was in Council?
A. Yes, sir.
Q. The cellar to which you have referred?
A. Yes, sir.
Q. This is marked "Doran." Is that where you understand the Doran property is?
A. Yes.
Q. Next to Woolley?
A. Yes.
Q. And next to Woehrer?
A. Yes, sir.
Q. That is the Woehrer building?
A. Yes, sir.
Q. That is Louis Weidman?
A. Yes, sir.
Q. The baker?
A. Yes, sir.

Q. Now prior to 1911 are you familiar with the condition of the land owned by these plaintiffs adjacent to the brook there?

A. I have been familiar with it all the time I have resided in Asbury Park, practically.

Q. What was its condition in the earlier days?

A. The first recollection that I have is the boathouse of McEwan.

Q. Where was that located?

A. Just where Treat's store is at the present time.

Q. What was there there in connection with the boathouse?

A. Well, it stood back from the west side of Main Street, the boathouse did, as I remember, about forty feet, and between him and the Main Street flume on the west of Main Street was this pond, a sort of a pond there, which he used to float his boats. In my judgment, if I remember rightly, the pond was then over the premises now occupied by Mr. Doran, and I think it extended at least—well, I wouldn't be surprised by what it extended up to Woerher's place.

(Objected to.)

The Court: Only what you know, what your observation is.

A. Well, as far as I can remember; it is a long way back.

Q. Look at the map again and I will call your attention to the lead pencil mark made by Justice Dodd. He testified, as I recall, that it was his recollection that the pond came down this way. Is that your recollection?

The Court: Pardon me a moment before you answer that. There was a reference to the McEwan boathouse

and then a reference to another.

Mr. Carton: Ormerod.

The Court: Is that the same?

The Witness: Yes, I think the building was owned by Mr. Ormerod and he rented it to Mr. McEwan, as far as my recollection goes.

Mr. Carton: The same place, your Honor.

Q. Is that your recollection as to where the pond covered, where the water covered at the time the boats were built?

A. I think there was a change made there some years ago, but what the change was I couldn't exactly tell you; some little change made there, but I don't know just exactly what it was.

Q. But you do recall at the time that you refer to on the south side of the brook there there was this pond?

A. Yes, sir; it whirled in there somewhere, and I think it was straightened up on account of the Treat property later.

Q. Your judgment is that it covered a part of the land on both Doran and Woehrer?

A. I think it did, to the best of my recollection, as far as my recollection goes.

Q. At that time and before the filling in there what is your recollection as to the height of the bank on the south side of the lake as compared with the water of the lake?

A. My recollection of that is that it was not much over a foot. It might have been a little more; I wouldn't want to say; but my recollection is it was not much over a foot higher than the water level, the natural level of the water.

Q. Have you been down there recently since there has been some filling in during the past year?

A. On the east side, you mean?

Q. No, the location of the Doran and Woehrer property.

A. I haven't been down there since I have been out of Council. I haven't any occasion to go.

By the Court:

Q. When was the spot occupied by the McEwan boathouse filled in?

A. There was a portion of it filled in after Mr. McEwan abandoned the boathouse and Mr. Treat built the present building.

Q. Can you fix the time?

A. I can't no, I can't fix the exact date.

Q. Well, five, ten or fifteen years?

A. Oh, it is twenty-five years ago.

Q. Twenty-five years ago?

A. Yes, sir; twenty-five years ago, easy, and more. It might be more.

By Mr. Carton:

Q. Now twenty-five years ago or since that, up to 1911, you say you have had complaints from the property owners of that brook overflowing. Have you ever examined it and observed yourself whether it did overflow its banks or not?

A. It did; yes, sir. I have a number of times.

Q. Did that overflowing also extend west of the railroad?

A. Yes, sir.

Q. To any considerable extent?

A. Oh, I have seen it there, ponds, where it covered

acres, where this flow would cover acres of land over there.

Q. On both sides of the brook?

A. On both sides of the brook, yes; more especially on the south side.

Q. Do you remember when the county built the culvert under Main Street?

A. No, sir; I don't.

Q. Mr. Winckler, will you describe the condition of the head of the lake, that is, from the boulevard to Main Street, as you remembered it originally and any changes that happened up till 1911, if any changes did happen in the bed of the lake at the head of the lake?

A. Well, I remember this, that it was a menace to health. We had more complaints—there was always a big flood in any storm and a lot of debris and stuff that would come in at that end of the lake, and the people, the neighbors around there and the people coming into the town complained. Of course there was always a green scum up there during the summer mostly and that would have an odor to it.

Q. And did that coming in of debris and trash, etc., have a tendency to fill in the upper end of the lake?

A. Yes.

Q. And did it actually fill in a portion of the lake?

A. It did. We used to clean that out at least once every two years, and we have cleaned it out once every year during my regime as Councilman.

Q. And as a matter of fact in 1911, at the time of making this improvement, what was the condition of the lake up there as to whether it was all covered with water or whether there simply ran through it a stream, the Wesley Lake Brook stream?

A. Well, the reason that the improvement, the detritus tank, was put in there was to obviate this flow of debris in there, to take care of that.

Q. But my question, Mr. Winckler, was whether the whole head of the lake was a pond or whether it was a mud flat and a stream running through it.

A. Well, it was a mud flat.

Q. The stream was on the Ocean Grove side, wasn't it, under the willows?

A. Yes.

Q. Did that condition become more aggravated in later years?

A. It did; yes, sir.

Q. The filling in there?

A. Yes, sir.

Mr. Kremer: I object. I think all these questions are very leading.

The Court: I think they do have some vice in that direction. You may exercise care in the future.

Q. Well, Mr. Winckler, to obviate the difficulty, will you describe the general condition at the head of the lake prior to making the improvement?

A. It was a mudhole practically. There was a stream running through it on the Ocean Grove side, and as I said before, Ocean Grove and Asbury Park generally used to clean that out at least once every two years. That is, I mean by cleaning it out we would take out two or three dozen loads of stuff out of it.

Q. Muck and filth?

A. Muck and filth; yes, sir. It has cost the City of Asbury Park and Ocean Grove as high as $2,200 to clean it in one year.

Q. Well, was it deemed advisable by yourself and your colleagues to change that condition there?

A. Well, by the advice of the engineer; yes, sir.

Q. Did you employ an engineer?

New Jersey State Library

A. Yes, sir.

Q. Mr. Niart Rogers?

A. Yes, sir.

Q. And did you co-operate with Ocean Grove in determining what was a proper thing to do?

A. Yes, sir.

Q. Was the matter taken up with the State of New Jersey or its representatives?

A. I think Mr. Niart Rogers took that up and made a report to Council.

Mr. Kremer: I object to what he thinks.

Q. You don't know of your own knowledge?

A. It is too far back to be positive.

Q. May I suggest this to you and see if it refreshes your recollection: did the State contribute to the improvement?

A. Yes, sir.

Q. Is that a public highway, Main Street, running through there to the head of the lake?

A. Yes, sir.

Q. Is that or not the main artery running through along the shore?

A. It is.

Q. North and south?

A. Yes, sir; it is what they call the Ocean Boulevard.

Q. You say you had complaints from property owners and passersby as to the objectionable view?

A. Yes, sir.

Q. And odors coming from this lake prior to the improvement?

A. Yes, sir.

Q. Did the fact that traffic conditions might be relieved by making the improvement enter into your consideration in deciding upon this plan?

A. Yes, sir.

Q. And how were traffic conditions relieved because of that improvement?

A. Why, the traffic was diverted from Main Street to this boulevard.

By the Court:

Q. Well, what was the primary consideration for this improvement? What was the real reason for it?

A. The real reason was—the boulevard, you mean?

Q. No, this improvement as a whole, the alteration and the detritus tank.

A. As I said before, to relieve this debris that came down the brook and gathered in this tank.

Q. At the head of the lake?

A. Yes, sir.

Q. Otherwise it would have gathered at the head of Wesley Lake?

A. Yes, sir.

Q. That was the primary consideration?

A. And made this unsightly condition.

Q. When did the building of the roadway enter into the consideration?

A. I think the same year that the detritus tank was built.

Q. What I wanted to understand was which was the primary consideration, the building of the boulevard to relieve the traffic or the relieving of the condition of the——

A. As far as the City of Asbury Park was concerned, and the health of its citizens and neighbors, the detritus tank was the prime consideration.

Q. The prime consideration?

A. Yes.

By Mr. Carton:

Q. The filling in of the head of the lake and the detritus tank?

A. And the building of this tank.

Q. Was the main factor?

A. Yes, sir.

Q. This brush and debris to which you refer came down from the township, I suppose, into this lake?

A. Yes, sir.

Q. And it was your purpose, was it, to arrange this contrivance to pick up this trash?

A. Yes, sir.

Q. So it would not flow out into the lake and stop up the stream?

A. Yes. I remember once when Mr. McCabe was superintendent of streets, at the time I was Chairman of the Street Committee, after the detritus tank was built, in one of the freshets Mr. McCabe and I went down there and we took out a ladder out of that detritus tank something like fourteen feet long. We took out planks twelve and fourteen feet long out of the tank that had floated through this brook. Now that was the kind of stuff that came through there. And that had often—I have seen it previous to 1911 gather at the flume under the street and stop the water.

Q. At the west side of Main Street?

A. Yes, sir.

Q. You have observed that stopping up of the flume by planks and things coming down the brook?

A. Yes, sir.

Q. Do you know anything about the spillway or gates at the other end of the lake, Mr. Winckler?

A. That was built in 1914 at my instigation; yes, sir. I was elected in the fall of 1913 and took my seat on January 1, 1914, and I was appointed Chairman of the

Street Committee on taking my seat. I immediately got busy on this spillway, to relieve the condition of the brook, and I immediately co-operated with the Ocean Grove Association, and they had their engineer, Mr. Cottrell, to submit plans, and he submitted those plans to the City Engineer, if I remember rightly, and the spillway was built according to the plans and specifications of Mr. Cottrell, supervised by the engineer, and it was built, if I remember rightly, anywhere from an inch to three inches lower than the old normal flow of water.

Q. You mean by that that it was contemplated by the spillway that the level of the lake would be lowered about an inch to three inches?

A. Yes, sir.

Q. I think that is what Mr. Cottrell said also. Mr. Cottrell was supervising architect and had charge of that?

A. Yes.

Q. That is William C. Cottrell?

A. Mr. William C. Cottrell.

By the Court:

Q. Which was built first, Mr. Winckler, the detritus tank or the spillway?

A. Oh, the detritus tank was built four or five years before the spillway.

Q. Four or five years before the spillway?

A. Yes, that was built in 1911 and the spillway was not built until 1914.

Q. Then after the detritus tank was built what next was built then?

A. The roadway across the boulevard; and then in 1914 the——

Q. No, when was the roadway built?

A. I think that was built in 1912, in the fall of 1911 or the spring of 1912. I can't just recall, but it was built within a year of the time that the detritus tank was built.

By Mr. Carton:

Q. Mr. Winckler, what has been your best recollection as to the actual overflowing of the lake itself in Asbury Park, its overflowing its banks on the avenue, on the street?

A. Well, my best recollection has been this, that we have always been able to take care of the water. There have been times, under the old regime, when we had the floodgates, before the spillway was put in there, that we used to have a good deal of trouble in raising the gates; it got jammed. But I have been down there myself and been down there with Mr. McCabe when we have opened it up, but I never saw the banks of Wesley Lake overflow itself east of Bond Street.

Q. Have you ever had occasion to observe the action of the ocean at the end of the lake there, as to whether it did or did not stop up the opening?

A. I have; yes, sir.

Q. Have you known an instance where it has stopped it up?

A. Yes, sir.

Q. Prior to 1911 and since, if you know, can you tell us what has been the condition on both sides of the brook west of the railroad?

A. On the west of the railroad, previous to the railroad company putting in their new flume, in each storm there was always a big flood; but since the railroad company has put in their flume, their enlarged flume, that has relieved the water on the west side of the track, and in my judgment that is what causes, why the flood in the cellars of these people happened at this time, because now there is such a flow from that pipe, it is not housed up, you know, and it is a straightaway through there, that the flood goes through there so heavy that it flows into these people's cellars and can't go through the cul-

vert under Main Street fast enough. I don't think the culvert can carry it fast enough.

By the Court:

Q. What is the size of the railroad flume, do you know?

A. I couldn't tell you the exact size; no, sir. I couldn't say, I don't think, any size.

The Court: Was there testimony as to that?

Mr. Kremer: Yes.

The Court: What was the size?

Mr. Kremer: Just about the same size as the culvert.

Q. I was going to ask how that compares with the Main Street culvert.

A. I think it is larger.

The Court: I was under the impression that there was already testimony.

Mr. Kremer: I think Mr. Allen testified.

The Witness: Yes, it is larger.

The Court: What was the testimony as to the diameter?

Mr. Carton: It is marked here 7 feet 6. I think that is what Mr. Allen and Mr. Rogers both testify.

The Court: The Main Street culvert is 6?

Mr. Carton: 6 feet from the bottom.

The Witness: And I think the dimensions are higher too. Yes, they are. I know it is an awful big culvert. I know it was almost tripled in capacity.

By Mr. Carton:

Q. Since that new culvert has been erected under the railroad it permits water to come through there in such volume that this brook and the culvert under Main Street cannot take care of it?

A. Cannot take care of it; yes, sir.

Q. Have you noticed since the erection of this culvert under the railroad as to whether it has relieved the flooded condition west of the track?

A. Oh, it has, yes. I have not seen that section flooded since then. Of course they have filled in a great deal over there, but I have not seen that section flooded since, not to any great extent, not to cover the area.

Q. It permits the flooding to come further down the stream?

A. Yes.

Cross-examination.

By Mr. Kremer:

Q. Do you know when that railroad culvert was built?

A. It was built previous to 1911.

Q. The railroad culvert?

A. The new one.

Q. The one that is there now.

A. That is my recollection of it, yes.

Q. Since the detritus tank was built? You said previous?

A. I am not positive.

Q. You don't know that?

A. I couldn't tell you the date, no. It was built after the detritus tank was built.

Q. Now you say that you did receive complaints from certain persons. Where did those people live that complained before 1911?

A. If I am not mistaken I think Mr. Doran was one of them.

Q. You think Mr. Doran was one of them?

A. I think so, if my recollection serves me right.

Q. Who else?

A. Mr. Treat. As I say, he was a member of Council, and a number of people right along there, I can't just recall who they were.

Q. The complaints you received were all from people living in that neighborhood?

A. Yes, sir.

Q. You never received any complaints from passersby in automobiles, did you?

A. Only as to the condition of the lake, not as to the flood.

Q. Did you receive complaints from people that lived outside of Asbury Park?

A. Yes, sir; as to the condition, the unsightly condition of the head of the lake; yes.

Q. These complaints were all received by Council?

A. Yes, sir.

Q. And will they all appear in the minutes of the Council meetings of Asbury Park?

A. I couldn't tell you whether they would or not. I couldn't tell you whether the minutes are here or whether they would appear in the minutes or not.

Q. If the minutes were here and were produced,

wasn't it your custom to enter every complaint that was before Council?

A. Not always, no. If they were in writing, yes. If they were verbal, no.

Q. You wouldn't record, you mean to say, verbal complaints?

A. Sometimes, if it was very valid, yes.

Q. How do these complaints come before Council, in writing?

A. Well, many of them personally came right to Council.

Q. Now you have testified to the boundaries of Wesley Lake Brook between the culvert and the railroad twenty years ago. To what year are you referring when you say there was a small lake in there and boathouses?

A. During the time that Mr. McEwan had his boathouse there. That was sometime in the 80's.

Q. Twenty-five or thirty years ago?

A. Yes.

Q. Do you recall what the condition of Wesley Lake Brook was and what its boundaries were in the neighborhood of 1905, for instance?

A. They are practically the same as they are now. There may have been a little change now where Mr. Doran has filled it.

Q. But they were virtually the same as they are now?

A. Yes.

Q. There was no lake there then?

A. Oh, no. Of course they had filled in some of that ground.

Q. Now you say that debris in large quantities used to come through the culvert into Wesley Lake?

A. Yes.

Q. Does that still come down the brook and into the lake?

A. It goes into this tank now.

Q. Goes in the tank?

A. Yes, sir.

Q. The detritus tank?

A. Yes, sir.

Q. And you consider the detritus tank an absolute essential to take care of this debris that came down?

A. Yes, sir; that was what was the object in building it.

Q. Doesn't any debris that you speak of come into the lake through the straightaway?

A. I think it does.

Q. Then you still get debris in the lake?

A. Yes, but not as much as we used to.

Q. But your purpose in building this detritus tank and this flume both were to purify the water?

A. Yes, sir.

Q. And you regarded that as an absolute essential for that purpose?

A. Yes.

Q. Now you said your primary object in the improvement was to fill in the lake and improve that condition?

A. To cure that unsightly condition, yes.

Q. As a matter of fact, the street itself, Lawrence Avenue, could not have been built without filling in that part of that lake, could it?

A. It could have; yes, sir.

Q. Why did you build the new spillway?

A. Why did we?

Q. Yes.

A. Because we had to either build a new spillway or build a new floodgate.

Q. The old floodgate was inadequate?

A. It was not inadequate; it was out of commission.

Q. It was out of commission?

A. It was adequate enough if it would work.

Q. But it would not work?

A. It would not work.

Q. How long was it in that condition to your knowledge before you built the new one?

A. Oh, about a year and a half, probably two years.

Q. It had been causing trouble all that time?

A. Yes, sir.

By the Court:

Q. Mr. Winckler, after the spillway was put in, the new spillway, you were then in Council, were you?

A. Yes, sir; I was in there up till January.

Q. What instructions, if any, were given to any employee of the city with respect to opening the gates, the new gates?

A. There were no instructions given, as I remember. It was not necessary to open the gate.

Q. Your spillway was able to take care of the overflow under all conditions?

A. Yes, we had a spillway there seventy-one feet long, that was built there as a fall. You see it was built at such a level that just as soon as it stormed it would overflow and go into the basin and out of the basin into the flume to the ocean. So it was not necessary to open it. This gate was only put into that spillway simply to empty the lake handily in case we wanted to clean it out or anything of that kind.

Q. It never was the intention to use those gates in the event of a flood?

A. Not in case of a flood; of course it wasn't big enough. The gate that is in there I don't think is over two by four. It is only a small, little gate. That was just built in there merely to empty the lake in case we wanted to clean the bottom. The spillway was supposed to take care of that there on the end and side.

Q. No matter what the height of the water might be it would flow over?

A. Yes, no matter what it might be.

By Mr. Kremer:

Q. Don't you think opening the gate would relieve the situation?

A. Not a bit, not in storms. Of course it couldn't go through there fast enough.

Q. Wouldn't it let more water out?

A. Oh, it would let more but not sufficient to relieve the back water in the——

Q. It is 2 by 4, isn't it?

A. Yes, 2 high by 4 wide.

Q. If you opened it wouldn't the water go through?

A. It would go through; yes, sir, but not in sufficient quantities to relieve a pipe that was six or seven feet in diameter.

Q. But it would help it to some extent, wouldn't it?

A. It would help it a little.

Q. You say you saw water under Mr. Doran's house before 1911?

A. No, I say before he built.

Q. Before he built?

A. Yes, before he built his present building, when the old building was there and it was on stilts.

Q. Where were you when you saw that water?

A. Right there alongside of it.

Q. In the backyard?

A. Yes.

Q. Did you have boots on?

A. Yes, sir.

Q. And didn't the construction of his house come down to the ground?

A. Not the old house. Now I am talking about——

Q. It didn't?

A. I have never been in his cellar since he built the new building.

Q. No, I am asking you as to the old building, if the wooden construction didn't come right to the ground.

A. It was clapboards, yes.

Q. Then how do you know there was water in the cellar?

A. I have been there and looked in.

Q. Did you go in?

A. I didn't have to go outside. I could look through the cracks; couldn't I?

Q. Could you see through?

A. Yes.

Q. When was this?

A. Previous to the new building, when he had the old building that stood there on piling.

Q. About when?

A. Along in 1902 or 1903. I don't know when he built his building. I think he built his building somewhere along in 1906 or 1907. I won't say as to that date, but this was previous to that. This was in early part of being Councilman.

Q. And you say that you never directed anybody to open the gates in time of freshets?

A. Not in this new spillway; no, sir.

Q. Mr. Winckler, when you contemplated the filling in of the end of the lake did you contemplate any other method of purification of the water in the lake than filling it in?

A. Only from this tank.

Q. Couldn't you have purified the lake without filling it in?

A. You mean without filling it with the dirt?

Q. Yes.

A. No.

Q. Why not?

A. Well, we couldn't have taken care of this debris such as we did.

Q. Couldn't you have built that tank somewhere else, under the main-land?

A. No, you had to build it on the line of the brook.

Q. Couldn't you have diverted the water and the debris into a tank somewhere else without filling in the lake?

A. I don't see how you could unless you changed the course of the brook.

Q. There is open land on either side of the lake isn't there?

A. Well, it is private land.

Q. You could have condemned it, couldn't you?

A. I don't think for that purpose, not when you had the brook to build it in.

Q. Couldn't you take it for any legitimate purpose?

A. You could take it for any legitimate purpose if you didn't have the land, but there was the land of the brook.

Q. Well, that wasn't land, that was water, wasn't it?

A. Well, it was partly so.

Re-direct examination.

By Mr. Carton:

Q. Mr. Winckler, you have said that you gave no instructions to any employee to open any gates in the new spillway or dam; is that so?

A. My recollection is that no instructions were given excepting where they were to clean out the lake.

Q. Well, the very purpose of building this spillway at this level was so that when the lake filled up it would overflow?

A. Absolutely, yes.

Q. On its seventy-one foot span?

A. Yes.

Q. All surplus water would run over that as quick as it would run out of the pipe underneath?

A. Yes.

Q. Nothing to retard it?

A. Nothing at all.

Q. What are those gates erected there for, emergency purposes or cleaning the lake or otherwise?

A. Yes, sir.

Q. Before this spillway was erected do you know who had charge at the beach of opening the gates?

A. Well, I don't know who had charge of the beach, but I know that Mr. McCabe, as I remember it, was superintendent of the streets during that time and he was instructed to go down and open the gates.

Q. Was that Albert T. McCabe?

A. Yes, sir.

Q. And was he the Mr. McCabe that was afterwards a member of Council?

A. He was a member previous to being——

By the Court:

Q. Why did you instruct Mr. McCabe—oh, that was before the erection of the spillway?

A. Of the spillway, yes. That was the old flume.

Q. Well, while the old gates were there?

A. Yes, the old floodgates.

By Mr. Carton:

Q. And that was the Mr. McCabe who built the Atlas Hotel at Lake Avenue and Main Street?

A. Yes, sir.

Re-cross examination.

By Mr. Kremer:

Q. And you say the spill of the gate was put there for emergency purposes, among other purposes?

A. Emergency purposes was to clean out the lake.

Q. That would not be an emergency purpose.

A. I can't see the necessity of raising that gate during a storm from the fact that you have got too much space there for an overflow.

Q. Suppose the water doesn't go over fast enough, over the top of this spillway; wouldn't opening the gate assist it to go over?

A. If you are a mathematician you can figure out just how much water goes over that flume and how much water that spillway could take. And there isn't enough water that could come through that culvert under there to carry that water over that spillway an inch and a half deep.

Q. But say we have rain on top of the lake that doesn't go in from the flume.

A. Yes, and all streets flow into it and then you can't get a stream over there an inch and a half deep.

Q. Assuming that the rainfall and the flow from the rear also made such a body of water on the lake that it didn't all go over fast enough to let the water from the brook go over the lake; would the opening of the gate assist the flow?

A. I don't think it would.

Q. You don't think it would?

A. No, I don't think it would help it to that extent that it would back up any water.

MARTIN L. BAMMAN, sworn for defendants.

Direct examination by Mr. Carton:

Q. Mr. Bamman, you live in Asbury Park?
A. Yes, sir.
Q. And have lived there how many years?
A. Thirty years.
Q. Have you been engaged in business there?
A. I was.
Q. What is your business?
A. Grocery business.
Q. How long were you in the grocery business there?
A. Twenty-three years.
Q. Did you conduct the grocery at Main Street and Cookman Avenue, now known as the Lehman grocery, during that time?
A. Yes, sir.
Q. Do you hold any official position in Asbury Park now?
A. I do.
Q. What is it?
A. Director of Parks and Public Property.
By the Court:
Q. A member of the City Commission?
A. Yes.
By Mr. Carton:
Q. Because you are a City Commissioner?
A. Yes, sir.
Q. Where do you live in Asbury Park and where have you lived for some years?
A. 607 Lake Avenue.
Q. And where is that say with reference to Bond Street?
A. It is between Bond and Emory.
Q. Just below Bond Street?

A. Yes, sir.
Q. Near the ocean?
A. Yes, sir.
Q. Towards the ocean?
A. Yes, sir.
Q. You have lived there for some time, have you?
A. Lived there all the time, thirty years.
Q. And living there, residing at that place, you have had occasion to observe the action of the lake during all these years, I suppose?
A. Yes.
Q. Are you and have you been familiar with the Wesley Lake Brook at the head of the lake from Main Street west?
A. Well, since taking office I have.
Q. Your attention has been called to it more particularly since taking office?
A. More particularly, not so much before that.

By the Court:

Q. When were you elected?
A. I took office the 12th of January, 1915.

By Mr. Carton:

Q. And went in in 1915, you say?
A. Yes.
Q. While you were about taking up your official duties were you familiar with the surroundings at the head of the lake, that is, west of Main Street, the brook and the buildings adjacent to it?
A. West of Main Street?
Q. Yes, between Main Street and the railroad.
A. Not very much prior to taking office.
Q. Just the ordinary observation passing by?

A. Yes.

Q. Well, did you know that Mr. Doran and Mr. Woehrer had buildings there?

A. Yes, sir.

Q. Do you remember the buildings there before the present building was erected by Mr. Doran?

A. Yes, sir.

Q. Do you remember the character of construction?

A. Yes.

Q. What was it, that is, the foundation particularly?

A. It was frame on piles.

Q. And stood quite near the brook, did it?

A. Yes.

Q. On the south side of the brook?

A. On the south side of the brook.

Q. Did you ever have occasion yourself to note the condition on the back there, whether it was covered with water or not?

A. Not particularly.

Q. Had no occasion to go in there, I suppose?

A. I did notice it casually, only casually.

Q. Well, as you casually observed it can you tell us anything of importance about it?

A. I know that it overflowed there.

Q. You know that from what incidental information you have about it?

A. Yes, sir.

Q. And further back, west of the railroad, do you know whether the brook overflowed there or not?

A. Yes.

Q. Did you actually observe that?

A. Yes.

Q. This all was long prior to 1911, I suppose, that you are talking about now?

A. Prior to 1911, yes.

Q. Since you have been a City Commissioner, since 1915, you have had considerable to do with the lake, I suppose, with other properties?

A. Yes.

Q. Does that come peculiarly within the line of your duties?

A. The lake does, and the brook I considered part of my business, until it was taken over by Mr. Pittenger, the Street Commissioner.

Q. Mr. Pittenger is the Chairman of the Street Committee?

A. Yes, he is the Street Commissioner, not Committee.

Q. This brook divides Asbury Park and Neptune Township, doesn't it? It is the dividing line between Asbury Park and Neptune Township, the brook?

A. Yes.

Q. What have you had to do with the lake since you went in office in 1915, will you tell us about it?

A. With the lake?

Q. Yes.

A. One of the first things when I went into office was to recommend the repairing of the spillway. It was out of repair and out into the ocean.

Q. So that at that time the water not only ran over the top of the spillway but also went through some lines in it, some cracks in it?

A. The lake was drained, completely drained.

Q. So much so that it drained the lake out?

A. Yes, sir.

Q. When was that?

A. It was in the early part of 1915.

Q. Do you mean to say that it actually drained the lake out so that the bottom of it showed?

A. It did.

Q. And that was repaired, I suppose, afterwards?

A. Yes, sir; it was taken up with the Ocean Grove Association and repairs were made.

Q. So it was afterwards repaired and still maintained the water at the top of the spillway?

A. The lake was out that winter, 1914 and 1915.

Q. You mean the 1914 and 1915 winter?

A. Yes, sir.

Q. Do you say that of your own knowledge, living there, or being officially connected with it?

A. Yes, sir.

Q. Can you tell us what months of the winter of 1914 and 1915 the lake was out?

A. I should say it was after October of 1914, up to the time it was repaired, which I think was in April. I think it was in April, 1915, when repairs were made.

Q. Well, has it been in repair and doing its work since then?

A. Yes.

Q. You I don't suppose knew what the level of the lake maintained by the old flume was, did you?

A. I think it was a little higher than it is at the present, from my observation.

Q. As you observed the lake, living by it?

A. Yes, sir.

Q. That has been your observation?

A. Yes. I am of course thoroughly familiar with the height of the water in the lake, having lived there so long. It is right in front of my residence.

Q. Your residence fronts right out on this lake?

A. Yes, sir.

Q. And it is your belief, from observing the lake, that the standard level fixed now is a little lower than it was prior to the building of the new flume?

Mr. Kremer: I object. I think the best evidence is not his belief but the elevations taken by an engineer.

The Court: He may state his observations, no difficulty about that.

By the Court:

Q. What is your observation or what was your observation with respect to the comparative levels of the old and the new spillway?

A. Of course I can give no observations as to the inches, your Honor. It is only the observation of the eye.

Q. Well, that is usually all most of us can do. Was the old one higher or lower than the present?

A. It was a little higher than it is now.

By Mr. Carton:

Q. Mr. Doran went on the stand and stated, as I recall, that he had made complaint or called upon you on two or three occasions. Do you remember those instances, Mr. Bamman?

A. Yes, sir; I remember two instances.

Q. Remember two instances?

A. Yes, sir.

Q. When were those times that he complained to you?

A. The first was in 1915, I don't remember the month, but after a particularly hard rain the brook had left its banks and overflowed the west of Main Street as well as west of the railroad. There was a large lake west of the railroad and he notified us, the Township Committee with myself, to come there and observe things. He said he had water in his cellar. And I went around.

By the Court:

Q. Who was this, Mr. Bamman?
A. The Township Committee.

Mr. Carton: Mr. Doran.

The Court: Mr. Doran?

The Witness: Yes, Mr. Doran asked us.

Q. To go over there?
A. Yes, to go over there. And we did meet them one morning, I think it was still raining, and we saw that condition of overflow.
Q. What was the condition that you found?
A. The overflow of the banks of the brook.
Q. Into the cellar?
A. I don't remember that it was in his cellar. I don't think it was, but it was around, the water was around the foundation of his place; and also west of the railroad it was still worse. That was before the present flume of the railroad was built.
Q. Before the present pipe?
A. Yes, sir.
Q. The large pipe was put in?
A. Yes, the one that is there now.

By Mr. Carton:

Q. Now did you take occasion at that time, when Mr. Doran saw you, to observe the condition of the culvert under Main Street or at the head of the lake, or the flume at the bottom of the lake?
A. Yes, I did.
Q. Tell us about it.

A. The flume under Main Street was filled up with debris.

Q. At the west end or east end?

A. It was the brook between Main Street and the railroad. The banks had caved in——

By the Court:

Q. That would be west of the street?

A. Yes, between the street and the railroad. The banks has caved in there and I recommended that the banks be built up, both on the side of the City of Asbury Park as well as the township; that they be built up with creosoted piles and creosoted bulkhead and that the flume under the street should be thoroughly cleaned out. The township committeemen agreed that they would go into communication with the township officials and see that that was cleaned out. And I agreed that we would clean out the detritus tank and knock out the wall in that tank; because my opinion was that these walls that were running through that tank were too high, that they were blocking up the water. The wall was knocked out by my recommendation, but the cleaning out of the street and the tunnel under the street as far as I know has not been done.

By Mr. Carton:

Q. Well, Asbury Park has no jurisdiction over that tunnel, has it?

A. No.

Q. That is a county matter?

A. I had no jurisdiction over it, no.

Q. You say at this time that Mr. Doran complained to you that the mouth of the culvert on the west side had choked up with debris and trash?

A. Yes.

Q. And the brook was filled with water?

A. Yes.

Q. Had Doran made any effort to clean out that brook or relieve the condition at the mouth of the culvert? Had Mr. Doran, the man who complained, made any effort to relieve the condition there?

A. Not as far as I know. He didn't agree to do that, Mr. Carton. The township officials, the township committeemen——

Q. You are stating what you recommended. I am asking you if he had done that or did it while you were there.

A. No.

Q. I mean to take care of the present situation. I don't mean any permanent improvement. He had not attempted to clean it out, had he?

A. Not so far as I know.

Q. What was the condition down at the foot of the lake at that time, if you observed, as to whether the lake was filled or overflowing, and if so how much?

A. At the foot of the lake?

Q. Yes, the spillway.

A. The spillway?

Q. Yes.

A. The spillway at that time, I think, has just been completed, the repairs to the spillway.

Q. Well, now I ask you whether you know whether the water was running over or not.

A. I couldn't tell you that now.

Q. Didn't observe that?

A. No, sir.

Q. When did he call on you the next time, make a complaint?

A. In 1916.

Q. Do you know the time of the year?

A. It was in the spring.

Q. And complained of the brook overflowing then, did he?

A. Yes, sir.

Q. Did you go with him to examine the situation then?

A. Yes.

Q. Where did you go?

A. I went on the railroad and west of the railroad.

Q. What did you find over there? 10

A. We found some water there then, not so much as before. The overflowing was not so bad.

Q. The brook was overflowing its banks some at that time?

A. Overflowing some, yes.

Q. How about east of the railroad west of Main Street, the same condition?

A. East of the railroad and west of Main Street?

Q. Yes.

A. Yes, it was overflowing there some. 20

Q. And did you observe the condition of the culvert under Main Street at that time?

A. Yes.

Q. What was its condition?

A. There was still a lot of debris in there.

Q. Was that during or after a storm?

A. It was after a storm.

Q. Mr. Bamman, these plaintiffs, Mr. Doran and Mr. Weidman, as I recall them, said that prior to 1911 they stored groceries or flour or something in connection with 30 the butcher or grocery business in their cellars. I ask you, in view of your experience as a grocer all these years in Asbury Park, in view of the actual situation surrounding these cellars and their proximity to this lake, if you think it was a safe or proper place to store such articles.

A. Well, I should never put any flour in any cellar in Asbury Park. I do not think there is a cellar in Asbury Park that is fit to store flour in.

Q. Wet or dry, eh?

A. Wet or dry.

Cross-examination.

By Mr. Kremer:

Q. Did you ever put any goods in your cellar, grocery in Asbury Park?

A. No, sir; never.

Q. Then you don't know what the effect on it would be if it was there, do you?

A. I have an idea what it would be, yes; make it musty.

Q. You don't know, though, do you?

A. Yes, I do.

Q. Did you ever put any down there?

A. No.

Q. Did you ever put any goods in your cellar, grocery goods?

A. Yes.

Q. And what was the effect on them?

A. For instance, what?

Q. Well, flour, for instance?

A. I didn't put flour.

Q. What did you put in your cellar and where?

By the Court:

Q. In other words, what did you use your store for on the corner of Main Street and Railroad Square?

A. We put in eggs and butter and molasses and vinegar.

Q. Meats?

A. Well, potatoes in the winter.

Q. Any smoked meats?

A. No, sir.

Q. Any meats of any character?

A. I don't remember that we ever put meats in there, although I would not object to keeping them there twenty-four hours or so or a day or two. I don't think it would affect it very much. But to store flour in a cellar would be entirely against my judgment.

Q. What is the comparative level of the cellar under your store building with that of Doran's building, do you know?

A. It was higher.

Q. That is, your property is higher?

A. Oh, yes, considerably higher. The water runs that direction.

Q. The surface water?

A. Yes.

By Mr. Kremer:

Q. You mean the water in the gutters and streets?

A. Yes.

Q. As a matter of fact didn't you use the cellar in that store at the corner of Main Street and Cookman Avenue for general storage purposes? Isn't it used for that purpose now?

A. I don't know what it is used for now. I didn't use it for general storage purposes. That would include such things as ought not to go into a cellar.

Q. You don't know what it is used for now?

A. No.

Q. Now, Mr. Bamman, you referred to the first time that Mr. Doran called you after your accession to office.

Can you fix the month of the year 1915 in which that occurred?

A. No, sir; I can't.

Q. Do you think it was possibly February?

A. It might have been.

Q. To the best of your recollection was it February or March?

A. I think it was along in the spring sometime.

Q. And the lake was full at that time, wasn't it? The lake had water in it at that time? You have testified that there was water in the lake then, not that it was running over the spillway but that the lake had water in it.

A. That I don't know. Of course it had water in when there was a lot running in there.

Q. At that time when he called you wasn't there water in the lake?

A. It would probably flood the lake, a very heavy rain, even though it was running out on the bottom.

Q. And during this winter, that one winter when you say the lake was during a portion of the time dry, in case of snows and thaws following a snowstorm this lake would have water in it, wouldn't it, be flooded?

A. It might have a little. I know there was no ice in there, so there was no skating in there that winter.

Q. But there would be on these occasions?

A. Might be a little.

Q. You say that occasion in the early part of 1915 was before the railroad culvert had been built?

A. Yes, it was.

Q. Then he was troubled before that time with floods?

A. Mr. Doran was troubled before that time?

Q. Yes, before the construction of the new railroad culvert.

A. Yes.

Q. The other time you have been there has been since the construction of the railroad culvert in 1916?

A. I think it was, yes.

Q. Did you on that occasion in 1915 see debris in the easterly end of the Main Street culvert?

A. It was all through it.

Q. How could you see all the way through it?

A. Looking in.

Q. Wasn't it full of water?

A. No, sir.

Q. Was not full of water?

A. No, sir.

Q. How high was it full of water?

A. About half full, perhaps.

Q. Then there was room for some water to go through?

A. Yes.

Q. You just saw occasional pieces of debris go through?

A. Yes, sir.

Q. There wasn't anything in the westerly end of the Main Street culvert in the way of debris to absolutely block the flow of any water which might come along, was there?

A. No.

Q. Don't you open that gate now during storms?

A. We do, yes.

Q. Isn't it open today in this storm?

A. I judge it will be, yes. The engineer takes care of it.

Q. Why do you open the gate?

A. We open it because it will probably help to relieve the situation all over.

By the Court:

Q. You are inclined to disagree with Mr. Winckler, are you?

A. I do on that score. I don't disagree with him in this respect, that that spillway was built for the purpose of taking care of the water that runs naturally over, but I think if we can relieve it by opening the gate we should do so.

Q. What instructions have you given to any city employee respecting the opening of the gates at any time?

A. I have instructed them to open it every time in a heavy storm.

Q. When did you do that, Mr. Bamman?

A. From the start.

Q. At the time you took office?

A. Yes.

By Mr. Kremer:

Q. 1915?

A. Yes, sir.

Q. Now you say that in 1915, upon the occasion of this flood, you examined the detritus tank and flume and you say you found the walls of the detritus tank too high?

A. Yes. Well, I didn't examine the walls but I know that they were built and I made up my mind that they were too high when they were built.

Q. And you thought that they were holding the water in there?

A. Yes.

Q. And they had been doing that ever since they had been built?

A. Until we knocked the wall out.

Q. Until you knocked it out in 1915?

A. Yes.

Q. Then from the time it was built in 1911, until 1915 it was too high?

A. It proved so to my mind. That is the reason they had to build the straightaway.

Re-direct examination.

By Mr. Carton:

Q. The straightaway, Mr. Bamman, was built in 1912, as it has been testified to?

A. Yes.

Q. Did you hear Mr. Savage, the plaintiff's witness, on the stand state he knocked those walls out in 1912, out of the detritus tank?

A. I didn't hear him state that, no.

Q. With regard to the opening of the gates in the present spillway at the foot of the lake you advised them to be opened in times of storm as an additional precaution, I suppose?

A. Yes.

Q. To help the situation?

A. That is it.

Q. Have you ever had occasion to observe the action of the ocean in building up sand there at the foot of the lake?

A. Yes.

Q. What has that been?

A. At certain tides the sand shifts. They will go either out and come in and they will fill up the mouth of the flume. And then the engineer who looks after that will dig it out or have it dug out every time when the low tide sets in.

Q. Well, to what extent does the deposit of sand come in there, considerable or otherwise?

A. Yes, sometimes it sands up the mouth up to the top. We have a gate now at the outlet so that no sand can come into the flume as it used to. I had a gate built in there so that the sand does not get inside the flume, and all we have to do is to take the sand away from the outside of the gate.

Q. A sort of opening out, gate valves out of the flume?

A. Yes.

Q. So that the sand cannot fill up inside?

A. Yes.

Q. And of course you cannot prevent the sand from backing up in front of it?

A. No.

Q. Because of the action of the ocean?

A. Yes.

Q. That is the sand that you have to dig out after these storms subside?

A. Yes. Formerly it used to come up in the flume and we had very hard work to get it out.

By the Court:

Q. How many times have you dug it out or had it dug out since you have been in office and prior to April 2, 1917?

A. Between ourselves and the Ocean Grove Association we have probably dug it out twenty or twenty-five times since I have been in office.

Q. Who is the man, since you have been in office, that has in his charge the opening of the gates in time of storm?

A. The chief engineer.

Q. What is his name?

A. John Groetzner.

Q. How long has he been employed in that capacity?

A. He has been there, I think, thirteen years.

Q. And is he there day and night?

A. No, sir; there is a night man there who has charge of it.

Q. Who is that man?

A. Mr. Cook.

Q. So that there is some one there in the employ of the city during the entire twenty-four hours?

A. Yes.

By the Court:

Q. Has Mr. Cook any instructions in respect to the gates?

A. Yes, sir.

Q. What are they?

A. He is to open them after a heavy rain, whenever the lake fills up.

Q. So that both the day man and the night man have those instructions?

A. Yes.

Q. You say they have had such instructions since you went into office?

A. Yes, practically.

Q. Well, since the lake began to fill up, after it went out through the——

A. Since the complaints, you mean?

A. No, sir; since the lake has been repaired so that it holds water. I mean the spillway.

Q. Since the spillway has been repaired?

A. Has been repaired, so that it holds water. Before then it was not necessary.

Re-cross examination.

By Mr. Kremer:

Q. Mr. Bamman, didn't that flume at the end of the lake, the ocean end, formerly go out further than it is now?

A. It did.

Q. And what happened to it?

A. The waves broke it.

Q. And when was that?

A. It was broken when I went into office. Just when it was broken I don't know.

Q. Has it ever been rebuilt?

A. No.

Q. Why not?

A. Because we cannot build it out far enough, in my opinion, to stop the sand from coming in, and the further we build it the more difficulty there will be to dig the sand out.

Q. So you have just left it in its present condition, broken as it was?

A. Yes, I thought it was better to leave it where it is now than build it out further, unless we go out far enough.

Q. How many flumes have you there?

A. Two.

Q. Have you gates on both of them?

A. No, sir.

Q. Why not?

A. One belongs to the Ocean Grove Association and one belongs to Asbury Park.

Q. Then the only one that has this protective device on it is the one that belongs to Asbury Park?

A. Yes.

Q. And you say it was 1915 when you knocked out the flumes in the detritus tank, had them knocked out, after you went into office, the walls, I mean to say?

A. Yes, at least that is what I understand. Mr. Pittenger told me that he had them knocked out. Whether he said that he had them knocked out or whether he said that they were knocked out before, I don't know. But I know that he told me they were out.

Q. You say there is a night man there as well as a day man?

A. Yes.

Q. And the night man takes his instruction from the chief engineer, Groetzner?

A. Principally.

Q. And isn't it true that his instruction is not to open that gate without Groetzner's direction?

A. No, sir.

Q. You say that is not the condition?

A. That is not true.

Q. That is not his instruction, at any rate?

A. No, sir.

Q. Do you know whether before the accession of the commissioners there were any persons who had the same instructions as to the opening of that gate that you have given now?

A. I don't know that; no, sir.

Re-direct examination.

By Mr. Carton:

Q. This night man there, he has individual instructions running to himself, that is, what to do?

A. Yes, sir.

Q. As to the opening of them?

A. Yes, sir.

Q. Then do I understand, Mr. Bamman, that when you stated a little while ago that you caused these walls to be knocked out of the tank that you meant to say that they had been knocked out from what Mr. Pittenger had said to you?

A. I asked Mr. Pittenger afterwards and he said they were knocked out.

Q. You didn't do that yourself?

A. No.

Q. And you can't testify of your own knowledge whether that was or was not done, only Mr. Pittenger told you it had been?

A. Not of my own knowledge or observation, I don't know.

ISRAEL R. TAYLOR, sworn for defendants.

Direct examination by Mr. Carton:

Q. Mr. Taylor, where do you live?

A. Asbury Park.

Q. What is your business?

A. Building business.

Q. Contracting and building?

A. Yes, sir.

Q. How long have you been engaged in that business?

A. About twenty years.

Q. Are you actively and have you been continuously engaged in the contracting business?

A. Yes, sir.

Q. Built a great number of buildings in and about Asbury Park, have you?

A. Yes, sir.

Q. Have you at my request examined the cellars of the plaintiffs, Doran and Woehrer here?

A. Yes, sir.

Q. When did you make that examination?

A. Last Thursday, I think, or Friday.

Q. In company with any other builder or alone?

A. No, alone by myself.

Q. Tell us what you found the condition of Mr. Doran's cellar to be.

A. Why, there is indications there that the water has raised in the cellar from two feet six inches.

Q. From the lines on the wall?

A. Yes, sir.

Q. Stain marks?

A. Yes, sir.

Q. And how is the cellar, quite close to the Wesley Lake Brook?

A. Yes, sir; I don't know just how close but very close.

Q. Is it high or low there?

A. The ground?

Q. Yes.

A. Well, they have made some attempt to fill it in but it is low, a hole in the ground.

Q. Does it bear evidence of it being filled in between the buildings and the lake?

A. Yes, sir.

Q. Is it low back of the buildings and toward the railroad?

A. Well, they have got curbing built each side of the creek and they have been filling in with ashes and so on. Yes, it is lower, I should imagine, across the railroad.

Q. What character of construction did you find the cellar to be, Mr. Taylor?

A. Regular cement floor, with concrete sidewalks.

Q. Did it bear evidence of having been water-proofed?

A. No, none that I could observe.

Q. Mr. Taylor, referring to the hole having been knocked through the wall, did you observe that?

A. No, sir.

Q. You didn't notice it, didn't pay any attention to it?

A. No, sir.

Q. As a builder let me ask you, can a cellar be erected in that location, such a cellar as Mr. Doran has erected, and serve its purpose as a cellar without being waterproofed?

A. It could not be expected to be waterproof without being waterproofed, certainly not, because the location of the ground there would really suggest the necessity of waterproofing.

10

By the Court:

Q. I suppose really the question is what would have been the effect with respect to the use of the cellar if it had been waterproofed.

A. If it had been properly waterproofed it could have been used.

Q. What do you mean by waterproofing? What is used?

20 A. Well, there are several methods by which it is waterproofed. Sometimes they build a concrete wall and then put over the bottom of the cellar, which they reinforce with steel, six or eight inches, or in other words, they build it strong enough to retard the pressure of water they are working on; and on top of that they lay a felt or pitch floor five or six pile high, and then on top of that they lay a concrete floor. Then on the wall they lay four inch side walls to take care of the force of the water.

30 Q. That is equivalent to building a tank, as it were, to resist the pressure, sinking a tank to resist the outside pressure?

A. Yes. Another method is to use melted asphalt, which they melt over the floor and up the side walls, and lay concrete against it. They are the only two real and

true practical methods of waterproofing. One or the other must be done.

By Mr. Carton:

Q. As a builder would you consider it practical and advisable to build such a cellar as Mr. Doran has in that location?

A. The one he has now?

A. Not if he expected to use it.

Q. Is that because of it being so low and so near the top of the springs?

A. Well, yes, so near the bottom of the brook, or near the top of the brook. We waterproof cellars, for instance, up at the Asbury Park & Ocean Grove Bank. We waterproof it, while we don't go into such an extensive system, we use a waterproofing compound.

By the Court:

Q. How far away is that from Doran's place?

A. I judge a quarter of a mile.

Q. Why do you need to waterproof it there?

A. To take care of possible seepage through the exterior wall, which often occurs, and quite a little water goes down in the bank, and they had some trouble at the old bank, and they put a drain in there which runs to the lake.

Q. That is the ordinary surface?

A. Yes, and that will seep through the wall where there is an ordinary rain for a day or two, it is there once in a while.

By Mr. Carton:

Q. As a builder if you were designing the construc-

tion of a cellar such as Mr. Doran's, would you advise that it be waterproofed in one of the methods that you have described?

A. Yes, it should be waterproofed in the walls extensively, because you have got to take care of the tremendous pressure of the surface water, together with the water coming from that brook through holes in it, enough to penetrate the walls, unless it was sufficiently waterproofed to protect it.

Cross-examination.

By Mr. Kremer:

Q. You have built a good many cellars in Asbury Park; do you waterproof them always?

A. Not always, but any possibility of water seeping through the walls I always do.

Q. That is a very expensive method?

A. Yes, much more expensive.

Q. You build cellars, though, and don't waterproof them frequently?

A. Not where there was any prospect of water.

Q. You have built such cellars?

A. Yes.

Q. They have been satisfactory?

A. Not where there was any pressure of water.

Q. Haven't you built some in places where there was pressure of water and not waterproofed them?

A. No, sir.

Q. Have those cellars that you have built without waterproofing never been satisfactory?

A. Not where there was any possibility of surface or ground water.

Q. You don't build any of any kind without waterproofing them?

A. We would not waterproof them if it was not necessary to insist on waterproofing, some water conditions which you could observe.

By the Court:

Q. Are there some places in Asbury Park where it is not necessary to waterproof?

A. Yes.

By Mr. Kremer:

Q. And in those cellars which you have built in that part of the city they have been satisfactory, they being in the condition in which you built them?

A. It depends altogether on the external condition.

Q. Wasn't that your testimony? Do you know whether the unwaterproofed cellars you have built have been satisfactory?

A. Well, here is a condition. We built the Asbury Park Trust Company. There is an old basement which stood there for years; we didn't put it in. Sometimes water from the lake will seep up through this floor. We had to go down below that and put in a bed and waterproof it, because it was necessary we should. We might have, nevertheless, observing the old condition there in building the new building, we might have said the water never runs past this floor and there is no necessity for doing it.

By the Court:

Q. How far is that from Wesley Lake?

A. Not more than 350 feet.

By Mr. Kremer:

Q. Do you know of any cellars, unwaterproofed cellars, in Asbury Park that do not leak?

Mr. Carton: I object to the question for the reason that this cross-examination is entirely unimportant, whether there are or not.

The Court: There is no question about that. The objection may be sustained.

By the Court:

Q. Are you familiar with the elevations of Asbury Park, Mr. Taylor?

A. Not very much, not in exact inches and feet.

By Mr. Kremer:

Q. If the brook did not rise in your opinion would not Mr. Doran's cellar be satisfactory and dry?

A. Not at all times.

Q. Not at all times, do you say?

A. No, sir.

Q. At what times would it not be so?

A. Well, in the spring of the year, when the springs are rising.

Q. If they didn't rise?

A. Well, they always do rise. Nature provides for that.

Q. Percolating waters you are speaking of now?

A. Enough surface water can accumulate in the street in a place like that, and it will come up and down Main Street and everything runs towards Mr. Doran's.

This is a low spot. That amount of surface water lying two days would percolate his cellar.

By the Court:

Q. Did you discover whether Mr. Doran's cellar was on a ridge or not?

A. No, sir; don't appear to be on a ridge to me, right along the creek.

By Mr. Kremer:

Q. You don't know as a matter of fact whether that has been filled in or not, do you?

A. There is appearance in the rear that they had filled in with ashes. In fact, Doran told me that they had filled in.

Q. But the land itself where the house is was not?

A. No, sir.

Re-direct examination.

By Mr. Carton:

Q. Did you examine the Woehrer cellar?

A. Yes, sir.

Q. Did you find that to be waterproofed?

A. No, sir.

Q. The same condition existed as at Mr. Doran's?

A. Yes, sir.

Re-cross examination.

By Mr. Kremer:

Q. You say every cellar in the springtime will be-

come wet if it is not waterproofed from rising waters?

A. No, not every cellar will do it. If it is high the natural tendency is, if they carry off the surface, it won't be wet.

Q. In your opinion if there were no brook alongside of Mr. Doran it would have water just the same?

A. In the spring of the year he would have water there just the same.

10

HERBERT O. GARDNER, sworn for defendants.

Direct examination by Mr. Carton:

Q. Mr. Gardner, you live at Asbury Park?

A. Yes, sir.

Q. What is your business?

A. Contractor.

20 Q. How long have you been in the contracting business?

A. About fifteen years.

Q. Tell us generally what experience you have had.

A. Well, I have put up several buildings and retaining walls and the boardwalk.

Q. Engaged now in any particular work?

A. Putting down concrete roads just at present.

Q. Have you recently been engaged in the work being done by the State at the mouth of Shark River?

30 A. Yes, sir.

Q. Have charge of that work?

A. Yes, sir.

Q. How long?

A. About nine months.

Q. Still have charge of it?

A. No.

Q. You have retired from it, have you?

A. I did; gave it up on account of my own building.

By Mr. Carton:

Q. Have you had considerable work in concrete construction?

A. I have.

Q. Have you examined the cellars of these plaintiffs, Doran and Woehrer?

A. I have.

Q. Recently?

A. I think it was last Wednesday or Thursday, I couldn't just remember which.

Q. You were not with Mr. Taylor, you went there alone?

A. I went there with Mr. White.

Q. Would you as a builder advise the construction of cellars such as those erected by Mr. Doran and Mr. Woehrer if they are to be used?

A. I would not, not in that locality.

Q. Well, first tell us what is the character of the locality.

A. Well, I should sum it up to say it was wet.

Q. Well, is it low or high?

A. It is low down there. It is in a hollow where water runs to it from every direction. In case of a storm there is danger like any brook of the water raising, nobody knows how high.

Q. How near is that cellar to the bank of the brook, or at least to the brook?

A. There is a hole cut through the cellar wall next to the brook, and I stuck my head out there and the water was right up next to the wall.

Q. At that time?

A. At that time, last Wednesday.

Q. What date?

A. Last Wednesday or Thursday. And we had had no rain in some time then.

Q. The Woehrer property is next to it south, the Woehrer cellar is next to the Doran cellar on the south?

A. Yes.

Q. Was that cellar floor and walls waterproofed?

A. No, there were no indications of it anywhere.

By the Court:

Q. Pardon me. The brook runs between the Doran property and the Woehrer property?

Mr. Carton: No, your Honor.

The Witness: No, between Doran and Treat.

Q. Well, the Doran property is on the south?

A. The south side of the brook, adjoining the brook.

Q. Then next to the Doran property is the Woehrer property?

A. Yes.

Q. South of the Doran property.

A. Yes, south of the Doran property.

By Mr. Carton:

Q. Well, Mr. Gardner, if an owner desired to erect a cellar there such as Mr. Doran's, do you think it could be made usable by waterproofing?

A. Absolutely.

Q. Do you think in the construction of this cellar as built by Mr. Doran it serves any practical purpose for use?

A. Well, it might be all right to store coal in or something like that.

Q. Is it so constructed that it will keep out the water from the springs or the overflow of the brook?

A. I think one of the great difficulties, there is a big hole in through the wall. I think the majority of the water comes through that.

Mr. Kremer: I object to what he thinks.

A. I know it then.

By Mr. Kremer:

Q. Did you ever see it come in?

A. I could see the water out of the hole.

The Court: Yes, that testimony is entirely competent. He testifies to what observations he made.

By the Court:

Q. You say that you saw the water line above the hole?

A. Above the hole.

Q. On the inside?

A. On the inside.

By Mr. Carton:

Q. You mean from the stain marks around the wall, showing the water line or where it was filled?

A. Yes.

By the Court:

Q. Just tell us where you saw that water line.

A. All around the cellar, on the furnace and on the piers inside the cellar.

Q. How high from the floor?

A. I didn't measure, but I should judge it was about two feet four or six inches.

Q. Now in respect to the hole where did you see the water line, above the hole?

A. It was about two-thirds of the way up the hole.

Q. Two-thirds of the way up the side of the hole?

A. Yes.

Q. You saw a water line?

A. Something like that.

By Mr. Carton:

Q. So that the instant the water was up to that height it would flow right in through this hole?

A. It would.

Q. Outside of its proximity to the brook, the building, would or would not, in your judgment, the springs, the ordinary springs, cause that flooding in that cellar?

The Court: Excuse me, Mr. Carton.

By the Court:

Q. You say that you saw this water line two feet six inches. Would the effect, the result of your observation of that hole, be to let out the water?

A. No.

Q. Only to let it in?

A. The bottom of the hole is about two feet above the floor, I should think.

Q. Two feet?

A. Yes, and the water would stay up until it got up to that point, that is, the great body.

Q. Therefore the water line was six inches above the bottom of the hole?

A. Above the bottom of the hole, about that.

(Question repeated): "Out side of its proximity to the brook, the building, would or would not in your judgment, the springs, the ordinary springs, cause that flooding in that cellar?"

A. I don't think it would to any great extent. It would probably make the cellar wet, but it would not fill it up.

Q. Would you advise the construction of a cellar in that location without waterproofing it?

A. I would not.

Q. Is this cellar in your judgment properly constructed?

A. Not to keep it dry, if they want to use it, I wouldn't say it was. As a foundation it would be all right.

By the Court:

Q. So far as practical use?

A. As far as sustaining the building above it would be all right.

Q. You say it would be impracticable?

A. Impracticable for storing or furnace work.

By Mr. Carton:

Q. What have you to say of Woehrer's cellar, occupied by Mrs. Woehrer and Mr. Weidman, the baker?

A. I only saw the cellar underneath the bake oven.

Q. Describe that, will you?

A. Well, that has a cellar, I should say, about maybe sixteen feet square, without any cement bottom at all.

Q. No cement bottom?

A. No. It seems to have been built for a foundation for a little room or wing of the house.

Q. Where the bake oven is, what is the construction of this bake oven in there? Did you describe that?

A. The bake oven is an iron frame lined with fire-brick.

Q. Up on piers?

A. No, it stands on the wooden floor beams. They put wooden floor beams across this foundation and then this oven stands in the middle of that floor.

Q. Did you make any examination of that to determine whether or not there was sufficient carrying strength for that weight?

A. Why, it seems not, because the beams were very badly bent, and at one place the leg of the oven was going down very far, but it had a wooden prop stuck under the corner of the oven to hold it up.

Q. The character of the soil there, did it appear to be black and mucky and soft?

A. What I saw was ashes; looked as if it had been filled in with ashes.

Q. Bearing evidence of having been filled in?

A. Yes, sir.

Q. Mr. Gardner, in your work have you done considerable work along the ocean front, bulkheading, etc.?

A. Yes, sir.

Q. Have you had occasion to note the action of the tides, whether they do or not fill up inlets and flumes emptying into the ocean?

A. I certainly have.

Q. What has been your experience in that regard?

A. Well, they are liable to do most anything. I have seen it throw up a bank of sand ten feet high over night

and maybe the next morning it would take it all away.

Q. And when that bank of sand would be thrown up I suppose it would naturally have the effect of shutting off any outlet to the ocean?

A. It certainly does.

Q. Backing up a brook or lake or anything else?

A. Cover up a lake or anything else. I have spent a good many dollars fighting those sand banks.

Q. Have you ever had any occasion to observe those at the foot of Wesley Lake?

A. Not especially so, no.

Q. You are speaking now of your experience generally?

A. Yes.

Q. And I suppose certain tides have the effect of doing that more than other tides, certain winds?

A. Well, a high tide with a drifting sand usually is what closes them up. That is what it is at Deal Lake and Shark River. Those are the places where I have had my experience.

Q. Deal Lake is further north in Asbury Park than Wesley Lake?

A. Yes.

Q. You have noticed that there?

A. A great many times.

By the Court:

Q. As a matter of fact, the tides are very erratic, aren't they?

A. They surely are.

Q. That is, the operation of tides upon sandbars and so on; you can have a sandbar one spring——

A. And deep water the next. And it might open on very short notice sometimes.

Cross-examination.

By Mr. Kremer:

Q. You say that this cellar of Mr. Doran's, being unwaterproofed, is not immune from being filled with water from the rising of the brook; the water would find its way through the concrete on account of the fact that it is not waterproofed?

A. I would like to say that my opinion is that outside of that hole that the water would not come in very fast.

Q. Would it come in?

A. That cellar seems to be a very good cellar; that is, as far as the wall is concerned; and I do not think a sudden flow that raised up there for an hour or two like that, that there would be more than an inch or two of water come in that cellar.

Q. But it would come in without coming through the hole?

A. There would some come in. Some water would seep in through the floor and around the cracks.

By the Court:

Q. But not two feet six inches?

A. No, I don't think so.

By Mr. Kremer:

Q. That water could force its way through without coming through that hole?

A. Oh, yes.

Q. And if it gradually rose to a point to where the hole is wouldn't it go out the hole in the brook?

A. Some of it would if it got down as low as the

bottom of the hole, and of course eventually it would go out itself, give it time enough.

Q. But it would take just as long coming in as to go out, if it came through the floor without going through the hole?

A. Yes.

Q. How much would it cost to waterproof that cellar?

A. I couldn't say off-hand; probably it would cost $200 or $300.

GEORGE COOK, sworn for defendants.

Direct examination by Mr. Carton:

Q. Mr. Cook, you live at Asbury Park?

A. Yes, sir.

Q. And are you employed by the city?

A. Yes, sir.

Q. How long have you been employed by the city?

A. About four years and one month.

Q. What are your duties?

A. Watchman at the Casino.

Q. Night or day?

A. Night.

Q. Is Mr. Groetzner the engineer in charge in the daytime?

A. He is.

Q. With respect to the pipe, where are you located?

A. At the Casino.

Q. At the foot of the lake?

A. Yes, sir.

Q. What are your duties, or rather, what are your instructions from your employers concerning the opening

or otherwise of the gates at the foot of the lake in time of storms?

A. To open the gate in time of flood, when the lake floods.

Q. Those are your instructions?

A. Yes, sir.

Q. Do you carry out those instructions?

A. To the best of my ability; yes, sir.

Q. Well, you are there for that purpose?

A. I am there.

Q. And have been for four years, you say?

A. Four years.

Q. Have you in time of storms since you have been there opened those gates when you deemed it necessary?

A. Always.

Q. And when in your judgment did you deem it necessary to open them?

A. Well, when the water covered the entire dam, then I opened it.

Q. When it rises higher and starts running over?

A. The entire dam, yes. I always wait till it flows over before I think it necessary to bother with the gates at all.

Q. And then is it your invariable custom to open the gates?

A. Well, it has got higher at times before I reached it, yes.

Q. You mean in time of heavy storm?

A. In time of unusual storm, yes.

Q. And what has been your observation of the effect of opening these gates on the spillway or the water running over the top?

A. Well, a bad storm it hasn't much effect for a long time, but a short storm it will reduce the lake right away, because after the supply of water stops coming in it helps it a great deal.

Q. I don't know whether you are the man or not, but Mr. Doran stated that he was down there on one occasion when some employee was down there, to see him about opening the gates. Were you the man?

A. No, sir.

By the Court:

Q. When are you on, the evening or when?

A. In the evening from six until six; six at night until six in the morning.

Cross-examination.

By Mr. Kremer:

Q. Have you been on every night for the last four years or has some one else been on part of the time?

A. When I had my vacation, in time of sickness, and one or two other nights.

Q. Do you recall a storm the night of January 21, 1917?

A. Yes.

Q. Were you on duty that night?

A. I was on duty that night.

Q. Now you say that you open the gate when the water flows over the dam, as a rule?

A. Yes.

Q. How long does it take when an average storm comes for the water to reach the height at which it will flow over the dam?

A. Oh, I don't know; that is a hard question to answer. It all depends on the amount of rain that is coming down. You know sometimes it is necessary to open it in a couple of hours and sometimes it is not necessary to raise it at all, it will take care of itself.

By the Court:

Q. Do you find it often necessary to raise the gate?
A. Quite often, yes.
Q. What for?
A. Well, the only reason I open the gates at all is because I was instructed by the chief engineer to open the gates in time of floods, to relieve Mr. Doran. I believe he has made some complaints, and that is the only reason.
Q. Did you open the gates to relieve Mr. Doran?
A. To relieve Mr. Doran.

By Mr. Kremer:

Q. You don't know whether it relieves him or not?
A. No, sir; I don't know anything about the other end of the lake.
Q. When were you given those instructions by the chief engineer?
A. I couldn't tell you the first instructions I had, but I know I was instructed year before last.

By the Court:

Q. Your instructions were for the purpose stated in respect to Mr. Doran?
A. That was the reason he gave me.

By Mr. Kremer:

Q. You say sometimes the water has gone pretty high over the dam before you have reached it, and you never open the gate until the lake is full and flooded?
A. Very seldom. Sometimes I will go down and open it before, as soon as it starts raining.

Q. But as a rule you wait until the lake is full?
A. Till it runs over, yes.
Q. Have you ever seen Mr. Doran down there?
A. Never have, no, sir.

Re-direct examination.

By Mr. Carton:

Q. Just one question. You, I suppose, get sick and have vacations, the same as other people?
A. Sometimes.
Q. Does some one take your place if you go away on a vacation?
A. Oh, yes.
Q. Who is that?
A. Why, different people. Sometimes the gardener will take it, sometimes they call an officer—different people, you know.

Re-cross examination.

By Mr. Kremer:

Q. Do you open the gate yourself or do you call up Groetzner in regard to the opening of it?
A. I open it myself.

Re-direct examination.

By Mr. Carton:

Q. You are not obliged in time of storm, when Mr. Groetzner is not there, to call him to see whether you open it or not, are you?
A. Hardly.

Q. Use your own judgment about opening it?

A. I am supposed to use my own judgment at all times.

Re-cross examination.

By Mr. Kremer:

Q. How far from the gate are you stationed?

A. Oh, just across that grass plot there at the Casino. I don't know how far that is; I suppose a limit of one hundred yards.

Q. You say on certain occasions you have let the water rise quite high over the dam before you opened it?

A. Yes.

Q. Why have you done that?

A. Well, I don't remember just exactly the reasons. Sometimes I am occupied at something else and haven't time to attend to it right away, sometimes I misjudge the amount of water going down and don't reach it on that account.

THOMAS HERBERT, sworn for defendants.

Direct examination by Mr. Carton:

Q. Where do you live, Mr. Herbert?

A. Asbury Park.

Q. And what is your business?

A. Inspector and general trouble man for the city.

Q. Asbury Park?

A. The City of Asbury Park.

Q. How long have you been employed by the city?

A. Seven years.

Q. In the water department, are you?

A. Water and sewer, yes, sir.

Q. In carrying out your duties in the water department have you ever had occasion to go to the cellars on South Main Street to read meters or anything of that sort?

A. Six times a year.

Q. What territory has that been in?

A. South Main Street.

Q. Including the Treat, Doran and Woehrer properties?

A. Yes, sir.

Q. How long have you been reading the meters in the cellars of those properties?

A. My first reading was in March, 1911, the last week in March.

Q. And were you in Mr. Doran's cellar then?

A. No, I was not. I couldn't get in there.

Q. Were you in Mr. Woehrer's cellar?

A. Yes, sir.

Q. Were you after that time in the spring of 1911 in Mr. Doran's cellar?

A. Well, I was in Mr. Doran's cellar three days after I was there the first time.

Q. Why didn't you go in the first time?

A. There was water in there.

Q. So much that you couldn't go in it?

A. That I couldn't go in it without boots, and I didn't have no boots.

Q. And were you thereby rendered unable to read the meter, because of that?

A. I was.

Q. Now that was in March, 1911?

A. March, 1911.

Q. You could get in Woehrer's cellar?

A. Yes, I could get in Woehrer's cellar.

Q. Was it damp or wet?

A. Well, Woehrer has so much on his floor you can't tell. You see he has got boxes and things to walk on, and he has got benches out there to lay his stuff on, about two feet from the cellar bottom.

Q. In that way you were able to get around?

A. Yes, sir.

Q. And you have been going there from time to time since, I suppose?

A. Yes, sir.

Q. Did Mr. Doran ever complain to you, representing the city, about the floods in his cellar from the brook up there?

A. He did on the morning of January 22d, I think. He stopped me as I was going to work.

Q. That is the time of the big flood that has been referred to?

A. Yes, sir; he told me that he was to the gate, to get them to lower the gate, and they wouldn't do it. He says, "Go look at my cellar." And I told him probably there was some stoppage in the pipe, and we would go look in the manhole. We looked in the manhole east of Main Street and the pipe was not full by two and a half or three inches. So I told Mr. Doran it couldn't be the trouble of the lake, it must be something west of it.

Q. Did Mr. Doran go with you then?

A. He did.

Q. Now just tell us where that manhole is and what pipe you looked at that was not filled up. Does this map mean anything to you? Do you understand it—Main Street, the boulevard, the lake, the Doran property? This is Main Street.

A. This manhole was right in here to the east of Main Street. (Indicating.)

Q. The manhole going down into this pipe?
A. Yes, sir.
Q. Did Mr. Doran go with you?
A. He did.
Q. You opened up that manhole?
A. Yes, sir.
Q. And did you find the pipe was not—the capacity was not taxed, was not filled?
A. No, the pipe—we could see the top of the pipe. We didn't go down in the manhole, but it looked about two and a half to three inches from being full.
Q. Did Mr. Doran see that?
A. Yes, sir.
Q. What did you do then?
A. Went on down to my work.
Q. That is all that you did with it at that time?
A. That is all.

By the Court:

Q. How was that, two and a half to three inches?
A. Well, it looked to be about two and half to three inches from being full.
Q. From being full?
A. Yes.
Q. In other words, the capacity of the pipe was about two or three inches?
A. Yes, sir.
Q. From the top?
A. Yes, sir.
Q. Which pipe was that?
A. That was the straightaway from the east side.
Q. Is that what they call the 48-inch pipe?
A. I don't know what size it is.

Mr. Carton: Yes, that is the 48-inch pipe.

Cross-examination.

By Mr. Kremer:

Q. When you looked at the pipe you say you found three inches headway in the pipe right near the top?

A. Yes.

Q. That pipe slants from the other end, doesn't it?

A. I don't know.

Q. It might have been full at the other end and open at the end you saw?

A. I don't know about that.

Q. You say it was in March, 1911, that you didn't go into Doran's cellar?

A. I said March, 1911.

Q. How do you know there was water in there?

A. I opened the store door and looked down. He told me there was water in there and there was nothing doing. That is what he says every time you would go there, "There is water in the cellar and nothing doing."

Q. How did you read that meter?

A. We read it the last week in March, read for three months the last week in March. We read for June, July and August the last week in August.

Q. What company do you say you are connected with?

A. Asbury Park, the City of Asbury Park.

Q. What reading were you taking in the cellar?

A. The water meter.

Q. Then you were not connected with the Monmouth County Water Company?

A. No, the City of Asbury Park.

Q. Are you absolutely sure that it was March, 1911, and not the next quarter reading?

A. I am sure it was that reading, because that was my first reading and I was pretty well discouraged with

the reading on South Main Street at that time. That was my first reading.

By the Court:

Q. You say you are an employee of the city seven years now?
A. Yes.

By Mr. Kremer:

Q. You are an employee of the city today?
A. Yes.
Q. Have you any records which you have used to refresh your memory to fix that date?
A. Have I what?

By the Court:

Q. What was the exact date that you went into the employ of the city?
A. March, 1911, the 1st of March.
Q. March, 1911?
A. Yes.

By Mr. Kremer:

Q. I say have you any records that you kept of the reading of the meter to show that you read the meter on that particular day?
A. We have got the meter reading book.
Q. Wouldn't that book show what date you read the meter at that time?
A. No, sir.
Q. Then there is no record of the fact?

A. Well, I don't know that there is a record of the day that we read a meter; no, sir.

Q. Doesn't the city keep records of the readings of all meters?

A. They take the reading of the meter as of the 1st of the month.

Q. And wouldn't the record of the city show who read the meter at that particular time, what employee?

A. No, it would not.

Q. Do you mean to say that those records are not kept?

A. The reading is kept, the reading book is kept. We have a reading book, A, B, C and D. I had the D book only at that time. Now I have C and D.

Q. And if the reading book were produced wouldn't it show it was read the last of March?

A. No, it will show it was read.

Q. Is there an April reading?

A. The readings are counted from the 1st of the month. We start in the last of the month so as to be through the first of the month, the last week.

Q. And the only way you have of fixing the date is your recollection?

A. Yes.

Q. And you are positive that it was not later in the summer?

A. What?

Q. Later in the summer of 1911?

A. Why, I read again later in the summer, yes.

Q. But you are positive that you read it before July, 1911?

A. Yes, I read it the last week in June again.

Q. Are you positive that you were in that cellar in 1911, in March? That is what I am trying to get at.

A. Yes.

Q. And it might not have been later, or that your

recollection would be somewhat obscure and hazy at this time?

A. I don't think so.

Q. You don't think it; do you know it?

A. Yes.

Q. How do you fix that it was the 11th of March?

A. What?

Q. Didn't you say it was the 11th of March?

A. No, I said it was the last week in March.

The Court: He went to work for the city on the 1st of March, 1911. He says that was the first meter that he read, as I recall his testimony.

A. No, I didn't say it was the first meter I read.

By the Court:

Q. Well, was it?

A. No, it wasn't.

Q. Then how do you fix the time?

A. I started in that last week in March on Summerfield Avenue and went on down South Main Street.

By Mr. Kremer:

Q. Now you say the last week in March?

A. Yes, sir.

Q. Not the first week in March?

A. No, not the first, the last week in March.

Q. You started on Summerfield Avenue?

A. I did.

Q. How long did it take you to work down?

A. I think it took two days.

Q. So that you were there, in other words, by the first of April?

A. Yes, I was in there.

Q. And Doran told you not to go in the cellar?

A. Yes, said there was nothing doing.

Q. Had the city improvement been started at that time, do you know?

A. I don't know.

Re-direct examination.

By Mr. Carton:

Q. The readings are made prior to the period ending on April 1st, I suppose?

A. Yes.

Q. And bills sent out as of April 1st?

A. As of April 1st.

Q. And the reading took place in March?

A. The last week in March.

Q. And the reason you remember this one particularly was because it was when you first became employed by the city?

A. It was my first reading.

Q. And because of the condition of the cellar it impressed itself upon you, the date?

A. Yes.

Re-cross examination.

By Mr. Kremer:

Q. But you say the record of the reading is somewhere in the city records?

A. Yes, but not the date.

Q. But the record of the reading is there?

A. Somewheres in the city; the book is there.

Q. If they were read every three months why wouldn't the record of this reading be there?

A. We start in the last of the month. We don't take any record of the date, it is the last of the month.

Q. Isn't it the 1st of April in there?

A. It will be the 1st from the reading.

Q. It will say the 1st of April, 1911?

A. Yes.

Q. And it won't say who read it?

A. I don't think so, no.

MRS. HARRIET SOPHIA MILLER, sworn for defendants.

Direct examination by Mr. Carton:

Q. Mrs. Miller, where do you reside?

A. I live in Atlantic Avenue, Asbury Park, New Jersey.

Q. And where is Atlantic Avenue, east or west of the railroad tracks?

A. It is west of the railroad tracks.

Q. And how long have you lived in Asbury Park?

A. Thirty-seven years.

Q. Always in the same vicinity where you now live?

A. Yes, sir; right where I am now.

Q. How far is your place of residence removed from Wesley Lake Brook, that divides Asbury Park and Neptune Township?

A. It is about as far as—it is about half a block.

Q. What has been your experience since the time you lived there as to whether Wesley Lake Brook overflowed its banks or not?

A. Well, it did overflow its banks. We had a great deal of trouble there with it. It comes down from that

hill there towards the graveyard, the water does, and then there is a kind of flat. The flat goes down that way, like, from the hill. It runs down there just the same as —I couldn't tell you, hardly.

Q. In time of heavy storm?

A. If you were there now you could see it for yourself just the same.

Q. How much does it overflow its banks, how far up?

A. Well, it overflows enough to put a small boat into it and put some people in and take them out. That is what I have had to do.

Q. Have you ever had any such experience as that?

A. I have, I have done it myself.

Q. To get out from your own house?

A. From my house, and then the water would rise up to my house. Then I lived in Adams Street, up there on the corner, most of the houses connected. And then I would come down and take them out of their houses near the brook, you see, and bring them out.

Q. In the boat?

A. In the boat, in one of those skiffs, I call them, dugout skiffs.

Q. Did that condition exist before 1911?

A. Oh, my goodness; yes, indeed. It was about twenty—it has been doing that all along for twenty years or more.

Cross-examination.

By Mr. Kremer:

Q. Now how far west of the railroad track do you live, madam?

A. West of the railroad track about two squares.

Q. About two squares?

A. Yes.

Q. Then from this point—this is Main Street here, right here, and that is the railroad track. You live two blocks west of that?

A. Yes.

Q. Then you are about four blocks west of this South Main Street house?

A. Yes.

Q. And this where the railroad is built there is a great high embankment, isn't there?

A. Not so very high. The railroad has an embankment, yes.

Q. The railroad runs up on an embankment?

A. There is tunnels underneath.

Q. But the railroad runs up on an embankment which divides the ground where these houses are and the ground where you are?

A. Yes, one east and the other west.

MARY ANN PEER, sworn for defendants.

Direct examination by Mr. Carton:

Q. Where do you live, Mrs. Peer?

A. I live at 1004 Springwood Avenue.

Q. In Asbury Park?

A. Yes, sir.

Q. How long have you lived there?

A. I have lived there eighteen years, if I live to see November.

Q. Is that near Prospect Avenue?

A. Yes, sir; right across the street.

Q. Across the street?

A. Yes.

Q. Prospect Avenue is one block west of the railroad, isn't it?

A. It is two.

Q. Does your property——

A. We don't own any property, just pay rent.

Q. Just pay rent?

A. Yes.

Q. Does your house or yard extend back towards the brook?

A. Yes, sir; well, we are quite a ways from the brook.

Q. Quite a distance from the brook?

A. Quite a distance from the brook, about two blocks.

Q. Has the brook in your experience ever overflowed its banks up at your place?

A. Yes, clean up to our kitchen door.

Q. Before 1911?

A. Oh, yes, long before that and after, but not bad.

Q. What do you say?

A. But not so bad.

Q. Not so bad in these recent years?

A. No, sir.

Q. Not so bad as when you first went there?

A. Oh, no, it was terrible when we first went there.

Q. How far would this brook overflow its banks?

A. I don't know that. I never went down that way, because I always had the store to look after.

Q. You say it would come up as far as your kitchen door at times?

A. Yes, clean up to the kitchen door.

Q. Have you ever seen people use boats out there?

A. No, sir; I have only heard it, never seen it.

Cross-examination.

By Mr. Kremer:

Q. How far west of the railroad track do you live?
A. About two blocks.
Q. About two blocks?
A. Yes.
Q. Right in Springwood Avenue?
A. Yes, we are right on Springwood Avenue, right there by Lewis' property, Charlie Lewis' property.
Q. His property?
A. Yes.
Q. Do you know that the railroad enlarged the hole under the railroad track?
A. No, I never knowed anything.
Q. Never knew that?
A. No, I never bothered.
Q. But you say in the last couple years the overflow——
A. It hasn't been so bad.
Q. It hasn't been so bad?
A. No, sir.
Q. You don't know anything about the place where Mrs. Doran lives, do you?
A. No, sir.

BENJAMIN ZWICKER, sworn for defendants.

Direct examination by Mr. Carton:

Q. You are a member of the Police Force of Asbury Park, are you not?
A. Yes, sir.

Q. How long have you lived in Asbury Park?

A. Nine years.

Q. Where do you live in Asbury Park?

A. Seven years on Springwood Avenue and two years on Cookman Avenue.

Q. What was your business before you became a policeman?

A. A plumber.

Q. In business on Springwood Avenue?

A. Yes, sir.

Q. Did you have any occasion to observe the condition of Wesley Lake Brook in time of storms?

A. Yes, sir.

Q. What was it?

A. When they had an awful heavy storm, used to have the water right up Springwood Avenue.

Q. How far is Springwood Avenue from the brook?

A. Just one block.

Q. Have you observed that of many occasions?

A. Yes, sir.

Q. Particularly at what time of the year?

A. Well, around the spring of the year.

Q. You observed that flooding prior to the year 1911?

A. Yes, sir.

Q. And since that time?

A. Yes, sir.

Q. What has been your experience whether it is better or worse since 1911?

A. I think it is better since 1911.

Q. To what extent or what area would this water cover when it would overflow its banks, the banks of the brook?

A. Why, the water would go as far as Embury Avenue on a flood.

Q. Embury Avenue is in Neptune Township?

A. Neptune Township. That is two blocks from Wesley Lake Brook.

Q. That is, two blocks south?

A. Two blocks south and one block north.

Q. From Springwood Avenue?

A. Yes.

Q. Did that continue all around to the railroad?

A. Yes; people used to pay so much to take them over to their houses, a quarter a head or fifteen cents a head, and took them in a boat.

Q. By what method of conveyance, a boat?

A. A boat, yes, sir.

Q. Have you observed that on more than one occasion?

A. Yes, sir.

Q. Prior to 1911?

A. Yes, sir.

Q. Do you know anything about the condition of the brook between the railroad and Main Street at those times, the times of these floods?

A. Yes.

Q. Tell us what you know about that.

A. I many times used to go down just for curiosity and see them dumping a load of boxes, box paper and all kinds of rubbish.

Q. Was that before you became a member of the police force?

A. Yes, sir.

Q. Was it your experience that when the land adjacent to the brook would overflow it would carry down the stream all sorts of trash?

A. Yes, sir.

Q. And fill up the brook?

A. Yes, sir.

Q. When you were in the plumbing business did you

have any experience with the cellars in Springwood Avenue section?

A. Yes, sir.

Q. Are there cellars over there?

A. No, sir.

Q. Why is that, because of the level?

A. Too much water in there. The nearest cellar I know of is away up at Henry Mustoe's house. They tried to waterproof that and the party didn't do it right; always water in there.

Q. Well, is or is not Springwood Avenue built up continuously from say Prospect Avenue on the west for a great many blocks on both sides?

A. Yes, sir.

Q. And to your knowledge there is not a cellar till you get up to Henry Mustoe's place? How far west is that?

A. About four blocks.

Q. And is that your opinion or your knowledge, that there are no cellars on Springwood Avenue?

A. No cellars on Springwood Avenue, because it is all made ground.

Q. Were you at the lake at this time in January of last year?

A. Yes, sir.

Q. That has been referred to?

A. Yes, sir.

Q. Was Mr. Doran there then?

A. I didn't see him.

Q. Didn't see him?

A. No, sir.

Q. Was that the time that Mr. Doran and the other witness have referred to, when the big storm was?

A. Yes.

Q. Were the gates open at that time?

A. Not that time; no, sir. Cook was down in the

engine room getting a pair of boots on. I was ringing my box there five minutes after twelve, and I came down a quarter of twelve and looked for Cook and I seen him down in the engine room and I says, "Where are you going?" He says, "I am going up and open that gate." And he says, "Wait." And I went up and waited at the box and he went over to the gate and jumped over some kind of a fence there and back again, and I rang five after the hour, and I talked to him five minutes and rang and I went away and went up the boardwalk again.

Q. You don't know whether he opened it or not?
A. I don't know. I seen him jump over.
Q. He had his boots on and went over there anyhow?
A. Yes, sir.

Cross-examination.

By Mr. Kremer:

Q. What time did the storm start that night?
A. I couldn't tell you.
Q. Do you remember at all?
A. No, sir.
Q. What time did you go on duty?
A. Five minutes after ten.
Q. Was it storming then?
A. Yes, sir.
Q. Had it been storming some time?
A. I couldn't say.
Q. What time did you wake and get up to go on duty?
A. It was half-past nine.
Q. Was it storming then?
A. Yes, sir.
Q. It was not opened at five minutes of twelve?
A. It was opened at a quarter of twelve.

Q. How do you know? You said you went in and didn't know whether it was opened or not.

A. I didn't say that at all.

Q. Didn't you say that you left and didn't know whether he opened it or not?

A. I said at a quarter of twelve he went over and opened the gate.

Q. And you went away?

A. No, sir; I stood there till five minutes after twelve.

Q. And did you see the gate opened?

A. I did not.

Q. Then you don't know whether it was opened or not?

A. No, sir.

Mr. Carton: He hasn't said so.

The Court: He didn't know whether he did it or not; it was merely the circumstance that the man in rubber boots went down and jumped over the fence or something, and that he declared he was going to open the gate.

Mr. Kremer: He said on examination by me that the gate was opened at a quarter of twelve.

The Court: No, he said Cook said he was going out to open the gate, and he arrayed himself and his movements indicated that he had gone.

Q. Then you don't know whether it was opened or not, do you?

A. No, sir.

Q. You know at five minutes of twelve it was not opened?

A. When he came back he told me he had opened it and I stayed there till ten after twelve and I went away.

Q. Did you wait till he came back?

A. Yes, sir.

Q. And he told you he had opened it?

A. Yes, five minutes before.

Q. But you know at five minutes of twelve when he went down it was not opened?

A. I don't know whether it was opened or not; he told me he went over there to open the gate.

Q. And that was a quarter of twelve?

A. A quarter of twelve.

Q. And you know it was storming as early as half-past nine if not earlier?

A. When I got up at half-past nine it was storming.

Q. Whereabouts on Springwood Avenue do you live? Do you live on Springwood Avenue?

A. Not now, I did.

Q. How far west of the railroad track did you live?

A. Probably one hundred and fifty to two hundred feet.

Q. And this condition of carrying people around in boats and all that sort of thing all went on west of the railroad track, didn't it?

A. Yes, Lincoln Place, they called it.

Q. That is all west of the railroad track?

A. The first block west of the railroad track.

Q. And there is an embankment, isn't there, between the railroad track—you go through between the property of these plaintiffs and there is a high embankment where the railroad comes along?

A. Yes, that is only the railroad track, the embankment.

Q. Well, that divides——

A. The Doran property is down the embankment.

Q. On both sides the ground goes down?

A. Yes, sir.

Q. Do you know whether the railroad company enlarged its culvert a couple of years ago?

A. Yes, sir.

Q. And haven't conditions over there been better since then?

A. Well, there has been a little, and of course I moved away from there the time they were fixing this here culvert, this new culvert, the concrete culvert, I moved away at that time.

By the Court:

Q. At the time the railroad was putting it in?

A. Just about the time.

Q. When was it they did that?

A. I think it was about 1915; the time they locked this colored fellow up for stealing this coal.

Q. You remember that time?

A. 1915; and the time of this shooting affair, this Italian fellow, 1915.

By Mr. Kremer:

Q. Hasn't that as a matter of fact sort of relieved the condition over there?

A. Relieved it a little. Of course I don't go over that way at all, I ain't on that post.

Q. But it is better since that culvert was enlarged than it was in the years preceding?

A. Yes.

HENRY BENVENGA, sworn for defendants.

Direct examination by Mr. Carton:

Q. Where do you live, in Asbury Park?
A. Yes, sir.
Q. How long have you lived there?
A. Twenty-eight years.
Q. Where do you live?
A. I live at Belmar at the present time but I used to live in Asbury Park.
Q. You are not living at Asbury Park now?
A. No, sir.
Q. Where did you live when you first lived in Asbury Park?
A. Springwood Avenue.
Q. How long had you lived in that vicinity?
A. About twenty years.
Q. And how near to Wesley Lake Brook did you live?
A. About four hundred feet.
Q. How near the railroad track?
A. About the same distance, four hundred feet.
Q. About the same distance west of the track?
A. Yes, on the west side of the track.
Q. When you first went to live there and after that time, Mr. Benvenga, what was your experience as to the action of the lake at the time of heavy storms, and the lake brook?
A. Well, every time we had a heavy rain the water used to reach Springwood Avenue; that is about four hundred feet. It raised up, well, close to three feet high.
Q. And I suppose it would cover equal territory on the south side?
A. Oh, yes.
Q. In the township?

A. Yes, the meadow was all full of water. There was no houses them days, though.

Q. How would people get out over there then?

A. Well, at present they have, you know; they built some houses on it.

Q. What do you say?

A. I say this is about over twenty years ago I am speaking of.

The Court. Before any houses were built, he says; afterwards the houses were built.

Q. Now after the houses were built what effect did it have, if anything?

A. Why, that water reached close to two hundred feet away from the brook, pretty near, on both sides. At one time it was reaching pretty near Corlies Avenue.

By the Court.

Q. You mean after the houses were built ?

A. The land was filled in?

Q. Yes, or at the time the houses were built.

A. Oh, yes, there has been a good many thousands of loads put there.

By Mr. Carton.

Q. And one time it reached almost to Corlies Avenue?

A. Yes, one time.

Q. And Corlies Avenue is a considerable distance south?

A. Yes, it is over a thousand feet.

Q. And there were some buildings over there, and

how did people get out from their houses when the brook would overflow its banks?

A. Well, they had to get heavy planks, you know, and some of them got over and got some small boats and came across and some of them——

Q. Now this condition that you are describing, d that take place before the year 1911?

A. Oh, yes.

Q. And does it take place now?

A. Well, it did away up till about three years ago, I guess it was, just about three years ago.

Q. It is not as bad as formerly, you view it?

A. It is not so bad since they fixed the railroad.

Q. Since they opened the large culvert at the railroad?

A. Yes, sir.

Q. That has relieved that condition, has it?

A. Oh, it has been relieved quite a little.

Cross Examination.

By Mr. Kremer.

Q. Then it doesn't spread three or four hundred feet now as it rises?

A. Well, no, it fills up with trash pretty well.

Q. Fills up the brook itself?

A. Yes, I have seen it fifteen feet on both sides of the brook.

Q. Do you know when the railroad enlarged the culvert or the hole under the track?

A. Yes, sir.

Q. You say the condition has been improved since then?

A. Yes, sir.

Q. Didn't that small hole under the railroad track as a matter of fact hold back a lot of water?

A. Held back water, yes.

Q. And that is what caused a whole lot of trouble?

A. That is what caused a whole lot of trouble on the west side.

Q. Caused trouble on the west side?

A. Yes.

Q. And then the railroad enlarged the hole and permitted the water to pursue its natural course through the brook?

A. Yes, sir.

SIDNEY HICKS, Sworn for defendants.

Direct Examination by Mr. Carton.

Q. Where do you live, Mr. Hicks?

A. Asbury Park.

Q. How long have you lived there?

A. About twenty-eight years, I think, or such a matter; since 1888.

Q. About twenty-eight years?

A. Yes, since I came there, 1888.

Q. And where in Asbury Park do you live?

A. I lived at 1029 Springwood Avenue a number of years.

Q. How long have you lived there?

A. I judge about thirteen years.

Q. Where did you live before that time, Mr. Hicks?

A. Well, I lived on Union avenue. I lived on Union Avenue and I moved from Springwood to Union.

Q. When you lived on Springwood Avenue how

far was your place of residence from the line of Wesley Lake Brook?

A. Well, about a square, I think.

Q. About a square?

A. Yes, sir.

Q. And about how far west of the railroad tracks was it?

A. It was about a square and a half; about half a square from Prospect to my place.

Q. Where you lived?

A. Yes.

Q. Did you observe the condition of the track in time of freshets and storms when you lived there?

A. Sometimes; yes, sir.

Q. And what was it?

A. Well, when there would come a heavy freshet the meadows, as I call it, would swell.

Q. The brook overflow its banks?

A. Overflow; yes, sir.

Q. How far up towards your property would it come?

A. Well, I have saw it come within—well, we will say within fifty feet from Springwood.

Q. And then would it also cover a space of equal distance on the south side of the brook?

A. Yes, sir; on the south side and west side.

No Cross Examination.

SAMUEL D. MARROW, Sworn for defendants.

Direct Examination by Mr. Carton.

Q. Mr. Marrow, where do you live?

A. Well, I am living 104 Langford Street, at least I am temporarily there.

Q. How long have you lived in Asbury Park?

A. Well, I came to Asbury Park about 1875.

Q. And how near Wesley Lake Brook did you live, Mr. Marrow?

A. Well, we first lived at the corner of Bond Street and Lake Avenue, up until about 1894 or 1895.

Q. And then where did you move to?

A. Then I moved on the west side of the brook.

Q. Your father owns considerable property over there, doesn't he?

A. He owns some on the corner of Lake Avenue. they call it, Lake Avenue and Langford Street.

Q. When you lived in that vicinity did you ever have occasion to observe the action of the brook in the time of freshest and floods?

A. Yes, sir; I think I have several times.

Q. What have you observed it to be?

A. I have noticed that during a heavy storm the flood all around that neighborhood there would be flooded quite some.

Q. Both sides of the brook west of the railroad track?

A. Yes, sir; both sides of the brook.

Q. Did you observe that condition before 1911?

A. Yes, sir.

Cross Examination.

By Mr. Kremer.

Q. These observations that you have made all refer to ground west of the railroad track?

A. Not all, no I lived, as I said, on the corner of

Lake Avenue and Bond Street, from about 1875 up till about 1900, so I feel fairly familiar with the territory east of the track as well as west of the track to some extent.

Q. The west side you have seen a boat—I guess you didn't testify about any boat.

A. No.

Q. Where was this that the brook overflowed its banks, west of the railroad track, wasn't it?

A. Yes, the brook is west of the railroad track at any rate.

EDWARD STRANO, Sworn for defendants.

Direct Examination by Mr. Carton.

Q. You live in Asbury Park?

A. Yes, sir.

Q. What is your business?

A. When I am doing it, ice-cream business.

Q. Where did you have your ice-cream place in Asbury Park?

A. I had an ice-cream business in Adams Street, Asbury Park.

Q. Did you own or live in any property near Wesley Lake Brook just west of the railroad track?

A. Not at the present time.

Q. Well, did you in former years?

A. Yes, sir.

Q. Where is that located?

A. In what you call Lincoln Place.

Q. Lincoln Place?

A. Lincoln Place, about one block the other side of the limits of Asbury Park.

Q. That was over on the south side of the brook?

A. Yes, sir.

Q. In Neptune Township?

A. Yes, sir.

Q. And that is just one block west of the railroad track?

A. Yes, sir.

Q. How long have you lived there or owned that lace?

A. I remember in 1908 when I built the place.

Q. You built the place?

A. In 1908 I built the property, the building.

Q. Do you remember the conditions existing there prior to 1908?

A. I do.

Q. How long have you lived in that vicinity altogether?

A. I think two or three years I have live there.

Q. I mean in that vicinity of West Asbury Park.

A. Oh, about twenty years or more.

Q. Well, now when you lived there you say that you erected your building in 1908. Before that did you observe the action of the brook in times of flood?

A. I did.

Q. What was it?

A. Pretty well flooded.

Q. Well, to what extent would it overflow its banks?

A. Well, just before I built the building in 1908 I put a fence up around the lot, and I remember that it was pretty well flooded all over from about fifty or seventy-five feet, maybe one hundred feet from Springwood Avenue right on through my place and about four or five hundred feet further.

Q. South?

A. Towards the south. I remember that a couple fellows passed me and says, "You will lose your lot. Go over there in a rowboat and see if you find your lot." That is how I remember it was all covered up. You could only see about six inches of the fence. Really I didn't want to try. I was afraid the lot was gone.

Q. Well, outside of that did you have any other experience with your lot?

A. I had a building there; I had also a barn. I think it was in 1908 when I got a rowboat from Lake Avenue and drove right in the barn with the rowboat. The horses' stall out there didn't have much water, or only about a foot in the barn, because it was higher than the street was; but it was a pretty good place for——

Q. The level of your stable was higher than the street?

A. Yes, it was higher.

Q. Only about a foot of water in there?

A. About a foot, not much more.

By the Court.

Q. You floated right into the barn, did you?

A. Why, about three feet. I went with the boat into the door.

By Mr. Carton.

Q. Prior to that time had you ever seen that territory flooded in heavy rains?

A. Yes, quite a few times.

Q. And extending back for years?

A. Sir?

Q. For years prior to that time?

A. Since that time; yes, sir.

By the Court.

Q. During the twenty years that you have known the neighborhood how frequently have you seen it flooded? I suppose that is the question.

A. Well, quite a few times, I can't remember.

Q. More than once?

A. Oh, yes.

Q. More than twice?

A. I think more than twice, but I can't exactly tell.

By Mr. Carton.

Q. In recent years has it been your observation that the flooding has been severe as it was formerly?

A. Well, really it has not been as bad as years ago.

Q. When do you think it has ceased to be as bad as it was formerly?

A. Well, I guess it was about—oh, I can't remember; I guess it was about——

By the Court.

Q. Well, has anything happened there within your recollection subsequent to it that has made less flooding?

A. Nothing that I know of, but of course it has always been flooding there.

Q. Do you recollect the putting in of the big railroad pipe?

A. I have seen it there and it has cut it down. I guess it has helped it.

Q. Has that had any effect on the flooding of water?

A. I believe it has helped it.

By Mr. Carton.

Q. No matter what the cause of it has been, your experience during the last few years is that it has not been as bad?

A. Not as bad. I have had that experience, it is not as bad. I drive in there.

Cross Examination.

By Mr. Kremer.

Q. They have been filling up the land a good deal, haven't they? All out there where they have built the houses didn't they fill up the ground, this part of the country where it used to be flooded?

A. Well, of course it is filling up a little, but not on the street.

Q. That would tend to keep the banks of the brook back if the ground surrounding was higher?

A. I don't know about that. I think if they have a gate right in through the street it would help a whole lot more than the street.

Q. Do you recall that hole under the railroad embankment before they built this new culvert?

A. Yes, sir.

Q. How big was it?

A. I don't know how big, I didn't measure it. It was smaller than it is now.

Q. Have you ever observed it?

A. Not particularly.

Q. How big to the best of your recollection was it?

A. Well, I can't tell you. I think it was a big as my forward wheel.

Q. I don't know how big that is. And in times of

floods and freshets did you ever observe the water congested at that point?

A. I don't know.

Q. Did you ever observe that hole holding back the water of that territory?

A. Did I what?

Q. Did you ever see that hole in the railroad culvert, holding back all the water back there?

A. Well, I would stand a little ways from Springwood Avenue and see it flooded all over.

Q. All around near that hole?

A. Around near that hole.

Q. And it goes through faster since they built the new hole, doesn't it?

A. I haven't looked particularly, but I suppose it would.

By the Court.

Q. As a matter of fact you never looked very close, did you, to the flood?

A. I never did.

Q. You were never interested in that?

A. Not particularly.

By Mr. Kremer.

Q. This house that you had and barn and fence were all on the west side of the railroad track?

A. The west side of the railroad track.

Q. How high is the embankment over the land on the west of the railroad embankment?

A. How high it was?

Q. How high is it?

A. How high at the present time?

Q. Yes.

A. Well, it has been filled in now lately. I don't know how high it is.

Q. How high was it when you lived there?

A. The railroad, I think, was about three feet higher than the street.

Q. Three feet higher than the street?

A. Three feet higher than the street. I think it is around that.

Q. How much higher than the land?

A. Than the land; the street and the land also.

Q. The railroad embankment is about three feet higher than the land on which you would build?

A. I think about that much.

Redirect Examination.

By Mr. Carton.

Q. Just a question, Mr. Shrano. You owned the property over there at the time, did you?

A. Yes, sir, I did.

Q. What is that property generally known as over there? How is it described, that territory where your ice cream place was erected?

By the Court.

Q. Has it any nickname?

A. Any nickname?

Q. Yes, that is what I suppose you mean.

Mr. Carton. Yes.

A. Why, flood, I guess, or swamp.

By Mr. Carton.

Q. Well, isn't it know as the meadows?
A. It is the meadows; yes, sir; and a good many of them consider it the swamp.

(Adjourned till Thursday, July 5, 1917, at 9.30 A. M.)

Freehold, N. J. July 5, 1917.

(Trial of the cause resumed at 9.30 A. M.)

Mr. Kremer. If your Honor please, I am sorry to make another motion which may result in complicating the record, but in view of the fact that has been developed in the testimony that Mrs. Elizabeth Woehrer has only been the owner of this property since the death of her husband in 1915, I wish to move at this time to amend the complaint and add Elizabeth Woehrer, executrix of Augustus Woehrer, deceased. She served in that capacity and the will is probated in the Surrogate's Office.

The Court. Is there objection?

Mr. Carton. This is the first intimation I have had of this application, your Honor. I suppose I ought to object, but the record has been amended about thirteen

times now in this case and I do object to shifting these parties around.

The Court. The only point about it in my mind is this: that the complaint as originally filed did cover the allegation of damages from 1912 in the name of Elizabeth. The only effect of this proposed amendment will be to change the language of the complaint from Elizabeth Woehrer executrix down to 1913. There is really no change excepting in the proofs required if there is a variance.

Mr. Carton. The party who lodged the complaint for the years 1912 and 1915 in the complaint is a party who could not recover, who has no cause of action. I do not know what the directions of the will are. I do not know whether this party even as executrix would have the right to sue for it.

The Court. There is nothing before the court to show whether the executrix of this property has been injured or not.

Mr. Kremer. Mrs. Elizabeth Woehrer has the right to sue for the damages that have accrued to her since the death of her husband in 1915. There is no question in my mind that he has established his right to possession and under our statutes parties must be joined at one time to bring out the adjudication of the rights of each and all parties in interest. The rights of the estate since 1915 cannot be adjudicated any other way than by naming her as executrix.

The Court. This is not an action not for damages to the executrix of the estate but to Mr. Woehrer in the use

New Jersey State Library

of his property during his lifetime. In other words, a personal action would not survive to the executor, undoubtedly.

Mr. Kremer. It would abate on his death.

The Court. It would abate on his death, there is no question about that. This is an injury to the property. I shall examine the question and I shall reserve decision and determine it at the close of the case.

ROBERT M. PURDY, Sworn for defendants.

Direct Examination by Mr. Carton.

Q. Mr. Purdy, where do you live?
A. Manasquan.
Q. You have lived there for some years?
A. About twenty-five.
Q. In business there?
A. Yes, sir.
Q. Did you formerly live or were you formerly employed at Asbury Park?
A. Yes, sir.
Q. By whom were you employed in Asbury Park?
A. All that I have been employed by?
Q. Well, let me ask you if you were employed at one time by George Ormerod.
A. Yes, sir.
Q. And when was that, Mr. Purdy?
A. Oh, I suppose some thirty-five years ago, something like that.

Q. How long did your employment with him continue?

A. Five or six years.

Q. What was Mr. Ormerod's business at that time?

A. He was in the boat business and in the furniture business.

Q. And where were his places of business located?

A. At the head of Wesley Lake.

Q. There is a map on the wall behind you, Mr. Purdy. I don't know whether you are familiar with it or whether you recognize the situation. This is Main Street in Asbury Park, running from Manasquan up through Asbury Park. This is Wesley Lake and this is the boulevard running across here at Bond Street, this is the culvert under Main Street and this is Wesley Lake Brook back to the railroad, this is the New York & Long Branch Railroad. This is marked "Treat" here and "Doran" and "Woehrer." Now will you look upon the map and see if you can indicate where Mr. Ormerod's place of business was with relation to the brook?

A. Well, the brook went across the street into Wesley Lake west——

Q. No, the brook that ran from Wesley Lake through Main Street back to the railroad; were you north or south of it?

A. Right in the middle of it.

Q. Over the brook?

A. Ormerod's building was right to the right, that is, to the north.

Q. Somewhere where Treat's store is now?

A. Yes, that is the building.

Q. Was it back from the roadway, away back from Main?

A. Sat in a little back from the street, the building did.

Q. And what was Mr. Ormerod's business?

A. His business?

Q. Yes.

A. He was in the boat business, then he went into the furniture business.

Q. What was the condition in back there at that time with regard to the brook? Was there water back there as you observed when you were there?

A. There was water in back there, quite a stream, and they used to put their boats in there to soak their boats up in the spring, or before the season opened they would put boats in there to soak them up.

Q. What was your observation in the spring of the year and at other times when there would be storms, as to whether or not the brook would overflow its banks on either side?

Mr. Kremer. I object to that as leading. I think he should not suggest the answer in his question to the witness.

The Court. Strike out the last. What was your observation? Strike out the last few words.

Q. What do you remember about the situation there, Mr. Purdy?

A. Well, sometimes the water was higher than others and it would bank up on both sides. To land owned to the north.

Q. That is the Lake View House?

A. Yes, the old Lake View House.

Q. And who owned to the south in those days?

A. I think a man by the name of Kelly owned the building next to Ormerod's store.

Q. And who else?

A. Well, I forget. And there was Johnson & Johnson had a feed store further up. I think Mr. Applegate had a barbershop right in there somewheres.

Q. Now from Mr. Ormerod's place, from there on back to the railroad, is that high ground or low ground?

A. It is low.

Q. And what would happen in the time of heavy storms?

(Objected to.)

Q. What did happen?

A. Well, there was always water there.

Q. Would the brook overflow its banks?

(Objected to as leading.)

The Court. Yes, what was the effect of the flooding? You state just what you saw, Mr. Purdy.

Q. Now state, Mr. Purdy, just what you saw around there.

A. What I saw there?

Q. Yes.

A. Well, that water there and the stream that ran down through under the culvert into Wesley Lake. Sometimes the water was higher than others. Probably it would bank up there two feet sometimes.

Q. Would the brook or culvert ever get clogged up in time of storms?

A. Yes, I have seen it clogged.

Q. And would that be the cause of backing the water up?

A. Well, it wouldn't take the water off sometimes.

Cross Examination.

By Mr. Kremer:

Q. Mr. Purdy, do you say it was thirty-five years ago when you first were employed by Mr. Ormerod?

A. About that.

Q. That was about 1887?

A. Yes.

Q. And you worked for him six years?

A. Five or six years.

Q. So when you left there it was about 1892?

A. Somewhere about that.

Q. In that neighborhood, that is, twenty-five years ago?

A. I haven't figured it up.

Q. He had a boatbuilding establishment on the north side of the street? Is that what he did, built boats?

A. He built boats. His place was located on the stream, because part of his property was over the stream.

Q. He built the boats and launched them in the stream, he didn't build them in the stream?

A. No.

Q. Simply built the boats up on the side and launched them in the stream?

A. That was it.

Q. Had you been there in recent years?

A. Not back there since I left there.

Q. Haven't been back there since you left there?

A. No.

HARRY J. BODINE, Sworn for defendants.

Direct Examination by Mr. Carton.

Q. Mr. Bodine, where do you live?
A. Asbury Park, Mattison Avenue.
Q. How long have you lived in Asbury Park?
A. Twenty-seven years.
Q. Were you at one time employed by Mr. James H. Sexton, the undertaker?
A. I was for a period of about five years.
Q. During what years, about?
A. Well, I will have to figure this back. I have been in business seventeen years and it was five years previous to that.
Q. Something along about twenty-two years ago, it was, for five years?
A. That is the idea.
Q. Where was Mr. Sexton's place of business?
A. No. 17 South Main Street, two doors from Treat's.
Q. As to Wesley Lake brook, was it north or south of the brook?
A. North of the brook.
Q. On the Asbury Park side?
A. That is the idea.
Q. How near the brook?
A. Well, I should say about sixty to seventy feet.
Q. Did you have a stable in there?
A. Right back in the rear.
Q. Were you employed there constantly during that five years referred to?
A. Five years.
Q. You know where the brook is, I suppose?
A. Yes, it went right under Treat's store.

Q. Did you observe the action of the brook in the time of storms when you lived there?

A. Yes, I have seen the time I couldn't get under Treat's store for water. It would be up to the counters, pretty near.

Q. Did the water flow in Treat's store?

A. From the back, between the railroad and Main Street.

Q. This building is just north of the brook, isn't it?

A. Well, if I recollect correctly it is right over the brook. I am not positive about it.

Q. Well, you have seen the water up in Mr. Treat's store when you lived there? This is said to Mr. Treat's property on the north side of the brook and this is Mr. Doran's and Woolley's and Mrs. Woehrer's on the north side. (Referring to map.)

A. This is where we were, right here.

Q. You were just north of Mr. Treat again?

A. Yes.

Q. Your stable was in back?

A. No, here.

Q. Could you indicate how high the water would come up each side of that brook in time of storm, do you recall?

A. Well, here was Barney Isola's barbershop, in next to Mr. Doran's, in the rear there.

Q. You say it used to come up two or three feet?

A. It was quite high, but the exact depth I couldn't say.

Q. Well, you have seen the water overflowing?

A. Oh, several times. It was a common occurrence. Everybody knows that.

Q. And back towards the railroad and Woehrer's property?

A. It seemed to back up in there and come from un-

derneath the railroad, from there to the head of the lake.

Q. And that would be more pronounced, I suppose, in time of heavy storms?

A. Positively so.

Cross Examination.

By Mr. Kremer.

Q. When did you finish your employment in that locality? 10

A. Seventeen years ago; and then five years back of that I was there.

Q. You don't know anything about the conditions from 1905 to 1911?

A. Practically no.

Q. Don't know anything?

A. I never was in there.

20

LENWOOD SHEPARD, Sworn for defendants.

Direct Examination by Mr. Carton.

Q. You live in Asbury Park and are employed by the city, are you?

A. I am.

Q. What are your duties or what is your employment by the city? 30

A. At the present time I am receiver of revenue.

Q. Were you in the water department for a time?

A. I was.

Q. Are you acquainted with Mr. Thomas Herbert?

A. Yes, sir.

Q. The witness who was sworn here the last day?

A. Yes.

Q. Does Mr. Herbert read meters?

A. Yes, sir.

Q. Did you read meters prior to Mr. Herbert's employment by the city?

A. Yes, sir.

Q. Do you remember when Herbert came on?

A. I couldn't give you the date, no.

Q. Did you prior to Mr. Herbert's employment read the meters on South Main Street?

A. Yes, sir.

Q. Are you familiar with the location of Mr. Doran's and Mr. Woehrer's property?

A. Yes, sir.

Q. Have you ever read meters there?

A. Yes, sir.

Q. When did you cease reading the meters, Mr. Shepard?

A. I can't give you the year exactly. I can tell you when I started.

Q. When did you start?

A. I went in the employ of the city in May, 1902, and we had six readings a year, January 1st, April 1st, July 1st, August, September and October 1st.

Q. And did you continue to read meters on South Main Street after Mr. Herbert was employed?

A. After Mr. Herbert was employed?

Q. Yes.

A. I don't think so.

Q. Now during the time you read those meters did you ever observe the condition of Woehrer's cellar and Doran's cellar as to whether it was wet or had water in it?

A. It was wet all through there.

Q. Through all the cellars?

A. Yes.

Q. Do you recall reading meters in Doran's cellar and Woehrer's cellar?

A. Yes, they were on puncheons, as I recall.

Q. There was no cellar dug at that time?

A. I don't think so; no, sir.

Q. Did you read the meter on the Doran premises at any time after the digging of the cellar?

A. I don't think so; no, sir.

By Mr. Carton.

Q. How about the Woehrer property, have you been in that cellar since there was a cellar there?

A. I can't remember whether there was a cellar there or not.

Q. Well, were you in Mr. Doran's place of business and did you read the meter there before he put up his new building?

A. Yes, sir.

Q. What was there by way of a cellar there before he put up the new building?

A. As I recall it it was boarded up on the side and the meter was directly under the floor.

Q. Well, how would you get downstairs and what would you find when you got down there?

A. I had to put boards there to get to the meter.

By the Court.

Q. Under the building, you mean?

A. Under the building.

By Mr. Carton.

Q. Why was that necessary?

A. Because it was wet there.

Q. Now do you remember anything particularly about the Woehrer cellar, the condition of that?

A. I don't recall. I recall the drugstore cellar, or the drugstore, where the meter was; it was very damp.

Q. And is that Woolley's drugstore?

A. It is now. I don't know whether Woolley had it then or not.

Q. Well, it is marked on the map before you as Doran's and Woehrer's and Woolley's. That is the drugstore?

A. Yes, sir.

Q. What was the condition of that cellar?

A. Bad. It was wet.

Cross Examination.

By Mr. Kremer.

Q. You were never in Doran's cellar?

A. I don't remember.

Q. You don't know?

A. I don't remember that I was.

Q. You can't recall ever having been in it?

A. No, it was several years ago.

Q. You can't recall ever having been in Woehrer's cellar?

A. No, I don't remember.

Q. Can't recall ever having been in any of the cellars of the plaintiffs in this suit?

A. I was all along there. I recall this instance where

it was so bad I had to put these boards and boxes down to read the meters.

Q. There were no cellars there at that time, however?

A. Some had boarded up, as I said before.

Q. But I mean there were no cement cellars?

A. No.

Q. The cellars that are there now were not in existence?

A. I don't think so.

WALTER D. FRANKLIN, Sworn for defendants.

Direct Examination by Mr. Carton.

Q. Mr. Franklin, where do you live?

A. Ocean Grove.

Q. Are you employed by the association?

A. I am.

Q. How long have you been in its employ?

A. About twenty-three years.

Q. What are your duties generally?

A. Well, I am chief electrician, superintendent of the electric light and power works.

Q. Are you acquainted with the condition of Wesley Lake Brook?

A I am.

Q. Where it divides Asbury Park and Ocean Grove?

A. I am.

Q. Particularly the block west of Main Street to the railroad?

A. I am.

Q. What is the character generally of the property on either side of that brook?

A. Marshy.

Mr. Kremer. I object. The answer is not responsive. He asks what is the character of the property.

The Court. On either side of the brook.

Mr. Carton. Absolutely responsive.

The Court. He says a marsh. I think that is responsive.

Q. Were you going to say something?

A. Yes, sir.

Q. Go ahead.

A. I belonged to the military company.

(Objected to.)

Q. What military company?

A. Company A, from 1888 to 1894.

Q. Well, as a member of that military company did you have any experience with that brook?

A. Yes.

Q. Tell us what it was.

A. We used to have our running over what is called Treat's building on the west side of the road.

The Court. Do you understand that map?

Q. This is Main Street, this is the railroad, this is Asbury Park, this is Neptune Township and that is the brook.

A. Right in there, where we used to have our running—what I mean, we used to have trouble to get in that building; it was almost surrounded with water.

Q. When was that?

The Court. Between 1888 and 1894.

Q. That was on the north side of the brook?

A. Always.

Q. Did you observe when you had this difficulty getting in to the building the condition on the south side of the brook?

A. Well, I know it was a kind of marshy—

Mr. Kremer. He is not stating what he observed.

Q. Did you observe particularly at that time?

A. These buildings at that time were on piling, I can recollect that very well.

Q. On the south side of the brook?

A. It seemed to me all the buildings on the west side of the road.

Q. Why was that necessary, as you observed?

A. The conditions of the water, when they would have freshets the water would be so high at that time.

Q. Is the property immediately south of the brook any higher than the property immediately north of the brook where you saw it overflowed?

A. I can't say that it was.

Q. Have you on said occasions that you referred to, when you belonged to the military company, ever observed the land on the south side of the brook, particularly Mr. Doran's and Mr. Woehrer's property here?

A. I never took particular notice of it.

Q. Whether there was water on it or not?

Mr. Kremer. I object to the question, suggesting the answer again and being leading. He ought to ask what were the conditions and not whether there was water on it or not.

The Court. Strike out the last.

Q. Tell us what you observed.

A. I observed at that time that the rear part of those buildings were on piling. I can't say whether there was any cellars being cut down, but I know if there had been they would have been submerged with water at the time of freshets.

Mr. Kremer. I object to the last part as a conclusion.

The Court. Yes, strike that out.

Q. Do you base the reason for the conclusion you now give because of what you observed as to the flooding on the north side of the brook back of Treat's store?

A. I don't quite understand your question.

By the Court.

Q. The question is whether you actually observed the condition with respect to the brook south, not north. You have spoken of the Treat property, which is north.

A. Yes.

Q. Now what condition did you observe if any south of the brook during freshets or heavy storms?

A. Well, the conditions were such that every thing was submerged with water in case of storm.

Q. South of the brook?

A. South of the brook as well as north.

Q. How far south?
A. Well, till it came up almost to the street.
Q. And how far south?
A. How far north?
Q. No, how far south.
A. I couldn't say as to how far; no, sir.
Q. You say it came up to the street; you mean it came——
A. Well, we had difficulty in getting into this building, I know.
Q. Speaking of the east then?
A. The north. This is on the west side.

Cross Examination.

By Mr. Kremer.

Q. You said to Mr. Carton that you never took any particular notice of the condition south of the brook, didn't you?
A. Not at that time; no, sir.
Q. And the time you are referring to is 1888 to 1894?
A. Yes, sir.
Q. You are also a city employee, one of the defendants in this action at the present, aren't you?
A. Yes, sir.

NIART ROGERS, recalled for defendants.

Direct Examination by Mr. Carton.

Q. Mr. Rogers, you have been sworn. Have you

made surveys sufficient to inform you as to the relative level or height of the land on both sides of Wesley Lake Brook between Main Street and the railroad?

A. In a general way.

Q. Was the land higher or lower on the south side of Wesley Lake Brook than it is on the north side?

A. The land on the northerly side, as I have observed, is more uniformly level with the brook and slightly higher than on the southerly side immediately adjoining the brook.

Q. Would it be your opinion then, from your experience as an engineer and from your levels you have taken, that if the land on the north side of the brook were overflowed with water that the land on the south side would also overflow?

Mr. Kremer. I object to that as a conclusion, if he doesn't state what he knows. There might be other circumstances——

The Court. I think that is based on his knowledge of the topography there.

Mr. Kremer. He is not asking him as to his knowledge, it is his opinion. There might be a bank on the south side that would keep it back.

The Court. You may reform your question so as to ask him what would be the effect of raising that on the north side and south side.

Mr. Carton. You may strike the question out altogether.

Mr. Kremer. I might make a suggestion, that he ask

him what time he is referring to, because the conditions have changed so.

Q. Do you know whether—take on the north side of the brook now, take where the corporation yard is and Treat's store—whether there has been any filling in there in recent years, say the past twenty years.

A. Yes, there has.

Q. Is it higher or lower now than it was some time ago?

A. Somewhat higher.

Q. Now I ask you, Mr. Rogers, say before this filling in, if the lands on both sides of the lake would overflow to about the same extent in times of freshets.

(Objected to.)

By the Court.

Q. In view of the filling in, Mr. Rogers, on the north side, as you have just said, what has been the effect on the north side or south side?

A. The effect has been to lessen the overflow of the bank on the north side.

Q. And with respect to the south side?

A. The south side is much lower than that on the north, and shows indications at the present time of water pools on low ground.

Q. That you have seen?

A. Yes, seen it within the last year and within the last few days.

By Mr. Carton.

Q. The fact is that to some extent the south side has

recently been filled in?

(Objected to as leading.)

The Court. Do you know that? He may ask him if he knows.

A. There has been filling in immediately at the rear of the place of Mr. Woolley and the rear of the bakery occupied by Weidman, with cinders, so that it stands now about three feet above the level of the normal stage of the brook immediately at the rear of the house.

Q. Further back towards the railroad on the south side, what have you to say as to that, as to whether it is higher or lower?

A. Well, the condition is almost the natural one there, especially near the railroad, back near Applegate's stable.

Q. Is that higher or lower there?

A. Very much lower, so that there is water standing in there in some places near the brook.

Q. Did you make a plan of some of these culverts down there in 1911?

A. Yes, sir.

Q. Is that the plan? (Plan shown witness.)

A. Yes, sir.

Mr. Carton. I would like to show it to Mr. Kremer and offer it.

(Plan marked Exhibit D 11).

Q. When did you make that map, Mr. Rogers?

A. It was made in 1911, I think; marked August 15th. I presume that was the date.

Q. And made as the result of your own work?

A. Yes.

Q. Will you explain to the jury what it contains?

A. Well, that drawing is similar to the one above it, showing a cross-section of the culvert to a scale as existed in 1911. The one under Prospect Avenue having a diameter of 3 feet.

Q. Where is that?

A. On the right hand side of the map; and the one in the center indicates the cross-section of the pipe which was then under the railroad. That was replaced since and the large one shown on the cross-section above; and the one on the left of the drawing is the flume leading from the easterly side of Main Street as constructed in 1911 to Wesley Lake.

Q. That is the flume made at the time of the improvement that ran to the tank?

Q. What are the relative dimensions of those three pipes or outlets, Mr. Rogers?

A. The one under Prospect Avenue is three feet in diameter, circular pipe, cast iron. The area of discharge, running full, is about seven square feet. The pipe under the railroad was an iron pipe, having a diameter of four feet. It was submerged so that the lower end of it was filled with mud.

Q. As indicated on your map?

A. Yes. The area of discharge above that line was equivalent to about six square feet, as the full capacity of the pipe was not possible under the conditions of the filling up with the mud. The other culvert was a pipe section, practically the half section of a pipe whose diameter was six feet, and the height from the floor or to the crown of the arch was three feet. That was the pipe leading from Main Street to the lake, and its relative capacity was fourteen square feet.

Q. What was the relative capacity of the pipe under the railroad, do you say?

A. About six and one fourth.

Q. And this map, you say, was made by you in 1911?

A. Yes.

Q. Of conditions then existing?

A. It shows the level of the water in all of those pipes at that time at the normal stage.

Q. The long map above us, that you presented the other day, is a map made recently showing the present—

A. That was made on the 28th of June of this year, the first one.

Q. Can you tell us after this pipe was put in operation, that is, the pipe put in at the time the improvement was made at Wesley Lake, when that work was completed?

The Court. The forty-eight inch pipe?

Mr. Carton. No.

A. You mean the one in connection with the detritus pipe?

Q. Yes.

A. It was sometime in the summer of 1911, I can't say positively, but I think it was June or July.

The Court. Which pipe is that?

Mr. Carton. This is the pipe put in originally, running to the detritus pipe.

The Court. Is that what they call the sixteen inch pipe?

The Witness. No, that had a diameter at its bottom of six feet and a height of three feet above the invert.

Q. Mr. Savage testified that in 1912 they put an additional pipe alongside of this, called a straightaway.

The Court. There was testimony that there was an additional pipe put in, a pipe that is a forty-eight inch pipe.

The Witness. That was 1912 sometime.

Q. That pipe was not there at the time your map was made?

A. No.

Q. You are familiar and I think you testified that later there was another pipe put in, in 1912, a forty-eight inch pipe?

A. Yes, there was.

Cross-examination.

By Mr. Kremer.

Q. Did you ever survey Mr. Doran's lot, Mr. Rogers?

A. I think I gave him the lines of his lot before he built the house that is standing there now.

Q. When did you do that?

A. I can't recall the time. I haven't had any occasion to refer to the memorandum, possibly nine years ago.

Q. You say that the ground on the north side of

Wesley Lake Brook today is higher than the ground on the south side?

A. It is higher than some portion of that on the south side.

Q. Well, isn't it as a matter of fact lower than some portions on the south side too?

A. Lower than on the south side?

Q. Yes.

A. No, not at the present time, unless it might be directly under the front of the store occupied by Mr. Treat, near the road. I think at that point the bank is very near the level of the stream, probably always was.

Q. You say at that point on the north side of that brook, between Main Street and the railroad track, is higher than it is on the south side?

A. I spoke more particularly of the place in the rear of the building, the open lot.

Q. And at all such points it is higher than on the north side, you mean?

A. Yes.

Q. Will you indicate on the map the place you say there is water at present?

A. On the south side, first here there is a hole near the railroad south of the brook, joining the block, in the lot adjoining the building there, right along the line; there is another one in back of the Thompson lot, very low there.

Q. That is in the rear of this?

A. In the rear of the lot.

Q. Where they abut up on the stream? That is how far in the rear of Woolley's building at present?

A. From eighty to ninety feet back to that point.

Q. I think you testified that you recommended to the City of Asbury Park certain constructions which would improve this situation, didn't you?

(Objected to.)

The Court. Not cross-examination.

Mr. Carton. He has been into that before.

The Court. Yes, he has already testified. In fact, you yourself say so.

Redirect Examination.

By Mr. Carton.

Q. Mr. Rogers, I want to ask you a question, because I am in doubt whether I did ask you. Did you have charge of the putting in of a surface drain from Railroad Square down Main Street, from Lake Avenue to the lake, at the time of the improvement of Main Street?

A. It began at Cookman Avenue and extended along Main Street to Lake Avenue, a thirty inch pipe, with connections at the corners of the streets, at the intersections, and was turned down Lake Avenue and a concrete culvert constructed there having been dimensions of about twenty-four inches in height and thirty-six inches in width, as I recall it, with a catch-basin and manholes, for the purpose of cleaning out, leading directly to the lake, at the easterly end of the retaining wall near Bond Street, at the northerly terminus of the boulevard.

Q. Indicate on the map the course it took.

A. The conduit not shown upon the map. The lines indicating the ditch at the point where the boulevard emerges into Bond Street and Lake Avenue.

Q. And what course did the water that this pipe served take before its installation?

A. Well, the most of it went directly along Main Street south to the culvert crossing the road by Treat's grocery.

Re-cross Examination.

By Mr. Kremer.

Q. When was this new device constructed?

A. This was done at the time Main Street was improved with a brick pavement.

Q. What year, to the best of your recollection?

A. It was in 1910, I think, the latter part of 1910.

Q. It was before these other straightaways and flumes were built?

A. It was after—no, let me see. I am not sure about that date. No, it was in 1911 that this was constructed. It was after the other work had been done. It was late in 1911. The Main Street pavement was completed in the spring of 1912.

Q. Do you know when Mr. Savage put in the straight-away?

A. Not particularly, only during the year 1912.

Q. And you don't know what arrangement was made or what the construction was of his new forty-eight inch pipe in relation to any connection with the one that you had built, do you?

A. No, I can't say as to what method of joining up was done. It is a segmental pipe, built of hollow tile, specially made for that work.

Q. You don't know anything about the method of joining it. That is all.

MICHAEL E. SEXTON, Sworn for defendants.

Direct examination by Mr. Carton.

Q. Mr. Sexton, where do you live?
A. Asbury Park.
Q. Have you lived there for some years?
A. Lived there since 1876.
Q. What is your business?
A. Well, I am in the livery business or automobile business now.
Q. Did you live in the vicinity of Wesley Lake Brook some time ago?
A. Lived there practically all my life up to about fifteen years ago.
Q. Conducting your business from that point?
A. I at that time was with my brother in the undertaking business.
Q. Mr. Sexton, will you look at this map? This is the railroad over here and this is Main Street, this is Asbury Park and this is Neptune Township; this is Wesley Lake Brook, this is Mr. Treat's and Doran's and Woolley's on the north side. This is the south side. Will you indicate now about where your place of business was?
A. My place of business was just at the other side of this—
Q. Treat's?
A. Treat's, next to Treat's store.
Q. You lived there up to what time?
A. Well, up to about fifteen years ago, I moved away from there, I guess.
Q. And during the long period of your residence there did you have occasion to observe the brook and its action in times of storms and freshets?

A. Yes, sir.

Q. What was it?

A. Well, what do you mean?

Q. With regard to water around there.

A. Yes, sir.

Q. What was it?

A. Well, in time of a heavy storm it would flush, fill up.

Q. Well, how far would it fill up?

A. Oh, it would go away up past Applegate's garage there, further up, pretty near up to Farmer's coalyard in back next to the railroad.

Q. How about along the north side of the brook?

A. It didn't fill up very much there, because it was higher next to the lake. If you remember where the Toland property was, A. R. Toland owned it.

Q. With regard to Treat's?

A. Well, Treat was afterwards. Treat's was built on piling over this brook, part of it, and one side it had a brick wall, the other side was on piling. George Ormerod built that building and used to have it for a boathouse. I have seen a hundred boats in back of this side of where your bridge or culvert is.

Q. In the water?

A. Yes, floating around there. That brook was about forty feet wide in there, and then at times in the time of storm—

By the Court.

Q. Where were those boats used?

A. On Wesley Lake. He was a boatbuilder.

Q. Go through the culvert?

A. Go through the culvert. I remember it when there was nothing but an iron bridge there, and of course

as times improved they changed the bridge.

By Mr. Carton.

Q. This is said to be Mr. Doran's property here and this is Mr. Woehrer's.

A. Well, at that time Steve Woolley—it was a feed-shop, I think, a man named Schauffer, up on the other side. But it was over the brook on this side, it was in the brook on piling.

Q. Do you remember when Jerome R. Medell had a butchershop in there?

A. Yes, sir.

Q. That is where it was?

A. Yes.

Q. Of course I don't suppose it overflowed all the time, Mr. Sexton?

A. No, only occasional storms, heavy storms.

Q. Did you observe that condition generally that you have described during the whole time that you have resided there?

A. All those buildings, that is, up on this side here, clear up to Applegate's. It was McCabe, R. A. Johnson—

By the Court.

Q. By that you mean on the south side?

A. That is the south side; yes, sir. They were all built on piling except the front. The front that the road goes through there has been built up. In back down like this they were all on piling, every one of them.

Q. Why?

A. Because it was marshy ground.

By Mr. Carton.

Q. Have you seen that ground overflowed with water?

A. Yes, sir.

Q. Several occasions?

A. Yes, sir; several occasions, all over it.

Cross-examination.

By Mr. Kremer.

Q. You say it only overflowed in times of heavy storm?

A. Yes, in times of heavy storm.

Q. You started to live there in 1876?

A. About that time, yes.

Q. And is it along in those years that you are testifying about that the water used to go down?

A. Right up until I moved away, about fifteen years ago.

Q. That was fifteen years ago?

A. Yes, sir.

Q. You don't know what has happened since down there?

A. No, I don't know what has happened since.

Q. That was 1902?

A. Yes.

Q. You don't know the condition there in 1907 and 1908?

A. No, I moved away from there and didn't go there any more.

Q. When you saw a hundred boats around in there, what year was that?

A. It was not quite so early as that, because the busi-

ness didn't get so big. That was Mr. Ormerod's business, that was in back, right along all the time. Where Mr. Treat's grocery store is, you understand, owned by Treat now, was a boathouse, and he used to store these boats during the winter, and they were on Wesley Lake. In that time that was the life of Asbury Park.

Q. And he stored them in winter and put them on the lawn, didn't he?

A. Put them up in his boathouse.

Q. And how did he run them down to the lake?

A. His business was back, understand, on the west side of Main Street, and he used this pond in there for the boats, and as he sold a boat or a boy rented a boat they went out under this culvert into the lake, and they were stored back there at nights.

Q. And when you saw a hundred boats in there it was in the winter time?

A. It was any time, winter, summer, spring or fall. The boats in the winter time were stored in the building. They wouldn't be there. Sometimes they wouldn't be there; sometimes be out, old boats, and went under this culvert and into the building and put upstairs and stored for the winter.

Q. There were no cellars under these houses up here when you left?

A. No, they were all built on piling.

Q. They hadn't constructed their cellars yet?

A. No, sir.

Q. Do you say that you saw the water down as far as Applegate's?

A. Yes, sir.

Q. Right up in 1902?

A. Why, whenever it was a heavy storm it was all overflowed. Now Applegate has filled in and built his garage since. It was R. A. Johnson's feed store, a man

by the name of Johnson & Son.

By the Court.

Q. How far is that beyond—

A. That is up here where Applegate's place is.

Q. One moment. Strike that out. Is that beyond Doran's property?

A. Yes, sir.

Q. How far beyond?

A. Well, one hundred and fifty feet, I should judge, maybe one hundred feet.

Q. It is beyond the Woehrer property?

A. Yes.

Q. How far beyond that?

A. It seems to me there is one lot between Mr. Woehrer's and that. I am not sure of that. It might be next to Woehrer's; I don't recall. It has been some time ago.

By Mr. Kremer.

Q. Now when the brook would start to overflow where would the water begin to overflow this section?

A. Come up in away back to the railroad.

Q. Start back there?

A. Yes.

Q. And it would run around here to Applegate's property?

A. Yes.

Q. So that Applegate's property might have been flooded before Doran's was?

A. Oh, no, it would flow first down here and then afterwards—

Q. I thought you said it would run back there?

A. Run back as far as the railroad and then naturally start with the brook to flow away out.

Q. Wasn't Doran's ground higher than Applegate's ground?

A. No, sir.

Q. That is what took place? The last you know about it was in 1902?

A. I moved away.

GEORGE W. PITTENGER, Sworn for defendants.

Direct Examination by Mr. Carton.

Q. Mr. Pittenger, you are one of the Commissioners of the City of Asbury Park, are you not?

A. I am; yes, sir.

Q. Serving with Mr. Bamman since 1915?

A. Since 1915; yes, sir.

Q. You have charge of the streets?

A. Yes, sir.

Q. Are you familiar with the boulevard at the head of Wesley Lake and the culverts in Main Street there?

A. I am.

Q. Caring for that work would come within your department?

A. We have the cleaning out of catch-basins leading to that culvert; yes, sir.

Q. Have you cleaned out the catch-basin or tank, they call it, there?

A. We clean those out that are directly over the street, over the culvert, when they get filled with dirt and trash; not the one east of Main Street, if you refer to that.

Q. Not the one east of Main Street?

A. No, sir.

Q. Did Mr. Doran complain to you some time ago about the stopping up of the brook there?

A. It is not to my recollection that he ever complained to me; he may have spoken to me about it once, possibly, from the fact that Mr. Bamman did not answer his complaints as quickly as he thought he ought to, I think it was once he spoke to me about it, is all, because it does not come directly in my control, that end of it.

Q. You have immediate charge of the streets?

A. Yes, sir.

Q. Whether he spoke to you directly or you got word of that kind, did you go there and examine this tank with a view of actually cleaning it out?

A. I think what really actually happened was this: that either Mr. Doran or else Mr. Kremer for Mr. Doran communicated with the Commission, calling attention to the conditions down there.

Q. About when was that?

A. It was along in February, probably, of this year. It might have been a little earlier than that. It might have been in January. I guess it was in January, not February.

Q. And what did you find then?

A. Mr. Bamman didn't have at that time a gang of men that could go there and do the work and I offered to relieve him of that work with my gang. So with a view of going down there to do some work we went down and made an examination with three or four men, and we took the top off of this manhole just east of Main Street, examined into that first, and found that at the time of the examination, which was probably several days after the complaint was made, within three or four days afterwards or five days afterwards, that that manhole was

perfectly clear, that is, possibly an inch and a half of sand or grit in the bottom of it, and about eighteen inches of water flowing through the pipe. The pipe was not nearly half full just at that time. We also examined the bank and the other drain line and found with silt accumulation and water that there was about two feet and a half in it at that time. That is after examining and taking off the tops of three or four manholes. A foot and a half of that was silt accumulation and the other was water. It seemed to be operating freely, so much so that we didn't deem it necessary to bother any further with it at that time.

Q. You didn't find it so filled up that it needed any particular attention?

A. No, there was considerable room between the water and the roof of this tank, so that it was not necessary then to do any work to it.

Q. You went in office January, 1, 1915, I think?

A. January 27th or 28th, I think, 1915; yes, sir.

Q. Now at that time when you first took office did you have your attention directed to the condition of the lake, or in January, February or March, 1915, as to whether there was or was not water in it, as to whether it was filled with water?

A. At that time, or just about that time, or possibly a little bit earlier, this spillway, that is, the floor of the spillway had given way, and negotiations were pending between the Ocean Grove Association and the City of Asbury Park about rebuilding that flooring, and I think we finally reached an agreement whereby the Ocean Grove Association should have charge of the work, and they made a contract with Low Brothers, as I recall it now, to rebuild that flooring. That was through the month of February, March, April and May. During all that time the lake was dry, except a stream running

through it, such as is ordinary, would be ordinary when the lake is all out. In other words, the construction at the lake was not such as would hold the water at all.

By the Court.

Q. Where was that floor put in, on the ocean side or lake side?

A. On the ocean side. There is a floor from the spillway that runs out to the ocean from the flume, and that floor is the one that was renewed.

Cross Examination.

By Mr. Kremer.

Q. Then when it would rain the lake would fill up again, wouldn't it?

A. No, sir; not at that time.

Q. Wouldn't the rainfall coming down from the brook into the lake cause that body of water to come in?

A. It would be a little bit wider, but it never filled again during those months.

Q. You say the time you examined the manhole was the only time you ever examined it?

A. Yes, sir.

Q. You never looked at it at any other time?

A. I don't think it was; no, sir. The pipe, the manhole, or whatever it might be there, was doing its work efficiently and it was not necessary to be looked after.

Q. You knew, however, that debris and sticks and brush were coming down the brook, through the brook into that straightaway continually, didn't you?

A. Yes, but they carried right on through.

Q. You are sure of that?

A. Yes, sir.

Q. You never inspected it to see whether it did or not?

A. Well, that is——

Q. You didn't, though, did you?

A. No, I didn't inspect it, no.

Q. And the time that you did clean it up this early spring was four or five days after you got the complaint?

A. Didn't clean it out.

Q. There was nothing there?

A. There was nothing there to be cleaned out.

Q. Did you have the weir walls knocked out of the detritus tank in 1915?

A. I didn't; no, sir.

Q. Mr. Bamman testified that you did and I merely wanted to clear that up.

A. Those walls were knocked out before we took office. Mr. Savage knocked them out during his administration.

Q. Then Mr. Bamman was in error about it?

A. Yes, he was in error there.

LEWIS BROWN, Sworn for defendants.

Direct Examination by Mr. Carton.

Q. Mr. Brown, you live in Asbury Park?

A. Ocean Grove.

Q. Lived there for some years?

A. Yes, sir.

Q. You have been in the employ of the city, have you not?

A. Ever since they have taken over the beach from

Mr. Bradley, say about thirty-five years on the beach front.

Q. What has been your work in connection with the lake or the beach?

A. Well, I am one of the superintendents for six or seven years under the city government and we had charge of the gates for Mr. Bradley for years; that is, down at the foot of the lake.

Q. And up until what time did you have charge of those gates?

A. Up until 1912 or 1913, I think was the last year.

Q. Was that when Mr. Cook succeeded you?

A. No, sir; Mr. Heppelworth.

Q. What were your instructions? What did you do concerning the opening of the gates at times of freshets and floods?

A. I had a certain level I got instructions to keep and just as soon as it came to that level I hoisted the gates. It was an old gate.

Q. It was before the present spillway was erected?

A. Yes.

Q. Those were your instructions from your employers?

A. Yes, sir.

Q. Did you carry out those instructions?

A. I did.

Q. And were you on day or night?

A. I was on day; Atlantic White was on at night.

Q. Was he on during the whole of that time that you were there?

A. He was there twenty-eight years.

Q. Mr. White recently died?

A. Yes, sir.

Q. He was the night man and you were the day man?

A. Yes, sir.

Cross Examination.

By Mr. Kremer.

Q. How long did it take to open that gate, Mr. Brown?

A. How long would it take me to open it? I could open it in my way in a very few minutes.

Q. Did it have a habit of getting stuck so that you couldn't move the planks out?

A. Not with this boy, oh, no. I was thirty-five years there.

Q. Did you ever see anybody else get stuck with it?

A. Yes, sir; and they didn't say anything.

Q. Who is that?

A. That is Mr. Heppelworth.

Q. You assisted in that?

A. No, sir.

Q. He used to get stuck trying to do it, did he?

A. Yes, sir.

Q. How was that?

A. There was a wrinkle in lifting up the gates.

Q. What would happen when he would get stuck with it?

A. He would monkey with it.

Q. It would stay closed?

A. No, he wouldn't open them.

Q. And what happened?

A. They had to put a jack under it and jack it up beneath, couldn't do it any other way.

Q. How long did that take when they had trouble with it?

A. Had trouble getting it up and all I know it would stay closed.

Q. The lake would be getting higher?

A. Oh, no.

Q. Well, wasn't it, wouldn't the lake continuously rise when they were trying to open the gate and the water was coming down?

A. It would go right on down. It couldn't get no higher.

Q. Didn't you have to saw the gate in two once to get it out?

A. I wasn't there that day.

Q. You don't know anything about that?

A. No.

Q. But you do know that other people besides yourself had to have a good deal of trouble getting it open?

A. I never had no trouble.

Q. Other people did besides you?

A. No.

Q. Didn't you just say so, that Heppelworth had trouble getting the gates open?

A. Yes, sir.

Q. What were your instructions, to open the gate as soon as it began to storm or when the lake began to rise?

A. When the lake began to rise to open the gate.

Q. You could do it?

A. Yes, sir.

Q. And Heppelworth couldn't do it?

A. He didn't know the trick of opening it.

Q. And the gate was closed when he was on duty and he wouldn't it?

A. No, he wouldn't open it.

By the Court.

Q. Why didn't you instruct Mr. Heppelworth?

A. I was ordinary carpenter at that time.

Q. You were discharged, were you, from that gate?

A. From my position.

Q. You didn't feel like giving Mr. Heppelworth any information? Why did you leave?

A. I didn't leave at all. I was reduced.

Q. Reduced?

A. Yes, to carpenter.

Q. When were you reduced from opening the gate?

A. In 1912 or 1913.

Q. How long did Heppelworth stay there?

A. I think in the neighborhood of three years.

Re-direct Examination.

By Mr. Carton.

Q. Up until what time did you continue to work, Mr. Brown? When did you leave down there?

A. That position what I held?

Q. Yes.

A. It was in 1912 or 1913, one of the two, when Mr. Heppelworth came on, to the best of my knowledge.

Q. Mr. Heppelworth was there but a short time, was he? Mr. Cook is there now, been there for some years, has he not?

A. Mr. Cook is the nightwatchman, yes.

By Mr. Kremer.

He was there two or three years, Heppelworth was, wasn't he?

A. A little over two years.

FRANK SMITH, Sworn for defendant.

Direct examination by Mr. Carton.

Q. Mr. Smith, you reside in Ocean Grove?

A. I do.

Q. Are you associated in some way with the Ocean Grove Association?

A. I have the general superintendency of the Ocean Grove Association, of the secular affairs. That includes business, lectures, entertainments, power house, water plant and anything that would come under that supervision.

Q. All outside work?

A. Yes.

Q. And how long have you been with them, Mr. Smith?

A. Since September 1, 1914.

Q. Mr. Doran and Mr. Woehrer have referred to some dates in the winter of 1915; January 19th, February 2nd——

Mr. Kremer. I object. I don't think that Mr. Doran and Mr. Woehrer have referred to those dates.

The Court. January 21, 1917.

Mr. Carton. January 13, January 19 and February 2, 1915.

Mr. Kremer. I don't recall any reference in the testimony.

The Court. No, I don't recall any specific dates prior to 1917. They did refer to the 21st of January, 1917.

Mr. Carton. They referred to the 21st of January as an unusual date, but in their complaint they set out these three specific dates.

Mr. Kremer. I believe not.

The Court. Yes, you have set some down in your complaint ,in your bill of particulars.

Mr. Carton. I mean the bill of particulars.

Mr. Kremer. It is not referred to in the testimony.

The Court. In any event Mr. Carton would have a perfect right to examine in respect to those dates which are set out in the bill of particulars and complaint.

Mr. Kremer. They were not set out in the complaint, and he insisted on a bill of particulars.

The Court. Do you abandon your bill of particulars?

Mr. Kremer. We are not bound by our bill of particulars as by interrogatories, because we are not under oath. They have been examined as to the particular dates.

The Court. I think he has a right to examine upon it. You have gone upon record.

Q. What was the condition of the lake during the months of January and February, 1915, as to whether it was or was not filled with water?

A. On December 13th I was in St. Paul's Church and was called by a messenger to the Wesley Lake spill-

way and found that it had blown up, and it remained dry with the exception of a ditch in the middle of Wesley Lake until May 1, 1915.

Q. No wall was there to hold the water at all?

A. Not at all. It cost $1,700 to repair that break.

Q. And did your association, with Asbury Park, repair it afterwards?

A. We had several meetings of the Commissioners of Asbury Park and also with the engineers of the New York & Long Branch Railroad Company, who gave us advice gratuitously, and there is a memorandum in the minutes authorizing me on March 5th to proceed with the work when authorized by the New York & Long Branch engineers, when approved by the New York & Long Branch engineers.

Q. You have refreshed your memory by examination of the minutes as to that date?

A. Also with my correspondence with the treasurer of the association on dates, different dates.

Q. Is there any arrangement at the North End Hotel upon which you can indicate the condition of the lake?

A. There is. On Spray Avenue, which is the north side of the hotel, about a block from the boardwalk, there is an engine room. You go down into that engine room about twelve steps and there are two large boilers, and a few feet away there is a fresh water and a salt water pump, and one of those pumps extends eighteen inches below the foundation of the engine room, and there is a blow-off pipe that enters this spillway, and if the water should be at the top of this spillway the water would filter along this blow-off pipe and immediately flood the engine room. So if the employees of the Ocean Grove Association or the City of Asbury Park did not do their work they would have to stop using those pumps.

Q. And was there some one in the employ of the

engine room of the North End Hotel all the time?

A. All the time.

Q. Outside of this precaution have you any men in your employ who have been instructed concerning the opening of the gates in time of necessity?

A. The police officer on duty, if there was a heavy flood, would go to the superintendent of the streets and have the employees go out and open up the sandy portion, so as to relieve that.

Q. Were there instructions to your employees to relieve that condition if necessity arose?

A. Surely.

Q. With regard to that sand, has it been your experience that sand would back up from the ocean and shut that stream off at times?

A. Yes, sometimes it could be relieved by a crowbar, and at other times perhaps it would take an hour or two, by opening up that spillway and letting off hundreds of tons of water, and sometimes relieve it in a few minutes.

Q. With regard to the sand that backs up from the ocean——

A. Oh, yes.

Q. Would there be a barrier at times?

A. Very often it would be relieved by the next tide, but if it is not relieved by the next tide it had to be opened up artificially.

Q. And does sand in any considerable quantity come in there?

A. Sometimes, yes.

Q. With regard to the lake itself, what attention has been given to it by your association and Asbury Park with regard to cleaning it out and making it sightly?

A. Every time the water was lowered in that lake we would set the employees on our side of the lake to clean it up.

Q. Is that yearly?

A. Sometimes it is twice a year. $1,500 has been spent that way this year.

Q. What has been your observation as to whether Asbury Park did anything in that regard or not?

A. Asbury Park—if the association loans them the scow they put in an extra man for that scow, and we have always done it.

Q. I mean with regard to the digging out of the lake.

A. I think they spend a larger amount than we do.

Q. Has it been your observation——

(Objected to.)

The Court. Yes, unless he knows.

Q. Has it been your observation that they cleaned it out?

A. Only by the number of men, I should say so.

Q. What is the purpose of digging out the lake at the head of the lake when you clean it out?

A. On the ocean side?

Q. No, at the Main Street side, nearer Main Street.

A. An accumulation of rubbish that goes through that spillway there, the culvert. That is what you call it, I think.

Q. And do you find it necessary from time to time to clean the lake out?

A. If we didn't the people in that vicinity would complain of it.

Q. You were not in the employ of the association at the time this improvement was made there?

A. I was not.

Cross Examination.

By Mr. Kremer.

Q. You are the general superintendent, Mr. Smith?
A. Yes, sir.
Q. You have charge of paying all bills, etc.?
A. Yes, sir.
Q. And pay taxes too sometimes?
A. Have to.
Q. You say that the management of the beach is entirely in charge of the street superintendent?
A. And his employees, yes, and Mr. Bamman, of Asbury Park.
Q. But so far as you are concerned he is the boss of it, the street superintendent?
A. Yes.
Q. Who is that?
A. Calvin H. Reed.
Q. And the instruction and regulation is that the employees are to speak to the street superintendent when it becomes necessary to open the gate and he gives the instruction to open it?
A. Yes, he has been there so long that he sometimes gets ahead—goes down of his own accord.
Q. And he is the man who says the word?
A. Yes.
Q. I asked you where he lived. Where does he live?
A. He lives at the corner of Abbott and Delaware Avenue, Ocean Grove. I have forgotten the number.
Q. What part of Ocean Grove is that in?
A. That is four blocks from the trolley line, the turnpike.
Q. And is that near Broadway?
A. It is one street north of Broadway?

Q. And how many blocks is it from the gate?
A. From the gate?

The Court. Which gate do you mean?

A. The gate you are referring to, that he has to open

The Court. Oh, the gate of the spillway?

Mr. Kremer. Yes.

A. Why, it is not over five-eights, perhaps half a mile.
Q. Half a mile?
A. Yes.
Q. Has Mr. Reed a telephone in his house?
A. I have a telephone in every one of my employees', like Mr. Tantum, Mr. Franklin and Mr. Reed.
Q. Now in reference to the blowing up of this spillway, when do you say that occurred?
A. That occurred at 11.30 o'clock on December 13, 1914.
Q. 1914?
A. Yes, sir.
Q. Just what happened to the spillway at that time?
A. Why, I know that the bottom was blown out. They tell me—it is only hearsay—I know I found the water on Wesley Lake going out like a fountain. It emptied the lake in about half a day. I went down there at five o'clock and found the lake empty?
Q. It emptied the lake in half a day?
A. In half a day, yes.
Q. Was it blown out its entire length?
A. No, it was not. You can imagine what a hole it put in that to take $1,700 to repair it.

Q. You can't imagine from that how big a hole it put in it. Do you know? Did you see the hole?

A. Yes. That is about the size of those three desks.

By Mr. Carton.

Q. Indicating about ten or twelve feet?

A. Well, it was a big—it was broken almost like the points of a star.

By Mr. Kremer.

Q. And did it run all the way through the concrete foundation of the spillway, the bottom, if it is concrete?

A. Oh, yes.

Q. How long was that hole? It was irregular in shape, you say?

A. Irregular like a star.

Q. Twelve feet long?

A. I should say it was—oh, yes, Mr. Kremer, I should say it was fifteen or sixteen feet, at its widest damage.

Q. How high was the hole?

A. All the wall. It was blown up this way. (Illustrating.) Different points. Suppose I had another map put up there. The concrete was raised up, just in that way, on four sides.

Q. Was the top blown off the dam all the way along?

A. It was not, it was raised.

Q. The top was raised?

A. It was raised.

Q. And how high off the bottom of the lake was the bottom of the hole?

A. Not over eighteen inches.

Q. Eighteen inches?

A. Yes.

Q. Then the water didn't run out below the eighteen inches, did it?

A. What do you mean, I don't quite understand it.

Q. Well, if there was eighteen inches between the bottom of the lake and the bottom of the hole that was blown in it, the water must have stayed in to that extent, didn't it?

A. No, the water came around like this. Here was the bottom of the spillway. It got in under this way and blew it out in the center.

Q. But you said the bottom of the lake was eighteen inches below the bottom of the hole.

A I meant to say—I don't know whether I did—that the concrete was raised up about eighteen inches.

Q. How high was the bottom of the hole from the bottom of the lake?

A. I couldn't say that. It might have been away down deep into the lake.

Q. It went down in the ground?

A. Oh, yes.

Q. You say it was not blown for the entire length of the spillway?

A. No, not all of it. No, on either side it was all right. It was right where this gateway opened into the spillway.

Q. And then a hole was just blown out of the middle of the spillway?

A. Yes.

Q. And right up on the top of it?

A. Yes.

Q. How far do you live from the lake?

A. Nearly three-quarters of a mile.

Q. South?

A. South.

Q. You don't go over the lake every day, do you?

A. Yes. I have a machine and go down very often.

Q. But do you cross the lake every day?

A. No, I don't cross the lake, but I go down to the North End Hotel, adjoining the spillway, several times a day.

Q. But you don't look at the lake every day, do you?

A. Certainly not. I might look at it two or three times. It depends upon my work. Some days I can hardly get out of the office, there are so many come in, but I go down to the North End Hotel every day.

FRANK TANTUM, sworn for defendants.

Direct examination by Mr. Carton.

Q. Mr. Tantum, you live in Ocean Grove?

A. Yes, sir.

Q. How long have you lived there?

A. Between forty and forty-five years.

Q. What is your position down there?

A. I am police officer, Chief of Police.

Q. And have you been employed in and about Ocean Grove for a number of years?

A. Ever since I have been there.

Q. Are you familiar with Wesley Lake and Wesley Lake Brook?

A. To a certain extent.

Q. You say you have charge of the police department now?

A. Yes.

Q. What if any are your instructions from the association with regard to observing and watching the condition of the lake at the foot of the lake, the spillway?

A. Well, the orders are now that Mr. Bradley, well, not Mr. Bradley, but Asbury Park has charge of the foot of the lake, and to hoist that gate in time of freshets or anything.

Q. Have you ever observed the condition of the lake down there at the time of storms, as to the effect the sand would have at the foot of the lake?

A. Yes, sir.

Q. What has that been? What have you observed about that?

A. About the sand backing up?

Q. Yes.

A. Why, the sand from the ocean, when there are certain tides, will build the sand up and stop the water off, the same as is done at Shark River or anywhere else.

Q. Have you observed that on many occasions?

A. On many occasions, yes, sir.

Q. And what would be its effect as to stopping the water going up out of the lake?

A. Well, it would simply stop it, that is all.

Q. Well, to such an extent that it would be necessary to use artificial means to open it?

Mr. Kremer. I object to that as leading, leading the witness entirely as to what the effect would be.

The Court. Well, he may reframe the question. What was the effect?

Q. When this sand would back up there what would that do?

A. Back up the water in the lake.

By the Court.

Q. What was done to relieve it?

A. Well, sometimes the tide would cut it out and at other times you would send a gang of men to dig it out. As soon as you got it started in that new sand—it would take considerable digging, as you will all bear me out in—it would cut it out itself afterwards, but it would not do it without help, without digging.

By Mr. Carton.

Q. At the other end of the lake, up near Main Street, were you familiar with the location up there?

A. Well, to a certain extent, yes.

Q. Do you know where Mr. Doran's and Mr. Woehrer's places of business are?

A. Yes, sir.

Q. How long have you known those locations?

A. Ever since before they was built, before there was anything built along there.

Q. What is the condition of the ground up there between Main Street and the railroad, both sides of the track?

A. Well, we always call it low ground, marsh.

Q. Well, is it low ground?

A. That is what I think it is. Mr. White filled it up, Mr. Washington White, at the time that Fees was there, Fees' restaurant.

Q. Where did Fees have the restaurant?

A. Right along where Mr. Doran is.

Q. South of the brook?

A. South of the brook; yes, sir.

Q. How long ago was it that they ran the restaurant there?

New Jersey State Library

A. Well, now you have got me on date, I don't remember the dates.

Q. Well, years ago?

A. Several years ago, before Mr. Doran came there.

Q. Have you ever had occasion when they were there to observe the condition of the land, the yard back of Fees' building?

A. Yes, sir.

Q. What was it?

A. I have been into Mr. Fees' restaurant when he has called my attention to it in the back there, and it was all water. I have also seen boats there when Mr. Ormerod was there. He stored his boats up in the building, but he had a basin, you might call it, or water there that he soaked them up in and like that. I have seen numbers of boats lay in there.

Q. Can you indicate on this map back of you, Mr. Tantum, about what portions of this land if any you have seen overflowed with water? This is the main street, this is Treat's and this is Doran's.

A. I have seen all along in here. (Indicating.)

Q. Back of Doran's, Wooley's and Woehrer's property?

A. Yes, sir.

Q. This is Mr. Applegate's here, that Mr. Sexton referred to?

A. Yes, I remember that. They were formerly all built on piling there.

Q. Do you know that of your own knowledge?

A. Yes, sir: I have seen them.

Q. The building there before Mr. Doran came, Treat's, was that on piling?

A. Not Treat's.

Q. Fees'?

A. Yes, Fees'. I used to sit there and throw clamshells down in the water at times.

Q. From the restaurant?

A. From the restaurant. Now this back of Doran's and Mr. Woolley's has been filled in some along there, and this brook that they are talking about, the banks, years ago didn't have banks. It was flat in there, instead of bulkheading it on each side. They have bulkheaded it since and forced it to come down in a certain place.

Q. Narrowed the stream?

A. Yes, but before it was flat in there, and of course the water went there. Of course there was a channel, but there wasn't a bulkhead to hold it. Then throwing stuff in there from these other buildings, from drift and like that, this brook has filled up somewhat in the bottom of it higher than it was, which prevents the flowing of the water.

Q. On how many occasions do you say you have observed this land overflowed with water there?

A. Oh, I couldn't tell you exact, but a number of times.

Q. These times that you are referring to and these incidents that you are referring to, did they all take place before 1911?

A. Well, as I said before, I don't remember the date. I have seen it before 1911.

Q. Well, how long ago since Fees was there?

A. Well, I don't know.

Q. Well, before 1911, wasn't it?

A. Yes, before that.

Q. Well, they were there before Mr. Doran came there, weren't they?

A. Yes, they were there ahead of Mr. Doran.

Q. Do you remember when the railroad track went through there?

A. Yes, sir.
Q. Do you remember that property before then?
A. Yes, I was there before the railroad went through.

Cross examination.

By Mr. Kremer.

Q. When was Ormerod there?
A. I don't know the date.
Q. Well, how long ago, is it twenty years?
A. Well, if I knew the dates I could tell you how long ago it was.
Q. Have you any recollection how long ago it was? It wasn't yesterday?
A. I am aware of that; I am sure it wasn't yesterday or two or five years.
Q. I am getting your best knowledge how long ago Ormerod had his boathouse there.
A. I am telling you as a gentleman I don't know.
A. No, but I know it was before Mr. Doran came there and the like of that.
Q. Have you any recollection as to when Mr. Fees came there?
A. Yes, I remember he time he came there but I don't remember the date. I didn't make a memorandum of the date.
Q. To the best of your recollection how long ago did Fees come there?
A. Oh, I should judge twenty years ago.
Q. Twenty years ago?
A. Yes.
Q. Did you ever eat in Fees' restaurant?
A. I certainly have.

Q. Didn't he have a regular garden out in the back where you used to sit at tables?

A. No, sir; that garden, he had a platform built up there on piling.

Q. Is that where you sat and threw clam-shells in the brook?

A. No, I stood in the backdoor of the restaurant, where the steps went down to what you would call the cellar, and I would call it piling, and throwed things in there, and he showed it to me, that was before Washington White filled it up in there.

Q. Where was this platform of Fees that you speak of?

A. Back of his place, right back here. (Indicating.)

Q. His place was right there, was it?

A. Yes, he had a platform there with piling about six feet long.

Q. Were you ever under the plaftorm?

A. Yes, sir.

Q. Were you ever under the house?

A. Yes, sir.

Q. You could go under the house, couldn't you?

A. You could by bending, in a dry time.

Q. Then you were under the house and it was land there?

A. Yes, land. Yes, there was marsh there, wet. He dumped his oyster shells under there and like that.

Q. But you walked under his house?

A. By bending forward you could walk under his house, yes. He dumped all the oyster shells and things there to fill it up.

Q. Then there was water under the house all the time?

A. Not all the time; most of the time.

Q. You admit it was most of the time. Were you ever under there?

A. Yes; not under there; I could see it under there.

Q. You could see it from the door?

A. Yes, from the back door in his restaurant.

Q. I thought there was a platform back of the house.

A. No, from the back door, where it had steps to go under there. He had steps from the backdoor of his restaurant to go down under and then he had a platform built out there that you could sit on, on piling.

Q. And this was twenty years ago?

A. Well, I don't know the exact date. As I told you, I didn't make a memorandum of the date.

Q. Now you say that the City of Asbury Park has charge of the opening of the gate at the spillway?

A. The way I understand it the Association has given them charge of opening the gate, at the foot of the lake, that is.

Q. That is the present arrangement?

A. That is the way I understand it.

Q. You are Chief of Police?

A. Yes, sir.

Q. And the policemen on duty are under you?

A. Yes, sir.

Q. And their instructions come from you?

A. Yes, sir.

Redirect examination.

By Mr. Carton.

Q. Mr. Tantum, I omitted to ask you if you remember the condition at the head of the lake before the improvement, the boulevard was made there, and if you did what was its condition as to sightliness or otherwise?

A. Well, I remember the lake there when there used to be a bridge across there, before the main arch was built across Main Street there.

Q. You mean the ——

A. The archway.

Q. Main Street itself?

A. Main Street itself, where it goes over. Amos Tilton built that for the township, I remember his building it, covering over.

Q. Answering prior to the improvement made there in 1911, this side, what was the condition of the head of the lake between Main Street and Bond Street that was filled in?

A. Between the railroad and Main Street, you mean?

Q. Along the front, yes.

A. It was mud about that deep (indicating.) I guess Mr. Doran will bear me out in that, a regular quagmire; that is, the street itself, before they widened the street and fixed it, the street.

By the Court.

Q. He is talking about the head of Wesley Lake.

A. The head of Wesley Lake? The street that goes across in front of Mr. Doran's, I remember I went across there once in a fire engine and got stuck.

Q. What is the condition of the lake, he is asking you, the north end of the lake?

By Mr. Carton.

Q. Above the lake.

A. The boats used to run up there under this Main Street and the boys used to stay there and halloo, "Down the lake" when the people was coming from the train.

Q. In later years, prior to 1911, was there any change in the head of the lake there as to whether it was filled in or not?

Mr. Kremer. I object to that as leading. He has testified as to what the condition was and now Mr. Carton endeavors to lead him, to suggest another.

The Court. No, he has not answered the question yet. His answer would be merely cumulative anyway.

By the Court.

Q. Prior to the improvement made by building the boulevard link, what was the condition of the lake over which the boulevard now runs, was it clean and wholesome and neat or was it—

A. No, sir.

Q. What was its condition?

A. Well, the condition, there was always more or less grass would grow up, but the condition was such that boats could run clear up to the main street, to the main street, that is, the head of the lake, on the east side of Main Street.

By Mr. Carton.

Q. Where was there more water, on the south side of the lake or on the north side of the lake; that is, in the block from Main Street to Bond Street?

A. I would say to the west side of Main Street.

Q. The east side of Main Street?

A. Which was the most water?

Q. Yes.

A. It was on the Park side, because the channel, the

culvert archway ran nearest ours. Then there was a kind of cove on the Park side there.

Q. Well, what course did the thread of the stream take after it came through the Main Street culvert? Did it go nearer Ocean Grove or nearer Asbury Park?

A. It was nearer Ocean Grove, when it first came out, then it cut across towards Asbury Park, towards Bradley's stable there.

Q. And in doing that what effect did it have, if it had any, on filling up the lake?

A. That is hard to say.

Q. Do you remember anything about the condition of the lake bed there from a sanitary standpoint prior to the making of this improvement?

A. Well, it always used to fill up more or less up there.

Q. With what kind of matter?

A. Well, with mud, you might call it, this washing of sand, mud and things of the like of that, and they would clean it out and cart it away. They dug it out there once and Dr. Kinmonth got a great deal of stuff there up to Bradley Beach, made a bank there. Mr. Doran remembers that.

Recross examination.

By Mr. Kremer.

Q. You could come right up to Main Street in a boat, couldn't you, on Wesley Lake?

A. Yes, and the water when you could do that was standing back west.

Q. You could do it all the time, couldn't you?

A. If you could do it now you couldn't ——

The Court. No, the question is whether you could it all the time.

A. They did do it there several years, yes.

Recess till 1.20 P. M.

(Trial of the cause resumed at 1.20 P. M.)

HARRY B. WHITE, sworn for defendants.

Direct examination by Mr. Carton.

Q. Mr. White, you have been sworn and you have stated you live in Asbury Park and were City Clerk, I think?

A. Yes, sir.

Q. Prior to your employment by the city were you in any other business in Asbury Park?

A. Yes, for quite a few years.

Q. Did you ever have anything to do in your business enterprises with Wesley Lake?

A. Years ago, when quite a young fellow, I used to run a boat on Wesley Lake.

Q. During what period did that cover?

A. First in the summer of 1895.

Q. And for how long did that continue?

A. About four or five years.

Q. Have you ever been in that part of the brook between Main Street and the railroad?

A. Several times.

Q. What took you up there?

A. I used to go through there for different parties with a boat, under the Main Street culvert and on into the brook.

Q. When you were running your boat on the lake?

A. Yes, sir.

Q. Were you in the boat business as a business? 10

A. Yes, sir; as a business.

Q. Carrying passengers?

A. Carrying passengers. I didn't carry passengers under the culvert.

Q. No, I mean you were then; when you went through the culvert at that time you were in the business of carrying passengers?

A. Yes, sir.

Q. What would you go through the culvert for?

A. Oh, for different things. We used to go there 20 and leave our boats there if we wanted to leave them there awhile, so that they would not be mislaid by the boys, etc., along the bank.

Q. Along the lake?

A. Yes, sir.

Q. What was the condition on both sides of the brook between the railroad and Main Street at the time you were there?

A. Why, the brook was quite some wider than it is 30 now at that time. I used to go through there and tie my boat to the piling that held the buildings along the south side.

Q. Do you know where Mr. Doran's building now is?

A. Yes, sir.

Q. This present building was not erected at that time, I suppose?

A. There was a different building there than there is now.

Q. Where would you tie your boat with relation to the location where Mr. Doran's building now is?

A. Well, at that same point.

Q. At that same point, yes; what did you tie it to?

A. Why, the piling that held the building up, or the slats. They had a sort of slat-work along nailed from the piling up to the building itself.

Q. Did you drive your boat right up to those slats or those piling and tie it?

A. Yes, sir. The banks went right straight alongside of the piling.

Q. What has been your observation further as to water up there outside of the brook itself?

A. I have been in there a number of times right following storms when the brook was very much swollen and overflowed its banks.

Q. To what extent, Mr. White? Will you indicate on the map to what extent you would observe it overflowing its banks?

A. I would say that all the way, it overflowed all the way from the culvert to Main Street. The biggest body of water would be in here. (Indicating.)

Q. Back of Doran and Woehrer's property?

A. Yes. In fact, there used to be a sort of pool, I judge about half way between Main Street and the railroad track. We used to come up there with our boats and turn around at that point. The stream would carry you in that turn, to that point, and you had to put it in the hole to turn and get out.

Q. Do you know whether there was any boat building enterprise in there at that time?

A. I don't know. I have seen five or six there, but I am not sure whether there was a boat-building plant there.

Q. I think you have said from 1895 on?

A. The summer of 1895 was the first year I was on the lake as a boat boy, as I recall then.

Q. And from that time four or five years on?

A. Four or five years.

Q. Now this condition that you have described there, did you note that on more than one occasion?

A. Oh, yes, a number of times.

Q. And would that be more pronounced in time of storms?

A. Yes, I used to live not very far from that spot at one time. At one time as a youngster we used to go down there and play, as the brook was overflowed or swollen; we used to think that it was a lot of fun to go down and fool along there.

Q. And the part that overflowed did comprise the land that you have outlined on the map?

A. Yes.

Cross examination.

By Mr. Kremer.

Q. You say that that pond that was created there in flood times was in the rear of where Doran's house is now?

A. I didn't say it was created by flood times. There was a pond there continually.

Q. All the time?

A. All the time.

Q. And that was along in 1895?

A. Yes, from that period on for four or five years.

Q. And the stream was narrow where Doran's house is?

A. Narrow, but wider than it is now.

Q. Which way was narrower, on the north or south?

A. I think on the south.

Q. Do you know that?

A. No, I can't recall that exactly.

Q. But you had to go back in this pond to turn your boat around?

10 A. To turn your boat around you had to go up there.

The largest departure from the present boundaries of the brook was in the rear, was it not?

A. I said, as I recall, it was about half way between Main Street and the railroad track.

DEFENDANTS REST

PLAINTIFFS' TESTIMONY IN REBUTTAL

MRS. MAUD FEES, sworn for plaintiffs.

Direct examination by Mr. Kremer.

Q. Where do you reside, Mrs. Fees?

A. 512 Cookman Avenue.

Q. Did you ever live on South Main Street in Asbury Park?

A. I did; yes, sir.

Q. There has been testimony with reference to a restaurant under the name of Fees' Brothers. Was that your restaurant?

A. Yes, sir.

Q. Where was that? Will you indicate on that map where this restaurant of Fees' Brothers was?

A. It was right beside that brook.

Q. Immediately on the south bank of the brook?

A. Exactly.

Q. When was that restaurant there?

A. Well, it was there—from my time of being there, from 1894 to about 1899.

Q. The business there five years prior?

A. Yes, but the rest of the family was there before that.

Q. You were there only five years?

A. Yes.

Q. Will you describe the condition of the boundaries of the brook during the time you were there?

A. Well, the brook looks about like it is here, when you got out in storms it would be as big as— there was a lake on the opposite side of the railroad.

Q. On the other side of the railroad?

A. Yes; and then of course this being narrow here it would not receive the water.

Q. Did you have a cellar under your house?

A. We did.

Q. What kind of a cellar was it?

A. It was just a dirt cellar.

Q. Did you keep anything down there?

A. Yes, we used to keep our oysters and clams.

Q. Was there any water in your cellar?

A. Not any.

Q. During the five years that you stayed there, from 1894 to 1899, will you state the condition as to whether or not there was ever any water in the cellar?

A. No, sir; there was no water absolutely.

Q. No water of any amount?

A. No, sir; we were always able to keep our clams and oysters in the cellar.

Q. And you left there in 1899?

A. Yes, the building was moved from there to where it stands now, which is the Hippodrome.

Cross examination.

By Mr. Carton.

Q. Mrs. Fees, I suppose you are aware of the fact that for a great many years prior to the time you went there your husband and his brother carried on a restaurant at this same place?

A. Yes, sir.

Q. You were there about four years?

A. Yes.

Q. Do you know where Mr. Doran's building now is?

A. Well, it stands on part of the ground where our building stood.

Q. And what other ground did your building cover? I mean who occupies the balance of the ground now?

A. Well, I believe it is what is now the vegetable shop, used to belong to Woolley's drugstore.

Q. So that where your restaurant was was just south of the brook where Doran and Woolley's place was?

A. Yes.

Q. That was quite a large restaurant, was it not?

A. Twenty-six feet front.

Q. And you say that when the brook was filled up at times that it would overflow its banks?

A. No, never overflowed its banks.

Q. Never saw that?

A. No.

Q. What did you say about west of the railroad all overflowed at times?

A. When it was after heavy rainfalls of course there was a lot of water over there.

Q. And the cellar under the restaurant was just a dirt cellar, I suppose?

A. Yes.

Q. The restaurant was up on puncheons or piling?

A. Yes.

Q. And what was kept down there was the oysters and clams?

A. Yes, sir.

Q. It never interfered with them, I suppose?

A. No.

Q. Any dampness or moisture?

A. No.

Q. I don't suppose you made a practice of going up and downstairs much to get oysters and clams, did you?

A. No, I didn't, but I have been in the cellar oftentimes.

Q. And when you have been in the cellar you haven't seen any water there?

A. No, never any water there.

Re-direct Examination.

By Mr. Kremer.

Q. And you can testify that there was no water in that cellar from 1894 to 1899?

A. No, it was much drier then than before.

Re-cross Examination.

By Mr. Carton.

Q. What do you mean by saying it was much drier then than before?

A. Well, because the building was not there and it had a chance—it was open, and the boys used to play there. There was a signboard in front and brush through there.

Q. In back?

A. No, where Mr. Doran's building now covers.

Q. Was there water there prior to that time?

A. No, sir.

Q. Why did you say there was not as much there then as there was before? What did you mean by that?

A. I didn't say there was.

Q. I misunderstood you.

A. Yes, you did.

Q. You say that at no time during the five years you were there was there any water in the cellar?

A. No, sir.

Q. You mean to say that you didn't see any water there, I suppose?

A. I didn't see none there, no.

Q. You don't mean to say that you were in the cellar every day during that time?

A. I wasn't in the callar but the other members of the family had to go to the cellar every day, three or four times a day.

Q. That is where they stored their oysters and clams?

A. That is where they stored their oysters and clams and had there been water they couldn't have used them, because the water wouldn't have been fit to use.

Q. Don't you think it would be a good place to store oysters and clams, in the cellar?

A. No, sir; not in that kind of water.

Q. It wouldn't have been helpful to the oysters and clams?

A. No, sir; I guess not.

Q. What was the character of this water that came down in time of storm, trash and dirt?

A. No, it was rain water, of course, that used to fill the meadow, you know.

Q. That was low in back there?

A. Well, I never seen that, the land in there, about its being low or high.

Q. Well, from your observation it was low, was it not?

A. The ground in the cellar, I believe, ran up quite high.

Q. In your cellar? The ground in your cellar?

A. Well, it was a little bit raised, higher in the front than it was in the back.

Q. And do you know why it was raised higher, for what purpose.

A. No, it was no purpose at all.

Q. Was that to get a place where water would not come over?

A. No, it was not any purpose; just simply a natural condition.

Re-direct Examination.

By Mr. Kremer.

Q. Now you say that they moved the building off in 1911?

A. Yes, sir.

Q. And how long to your recollection after they moved the building off did the ground stay open?

A. Until Mr. Doran bought the ground and built.

Q. And during those years until he built, do you recall whether that land was above water or under water?

A. It was above water.

Q. And you say that is where your children used to play?

A. Yes, sir.

GEORGE W. TREAT, Sworn for plaintiffs.

Direct Examination by Mr. Kremer.

Q. Where do you reside, Mr. Treat?

A. Asbury Park.

Q. Whereabouts in Asbury Park?

A. On the immediate north shore of Wesley Lake Brook.

Q. How long have you lived there?

A. I don't reside there, that is my place of business.

Q. How long have you conducted a business at that place?

A. Well, you mean personally or in the family?

Q. How long have you been employed or how long have you been there?

A. Oh, we have been there at least thirty-five years.

Q. You have yourself in one capacity or another?

A. I have been employed in one capacity or another. I have been proprietor of the place for about twelve years.

Q. Have you a cellar under that house?

(Objected to.)

The Court. Why, what is the objection?

Mr. Carton. It does not rebut anything and it is immaterial. This is in rebuttal only, and it cannot make any difference on rebuttal whether Mr. Treat has a cellar or whether he has not. It seems to me if they want to show any conditions existing there it is on the affirmative.

The Court. I am not so sure. Your testimony has shown that there were certain conditions existing under and about the particular property. I think that by the production of Mr. Treat himself the plaintiffs have a perfect right to rebut your testimony, because it is a part of your affirmative case, a part of your defence.

Mr. Carton. I do not question that, your Honor, but it seems to me the question asked does not rebut anything, and unless it is rebuttal and does rebut something it is not proper.

(Question repeated.)

The Court. He may answer.

(Objection noted for defendants as ground of appeal.)

A. I have.

Q. When did you build the cellar, Mr. Treat?

Mr. Carton. I make the same objection.

(Objection overruled.)

(Objection noted for defendants as ground of appeal.)

A. It was built at least twenty years ago.

Q. Before the construction of the cellar will you state what the ground was under your building?

A. Well, we excavated to make the cellar.

Q. You excavated?

A. Yes.

Q. From the time of the construction of your cellar up till 1911 will you state whether or not you were troubled by floods?

(Objected to. Objection overruled.)

(Objection noted for defendants as ground of appeal.)

A. On only one occasion. There was a boat building shop in the rear of our store where they had a gate that they dropped to the entrance to the bridge, and on one occasion this gate was dropped in the dam in a severe rain storm and the gate clogged with debris, backed the water up, and we did get some water on one occasion.

Q. When was that?

A. Well, that was about 1903 or 1904.

Q. And why was the gate dropped?

A. To protect the man's boats from running out into

the lake. He was a boat builder and when he built them complete he used to drop them in the lake to soak them up.

Q. And would he drop that gate whenever there would be a storm to keep them from running out?

A. No, he did at certain times of the year. If he was about to let the boats go out of his shop to sell them he would drop that gate, and on that occasion he failed to raise the gate.

Q. And where was that gate? Will you indicate on this map as near as you can where that gate was? Here is the brook.

A. Here is Treat's building. The gate was just in front of the culvert where it crosses Main Street. I guess Main Street is seventy-five feet wide.

Q. This is the westerly end of Main Street, is that where his gate was?

A. No, it was under the Schauffer building. The Schauffer building covers this tract, I imagine seventy-five feet deep. And it was under the Schauffer building where this gate dropped prior to coming to the culvert, somewhere seventy-five feet from the westerly end of Main Street. This gate would drop and debris came down from the west side and clogged this gate. It was, perhaps, a six inch division of slats, and the debris collected so it backed up, and on this one occasion we got water.

Q. Dropping the gate would cause the brook to bank up and overflow its banks in the rear?

A. Yes, sir.

Q. During how many years is that period during which you say you only had water in your cellar once?

The Court. Prior to 1911, his statement was, as I recall.

A. I can't recall but this one particular instance. It

was a very, very severe storm, almost a deluge.

Q. Do you know when that gate of that boatman, whatever his name was, was removed?

A. I think it was removed along about 1905.

Q. From the time of the removal of that gate up until 1911 did you ever have any water in your cellar?

A. I don't recall any.

Cross Examination.

By Mr. Carton.

Q. You have been proprietor of a grocery store some fifteen years now?

A. I have been proprietor of a grocery store individually since 1905, September 25th.

Q. And did you have your office there in the store?

A. Yes, sir.

Q. How many men on an average do you employ there to do your work for you?

A. Oh, about twelve during four months in the year and from six to eight during the other period, from five to eight.

Q. Your father was a member of the City Council of Asbury Park a great number of years, was he not?

A. Yes, sir.

Q. When did he die, Mr. Treat?

A. 1905, August 28th.

Q. Did you ever have any knowledge of any complaints your father made because of the overflowing of his cellar prior to his death?

A. I don't recall any.

Q. Don't recall any?

A. No.

Q. He was in charge up to that time, was he not?

A. Yes, he was the proprietor. I was jointly interested a number of years with him, but he was the head.

Q. Now you have indicated that there was a building, the Schauffer, I think, immediately over the lake, extending back from Main Street west about seventy-five feet?

A. I believe it is about the depth.

Q. That building is there yet, isn't it?

A. That building is there yet.

Q. The brook runs right directly under that building, doesn't it? 10

A. Right directly under it.

Q. And the fact is that there are posts or slabs that run down from the sill of that building in the lake all the way across?

A. On the sides.

Q. And a part of the foundation; no, but all the way across the brook?

A. I dont think so.

Q. Well, that was the situation formerly?

A. I don't recall it. This gate used to abut piers. 20 These piling, the sides of the gate used to come down against these piling.

Q. Who maintained the gates there?

A. George C. Ormerod.

Q. What was the purpose then?

A. He was a boatbuilder.

Q. Where did he occupy?

A. In the building that you now occupy by the corporation yard, the old building that was on fire recently. 30

Q. Back of your store?

A. Back of my store.

Q. And he built boats there?

A. He built boats there.

Q. Where did he float his boats after he built them?

A. And afterwards McEwan followed him or suc-

ceeded him. He floated them in the creek in the rear.

Q. And the creek was the same size then that it is now?

A. The creek was wider then than it is now.

Q. Considerably? A sort of pond in there, wasn't it?

A. No, not a pond. Perhaps they have infringed on the south side of the lake. They have built in, perhaps, two feet, three feet, perhaps.

Q. You think the boatbuilders likely infringed on the south side of the lake in floating their boats?

A. No, the boatbuilder was on our property.

Q. Yes, but I mean in floating his boats.

A. No, the property belongs to the lake. That is filled in in the rear, in the extreme rear.

Q. What is the character of the property, whether it is high or low, on the south side of the lake and on the back of Doran's and Woolley's and Woehrer's and on back to the railroad on the south side.

A. Well, from the water level I would imagine it is two feet higher than the water level, possibly more. I would say that.

Q. That is the bank?

A. The bank, yes.

Q. And it is higher nearer up towards Mr. Doran's building, the bank is higher than it is up near the railroad isn't it?

A. I am not sure about that.

Q. You had planks and posts in your cellar upon which you set your butter tubs, didn't you, to keep them up off the wet?

A. Never since the present improvement by the city and the detritus tank has been put in.

Q. And didn't you have them long prior to 1911?

A. Never.

Q. Never had any there?

A. Never; stored on the bottom.

Q. You have a drain built on the side of your cellar floor, have you not?

A. Safety drain, yes.

Q. And you had it long before 1911, didn't you?

A. No, built it when we built the store; but we have never had any occasion to have it overflowed excepting that particular occasion that I mention.

Q. That is the only occasion that you can recall?

A. The only one I can recall.

Redirect Examination.

By Mr. Kremer.

Q. And you have had to use planks in your cellar since the city's so-called improvement, have you?

A. Well, we have never attempted to put anything in the cellar excepting things of little value, and we have an eighteen inch platform built now in the cellar, and anything we put there, if it has got barrels we put them on the platform and have ever since the improvement has been made, that is, the detritus tank and the culvert which now has been made, extending down to the boulevard and under the boulevard.

Q. And before this improvement was made did you use your cellar generally?

A. We used to for every storage, all kinds of storage and all kinds of goods. I have stored carloads of potatoes in there on one occasion.

Q. Was it dry?

A. Absolutely. We had a carload of potatoes in there from October until we—

By the Court.

Q. Why did you put that eighteen inch shelf in there?

A. But we were compelled to by this detritus tank that the city caused to be put in, on account of this being put in, we couldn't utilize the cellar at all. But we are compelled to do it, otherwise we wouldn't have to abandon it.

Recross Examination.

By Mr. Carton.

Q. You had two cellars there, had them years ago, didn't you?

A. No, never had two cellars.

Q. Didn't you have a cellar further west than the main store?

A. No, no cellar. That is the old original ground. We have filled in everywhere else but that. The building is built over his original cellar, but that cellar is entirely separate. We have never utilized the other place, under the building.

Q. Isn't there a cellar in the rear of your store that you have described with a drain around it?

A. There is an open space, no drain around it; no, sir.

Q. Isn't there in that erected benches sitting up some six or eight inches high, upon which there are planks upon which you put tubs and store things down there?

A. I believe not.

Q. Don't you know there is?

A. I know there is not.

Q. Wasn't there before 1911?

A. Never. We never utilized that part of the build-

ing. That was the natural ground, as I said, before the place was filled in.

Q. How did the level of that ground compare with the level of your cellar?

A. The cellar is above it.

Q. The cellar is above it?

A. Yes, sir.

Q. And you never used that, did you?

A. I think the cellar is above it. No, we have never used it, never stored anything in there of any kind or character.

Q. This second cellar, how much higher than the level of the lake is that, do you know?

A. Well, that is, I would imagine, eighteen inches.

Redirect Examination.

By Mr. Kremer.

Q. What would you say as to the change, if there has been any, in the banks of the brook during the last ten years? Were the conditions in 1905 as to the banks of the brook largely similar to what they are today, or largely different?

A. They have never been changed on our side of the lake, at least. I don't know anything about the other side, because I haven't particularly observed it. I know we have made no improvement.

Q. Have you observed any great change in the boundaries of the lake on the south side?

A. Well, the only change that I have noted is that some of the property owners have infringed upon the waterway by filling in to make their yards bigger in some places, particularly Applegate.

Q. That is away at the rear?

A. Applegate. Applegate comes right down here. (Indicating on map.) He had built over that lake. I think this property is built over that lake.

Q. But is this land along here much as it was in 1907?

By the Court.

Q. When you speak of the lake do you mean the brook?

A. The brook.

Q. The lake does not run to the west of Main Street, does it?

A. It does not, sir, the lake.

Q. It is the running brook there?

A. It is the supply.

Q. That is what I supposed you meant.

A. Yes, sir.

By Mr. Kremer.

Q. Is the boundary line along this section of the brook today largely what it was in 1907 and 1908?

A. It is not as wide as it was.

Q. Was it much wider here in 1907 or 1908?

A. Not at that point. It is about the same. But these properties up here have filled in to give themselves more yard; and here it is about the same.

Q. It obstructed the waterway?

A. Yes, sir; here it is about the same.

Recross Examination.

By Mr. Carton.

Q. Has that infringing of the property owners extended down as far as the Woehrer property here?

A. Well, I can't recall sufficiently to make a statement, but I know this: in back of where the corporation yard is now, here the corporation yard runs here; right at this point there is an infringement of the property owners on this side, and I guess perhaps a portion of Woehrer's might come out of that, particularly Thompson's here and Applegate's, you will find that this is a very narrow streak of water. You come down here by the outlet of the supply and it is wider, or should be wider here than anywhere else, but it is not, they have filled in.

Q. Have you noticed in the past few years whether Doran's property has been filled in here, Doran's and Woehrer's, since the Woolley fire?

A. Doran is practically on the edge of the water.

Q. What I mean is, has he improved his lake bank, his brook bank, I say, in the past few years?

A. Doran hasn't any brook bank. Doran goes directly on the lake. Woolley, I think, has a very small portion on the lake. You can see here Doran hasn't any fllling, hasn't any land back of his building. It is triangular.

Q. So that Doran's building covers his entire holdings there?

A. His entire holdings.

Q. And Woolley, you say, has a little in his backyard on the brook?

A. Yes, Woolley is adjoining.

Q. And Woehrer has, I suppose, considerable on the brook?

A. Yes, he has quite a piece.

Q. Now let me ask you if along here where it is marked on the map in front of the Woehrer property, if that has been filled in any within the past few years.

A. I couldn't say definitely, but I know that Thompson and Applegate are.

By the Court.

Q. What effect has that had on the capacity of the brook, do you know?

A. Well, the effect that I would naturally take——

Q. Well, I mean as the result of your observations.

A. Well, as the result of my observations it would be that the narrowing of the source and the widening of the outlet would have a beneficial effect.

Q. A beneficial effect.

A. A beneficial effect of water getting away. The water would naturally back up further back.

Q. Towards the railroad?

A. Yes, sir; towards the railroad. As a matter of fact, if you take a two foot supply and a four inch receiver it flows freer than it does with a two foot receiver.

Re-direct Examination.

By Mr. Kremer.

Q. According to your observation would filling in or raising the level of the south banks of the lake tend to make the water flow through the brook more readily?

A. No, it would obstruct it back here. It would obstruct it back here; it wouldn't obstruct it here where this is holding it back.

Q. Wouldn't it tend to keep the water right within

the channel of the brook so it would flow down to the culvert?

A. Well, if the culvert wasn't sufficient to let it go by it wouldn't help to relieve the situation.

Q. Assuming the culvert was big enough, wouldn't the raising of this keep the water in the culvert and shoot it down into the lake?

A. The situation is this: the water stopped on the easterly side of Main Street.

Q. What stopped the water on the easterly side of Main Street?

By the Court.

Q. The east of Main Street?

A. Yes, sir.

Q. That is on the lake side?

A. On the lake side. Prior to this condition there was an open lake directly east of Main Street and there was no cement foundation under the culvert, and water will find its way. When there would come a heavy supply of water or a deluge of water it would cut that channel deeper, if it was necessary, and throw up a sandbar. Anybody in Asbury Park knows that there was always a sandbar the other side after a heavy storm, east of Main Street in the lake, and they dug it out repeatedly, always dug it out. Now it is a solid bottom there and can't get out, and the culvert under Main Street is filled up. I have rowed under Main Street in a boat and you can't get out today to save your life with a boat.

By Mr. Kremer.

Q. What is the cause of the present obstruction, if you know?

(Objected to.)

The Court. If he knows.

Mr. Carton. I object to it anyhow.

The Court. On what theory?

Mr. Carton. Not rebuttal.

The Court. Yes, that is probably a part of your affirmative case on direct examination.

Mr. Kremer. It has been testified to by others.

Mr. Kremer. I will withdraw the question.

The Court. Yes, it is cumulative, probably.

Q. It has been some years, I suppose, since you went through the culvert in a boat under the road?

A. Yes, it has been, prior to the completion of this detritus tank and filling in.

Q. I mean some years prior to that time, a great many years prior to that time.

A. Well, yes.

Q. That culvert had filled in considerably before 1911, hadn't it?

A. The culvert, no. And naturally that was filled in, because the dirt would cut out from under the culvert under the street and throw up a sandbar, as water would find its way out, and then either Asbury Park or Ocean Grove people would dig that out periodically. I don't know which one of them did it, but I have seen them dig

it out a number of times in my experience or life in Asbury Park.

Q. Was it your experience after these freshets that it would throw up this big deposit, a sandbar of earth out there?

A. It would on some occasions, yes.

Q. The effect of that in recent years, before 1911, was practically to fill up that end of the lake, wasn't it?

A. Well, it would make some pretty big bars. You could stand out there sometimes on a bar at the head of Wesley Lake.

Q. And so the stream hugged the Ocean Grove shore through the willows?

A. Yes, there was a deep hole on the Ocean Grove side there under those trees. There was a bulkhead there. The hole would whirl the sand out and throw it on the Asbury Park side in front of the dike that was originally there on the Asbury Park side.

Q. According to your observation did the construction of the flumes and detritus tank by the City of Asbury Park and the Ocean Grove Association cause the bottom of the Main Street culvert to fill up?

A. No question about it.

Mr. Carton. I object to that as not cross-examination.

Mr. Kremer. I think he has opened the way to ask that, what caused the culvert to fill up, and if it was before the new construction was made.

Mr. Carton. I asked the condition of Main Street, the crossing of Main Street, and he said it threw a sandbar up in the lake.

The Court. I think he is entitled to answer it.

A. I will answer it honestly. There isn't any question with any reasonable man to consider any other reason but what it is that cause. The outlet water has a solid foundation. The culvert has broke up the solid foundation and consequently the sand can't get away and the culvert under the street is filled, so that the water can't get out.

Q. And you say these constructions are what has caused it, the trouble?

A. Yes.

Re-cross Examination.

By Mr. Carton.

Q. You have got a kick in against the city on account of this trouble?

A. I haven't any kick at all.

Q. You were a member of Council since that work was done, weren't you?

A. Yes, sir.

Q. How long did you serve?

A. A little over a year.

Q. When did you serve?

Mr. Kremer. I object on the ground that I did not develop that on cross-examination and it relates to other matters that have been developed on direct.

The Court. I don't think it is material, is it?

Mr. Carton. I ask it for this purpose——

The Court. You have already asked him whether he hadn't a kick in on account of this.

Mr. Carton. Yes, I was not able to put it just that way, but that is what I want.

The Court. And I understood him to say he was perfectly satisfied. Now you follow it up by questioning whether he was not a member of Council.

Mr. Carton. And I want to show whether he has not served as an official of the municipality which he is complaining about.

The Court. I think it goes to his credibility. You may answer.

Q. You have served as such Councilman?
A. I have; yes, sir.
Q. And from what time to what time?
A. Well, I served in City Council for a year and one month, or a portion of one month, prior to the coming in of the commission government.
Q. That was in 1914, I imagine. It has been testified they took office in 1915.
A. 1915?
Q. Yes.
A. Well, I was there during the period of 1914 and up to the last meeting in January of 1915.
Q. That is all?
A. Yes, sir:

JOHN DORAN, recalled for plaintiffs.

Direct Examination by Mr. Kremer.

Q. Mr. Doran, you heard the testimony of Mr. Herbert, that he went with you into your cellar and read the meter in 1911, in March; was there any water in your cellar in March, 1911?

A. No, sir.

Q. Was there ever any water in your cellar before August, 1911?

A. No, sir.

Q. It has been testified by Mr. Winckler that he looked through the clapboards in the construction of your cellar in 1905 or 1906. Can you say anything as to the truth of that statement?

A. Yes, there weren't any clapboards to look through. It stood just on puncheons.

Q. And it was wide open?

A. Wide open.

By the Court.

Q. I suppose you are willing to be charitable and say that Mr. Winckler had in mind another building?

A. I presume so. It surely wasn't that one.

By Mr. Kremer.

Q. Have you examined into the straightaway as it exists now under Main Street?

Mr. Carton. I object. He has gone on the stand twice now and testified about it.

(Question repeated.)

Mr. Carton. He has testified to it twice now.

Mr. Kremer. If your Honor please, I would like to state what my purpose is in asking the question.

The Court. You may.

Mr. Kremer. It has been testified to by Mr. Rogers as to the relative capacity of the former detritus tank built in 1911 and the new straightaway built in 1912. I wish to show by this witness that the first one built is not in operation at present. It seems to me that is in the nature of rebuttal of what Mr. Rogers said as to the dual capacity of those.

The Court. Well, Mr. Doran was exhausted—his testimony with respect to the cause of this alleged flood. He thoroughly described that, described going through it and all that sort of thing. I think I will allow you to ask whether that pipe Mr. Rogers referred to is in operation or not. Probably he did not refer to that particular pipe.

Mr. Kremer. That is my purpose.

Mr. Carton. Yes, your Honor, I insist that he did. I don't want to be obnoxious by saying that I insist.

The Court. You have a right to object.

Mr. Carton. I do object upon the ground that it is not rebuttal, and for the reason that I do remember Mr. Doran when he first went on the stand said he opened this manhole and saw the straightaway pipe and that he didn't

see the pipe running to the culvert. Now that is what he stated. I may be wrong. If I recall right he didn't see the other pipe.

The Court. You may ask him whether he saw the other pipe or not.

Q. Did you see the old pipe connecting with the new straightaway?

A. Yes, sir.

Q. You did see the old pipe connecting with the new straightaway?

A. I was down in it.

Q. Which one were you in?

A. I was in both of them, the straightaway and the pipe in the street.

Q. You didn't get my question. When you were in the straightaway did you see the pipe that was constructed in 1911?

A. I beg your pardon. I misunderstood you; no, sir.

Q. Was it there?

A. No, sir.

(Objected to.)

The Court. He says he didn't see it.

Mr. Kremer. He may state what——

The Court. Oh, no, that won't do.

Q. You went all the way through the straightaway?

A. Yes, sir.

By the Court.

Q. You say you didn't see this other pipe?
A. No, sir; it wasn't there to be seen.

By Mr. Kremer.

Q. What is the relative height of the land on which your house is built, and Lake Avenue, north of Wesley Lake?
A. The ground that we still stand on——

(Objected to.)

The Court. I think he has gone over that.

Mr. Carton. It doesn't rebut anything whatsoever that makes a bit of difference one way or the other.

Mr. Kremer. There has been so much testimony it is rather hard to recall what has been said. It seems to me there has been testimony that this ground was all filled in and was lower than Lake Avenue.

Mr. Carton. I haven't heard anybody say it was lower than Lake Avenue.

Mr. Kremer. Of course if it is admitted that it is not lower than Lake Avenue——

Mr. Carton. Or higher, either one.

The Court. I don't recall that Mr. Doran was asked as to the relative elevations between his property and the McCabe property on Lake Avenue.

Mr. Kremer. There has been testimony that all these Lake Avenue properties have been flooded when the lake would overflow its bank. Now isn't it pertinent that it should be developed that the land is lower, to explain the cause of the flooding?

Mr. Carton. Suppose it did or didn't overflow; it doesn't rebut anything to say it is higher or lower. He doesn't say that it did or did not overflow.

The Court. Save time by answering it. Is your property lower than Lake Avenue?

A. Higher.
Q. Did you fill in any more to build your house?
A. No, sir.

By Mr. Carton.

You didn't have any ground to fill in, did you?
A. Just a little bit.

Mr. Kremer. I wish to recall Mr. Weidman to prove the bills of Mr. Rothfritz. Mr. Rothfritz is still incapacitated.

The Court. Very well.

LOUIS WEIDMAN, recalled by plaintiff.

Direct examination by Mr. Kremer.

Q. Mr. Weidman, you have testified that you had the repair work on your oven done by Mr. Rothfritz.

A. Partly, some of it.

Q. Will you produce the bills and check vouchers for that work?

(Papers produced.)

Mr. Kremer. I think the checks have been offered in evidence, your honor. They were marked for identification.

(Checks offered in evidence and marked Exhibits P 6, P 7, P 8, P 9 and P 10.)

Q. I show you a bill of Mr. Rothfritz for mason work and labor done for you, and I ask you if that relates to work done on the repair of your oven.

A. Some of it.

Q. How much of it?

Mr. Carton. I object unless the bill shows.

The Court. Does the bill show the items for repair on the oven?

Mr. Kremer. Yes.

The Court. What items are they?

Q. Was all the amount of this bill expended on the repair of that oven?

A. On one of these there is some tiles, and I had to go and get them in New York. I get that done from New York, the firm what built the oven.

Q. Then this entire bill relates——

A. Only one time that he done work.

Q. How much is the item?

A. $9.80 for labor, one and a half days; two hundred fire brick, fire tiles, $7; 1916, fireclay, $3.50; May 9th, mason work on oven, $6.85; paid by check.

Q. Making your total how much?

A. For this one piece of work there, $27.15 for the one job.

By Mr. Kremer.

Q. Did you have other work done?

A. Yes, sir.

Q. What was the amount of the other work?

A. Well, you have got the checks there.

By the Court.

Q. You haven't the bills for those?

A. I wrote to New York and I couldn't get them; I wrote to the oven company.

Mr. Kremer. I wish to offer these bills.

(Bills marked Exhibit P 11.)

By Mr. Kremer.

Q. You have also testified that you had certain goods

destroyed on the 21st of January, 1917. What was the total amount of the value of the goods lost?

Mr. Carton. Didn't you cover that, Mr. Kremer? I don't want to be captious, but didn't you examine him on that? You reserved the right to produce Mr. Rothfritz with the bill.

The Court. My memory is that he testified to these bills for repairing this oven, $82.32, and that he said certain goods were damaged and the damage is estimated at $500 since 1912. That is what he estimated. It is merely an estimate, I think.

Q. You estimate your damage as $500?

A. Yes, occurring since 1912. I can't just exactly tell how much it is, but that is about my estimate.

BOTH SIDES REST

The Court. I think I shall pass upon this motion to amend. I shall allow the amendment to Mrs. Woehrer appearing as a party plaintiff and as executrix of her husband's estate from the 26th day of August, 1911, to September, 1913. Is that the date of Mr. Woehrer's death? There isn't anything to indicate here.

Mr. Kremer. I think Mrs. Woehrer testified her husband died in September, 1915.

The Court. I will allow you to prove that, the exact date of the death.

FREDERICK A. WOEHRER, recalled for plaintiffs.

Direct examination by Mr. Kremer.

Q. What was the date of your father's death?
A. September, 1915.
Q. What was the exact date?
A. September 16, 1915.

Mr. Carton. I wish to note on the record an objection to the allowing of the amendment, for the reason that there is nothing in the record to show that the executrix would have the right to prosecute an action for the interim between 1912 and the date of Mr. Woehrer's death, nothing to show that the estate has been settled and that an action might not lie to the heirs at law or the devisees.

The Court. Mr. Kremer, I will hear you on that subject.

Mr. Kremer. If your Honor please, I might offer a certified copy of the will in evidence from the Surrogate's Office, as that will states that Elizabeth Woehrer is the executrix under the will, and that after her death the property is to go to the three children. The executrix, therefore, to my mind, would be the person entitled to bring any suit for the benefit of the estate.

The Court. I shall allow it to rest upon the announcement of the court.

Mr. Kremer. There were further requests that the complaint be amended to change the date of the accrual of damages to August, 1911, instead of July 1912. Your Honor also reserved decision on that amendment at the time it was made, stating, I believe, that you would decide it at the close of the case in accordance with the fact.

The Court. Well, I have been reading the complaint and it occurs to me that you did set up that date, that you would show your damages accrued from the 25th of August, 1911.

Mr. Kremer. I think it is stated in the complaint that that was the time of the first flood.

The Court. That is my recollection, and the case has been tried upon that theory.

Mr. Kremer. I will withdraw that motion then, if your Honor please.

MOTION FOR DIRECTION

Mr. Carton. I wish at this time to renew my motion for a nonsuit in the form of a motion for a direction, and ask for this for the reasons advanced in the making of the motion for nonsuit and particularly on the whole case as it is now in.

In addition to the reasons advanced then on the question of legal liability, which I claim now that there can be no disputed question as to the liability of the defendants, as to the right of action of these plaintiffs, that in view of the whole case there should be the direction of a verdict for the defendants at this time.

The Court. On the same ground that you advanced for the nonsuit?

Mr. Carton. On the same grounds then advanced as to the legal liability, and the evidence of the defendants' witnesses since as to the situation around the locus in quo where Mr. Doran erected his store.

The Court. The witnesses for the plaintiffs and defendants did not seem to agree on certain points which I am inclined to think material.

Mr. Carton. My idea is that taking the sum total of all the testimony, outside of those on which they do not agree, which are minor, that they lead to but one legal conclusion, and that is that there is no legal liability on the part of the defendants.

The Court. The motion is denied.

(Objection noted for defendants as ground of appeal.)

(After summing up of counsel.)

The Court. I have examined the amended complaint and interrogatories in this case, and view of the fact that the first date from which damages are alleged is from August 26, 1911, I shall allow the amendment to the complaint, which is a mere formality, in view of the fact that this case has been tried upon the theory that the inception of the liability began with the date in question; to amend the amended complaint with regard to the claim from August 26, 1911, instead of January 1, 1912.

(Adjourned till July 6, 1917, at 9.30 A. M.)

Freehold, N. J., June 6, 1917.

CHARGE OF THE COURT.

Gentlemen of the jury: The plaintiffs in this action seek to recover of the defendants damages which it is alleged by them they have suffered by reason of the flooding of the cellars of the buildings either owned or occupied by the plaintiffs. The plaintiffs have joined in this action because it is urged by them that the alleged damages suffered are the natural and proximate results of a common cause. That is to say, that the flooding of their cellars occurred on the same dates, and as the result of a defective construction of a system of dams, catch basins, a detritus tank and a straightaway, so-called. The defendants are the City of Asbury Park and the Ocean Grove Camp Meeting Association and it is admitted, I may say, that the construction complained of was jointly brought about by the defendants.

It appears in the case, gentlemen, that there is a running stream known as Wesley Lake Brook, the normal and natural course of which was from the west of the premises of the plaintiffs, or by the premises of at least one of the plaintiffs, through a culvert under the highway into Wesley Lake, and it is claimed that this brook had a normal and natural flow and that in times of storm the water was accustomed to overflow the banks, but not to the extent of injuring the property of the plaintiffs in the manner complained of in this suit. I say it is claimed by the plaintiffs, although, as I shall presently point out to you, there is an issue created by a denial on the part of the defendants that there was a lack of flooding of the

premises of the plaintiffs—at least one of them, Doran's —prior to the alleged construction, the construction complained of.

Now it appears, gentlemen of the jury, that between April and July, 1911, the defendants constructed what is known as a detritus tank, and you will recall under the evidence that the reason given was for the purpose of providing a better condition in the lake. It is claimed by the plaintiffs that on August 26, 1911, after the detritus tank was constructed, the cellars were flooded. It appears that these cellars were built in 1908, and it is claimed that there was no flooding of the cellars until August 26, 1911, and they attribute the flooding at that time to the detritus tank. It further appears that later, in 1912, the defendants constructed a straightaway in connection with carrying the flow of Wesley Lake Brook into Wesley Lake. That also is complained of by the plaintiffs as a defective construction in that it is said that particular construction involved the placing of a pipe four feet in diameter, or forty-eight inches, as it has been designated in the case, in connection with the culvert, apparently of much larger diameter, under the roadway. And I may say at the same time, or about the same time, as I recall—and whenever I refer to the evidence of course your recollection must prevail rather than mine; I am simply reciting it as a comment in connection with the charge—that at the same time there was a cutting off, as it were, of the west end of the lake and a filling in with a roadway, what is called in the case a section of the Ocean Boulevard.

Now I think it will not be questioned, gentlemen, that the defendants in building the roadway had no ulterior motive whatever, no purpose to do injury to the property owners on the west side of the road. You will fairly conclude, I think, that that was an improvement which was

deemed desirable by the defendants for the use of the public, and also for relieving the condition of the lakes at the west end, where there had been an accumulation of mud and debris, augmented somewhat by the material that floated through the drain in question into the lake. And therefore it is not,I may say in comment, a question of any wilful conduct on the part of the defendants in connection with this construction.

It appears later in 1914 that the defendants built what is known as a spillway at the east end of the lake,or, as has been spoken of by witnesses in the case, at the ocean end of the lake, and in that spillway they placed gates. It appears that prior to the erection of that spillway there were gates there, and in that situation I think I may fairly say the purpose of the defendants was to install an improvement for the purpose of relieving the conditions existing in the lake, and especially with respect to the increased volume of water which accumulated in the lake fed by this brook, in times of storm. Therefore there is not in this case the feature or element involving wilful conduct from which it might be concluded that the defendants should be punished in punitive damages, because, as I understand the attitude of the plaintiffs, there is no such claim.

Now, gentlemen of the jury, the law, however, is perfectly well settled in this state, and the rule of law to be derived from the declarations of the appellate courts applicable to this case is this: "A municipality has no right by artificial drains to divert surface water from the course it would otherwise take and cast it in a greater body large enough to do substantial injury on land where but for such artificial drains it would not go."

I may also say that that same principle has been reiterated and followed by the Court of Appeals in this state

within the past month. And that rule, as I have stated it to pou, has been adopted and appears to be specifically stated in this most recent case.

Therefore, gentlemen, you will observe that while the defendants had a perfect right in law—indeed they had the authority in law—to make these improvements, they had no right to so make them as to cast a greater burden, I may say, upon the property of the plaintiffs with the proximate result of causing them substantial injury. You may find it difficult, gentlemen of the jury, in determining the preliminary question in the case, because you cannot consider the question of damages until you first determine that the defendants by the construction in question and of which complaint is made did cause substantial injury to the property of the plaintiffs.

It appears, it is true, in the case that the cellars of the plaintiffs were built in a locality where you may conclude the soil was naturally marshy. They say though that for a period of at least three years they never had any water in their cellars. But, I may say, there is at least one witness who testified that in March, 1911, he went into the Doran cellar for the purpose of reading a meter and that he found water in the cellar. And of course it you believe that testimony that was prior to the construction complained of by the plaintiffs, and therefore you would be justified, I say, if you believe the testimony, in reaching the conclusion that that construction was not the occasion of the flooding of the Doran cellar. But Mr. Doran, you will recall, absolutely denies that such a circumstance could have occurred in March, 1911, because he says at that time, as I recall his testimony, there was no meter—no, I beg your pardon——

Mr. Kremer. He said there was no straightaway at that time.

The Court. Yes, at that time that this construction had not been made. You will recall there was a very sharp issue made between the witnesses for the city and Mr. Doran in that respect.

Now, gentlemen of the jury, you must first determine whether this construction did create the flooding complained of. If it did not and if the Dorans and the Woehrers built their cellars in a situation where they were bound to have water flow into them and it was not the construction which occasioned it, why, there can be no recovery in this case, because the defendants will not have been shown to have been responsible—the construction will not have been shown to have been responsible—for the flooding.

Your verdict will be one that will do as even and exact justice between these parties as possible, because that is what you are required to do under your oaths, return a verdict in this case according to the evidence, being guided by the law as I have stated it to you. Of course the rule of law is that the plaintiffs must establish their case by the greater weight of the evidence. That is to say, the burden is upon the plaintiffs to satisfy you by a fair preponderance of proof that this construction complained of did result in retarding the normal and natural flow of the water or that it interrupted the flow of the water and backed it up so that it was cast into the cellars of the plaintiffs. Now a fair preponderance of proof does not necessarily mean a greater number of witnesses on one side than the other. In other words, the party producing the greater number of witnesses would not

necessarily have established the greater preponderance of proof. The greater preponderance of proof means simply the greater weight of credible legal evidence.

There has been a very considerable volume of testimony taken in this case. There are witnesses who testify that they were familiar with the conditions prior to the construction complained of and that water was cast upon the premises adjoining the brook, including the premises of the plaintiffs. So that it will be for you to determine to whom you will give credit and the probabilities of the truth of the matters that have been testified to. You will apply the usual tests to the several witnesses who have appeared. Whether you believe the witness or not depends upon whether the matters testified to were within his or her knowledge, the probability of the truth of that to which he or she may testify, and whether he or she was in a position to know that to which she or he testified, their demeanor upon the stand, and whether the particular witness, or I may say the parties, have an interest in testifying as they do. Those are the tests that you as reasonable men should apply in determining what weight and credence you will give the testimony of a particular witness or the several witnesses.

Now, gentlemen of the jury, if you reach the conclusion that the construction complained of did cause the injury complained of by obstructing the natural flow of the brook into Wesley Lake in times of storm, then you have the right to consider the question of damages, but not till then. Therefore, gentlemen of the jury, if you do reach the question of damages you will have probably, some difficulty, and it will depend upon your common sense and good judgment under the evidence as to the amount of damages which you will return.

The situation is somewhat complicated by reason of

the fact that there are a number of plaintiffs joined in this suit. Mrs. Doran owns the property which she and her husband occupy and in the pleadings it is said that Mr. and Mrs. Doran also conducted a butcher business in the building located upon the lot in question.

In the case of the Woehrers it appears that Mrs. Woehrer claims to be the owner of the property from September 16, 1915. That is to say, she had, as I recall, a life estate in the property. Prior to that date the property was owned by her husband, but the Woehrer property appears to have been occupied and to be occupied by two tenants; the son, Frederick Woehrer, conducting a shoe-store on the ground floor of the building in part and Louis Weidman conducting a store in the other part on the ground floor; and the cellars, apparently, were occupied by the tenants or used by the tenants. So that you will observe, if you reach the question of damages at all in this case, that you will be obliged to distinguish between the damages as to the amounts that you find, if you find any to have been suffered by the plaintiffs.

I should say to you, however, gentlemen, before discussing with you the question of damages and the measure of damages that you will apply in this case, that there has been discussed in this case the question of whether or not, in respect to the Dorans, that they have contributed to the injuries—assuming that this flood occurred by reason of the construction complained of—by their cutting into the cellar wall a hole. Mr. Doran, as I recall his testimony, stated that after the flood of August 26, 1911, that hole was cut for the purpose of letting out the water. But there is testimony in the case, which you will recall, on the part of at least one or perhaps more witnesses, that the effect of that hole was to let in the water rather than to let it out. Now if that be so, gentlemen, and that is for

you to determine, the proximate cause of the flooding of Doran's cellar was not the construction in question but the hole in the cellar wall, and, as I say, if you find that is so, the Dorans are not entitled to recover damages against the defendants.

It is also said by one or more of the witnesses that waterproofing would have protected the Doran cellar from the flood or the injection of water of which complaint is made. The witness who so testified stated that the expense of such waterproofing, as I recall, would be about $300.

Now I am obliged to charge you, gentlemen of the jury, that if these plaintiffs have suffered damage as the result of the defective construction complained of and they could reduce their damages by some such protection as waterproofing—I do not know whether you will find that or not, but it is for you to say—and that there was a failure on the part of the Dorans—I do not recall that there is any such testimony in regard to the Woehrer cellar, although I do not withdraw from you the right to infer under all of the evidence, if you think the same rule applies to the Woehrer cellar—that within a reasonable time after the discovery by the plaintiffs of the flooding of their cellars they could have protected themselves, assuming they knew they could have protected themselves, against future flooding by the waterproofing in question, it was their duty to repair their cellars in that respect; and they would be entitled to recover against the defendants, assuming that you find liability of the nature that I have pointed out to you, the expense of that repairing. They should be allowed in your deliberation a reasonable time, assuming that you reach the conclusion that that would have stopped this flooding. In other words, you would not be justified in reaching the conclusion that they could

wait from August 26, 1911, to April 2, 1917, without repairing their cellars in the manner suggested, assuming that they knew that that would be an effective remedy against the repetition of the flood to which their attention had first been called in August, 1911.

If, however, you should reach the conclusion—and I am now discussing the Dorans—that that was not an effective remedy and that that would not have prevented the flooding of the cellar of the Dorans, then you would pass on to the question as to what amount of damages they would be entitled to recover; again assuming and always assuming, gentlemen, in discussing this question of damages, that you find liability on the part of the defendants; because the construction must be, before you can give any damages, the proximate and natural cause of the injuries complained of.

It apppears according to the plaintiff's testimony that they, that is, the Dorans, used the cellar for the purpose of storage and also had installed therein a hot water heater. They say that after this flood they were unable to use the cellar for storage purposes and they were also unable to use the furnace. You will recall the testimony as to a series of floodings from time to time up to the bringing of this suit. They would be entitled, gentlemen, assuming again that you find liability as a fact, to a sum which would compensate them for such deprivation of the use of the cellar. Now what that sum shall be is for you to determine. There have been three or four witnesses who have testified upon the subject and I think, as I recall their testimony, they have all differed. For example, Mr. Doran states the amount as $100 a year and Mrs. Doran spoke of a somewhat larger amount, as I recall, but you will recall what she said. Mrs. McCabe spoke of receiving as the rental value of the cellar on her premises—

I am not clear as to her statement, whether it was about the same size as the Doran cellar or not, but you will recall about that—the sum of $175. However, you must exercise your best judgment with respect to compensation under the evidence for the deprivation of the use of the cellar so far as the Dorans are concerned.

There is not here involved, gentlemen, and the case has not been tried upon the theory that the damages claimed are for a depreciation in the value of the land. The rule applicable here is stated in one of our reports as follows: "In an action for negligently obstructing a drain which caused the water and filth to flow back into plaintiff's cellar, it was said by the Supreme Court of Massachusetts that plaintiff could recover for any injury which diminished the value of his use and occupation of the house. Where the property is rented the proper measure of damages is said to be the difference between the rental value free from the effects of the nuisance for which damages were claimed and subject to it. These citations sufficiently declare the rule to be applied to the case in hand, which concerns both properties rented and properties occupied by their owners. I think it is quite clear, under the decisions, that no allowance can be made for alleged depreciation in the value of the lands themselves. The injury must under the pleadings be treated as temporary and not as permanent."

In other words, what you are to consider in this case is the damages alleged to have been suffered, not the future damages at all. The Dorans claim also that they have been deprived of the use of the furnace in the cellar. Now what amount you shall allow them in compensation for that, if any, must appeal to your good judgment. In the case of one of the other plaintiffs the testimony was that the loss of use of the furnace was equivalent to $25

a year. Frederick Woehrer, you will recall, so testified, at least that is my recollection. The Woehrer furnace, however, was apparently installed for the purpose of heating the first floor of that building, but you will recall what his testimony was. So that, gentlemen, therefore, with respect to the damages there are two items, so far as the Dorans are concerned, which apparently you will consider: first, compensation for the deprivation of the use of the cellar, for storage purposes and, second, compensation for deprivation of the use of the furnace. There is, I may say also, a claim in the complaint in this case on the part of Doran that they lost through the alleged flooding certain materials such as burlap and other articles used in their butcher business, but I do not recall, although you may, any testimony or proof as to the value of such lost property. And while I cannot say, because my recollection is now not clear, as to whether there was any such testimony or not in support of the claim in the complaint, I am willing to leave it to you and your best recollection on that subject. But, gentlemen, if you find in turning over this testimony in your minds there was no proof of the value or of the loss of any such property you must not allow it to the Dorans.

With respect to the Woehrers probably the same measure of damages applies, that is to say, the deprivation of the use of the cellar, but I am obliged to say to you that the deprivation of the use appears not to have fallen upon Mrs. Woehrer, but upon the tenants of the property, namely, Frederick Woehrer and Louis Weidman. With respect to Frederick Woehrer you will recall his testimony as to his being prevented from using the cellar as a place of storage in connection with his shoe store. He does claim that he lost some leather as a result of the alleged flooding and he says the value of that leather was

$72. But you will observe, gentlemen, that he also said that it was not a total loss, because he was using it for the purpose of heeling shoes and he intended to use it for such purpose or similar purposes in connection with his business. Now just what value if any you would consider as compensating him for the alleged loss of the leather or the depreciation in value you will find very difficult, because, as I recall his testimony, he did not place any value for any depreciation upon the leather in question. That is, it became softened so that he could not use it for the purpose for which he would have used it ordinarily. But if under the evidence you can find, assuming there is liability in this case found by you as a fact, any value, why, you will return such compensation as will be just under the circumstances. With respect to deprivation of the use of the cellar so far as Frederick Woehereh is concerned, you will apply the same rule under the evidence that you applied in the case of the Dorans. I am not clear under the testimony in this case whether the size of the Woehrer cellar and that of Louis Weidman were the same as the Doran cellar or not, or whether that cellar is divided and partly occupied by Weidman and partly by Woehrer. Your recollection must prevail in respect to that. It is claimed by Woehrer that the loss of the use of his furnace—I think there is some testimony in the case was equivalent to $25 a year. Mrs. Woehrer's testimony, as I recall, raised the amount very considerably.

Now Weidman, in addition to the deprivation of the cellar for storage purposes, also claims that he lost certain property in connection with his bakery, and he says that he is unable to give in detail the amount, but he estimates his loss in that respect at least $500.

You are not permitted, gentlemen, to take speculative evidence of damages as a criterion. No man can guess

as to his loss and oblige you to take his statement as conclusive evidence of his loss. He does say that his losses were greater, but he insists, as to that item, his losses to have been at least $500, and he further claims that as the result and as the proximate cause of this construction complained of followed by this flooding that a bake oven of his was injured and that in placing it in repair he was obliged to expend $82.32. If you find under a fair preponderance of the proof that his oven was injured and that the proximate cause was the flooding occasioned by this construction, he would be entitled to recover the item in question. With respect, however, gentlemen, to the deprivation of the use of the cellar in question you will give some consideration to this circumstance: there is no evidence in the case that the tenants of the buildings in question sought cellars elsewhere or incurred expense in that regard. Therefore the question may be suggested in view of such circumstances whether there actually was any deprivation in the use of the cellars in question for storage purposes. That is merely a comment of the court. Of course you gentlemen are not going to mulct the defendants simply because they are corporations. You will of course accord to them the same consideration that you would an individual. What we are after in this case is to arrive at a verdict which shall be based upon the evidence in the case and under the rules of law which the court has endeavored to lay down to you. I assume, and I have a right to assume, that there is no prejudice whatever in the minds of any of the jurors in this case in favor of one or the other of the parties to this suit. That is not what we are here for, but your effort as well as that of the court is to see, as I said a moment ago, that even and exact justice is done in this matter, because it is an important case, and it has been very thoroughly tried and

has consumed a large amount of time and, incidentally, the patience of the court and jury, and I may say finally, although it is of no importance, counsel in the case. So that, gentlemen, the issues in this case are pretty well defined. The primary question which you must determine is were the floodings complained of the proximate and natural result of the construction which has been testified to in this case? There may be some difficulty in arriving at the proximate causes and relative amounts of damages. For example, the first thing complained of was the flood in August, 1911. At that time the thing that had been constructed was a detritus tank. The straightaway was not built until 1912. The spillway was not built until 1914. So that it cannot be said that the spillway built in 1914 was the proximate cause of the damage in 1912 or 1913 and it cannot be said that the straightaway built in 1912 was the cause of the flooding in August, 1911. So that you will see you will have to use your common sense with respect to ascertaining first the liability as a fact and then the amount of damages.

I may say that it is also proper for you to consider in connection with the alleged damages suffered and in determining the cause any negligent operation of the gates in the spillway. As I recall, there is some testimony that instructions were given by the defendants to employees to open the gates in question, and that as a result of the opening of the gates the flood subsequently subsided. Now if the defendants gave those instructions and there was nothing to indicate to them that the employees to whom the instructions were given were incompetent, so as to charge them with knowledge of their incompetency, the defendants did all that in the law they were required to do. But, as I say, that question must relate to damages, if any, proximately caused by the spillway

and the failure to open the gates, which were not erected till 1914.

Now, gentlemen,I think that is all that I care to say to you with respect to this case. I wish that counsel would call my attention to any exceptions which they desire to take to the court's charge before the jury retires. You may step here, gentlemen, both of you.

(Counsel confer with court at side bar.)

The Court. Gentlemen of the jury: As a supplemental instruction I desire to say to you that on the question of waterproofing, I think I made it clear to you that if the plaintiff Doran or the plaintiff Woehrer had no knowledge that such construction was necessary—although you must remember that there is testimony in the case from which you may conclude that they were charged with notice that they were building cellars in a locality where cellars had not been built, that is, on these particular lots before—but if they had no notice that waterproofing was necessary and if it further appears—you must consult your recollection about that—that it was impossible to waterproof after the cellar was once built, why, then of course you would eliminate that question so far as that would be to the detriment, I may say, of the Dorans, from your deliberations. But as I have already said, I think I have made it sufficiently clear to you as to the effect of that testimony and its place in your deliberations. Because the rule undoubtedly is, as I said in my main charge, that these plaintiffs were obliged to reduce their damages if it was reasonably within their power, assuming of course that you find there was liability on the part of the defendants and the plaintiffs are entitled to recover.

With respect to the deprivation of the use of the cellar

on the part of Frederick Woehrer my attention has been called to the fact that you may infer that the court meant that the deprivation of use was represented by the amount of $25 a year. That is not what I said to you or intended to say to you. I intended to say to you that the same measure of damages with respect to deprivation of the use of the cellar on the premises occupied by Frederick Woehrer would be applied in his case as in the Doran case and you will exercise your common sense as to the measure of such damages. There is testimony that the loss was represented by the sum of $100 a year and $175 a year, and Mrs. Doran's testimony, as I recall, was perhaps more. But in any event you will recall what she estimated her loss was. In connection with Mrs. Woehrer I may say that she testified that it cost her $25 a year to clean out her cellar. If you find that that expense was incurred by her and that she is entitled by reason of liability found by you as a fact to recover compensation, you have a right to consider that item in that respect.

I am also requested to call your attention to the fact, and it is a mere reference to the testimony, that the defendants claim there are at least three dates when it is claimed by the plaintiffs that their cellars were flooded when the lake was absolutely dry; and of course if that were so you could not attribute any damages or any proximate cause of damage from the construction in question when there was no water in the lake or any flooding. It is a question of fact for you to determine, in doing which, you may adopt the rule I have laid down to you in respect to the tests which you should apply to all of the witnesses in the case. Is that all, gentlemen?

(Counsel confer with court at side bar.)

The Court. Finally, gentlemen, you must find as a fact before there is any liability on the part of the defendants that the construction in its various phases was so made as to be the proximate cause of the alleged injuries from time to time. If they had notice of the defective construction, or if it was suggested to them—and that is for you to determine—and its use was continued without remedying the defective construction, with the result that the injuries occurred, then that would justify you in finding liability on the part of the defendants.

DEFENDANTS' OBJECTIONS.

Mr. Carton. I desire an exception to your Honor's charge on the question of liability.

First, I desire to except to that part of your Honor's charge where in you stated at the outset of the charge—I do not recall the language at this time, but it was where your Honor stated in detail what the rule was—that it was well settled as the law applicable in this suit, or as applicable to this case, at the time your Honor read from one of the decisions. I object to that part of the charge because it does not state the law, the well settled law of this state, as I understand it, in that the charge should have stated, or your Honor should have stated, if any of this work was done by these officials for the public good, that then these defendants were not responsible for this injury; that the damage was not to one of these plaintiffs, but the public generally; and that then there could be no recovery by these plaintiffs as individuals and that the only remedy would be by an indictment for a public nuisance; keeping in mind when making that statement that others of the public than these plaintiffs have been injured and that there has been other flooding alleged to have been occasioned because of this improvement. For instance, the witness Treat owned a piece of land nearly opposite the locus in quo that was flooded and it also appears that there has been a general flooding both on the north and west side of Woehrer; and that if there was any injury at all it was a public injury that should be addressed by indictment. And also that it is my idea that the charge was not proper in stating the law was well settled, or that the rule of law applicable in this case was well settled, in that the evidence in this case is that if there was any injury at all it was consequential or the re-

sult of the doing of a public work from which the municipality or the defendants can get no profit, return or remuneration in any way; and that it is not a situation where a municipality did a direct injury to a particular individual by diverting a stream across his lot or something of that sort; and that at the best all that happened was a general backing up of the water, for which the defendants are not responsible in any way, in that there was no particular injury done to any particular party, but the injury if any was a public injury.

I also wish to except to that part of the court's charge wherein the court discussed the matter of contributory negligence, particularly with regard to the plaintiff Doran.

I wish to object particularly to what the court said in regard to this being the proximate cause, if the jury find that what we did was the proximate cause; it being my view that no matter if the improvement or the construction had a tendency to or did back up the water, if Doran had exercised proper diligence, such diligence as would be suggested by the location of his property and its proximity to the stream, if he could have protected his cellar by the use of this waterproofing and prevented the injury or the damage complained of, that there can be no recovery in any event; notwithstanding that the defendants may have been liable for instituting the improvements, which are said to have been the proximate cause, if he contributed to the injury by his own activity he cannot recover.

And in this regard I have particular reference to what was said by the plaintiff's witness Cottrell and the defendants' witnesses Taylor and Gardner, that it was impracticable to build a cellar in that location at all if the plaintiffs or the parties wished to use it, they stating that there were no cellars in that location, and especially without

using the precaution of waterproofing it; and that the situation was such as to suggest to the plaintiffs or to any reasonable parties the necessity of taking such precautions.

I also wish to object to that part of the court's charge wherein the court referred to the extent to which damages might be assessed to Mrs. Woehrer, that is, in regard to what the court said about her life estate; for the reason that there is nothing in the case to show she has a right to maintain an action for any damages upon this property prior to the death of her husband, which as I recall happened in 1914 or 1915.

I also wish to take a further exception to that portion of the court's charge at the last, after the conference with counsel, with regard to what was said by the court at that time, that if notice of this defective condition came home to the city officials or the representatives of the defendants, in which the court said if the defendants did not remedy such conditions "then you would be justified in finding liability on behalf of the defendants;" my idea being that that part of the charge is improper, because the court should have said that if the defendants employed proper and competent employees and that these men were properly instructed as to their duties in this regard, that this comprised ther full duty.

The Court. The objections will be noted.

PLAINTIFFS' OBJECTIONS

Mr. Kremer. I pray a general exception to the charge of the court.

I also want to except to that part of the charge in which the court stated that if a municipal corporation gave proper instructions to their employees relative to the opening of the gates that their duties ended there, and that they were not responsible for failure on the part of their employees to carry out the instructions.

The Court. The objections will be noted.

NEW JERSEY COURT OF ERRORS AND APPEALS

MARY J. DORAN, JOHN DORAN, ELIZABETH WOEHRER, FREDERICK A. WOEHRER AND LOUIS WEIDMAN, Plaintiffs-Respondents, vs. THE CITY OF ASBURY PARK, A MUNICIPAL CORPORATION, THE BOARD OF COMMISSIONERS OF THE CITY OF ASBURY PARK, AND HARRY B. WHITE, CLERK OF THE CITY OF ASBURY PARK, AND OCEAN GROVE CAMP MEETING ASSOCIATION OF THE METHODIST EPISCOPAL CHURCH, Defendants-Appellants.	Action at Law.

BRIEF OF DURAND, IVINS & CARTON
Counsel for Appellants

The plaintiffs, five in number, jointly sue, in one action, the City of Asbury Park and the Ocean Grove Camp Meeting Association of the Methodist Episcopal Church, alleging that the construction, by the defendants, of the detritus tank, flume and straightaway at the head of Wesley Lake when laying out a new road from Bond Street in Asbury Park to Main Street in front of Ocean Grove has caused the waters flowing down Wesley Lake Brook to back up upon their premises, and into their cellars, causing them substantial damages.

The following are the pertinent facts as disclosed by the evidence:

Wesley Lake is a shallow body of water, extending in a northeasterly direction from Main Street, which is the street running in a northerly and southerly direction in front of plaintiffs' premises, to the Atlantic Ocean, and has an outlet in the ocean. Wesley Lake Brook drains into this lake, and extends back westwardly for a considerable distance in Neptune Township, draining a large section of the Township. Most of the land bordering on the brook is low and marshy. During the times of freshets and heavy rains Wesley Lake Brook normally overflows its banks, both north and south, for a considerable area, and the lands, now the premises of the plaintiffs, and which border on the south bank, were at such times completely submerged.

When Main Street was laid out, upwards of 40 years ago, a culvert was put in under the street, covering the line of Wesley Lake Brook, for the purpose of carrying the water from the brook to the lake.

In 1877 the New York and Long Branch Railroad extended its railway southward from Long Branch to Sea Girt, which extension runs parallel with Main Street, and about 500 feet westward therefrom, and the Railroad Company, in crossing Wesley Lake Brook, in order to maintain proper grade, constructed an embankment about five feet high, with an iron pipe thereunder, for the purpose of allowing the waters of Wesley Lake Brook to pass through. In times of freshets and heavy rains this iron pipe under the embankment of the railroad was not large enough to permit the free flow of the waters of Wesley Lake Brook, and in 1914 the Railroad Company removed the iron pipe and put in an arch, with a much larger capacity, and which permitted a greater volume of water to flow under its tracks.

Said Main Street was the only street for travel between the territory north and south of Wesley Lake Brook, and in 1902 travel had become so congested that it became necessary to relieve it, to widen Main Street (see Slocum v. Neptune Township, 68 N. J. L. 595), and said street was widened by the Township authorities at that time, by taking for street purposes a portion of the lands on the west side

of the street, including a strip of land off of the lands now the property of the plaintiffs.

In 1911 the condition at the head of Wesley Lake was such that it was dangerous to public health, and it also became necessary to provide additional roadway to relieve the congestion at Main Street at the head of the lake, and for the purpose of improving the condition at the head of the lake and to provide additional street room, the detritus tank and other improvements were made by the defendants, which tank and straightaway are continuations of the culvert under Main Street.

The trial resulted in verdicts for all the plaintiffs, and defendants submit, as grounds for the reversal of the judgments:

(1) That Wesley Lake Brook is a natural stream, and the backed water complained of did not exceed in volume the natural overflow of the stream in time of freshets and unusual and heavy rains, and therefore is not actionable.

(2) That Wesley Lake Brook has from time immemorial overflowed its banks in times of freshets and heavy rains, and during such times the lands of plaintiffs were submerged, and said lands are at such times subject to such submersion the result of natural causes.

(3) That Wesley Lake empties into the Atlantic Ocean, and at times the inlet at the ocean, by the action of the sea, filled up with sand, causing the water in the lake and brook to back up and overflow the lands now owned by plaintiffs, also due to a natural cause.

(4) That Main Street was laid out many years ago, crossing said Wesley Lake Brook about where said Brook emptied into Wesley Lake, and extending in a northerly and southerly direction in front of plaintiffs' premises, and is the main highway connecting the territory north and south of said Wesley Lake, and in the construction of said road a culvert was laid under said road over said brook, and is in time of unusual and extraordinary rains some obstruction to the free flow of the water down said brook, but said culvert was in use by the public for more than 20 years before

plaintiffs acquired their lands and brought their actions, and any overflow of plaintiffs' premises, as the result of obstruction caused by said culvert, is not actionable.

(5) The work complained of was done in making a necessary general public improvement, by the construction of an additional road or highway at the head of Wesley Lake, to relieve a very congested condition existing there, and also to remove an unhealthy condition in said lake, in doing which the said culvert under Main Street was extended under said newly built roadway, by the building of a detritus tank, flume and straightaway, which did not increase any obstruction caused by said culvert and is not actionable.

(6) That the construction of said road and the culvert or straightaway under it was a necessary public improvement, because of the congested travel at that point.

(7) That said work was done upon the advice and under the direction of a competent and skillful engineer, and that said work was skillfully and properly done.

(8) That the overflow of said stream upon plaintiffs' premises, during freshets and heavy rains, after the construction of said culvert under Main Street, was no greater than the overflow under normal conditions, and after the construction of said new roadway and spillway, did not exceed the overflow on said lands under such normal conditions.

(9) That for some years prior to 1914, the New York and Long Branch Railroad Company maintained, under its road-bed, which at Wesley Lake Brook is an embankment about five feet high in the rear of plaintiffs' premises, an iron pipe which was not of sufficient capacity to permit the water collecting in Wesley Lake Brook, in times of freshets and heavy rains, to pass freely, and collected it and backed it up in a large pond or area west of said railroad embankment, thus reducing the volume of the water flowing down said stream east of said embankment, and along plaintiffs' lands, and preventing the normal overflow of said stream upon plaintiffs' lands, and in 1914 said Railroad Company enlarged the opening in this embankment, for the flow of the water of said brook, by putting in an arch, which allowed

the water to flow in greatly increased volume and necessarily enlarged the overflow on plaintiffs' lands in times of freshets and heavy rains, having the result of practically restoring said stream in its flow to normal conditions, and any change in such condition would not give plaintiffs a cause of action against defendants.

(10) That in the year 1912 the defendant, City of Asbury Park, built a sewer or drain which diverted a considerable part of the water which theretofore had flowed into Wesley Lake Brook, directly into Wesley Lake, reducing the overflow of said brook in times of freshets and heavy rains.

(11) That the plaintiffs built the cellars under their buildings with knowledge of natural conditions, that in times of freshets and heavy rains their lands were submerged, and they sought the danger and contributed to their injury.

(12) That the damages sustained by plaintiffs were the result of natural causes and conditions, and the negligence of plaintiffs in constructing their cellars in a place of danger, for which they have no action against defendants.

The facts stated in the foregoing propositions are clearly proven by the evidence.

John C. Patterson, who had lived in Ocean Grove, and been in the employ of the Association for 44 years, testified that the Brook in heavy falls of rain overflowed its banks, and it overflowed the ground back of the turnpike, now Main Street, and in the rear of the property now plaintiffs'. He had also seen the ground there covered with water from the overflow of the Lake, and he observed this on many occasions. He remembers when the culvert was put in under Main Street, but does not recollect the year, it was so many years ago, and this overflowing of the property of plaintiffs occurred both before and after the culvert under Main Street had been constructed, and that before there was any filling done in that locality at all, the water at times overflowed the premises of plaintiffs; that since his first knowledge of the place there had been some filling in on the south side of Wesley Lake Brook, and about where plaintiffs' premises are located; that at one time George C. Orme-

rod, a boat builder, conducted a boat building establishment along Wesley Lake Brook just across the brook from plaintiffs' premises and under it was a basin of water in which he floated his boats, and floated them from there down through the culvert into Wesley Lake, and the buildings which were erected both north and south of the Lake, and where the plaintiffs' premises are located, were on piling. He also represented the Ocean Grove Association when the work of the construction of the detritus tank and flume was done in 1911. This work was done under the direction and supervision of Niart Rogers, an engineer, who had prepared the plan and scheme, and it was done according to the plan and scheme of this engineer, and in doing the work it was necessary to bridge the Lake. One of the causes for the work was, that debris collected at the upper end of the Lake and created an unhealthy condition, and it was also done to relieve the congestion on Main Street, by constructing another roadway from Bond Street, in Asbury Park, to Main Street, thus affording an additional roadway for travel between the territory north and south of the head of Wesley Lake. He had also observed the conditions at the inlet, and that in heavy rains, especially in southeasters, the sand would fill up the inlet and close up the Lake, and cause the Lake to overflow its banks. The additional roadway, built in 1911, was a boulevard running from Main Street, in Neptune Township, to Bond Street, in Asbury Park, and that Wesley Lake Brook was a running stream, and that all the time he has known it, it has occupied the same location, and during freshets the land between the turnpike (now Main Street) and the railroad would be overflowed, and that he had seen water over the parts of the ground where the plaintiff Doran had built; and on the block west of the railroad he had seen it a lake, so boats could be used thereon; but that the railroad has since increased the capacity of the culvert under the road, at least three times the former capacity, so that much more water flows through from the west side; that when the improvement in 1911 was made, it was for the purpose of improving the unsanitary and unsightly conditions at the head of the Lake, and

also to relieve the dangerous traffic which went up Lake Avenue, in Asbury Park, to Main Street, and then turned down Main Avenue, going south. (Printed case, pp. 404-16.)

The testimony of the witness Winckler, who was for years one of the city officials of Asbury Park, is to the same effect. And among other things, he states, that he saw water under the Doran house before 1911, that is, before the present building was built, and the old building was on stilts. (Printed case, p. 421.)

Mr. I. R. Taylor testified that the brook would necessarily rise in the Spring, owing to natural conditions, and that plaintiffs' properties would naturally be flowed, as they are in a low spot, and the creek would overflow its banks at such a time. (Printed case, p. 466.)

Mr. Gardner testified that it was low there; that it is in a hollow where water runs to it from every direction, and in case of a storm there is danger, like any brook, of water rising, nobody knows how high. He also testified that he had occasion to note the action of the tides on the inlets emptying into the ocean, and that they are liable to do most anything; that he had seen the sea throw up a bank of sand ten feet high over night and the next morning take it away, and that when a bank of sand was thrown up it would close the outlet to the ocean. (Printed case, p. 474.)

The witnesses, Sophia Miller (p. 497), Mary Ann Peer (p. 499), Benjamin Zwicker (p. 501), Henry Benvenga (p. 509), Sidney Hicks (p. 512), Samuel D. Morrow (p. 513) and Edward Strano (p. 515) all testified to the extent, the brook overflowed its banks during times of freshets and heavy rains, and that west of the railroad it covered a large area both north and south, so that it was necessary to use a boat to go about from place to place.

And the witnesses Purdy, Bodine, Franklin, Tantum and Sexton, who knew the location more than 35 years ago and since, testified to the conditions which had existed along Wesley Lake Brook, east of the railroad, before plaintiffs owned their premises, showing that under normal conditions,

in times of freshets and heavy rains, the lands where the plaintiffs' buildings and cellars are now located were completely submerged, and that at that time all the buildings on these lands were built on piling; that Wesley Lake Brook was a wide stream between Main Street and the railroad, where Ormerod, a boat builder, stored his boats, and at times had as high as 100 boats in the water there; that the culvert under Main Street was built over 40 years ago, and that at times this culvert would be stopped up by wreckage or debris, which flowed down the brook into the culvert, and that this occasioned the frequent cleaning out of the culvert. (Printed case, pp. 524, 529, 549, 573.)

And the testimony of all these witnesses shows that from their earliest knowledge and recollection of the locality, the plaintiffs' lands were frequently submerged by the overflowing of the banks of Wesley Lake Brook, due to natural causes, and that the overflow on the premises now does not exceed the overflow in years past, which was due to natural causes

The testimony also shows that the construction of the detritus tank, flume and straightaway was done according to the plans and scheme, and under the direction of a skilled engineer, and was part of a necessary public improvement, made to relieve the unsanitary condition at the head of Wesley Lake, and to provide an additional boulevard to relieve the congested condition of travel on Main Street, at the head of the Lake.

The view of the Court and plaintiffs' counsel on the trial was, that this was a case for damages resulting from surface water, while the alleged injuries in fact were the result of the rising of a natural stream.

Dillon, in his work on Municipal Corporations (Sec. 1731), says: "It is important to distinguish between natural streams flowing in channels between defined and natural banks and surface water caused by rain or melting snow, for the law relating to them is essentially different."

In *Perry v. Worcester,* 6 Gray, 546, an action brought against the city for the construction of a bridge, which the

plaintiff alleged caused the water of the river to flow back on his property, Shaw, C. J., said:

> "We think the distinction is well established by authorities and founded upon just principles, that where damage is necessarily done to the property of an individual by taking his land for a highway, etc., such works are legally regarded as warranted by the public, in the exercise of the right of eminent domain, they are legal and right; they are not unlawful; and therefore no action will lie, as for a tort.
>
> "This presupposes that the public work thus authorized will be executed in a reasonably proper and skillful manner, with a just regard to the rights of private owners of estate."

And the same Judge, in *Sprague v. Worcester,* 13 Gray, 193, a similar action, said:

> "If, for want of reasonable care and skill in the construction of a public work, unnecessary damage is caused, the corporation or its agents are responsible for it. Such damage, however, must be real, substantial and appreciative, and not merely theoretical or slight, or such as may be caused by *an unusual or extraordinary swell of the waters.*"

and further said:

> "Bridges are not required to be so built as to secure all private proprietors of lands from all possible damage from extraordinary causes; but to be so reasonably constructed as to secure private proprietors from damages from the ordinary action of the elements, including in such ordinary action water in its high and low annual stages."

and *held:*

> "An action of tort will not lie against a city for obstructing a stream to the injury of a mill, by the erection of a bridge, if the bridge is suitably constructed so as to let the water pass off with reasonable freedom, at all times, except in case of

extraordinary freshets not occurring annually."

In *Drew v. Westfield,* 124 Mass., 461, Gray, C. J., held: "If the waters of a stream are discharged through an artificial culvert under a highway, and the culvert is closed by the town authorities in repairing the highway, the owner of a mill on the stream cannot maintain an action of tort against the town for an injury occasioned to his property thereby, in the absence of evidence that he had acquired any right in the culvert by prescription or contract, if the closing of the culvert was a proper and suitable means of repairing the highway."

In Wheeler v. Worcester, 10 Allen, 591, the Court held:

> "A city is not liable in an action at law for an injury to a private person by the obstruction of the flow of the water of a stream, caused by an increase of the surface wash from the streets into the same, if such increase is only the natural result of the growth of the city, or by the emptying of the sewers into the same, if these are no greater than would otherwise have been carried in by surface washings, and are not sufficient to exert any appreciable effect on such person; or by a bridge constructed by a railroad corporation, under the authority of its charter; or by a bridge constructed by the city, if the bridge when built was sufficient to allow the free flow of the water as the stream then was, or with such changes as were likely to be produced by natural causes alone, although it has proved insufficient for this purpose, with such changes as have been produced by the exercise by a railroad corporation of its chartered rights, or by the wrongful acts of individuals."

In that case the court held that because of the result it was not necessary to consider the ground relied on by the defendants; that the plaintiff contributed to his own injury, by excavating his basement and extending his drain in the location in question.

The case of *Jeroloman v. Belleville,* 101 Atl., 244, was relied on by the court as an authority to support plaintiffs'

action, but that case is one of the well defined line of cases recognized in our State where the municipality, by some act, collects the waters and discharges them in a large body over plaintiff's premises. In that case the municipality diverted the waters from a natural stream down a certain street, through a culvert and then across plaintiff's lands, and thus under the well established rule in our State, was liable.

But that is not the situation in our case, and that line of cases has no applicancy here.

The defendants had the undoubted right to make the public improvement, by constructing the boulevard from Bond Street, in Asbury Park, to Main Street, in Neptune Township, and in doing so to extend the culvert under Main Street, or to put in such a culvert as a skillful engineer advised, and the defendants, under the advice of a skillful engineer, constructed as a culvert, and as a continuation of the culvert under Main Street, the detritus tank and flume and straightaway, mentioned in this action.

The evidence is, that plaintiffs' premises always in times of freshets and heavy rains were submerged, and that ever since the culvert under Main Street was constructed, at times it would be stopped up by the collection of debris floating down Wesley Lake Brook, and if the construction of the culvert in any way increased the volume of the back water (which, however, is not proven in this case), it would not give the plaintiffs a cause of action. The condition has existed for upwards of 40 years, and there is no evidence that the construction of the extension of the culvert under the new boulevard has increased this back water to any appreciable extent.

In *Van Pelt v. Davenport*, 42 Iowa, 308, the action was brought for damages for surface water which flowed back on the plaintiff's premises, in consequence of the insufficient size of the culvert constructed across a ravine by the city, in the course of extending its streets, for the purpose of carrying off surface water. Before the culvert was made the surface water flowed along the ravine without injury to plaintiff. In heavy showers the culvert was too small to

carry off all the water rapidly enough to prevent its flowing back on plaintiff's property. The Court held, that the city was bound to use reasonable care, judgment and skill in determining the size of the culvert, and that it had discharged its whole duty, so as to relieve it from liability, if it had committed the matter of the size to a competent Civil Engineer, who drafted plans providing for the culvert, which, in his judgment, would be large enough, but in which it afterwards appeared he was mistaken.

Ch. J. Ruger, in *Seifert v. Brooklyn,* 101 N. Y., 136, in discussing the question of exemption or liability of municipal corporations for damages, said: "The cases on the subject are by no means harmonious and render it difficult to deduce from them any general rule, founded upon principle, which clearly marks the line of distinction between liability and exemption therefrom," and reviews the earlier cases in that State on the question which support the proposition of exemption from liability. These cases arose from damages resulting from surface water, but are similar in principle to our case, and are authorities for our position that defendants are exempt from liability in this suit.

Plaintiffs, with knowledge that in times of freshets and heavy rains their lands were submerged, partly filled them in and constructed cellars over the very lands which were at such times submerged, and are now trying to make the defendants pay the damages resulting from their own disregard of natural conditions.

This case falls within the class of cases where the municipality is exempt from liability, the damages suffered by plaintiffs being only such as would have naturally resulted to them in times of freshets and heavy rains, whether the extension of the culvert by defendants had been constructed or not, these damages being due to the construction by plaintiffs of their cellars in a place of danger, normally subject to flood and submersion at such times.

Plaintiffs' damages are the result of their own carelessness and negligence in disregarding the action of the elements upon their premises, and they have no right of action against defendants, and the judgments should be reversed.

DURAND, IVINS & CARTON,
Counsel for Defendants-Appellants.