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**Notice and Grounds of Appeal.**

Filed Dec. 26, 1929.

**Essex County Circuit Court.**

<p style="text-align: center;">LEO P. HEINTZ, Plaintiff,</p> <p style="text-align: center;">vs.</p> <p style="text-align: center;">THE BOROUGH OF ESSEX FELLS, Defendant.</p>	}	<p>Action at Law. Notice and Grounds of Appeal.</p>
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To: ARTHUR B. SEYMOUR, Esquire,  
Attorney for the plaintiff.

Please Take Notice that the defendant, the Borough of Essex Fells, in the County of Essex, a municipal corporation of the State of New Jersey, appeals to the Court of Errors and Appeals of Last Resort in All Causes from the judgment entered in the Circuit Court of the County of Essex in the above entitled action upon the following grounds:

30

1. The trial court sustained the objection of the plaintiff's counsel to the following question addressed upon cross-examination to the plaintiff: "What did you say when you went out there and looked at the oil?", said question being addressed to the credibility of the plaintiff.

2. Because the Court charged as follows: "Of

40

*Notice and Grounds of Appeal.*

10 course, it may be assumed from the evidence in this case that the oil which was placed upon the roads was within the limits of Essex Fells. The Mayor tells us that oil was put upon those roads. It may be that some of this oil which came into this brook came from the oil which was put upon those roads; but the municipality had not any more right to discharge oil from its roads, if it knew that that was the effect of placing the oil upon the roads, into this brook and polluting it than it had to discharge oil from its plant. Whereas the defendant is not liable in damages for injuries sustained growing out of the exercise of its governmental functions.

20 SPAULDING FRAZER,  
Attorney for and of Counsel  
with the Defendant.

Dated December 23, 1929.

30

40

**Summons.***The State of New Jersey*

To the BOROUGH OF ESSEX FELLS, a  
municipal corporation.

(Seal) You are Summoned to answer  
the annexed complaint of Leo F.  
Heintz, in an action at Law in the 10  
Essex County Circuit Court. And take notice  
that unless you file your answer to said complaint  
with the Clerk of the Essex County Circuit Court,  
at Newark, within twenty days after service upon  
you of this writ and the annexed complaint, the  
plaintiff may proceed in the suit and judgment may  
be entered against you.

Witness, WILLIAM S. GUMMERE, Judge of the 20  
said Court at Newark, this 30th day of August,  
nineteen hundred and twenty seven.

JOHN H. SCOTT,  
Clerk

ARTHUR B. SEYMOUR,  
Attorney.

30

40

**Complaint.**

## ESSEX COUNTY CIRCUIT COURT.

10	LEO P. HEINTZ, Plaintiff,  vs.  THE BOROUGH OF ESSEX FELLS, a municipal corporation, Defendant.	}	Action at Law.  Complaint.
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Plaintiff, Leo P. Heintz, residing at the Town of West Orange, Essex County, New Jersey, says:

- 20     1. Plaintiff is, and for the past fifteen years has been, the owner of lands and premises on Eagle Rock Avenue in the Town of West Orange, Essex County, New Jersey, and during said time has conducted and still does conduct the business of farming, and raising milk, poultry and eggs and selling the same and in the conduct of his business owns and keeps and has owned and kept horses, cows and chickens. In the use of his land and in the conduct of his business for the purpose of supplying
- 30     his horses and cows and chickens with drinking water, plaintiff has used and his horses, cows and chickens have used the water from a natural stream running through the lands, of plaintiff in a southerly direction from its source, and up to the time of the grievances hereinafter mentioned the water of said stream has always been fit for the uses aforesaid.
- 40     2. Defendant is a municipal corporation and

*Complaint*

is the owner or lessee of certain lands and premises in the said town and within its own territorial limits and on the said land and premises (known as Essex Fells Club Golf Links) along the west bank of said stream, above the lands of plaintiff, erected in or about the year 1918 a building known as a pumping station; since said date defendant has maintained and operated the said pumping station daily to pump water from wells through pipes and mains for the purpose of supplying its inhabitants with water for drinking and general domestic use and for use for defendant's own institutions, offices and departments; and in operating the said pumping station uses and during said period has used fuel oil from which to obtain power to drive its engines in the said pumping station and operate its pumps and in the operation of said station and the use of fuel oil therein throws and empties said fuel oil and the waste thereof after its use into the said streams for the purpose of dumping and getting rid of said waste.

10

20

3. By reason thereof the said stream from the point at which said fuel oil or waster is emptied and thrown into it by said defendant, on to and through the lands of plaintiff aforesaid, is polluted and made unfit for use by horses, cows and chickens who refuse to drink it; and as a result of the pollution of said stream by defendant, by its agents and servants, plaintiff since the erection and operation of said pumping station and for the past six years has been compelled to carry water daily from a well on his land a long distance to his horses, cows and chickens and will in the future and until defendant ceases polluting said stream and up to the trial of this action, be com-

30

40

*Complaint*

10 pelled to carry water daily from said well as aforesaid; the land and premises owned by plaintiff has by reason of said pollution been greatly depreciated in value to wit, five thousand dollars; the fence of the plaintiff was burned by the igniting of oil on the surface of said stream by reason of said pollution from a match lit and thrown by some passerby to his damage five hundred dollars; the well on the lands of plaintiff has become polluted by seepage from said stream polluted as aforesaid by defendant; and plaintiff has lost entirely the use of the water of said stream for any purpose whatever, and the value of the labor performed by plaintiff is two dollars per day for each and every day during the past six years and up to the time of the trial of this action.

20

Plaintiff claims Twenty five Thousand (\$25,000.00) Dollars damages.

ARTHUR B. SEYMOUR,  
Attorney for Plaintiff.

30

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**Answer.**

Filed Sept. 29, 1927.

## ESSEX COUNTY CIRCUIT COURT.

<p style="text-align: center;">LEO P. HEINTZ, Plaintiff,</p> <p style="text-align: center;">vs.</p> <p style="text-align: center;">THE BOROUGH OF ESSEX FELLS, a municipal corporation, Defendant.</p>	}	<p>10</p> <p>Action at Law.</p> <p>Answer.</p>
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The defendant, the Borough of Essex Fells, a municipal corporation of the State of New Jersey, in answer to the complaint filed by Leo P. Heintz, the plaintiff in the above entitled action, says that: 20

1. It admits the allegations of paragraph 1 of said complaint.

2. It admits the allegations of paragraph 2 of said complaint except that it denies that in the use of fuel oil as therein alleged it now throws and empties or did at any time throw and empty said fuel oil after its use into the said stream for the purpose of dumping and getting rid of said waste or for any other purpose. 30

It denies the allegations of paragraph 3 of said complaint.

FRAZER & TRIMBLE,  
Attorneys for the Defendant.

**Judgment.**

ESSEX COUNTY CIRCUIT COURT.  
44150

10	<hr/> LEO P. HEINTZ, Plaintiff,  vs.  THE BOROUGH OF ESSEX FELS, a municipal corporation, Defendant. <hr/>	}	Action at Law. On Verdict by a Jury.  Judgment entered May 22, 1929.
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	Damage	\$1,500.00
	Costs	116.11
20	Total	\$1,616.11

ARTHUR B. SEYMOUR,  
Atty of Plaintiff.

This action was tried before Judge Nelson Y. Dungan, with a jury at the Essex Circuit on May 22, 1929.

The cause having been heard and submitted to the jury they return their verdict as follows:

30 They find in favor of the plaintiff Leo P. Heintz and against the defendant Borough of Essex Fells, a municipal corporation for the sum of One Thousand Five Hundred Dollars (\$1,500.00) Damage.

Whereupon it is adjudged that the plaintiff recover of the defendant the sum of One Thousand Five Hundred Dollars (\$1,500.00) damage and costs which are taxed at One Hundred Sixteen Dollars and eleven cents making in the whole the

*Judgment.*

sum of One Thousand Six Hundred Sixteen dollars and eleven cents.

Judgment entered and signed May 22, 1929.

WILLIAM S. GUMMERE,  
Judge.

JOHN H. SCOTT,  
Clerk.

10

Recorded in Book 107 Circuit Court Judgments,  
page 448.

**Clerk's Certificate.**

## ESSEX COUNTY CLERK'S OFFICE.

State of New Jersey, }  
County of Essex, } ss.:

I, John H. Scott, Clerk of the Circuit Court, in  
and for the County of Essex in the State of New  
Jersey. 20

Do hereby Certify that the foregoing is a true  
and correct copy of all the Pleadings and Proceed-  
ings in the Case of Leo P. Heintz, Plaintiff vs. the  
Borough of Essex Fells a Municipal Corporation,  
together with a copy of the Judgment Record en-  
tered in Book 107 Circuit Court Judgments page  
448, and a copy of the Notice of Appeal filed De-  
cember 26, 1929.

30

And the same is taken from and compared with  
Original Copies of all Records and as the same now  
remains on the files of said office together with copy  
of Judgment Record.

In Testimony Whereof, I have hereunto  
set my hand and affixed the offi-  
cial seal of said Court and County  
at Newark, N. J., this Thirtieth  
day of December, A. D., 1929.

(Seal)

JOHN H. SCOTT, 40  
Clerk.

**Testimony.**

ESSEX COUNTY CIRCUIT COURT.

Tuesday, May 21, 1929.

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LEO P. HEINTZ,  
Plaintiff,

vs.

THE BOROUGH OF ESSEX FELLS,  
Defendant.

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} Action at Law

Before HON. NELSON Y. DUNGAN, *J.*, and a jury.

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APPEARANCES:

For the Plaintiff appears ARTHUR B. SEYMOUR.

For the Defendant appears FRAZER & TRIMBLE (by SPAULDING FRAZER).

30

A jury is called and sworn.  
(The court takes a recess from one to two o'clock P. M.)

After Recess.

(Mr. Seymour opens the case in behalf of the Plaintiff.)

(Mr. Frazer opens the case in behalf of the Defendant.)

40

The Court: I am just wondering whether, from these openings, there may not be certain things

*Jere K. Ross—Direct.*

admitted which will dispense with the necessity of proof. I notice that the answer is a complete denial, but from the opening I judge that it is not disputed but that the water works are located as stated in the complaint, and that they are operated by the Borough of Essex Fells.

Mr. Frazer: Owned by the Borough as well. 10

The Court: So that that need not be proven.

Mr. Frazer: That need not be proven, no, sir.

The Court: Is there anything else that you gentlemen think of that can be admitted?

Mr. Frazer: The ownership of Mr. Heintz's farm. I am perfectly willing to admit the location of it.

Mr. Seymour: Your Honor, I think everything is admitted in the case by the pleadings except that the Borough in the operation of the station, the use of fuel oil and the waste thereof after its use into the stream. 20

The Court: All that I have suggested has been admitted by the answer.

Mr. Seymour: All of the third paragraph has been denied. That is our allegation of damage.

The Court: Yes, everything else was admitted.

30

JERE K. ROSS, sworn in behalf of the plaintiff.

*Direct-examination by Mr. Seymour:*

Q. Where do you live? A. 231 North Avenue West, Cranford.

Q. Mr. Ross, what is your occupation? A. Chemist.

Q. Have you degrees from any colleges in chemistry? A. Bachelor of Science degree from La- 40

*Jere K. Ross—Direct.*

fayette College, and the Master of Science degree from the same institution.

Q. When did you receive your degrees? A. Received my Bachelor's degree in 1922, and the Master's degree in 1924.

10 Q. Since then have you had any practical experience in chemistry and so forth? A. I have worked in chemistry since I have left college; nothing but that.

Q. Where? A. For about fifteen months with the Burritt Manufacturing Company in Frankford, Pennsylvania.

Q. What is their business? A. Manufacturing coal tar products and oils.

20 Q. Yes. Go on. A. About three years with the Atlantic Coal Tar Distillates Company in Bayway, New Jersey; a year and a half with Dr. Albert Edel, Broad Street, Newark; and almost a year with the Wailes-Dove-Hermiston Corporation at their factory in Westfield, New Jersey.

Q. What is their business? A. The manufacture of bituminous products, paints.

Mr. Seymour: Do you wish to cross-examine?

30 Mr. Frazer: On his qualifications? What do you want to qualify him for?

Mr. Seymour: As an expert on testing this water.

Mr. Frazer: Go ahead.

Q. Mr. Ross, did you visit the plant of the pumping station of the Essex Fells for the purpose of taking some water and making a test of its contents? A. I did.

40 Q. When was that? A. On April 4, 1927.

*Jere K. Ross—Direct.*

Q. Who was present with you at the time? A. Mr. Heintz and Mr. Seymour.

Q. Will you tell us what you did on that occasion? Where is the plant? A. The plant was situated near a small brook that flowed through the Essex Fells golf course.

Q. Could you make some sketch of the plant and the brook and the grounds there, for the purpose of illustration? 10

(The witness makes a drawing on the blackboard.)

*By the Court:*

Q. What road is that? Do you know? A. I don't know the geography.

The Court: Perhaps you can tell us. 20

Mr. Seymour: Eagle Rock Avenue is the street called "road".

Q. What is the parallelogram to the right of the pump house? A. This is the tank partly sunk in the ground.

Q. And those three little round circles? A. These were oil barrels.

Q. That is the condition you found there on April 4, 1927? A. Yes, sir. 30

*By Mr. Seymour:*

Q. Will you take the pointer, Doctor, and tell us what you found and what you saw? A. Mr. Heintz's house was over in this section over here (indicating.)

*By the Court:*

Q. Which way does this brook run? A. This way, from right to left (indicating). 40

*Jere K. Ross—Direct.*

Q. Where is the Heintz' place? A. Down in this section here from this side of the road.

10 Q. South of Eagle Rock Avenue? A. South of Eagle Rock Avenue. Mr. Seymour drove me up there. We called on Mr. Heintz and went down in his field on this south side of the road to look at the condition of the brook, and all through here it was a sort of land that is very flat, and the brook meanders back and forth, and at every one of those little curves you would find an oil sheen or iridescence with an oil scum in the corners. This was a black oil scum and in all cases floated on the water, which would show that the oil was lighter than water. It was not a heavy oil. Down in this section here—

20 Q. Still south of the road? A. Still south of the road; the fence, the boundary fence of Mr. Heintz's property (indicating).

30 Q. The north or southerly boundary? A. On the southerly boundary. At that point about two feet from that fence was the place where a small natural dam had been formed by some twigs and leaves falling there, and at this particular point there was a sample taken which, the bottle was probably about a twelve ounce bottle, had about half oil and half water.

Q. By volume you mean? A. By volume, yes.

*By Mr. Seymour:*

40 Q. All right. Go ahead. A. From one of these sites of this brook tree leaves were taken, and these were taken in a separate jar and taken back to Dr. Edel's laboratory for examination. Another sample of water was taken on this south side of the road, and then we crossed the road, went through the Essex Fells Golf Club along the edge of the brook,

*Jere K. Ross—Direct.*

and all through there at various places could be seen this oil sheen on the surface of the brook. The vegetation along the sides of the brook was black up as far as where the water had come in contact with it. Beyond that it was green; that is, the grass that was growing on the sides of the bank.

Q. Go right on, Mr. Ross. A. We crossed this little foot bridge which was quite near the pumping station and went up beyond the pump house, and another sample of water was taken beyond here (indicating). Now, up on that side there was no oil sheen, and the vegetation was growing quite verdantly on the sides of the brook, and some water plants growing in the brook. We came back and noticed that there were several oil drums and at least one of these pipes like they have at the oil stations where they put the gasoline in to underground tanks. This spot right in here (indicating), the ground was what I would call saturated with oil. We tried to see if there was—what sort of machine was used in the pump house, but the windows were so splattered with oil that it was impossible to look in. Right about this part from somewhere near the scene of the pump house—

10

20

30

*By the Court:*

Q. You are indicating between the pump house and the brook? A. This is the pump house (indicating).

Q. You are indicating between the pump house and the brook? A. Pardon me?

Q. You said "Right around here". That means nothing for the record, and I am asking you

40

*Jere K. Ross—Direct.*

whether you are indicating between the pump house and the brook. A. Yes, sir; I am.

10 Q. All right. A. Between the pump house and the brook and about the center of this wall of the pump house a new drain had been put through which emptied right into the brook, and from this particular point as well as this point where the oil barrels were you could see this faint oil sheen come down across the brook. These samples were taken back to the laboratory and analyzed for their oil content. Report of those findings I have here.

*By Mr. Seymour:*

20 Q. What were your findings? A. Samples of water taken from the brook which flows into the Essex Fells Golf Club grounds past the pumping station.

*By the Court:*

Q. You are reading from a report, are you not? A. Yes.

Q. On your examination? A. Yes, sir.

30 Q. All right. A. Past the pumping station on these grounds and through the property of Mr. Leo P. Heintz, April 4, 1927. The survey was made of this territory—

Mr. Frazer: If it please the Court, I think we have had substantially what is in the report except the findings.

*By the Court:*

40 Q. Just read your findings. A. Four samples were taken. The first was taken from the brook at a point about ten feet from where the brook passes Mr. Heintz's property. Some leaves were

*Jere K. Ross—Direct.*

taken from the side of the brook at this point. The physical appearance of the water was a yellowish tinge, a strong odor of oil, iridescent oil sheen noticeable on the surface of the water. The sample yielded 46 milligrams of oil per liter of water.

*By Mr. Seymour:*

10

Q. Is that 46 or 64? A. 64 milligrams. The leaves had a characteristic oil smell. The oil was greasy when rubbed between the fingers. The oils from the tree leaves total 4,655 milligrams. The second sample was taken from the small natural dam.

*By Mr. Frazer:*

Q. 4,655 milligrams? A. Yes, sir.

20

Q. From the leaves? A. Yes.

Q. From the tree leaves? A. Yes, sir.

*By the Court:*

Q. That is not pointed off anywhere? A. No, sir.

Q. 4,655 milligrams. A. 4,655 milligrams. Sample No. 2 was taken from the small natural dam where considerable oil had accumulated. This dam was about two feet from the barbed wire fence at the end of the property. It had a slight yellowish tinge, strong odor of oil, about one-quarter inch of oil and one-half inch oil scum. The yield of oil was 34,002 milligrams.

30

Q. From which sample was that? A. That was the second sample.

Q. And that was taken here near the road? A. No. At the small natural dam near the fence. Sample No. 3 was taken about 100 feet below the

40

*Jere K. Ross—Direct.*

pump house situated in the Essex Fells Golf Club. It was taken from the running stream. There was a slight yellow tinge noticeable there of oil, an iridescent oil sheen present. The oil yield was 42 milligrams per liter.

10 Q. And where was that taken from? A. That was taken just this side of the foot bridge.

Q. By this side you mean south? A. The south side. The fourth sample was taken about 100 feet above the pump house situated in the Essex Fells Golf Club. The water was colorless, earthy and had a slight fishy smell. There was no oil present.

*By Mr. Seymour:*

20 Q. Mr. Ross, will you go back to your report on the first sample where you said that the oil measured 64 milligrams of oil per liter? A. Yes.

Q. Mr. Ross, could you tell us in other forms of measurement what you mean by 64 milligrams? Could you tell us in teaspoonfuls or ounces or something of that sort? A. Well, a liter is just a little bit less than a quart. It takes about 3-9/10 liters to make a gallon.

*By the Court:*

30 Q. You mean a little more than a quart then, don't you? A liter is a little more than a quart? A. Yes, a liter is a little more than a quart.

Q. All right. A. Milligrams is an expression of weight given to small quantities that come below one gram. It takes 454 grams to make a pound.

*By Mr. Seymour:*

40 Q. How many milligrams to make a gram? A.

*Jere K. Ross—Direct.*

How many milligrams? It takes a thousand milligrams to make a gram.

Q. A liter is merely a quart, or a little over a quart? How much of that quart is represented by the 64 milligrams of oil? A. Well, it would be probably about two drops.

Q. Could you give us the other measurement in the other finding, a different measurement? 4,655 milligrams of oil in the tree leaves—how much is that? What quantity is that, the other measurement? A. Well, it is 64 grams, which would be about drops. If you take 64 into the rest of the percentages it would probably give you the number of drops; inaccurate, though. 10

*By Mr. Frazer:*

Q. About 1,400 drops, wouldn't it be? 20

Mr. Seymour: I am referring to your second finding, the oil from the tree leaves.

The Court: I make it about 160 for 4,655.

Mr. Frazer: Yes, sir.

*By Mr. Seymour:*

Q. Could you tell us that in ounces? A. Well, that would be—that is really only four grams. That would be about 7/10 of an ounce. 30

*By the Court:*

Q. You are talking now about the 4,655, are you? A. Yes, Well, if there are a thousand milligrams to a gram, that would give you 4½ grams, and there are 25 grams to an ounce.

Q. Measuring that in teaspoonfuls, that would be about five teaspoonfuls, wouldn't it, 4,655 milligrams? A. No. An ounce would probably be 40

*Jere K. Ross—Direct.*

around two teaspoonfuls, so that that would be less than one.

Q. An ounce is two teaspoonfuls? A. Two teaspoonfuls.

10 Q. Will you tell us what 4,655 milligrams would be in measurements that we all know? A. I would say about a half a teaspoonful.

Q. So you get a half a teaspoonful from tree leaves? A. That is right.

Q. What kind of leaves were they? A. Oak leaves.

*By Mr. Seymour:*

20 Q. And the third finding—what is that in ounces or teaspoonfuls or some other measurement? A. That would be about an ounce and a quarter. That would be about a little over two teaspoonfuls.

Q. And the fourth measurement? A. Would be less than two drops.

*By the Court:*

30 Q. I am not sure that you told us the size of these samples, the sample taken from the small natural dam. How much was there of that? A. Well, the sample taken was taken in about a quart jar, and in the analysis you thoroughly mix this sample and take an exact measured quantity.

Q. What was the measured quantity? A. You take a hundred C. C., a hundred cubic centimeters.

Q. What is that expressed in liquid measures that we know? A. A hundred cubic centimeters—all things in chemistry are divided into equal factors. That is, one C. C. would be about 20 drops.

40 Q. Can't you tell us what a hundred cubic centimeters would be? A. About four ounces.

*Jere K. Ross—Direct.*

*By Mr. Seymour:*

Q. Now, can you say whether or not cows or horses would drink such water?

Mr. Frazer: I object. I do not think he is an expert upon bucolics.

The Court: I doubt if his qualifications as a chemist would qualify him. He might have to state not whether or not they would drink it, but what the effect on them would be of drinking it. 10

Q. Can you tell us what the effect would be upon a horse or a cow drinking the water that was polluted as you have stated?

Mr. Frazer: I object on the same grounds. It seems to me that he is not qualified as a physiologist either, a bovine physiologist. 20

The Court: Perhaps that question is all right, "Can you tell us", if he answers it yes or no. That question should be answered yes or no.

Q. (Read by stenographer). Can you tell us what the effect would be upon a horse or cow drinking water that was polluted as you have stated? 30  
A. Probably make them sick.

The Court: No, no. Can you tell? Yes or no.

The Witness: No.

Q. The answer is no? A. No.

Q. In your opinion, would animals drink that water?

Objected to.

Objection sustained. 40

*Jere K. Ross—Cross.*

*Cross-examination by Mr. Frazer:*

Q. Dr. Ross, a liter of water at the proper temperature and pressure weighs a kilogram, does it not? A. Yes, sir.

10 Q. And a kilogram contains 1000 grams? A. That is right.

Q. And each gram contains 1000 milligrams? A. That is right.

Q. So that there are 1,000,000 milligrams in a liter of water, is that right? A. That is right.

Q. Your samples are approximately a liter or slightly less than a quart? A. No, sir. The samples were about a quart.

Q. And that is approximately a liter, isn't it? A. Yes, sir.

20 Q. So if there are a million milligrams in a quart—we might say there were 950,000 milligrams in a quart roughly, making a slight allowance for the smallness of the quart compared to the liter. A. Yes, sir.

Q. So 950,000—is that fair—milligrams in a quart? A. That is correct.

Q. And this first sample had out of its 950,000 milligrams, 64 milligrams of oil. A. That is right.

30 Q. That was taken below the bridge, that sample. A. Yes, sir.

Q. The second sample was not of flowing water, was it? A. No, sir.

Q. As I understand there was a little barrage of twigs against which leaves had accumulated, and the water had washed up against what you call the natural dam, is that right? A. That is right.

40 Q. And it was around that little pool that you got this second specimen. A. That is right.

*Jere K. Ross—Cross.*

Q. The oil, I understood you to say, was light oil. A. Yes, sir.

Q. How many days do you think it took to accumulate the amount of oil which you found around that little dam on the surface?

Objected to as not cross-examination.

The Court: While the question is not strictly cross-examination I think the question should be whether or not he can tell. 10

Mr. Frazer: I will reframe the question.

Q. Mr. Ross, assuming that just across the road bridge where the water was flowing you found a specimen with 64 Milligrams out of 950,000 milligrams, and you found a specimen a little farther down against a natural dam with 34,000 milligrams against 950,000 milligrams, would it be possible for you to compute how long it took that oil at the natural dam to accumulate on the surface? 20

A. Not with the data I have.

Q. You could not compute it? But it obviously took a long time, didn't it? A. It depends upon what you mean by long.

Q. It did not accumulate in a day? Would you say that? A. No, not in a day.

Q. So that with this whole wash of oil down in the course of one day there had not been accumulated at this natural dam even a 25th of a quart, is that right, of oil? A. I don't know. 30

Q. Well, how much is 34,000 milligrams in relation to a quart? A. About one-fifth.

Q. One-fifth? 34,000. Multiply it out and see what you get.

*By the Court:*

Q. It would be about a thirtieth wouldn't it? A. 40

*Jere K. Ross—Cross.*

Yes, about a thirtieth, about a thirtieth of a quart.

*By Mr. Frazer:*

Q. Somewhere about a gill? No, a gill is much more than that, isn't it? A. A gill is one-eighth of a quart.

10 Q. This is about a quarter of a gill, and it took over a day to accumulate it at a point of natural barrier on the surface of the water; a quarter of a gill of oil; isn't that right? A. Yes, sir.

Q. And when you got up nearer to the pumping station you found 42 milligrams in the 950,000, isn't that right? A. Yes, sir.

*By the Court:*

20 Q. I am just wondering if I figured that right, 34,000. The proportion of 34,000 to 950,000 is a little less than one-thirtieth putting it roughly, wouldn't it be? That is, three times 34,000 would be 102,000; and then one million, twenty thousand? A. That is right.

Q. So about one-thirtieth is roughly correct, putting it about one-twenty eighth to be entirely fair. A. That is about right.

30

CARMAN B. SKIDMORE, sworn in behalf of the plaintiff.

*Direct-examination by Mr. Seymour:*

Q. Where do you live, Mr. Skidmore? A. Caldwell Township.

Q. Were you employed by the Borough of Essex Fells at this pumping station? A. Yes, sir.

40 Q. During what years? A. Spring of 1922 to July a year ago.

*Carman B. Skidmore—Direct.*

Q. What were your duties?

*By the Court:*

Q. I suppose you mean 1928; July, 1928? A. Yes, 1928.

*By Mr. Seymour:*

Q. What were your duties? A. I was plant operator. 10

Q. What was the first year that you were there, did you say? A. 1922.

Q. How was that plant operated in the Spring of 1922? A. Why, by kerosene engine at that time.

Q. Kerosene engine? A. Yes, sir.

Q. Was the kerosene stored on the premises? A. Yes, sir.

(A brief recess is taken.)

20

The Court: The witness desires to correct a statement he made, Mr. Frazer.

*By the Court:*

Q. Now, you may correct your statement. A. I should have said kerosene and fuel oil engine, but was run at different times.

*By Mr. Seymour:*

Q. That building there is a pumping station, isn't it? A. Yes, sir. 30

Q. Are there oil wells in the vicinity? A. Oil wells?

Q. Yes, of the pumping station.

The Court: You mean storage wells where it is stored, or natural oil wells?

Mr. Seymour: Did I say oil wells? Pardon me. I mean wells.

The Witness: Wells, yes, there was four. 40

*Carman B. Skidmore—Direct.*

Q. What is the machinery used for? A. For Pumping the water out of these wells in reservoirs, lift the water out of the wells to the reservoir.

10 Q. For the purpose of being used by the inhabitants of the Borough? A. Yes, supply the different boroughs.

Q. You say when you first went there there were two engines, one was operated by fuel oil and the other by kerosene? A. That is intermittently, not both together.

*By the Court:*

Q. That is, you used that alternately, you mean, first one then the other? A. Yes.

20 Q. Not both together? A. Not both together.  
*By Mr. Seymour:*

Q. Where did you get your fuel oil from to operate the machine? A. Why, the Standard Oil truck would deliver it right to the tank.

Q. Where was the tank? A. About 50 feet from the plant, east of the plant.

30 Q. Can you show us on that blackboard? A. Well, it is in the direction that is marked on the board there, about that direction, to the right of it.

Q. Where it says "tank"? A. Yes, sir.

Q. Where was the kerosene oil stored? A. Between that tank and the brook.

*By the Court:*

Q. Right in the barrels? A. Yes, sir; in the barrels, under the ground.

40 Q. Oh, under the ground? A. Yes, sir.

*Carman B. Skidmore—Direct.**By Mr. Seymour:*

Q. How did you get the fuel oil into the pumping station? A. Suction pump. Suction pump attached to the engine.

Q. And you got the kerosene oil in the same way? A. Yes, sir.

Q. How long have they continued to use kerosene oil? A. Well, I don't know as I remember just exactly how long it has been continued to be used there. 10

Q. About how long? A. Kerosene I think it was used about maybe four years from the time that I was there at different times.

Q. How long did they continue to use fuel oil? A. Well, they had fuel oil there all the time.

Q. Up to the time you left? A. For the engines; yes, sir. 20

Q. Up to the time you left? A. Yes. Well, just before I left the oil engines were removed; maybe March, something like that. The oil engine was moved just about a month before I left in July.

Q. What did they use when the oil engine was moved? A. Electricity.

Q. So that from the time you went there in 1922 to July, 1928, they used fuel oil and kerosene, is that right? A. Yes, sir. Well, just a short while before I left. They started the electric equipment just a short while, maybe a month or so, before I left. 30

Q. Was there or was there not a drain leading from the pump house into the brook? A. There was a drain, yes, from the floor out nearly to the brook.

Q. What was that drain built of? A. Why, it 40

*Carman B. Skidmore—Direct.*

was built of hollow or terra cotta pipe just like sewer pipe, about three inches, something like that.

Q. Were the joints of the pipe cemented or closed in any way? A. No, sir.

Q. How far from the stream did the drain end?

10 A. How far?

Q. The pipe. A. I beg your pardon.

Q. How close to the stream did the pipe approach? A. Within a couple of feet I imagine.

Q. What was between the end of the pipe and the stream? A. Why, nothing but the dirt.

Q. Can you say whether the oil flowed from that pipe into the stream? A. I beg your pardon.

20 Q. Can you say whether the oil flowed from that pipe into the stream? A. Well, there may have been times when the oil—

The Court: I have not yet understood him to say that it was oil that flowed through that pipe.

Q. What did flow through that pipe? A. Why, it was put there to clean the plant; the floor water mostly. Of course anything that would get on the floor would go through that.

30 Q. Any oil? A. Well, if there is oil on the floor when we were cleaning it it would have to go through.

Q. Was there any oil that got into this stream from the barrels that you mentioned? A. Well, I couldn't say that it went directly from the barrel into the brook.

40 Q. What did you see? A. Why, I couldn't say that it did go directly from the barrels into the brook.

*Carman B. Skidmore—Direct.*

Q. I am referring now to the barrels in which the kerosene was stored; any chance of that getting into the brook? A. No, I think not, not from the barrels, no.

Q. Referring to the tank in which the fuel oil was stored, is there any way of getting out of that tank into the brook? A. Well, there was reason to believe that the tank did leak a little, and that would go through the ground into the brook. 10

Q. Where was the fuel oil, the waste fuel oil after it had been used in the engine? Where was that emptied or ejected? A. Why, there was some barrels buried in the ground with a drain pipe from the kitchen to these barrels, the barrels on the outside, that the waste oil would go from the engine to these barrels.

Q. How large were these barrels? A. About fifty gallons. 20

Q. Were they fully covered? A. Yes, sir, just a little vent in the top.

Q. A vent in the top? A. Yes, sir.

Q. How much of a vent? A. About a quarter of an inch.

Q. Did any oil come out of those barrels at times? A. It did on one occasion. A heavy rain of water lifted the barrels up and turned them over. 30

Q. Have you observed that brook from time to time? A. Yes, sir.

Q. Did you ever see any oil in it? A. Yes.

Q. Did you ever see any oil above the tank? A. No, sir.

Q. Where did you see the oil? A. Well, from opposite the oil barrel down the brook toward Eagle Rock Avenue.

Q. Did that continue all through the time you 40

*Carman B. Skidmore—Cross.*

*Carman B. Skidmore—Redirect.*

were there? A. It did not continue all the time that you could see, that you could tell it was running.

*Cross-examination by Mr. Frazer:*

10 Q. Mr. Skidmore, the only time that there was any over large quantity of oil was the time that the barrels upset, wasn't it? A. That was the largest amount that I could see.

Q. And the other times would be a small quantity such as Mr. Ross was testifying about? A. Yes, sir.

20 Q. Was there ever a fire in that pump house during your employment there? A. Fire in the pump house?

Q. Yes. A. Why, yes, the roof burned off it a couple of times.

*Redirect-examination by Mr. Seymour:*

Q. How did that happen? A. Never could find out.

Q. What was the roof made of, wood? A. Wood; yes, sir.

30 Q. And the walls were all bright? A. Walls were stone.

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BENJAMIN STEPPEL, sworn in behalf of the plaintiff.

*Direct-examination by Mr. Seymour:*

Q. Mr. Steppel, where do you live? A. I live in East Hanover.

40 Q. Is that near Essex Fells? A. Near Essex

*Benjamin Steppel—Direct.*

Fells. I was lived before near. I lived in Pleasantdale.

Q. At one time you lived in Pleasantdale? A. Yes.

Q. Was that near Mr. Heintz's property? A. I think about between a thousand or fifteen hundred feet back of Mr. Heintz's property. 10

Q. It was a thousand or fifteen hundred feet farther on down the brook, wasn't it? A. Down the brook, yes.

Q. South of the Heintz property? A. Yes.

Q. What sort of property did you have there? A. I had good property there.

Q. What kind of property was it, a farm? A. Farm property.

Q. How many acres did you have? A. Nine. 20

Q. How long did you live there? A. I lived there eighteen years.

Q. And when did you move from there? A. 1924.

Q. Does this brook that has been talked about in this case flow through your property? A. Yes, sir.

Q. For what distance through your property? All through it? A. All through my property.

Q. When you had that property did you have any horses or cattle or chickens? A. I had cows and horses. 30

Q. How many horses did you have? A. Two horses.

Q. Cows? A. Cows, I had twelve; four heifers.

*By the Court:*

Q. Twelve cows and four heifers? A. Four heifers, youngsters. 40

*Benjamin Steppel—Direct.**By Mr. Seymour:*

Q. Were you in business? A. I was in dairy, in milk business.

Q. Did your cattle use this stream for drinking purposes? A. I used that stream before that pump houses was built there. Was good water.

10 Q. What did you use it for? A. I led down my cattle to the water to drink it, and the people drink too the water. The water was really spring water.

Q. Did there come a time when your cattle and your horses and cows would not drink the water? A. When they put up the pump.

Mr. Frazer: That is rather leading.

20 Mr. Seymour: He has already said until the plant was built there. I did not mean to emphasize anything.

Q. You say that you used that water for the purpose of your horses and cows until that plant was built there? A. Until that plant was built.

Q. What happened after that? A. After that they wouldn't drink it.

30 Q. Do you know when that began? A. I couldn't say exactly the time, but I think that was before 1916.

*By the Court:*

Q. Before when? A. 1916 I think they built. I couldn't tell exactly the year when they built the pump house.

*By Mr. Seymour:*

40 Q. Did you notice anything peculiar about the water? A. Well, it was lots of oil, and when the

*Benjamin Steppel—Direct.*

cattle went in they got blistered their feet. They lost their hairs.

*By the Court:*

Q. Lost what? A. The hair from the feet. The hair. They got blistered.

*By Mr. Seymour:*

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Q. Over how long a period did that condition continue that they refused to drink the water? A. Well, as soon as the oil, the oil came on the water and was standing there, and when was low the water, the water was standing steady, but when the water came like now rains, they washed down, but it was filled always with dirt.

Q. Over how long a period did that continue? A. That was steady.

20

Q. You say it started when the plant was built? A. When the plant was built.

Q. When did it stop? A. They never stopped. I make complaint to the Board of Health of Rose-land, and they promised me to stop, but they never done it.

Q. How often did you see that oil on the water? A. I see them every day. I worked there.

Q. Can you say whether or not there was water in the brook all the time? A. Well, lately when, I will say about in 1920, I think, I couldn't remember which year, it was a dry year; the brook was dry altogether.

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Q. How about other years? A. Well, the most of the years when it was, and I was there it was more rain. There was oil, they would not drink, and then the fish died.

Q. You say the fish died? A. Sure.

Q. Did you see any dead fish? A. I saw a lot.

40

*Benjamin Steppel—Direct.*

Q. Can you tell us about the pool that you built? Did you build a pool on your property? A. I built a wall to bathe themselves; the children shall go bathing.

10 Q. A dam? A. A dam. When the children went in to bathe that took off the oil, but it didn't help it. They came out and they got blistered. The mother have to wash them home with well water.

Q. Do you recall the fence on the Heintz property getting on fire? Did you see that fence? A. No. That time I didn't see the fire.

20 Q. Did you ever follow up the course of this stream to see where the oil came from? A. Well, I know that I worked over there with the team, and I know that it came from the—

Q. Where did you work? A. I work on the golf links; Wendel and Heiser; I used to work for them.

*By the Court:*

Q. Is the golf links above or below the pump house? A. Golf links is between the pump house. On one side is the golf links and on the other side, and the pump house is right in the middle.

*By Mr. Seymour:*

30 Q. Is it a fact that the golf links is all around? A. Yes.

Q. Not at this side of the road. A. No.

Q. But all around here. A. Yes.

Q. Who were Wendel and Heiser? What were they doing? A. They were the superintendents of the golf links.

40 Q. When did you work for them? A. I started to work about 1914 or 1913, in that years. I think I started to clean the cedar lot.

*Benjamin Steppel—Direct.*

Q. Was the plant built then? A. No. The plant is there after.

Q. Did you work for them after the plant was done? A. Yes.

Q. Trucking and carting? A. Carting dirt.

Q. On the golf links? A. On the golf links.

Q. Did you discover where the oil came from? 10  
A. Well, anybody could see it comes from the pump house.

Q. Did you see it? A. Sure.

Q. Where did it come from? A. It comes right out like a little ditch and comes right in the brook.

Q. Did you see any pipe in the ditch? A. Well, I did not was interested so much. I was look which was there or what comes out, but I see it comes out from the pump house.

Q. Did you examine the brook above the plant? 20  
A. No, I didn't look above.

Q. You saw that the oil came out from the pump house? A. From the pump house.

Q. How many places was it coming out from?  
A. When I looked it was coming out from one place, one ditch.

Q. Mr. Steppel, do you know whether this was affected, or did the water affect any of your cattle or horses? A. I don't know. I couldn't tell exactly. I lost about twelve heads of cattle. 30

Q. Do you know what caused the loss? A. I was poor, I shall spend any money that time on a doctor, he shall examine it.

Q. You don't know what caused the loss? A. I let them analyze the water. That was on a Friday, Saturday morning, I lost the first cow.

Q. Cows are you talking about? A. Yes.

*Benjamin Steppel—Cross.**Cross-examination by Mr. Frazer:*

Q. When was that that you are referring to?  
A. When I lost the cow? That was in April.

Q. Of what year? A. That was in 1918, I think, or 1919, something like that. I didn't keep track.

10 Q. Now, you say you saw the oil coming out of the pipe. How fast was it coming out? How big a stream? A. I didn't look at that, how big stream was.

Q. What? A. I did not was interested how big the stream was. I see it coming.

Q. You saw it coming? A. Yes.

Q. But you can't say how much was coming out?  
A. No.

20 Q. Was there a stream? A. Sure, it was a little stream.

Q. It was a little stream? A. Sure.

Q. How big a little stream? A. I couldn't say. I did not measure it.

Q. You saw it, didn't you, Mr. Steppel? A. Yes.

Q. Why can't you tell us what you saw? A. Why I shall say it if I did not know the measurement.

30 Q. Well, was it as big as that little pencil (indicating)? A. Sometimes was bigger, much bigger.

Q. That was a stream of oil as big as that little pencil? A. Bigger.

Q. Bigger than that little pencil? A. Yes.

Q. Now, it was going on down the stream, that took all the hair off your cattle? A. My cattle.

Mr. Seymour: Well, he did not say that.

Mr. Frazer: Well, if the parts of the

*Benjamin Steppel—Cross.*

cattle that the water came in contact with

The Witness: I said the feet.

Q. It came off the feet? A. Yes.

Q. You said you made complaints. Who did you make complaints to? A. At that time I didn't make complaints. I didn't know to who that pump house belonged, to the golf links or to Essex Fells, and I went down to the Board of Health in Roseland and I meet—I don't know if it was the president or not; Mr. Williams; and I told him about it. 10

Q. Mr. Williams? A. Yes, sir. And he says he is going to see the Essex Fells and they are going to fix it. They never came and fixed, and I couldn't use the brook, nothing. 20

Q. That was in 1914? A. 1918 or 1917, those years that I was started to complain right away as soon as I saw the oil.

Q. That is the only person you complained to? A. Yes.

Q. What did you do about water for your cattle after this serious situation arose? A. I had to take from the well and water them.

Q. From the well? A. Yes. 30

Q. Now, how many times did you have to do it from the well anyhow before this? A. Before this? I never done it.

Q. You never had done it? A. No.

Q. The stream was always so full that you could water your cattle there? A. The stream was always full.

Q. Mr. Steppel, don't you know as a matter of fact that stream goes dry several times a year? A. Never was dry. 40

*Benjamin Steppel—Cross.*

Q. Never? A. Never before the pump house.

Q. You said it was dry in 1920. A. Yes, when they put up the pump house.

Q. You think the pump house dried it up? A. Yes, sir.

10 *Redirect-examination by Mr. Seymour:*

Q. Mr. Steppel, do you know when that pump house was built? A. I can't remember exactly right.

Q. About what year? A. I think this was in 1913 or 1914, something like that. I couldn't exactly say the years exactly.

*By the Court:*

20 Q. I thought you said it was built in 1916, you said before. A. Maybe 1916. I couldn't remember the year when it was built, the pump house.

Mr. Frazer: It was not the Borough's property at that time. I am willing to stipulate when it was. Mr. Seymour is willing to stipulate when we took possession of it, which I think was in 1921 or 1922.

30 Mr. Seymour: I really don't know anything about that latter fact, your Honor.

Mr. Frazer: Well, I can prove it by the Mayor.

JAMES ALBERT MARTZEN, sworn in behalf of the plaintiff.

*Direct-examination by Mr. Seymour:*

40 Q. Where do you live, Mr. Martzen? A. I live in West Orange.

*James Albert Martzen—Direct.*

Q. By whom are you employed? A. I am employed now with the Watchung Coal Company.

Q. Were you ever employed by Mr. Heintz? A. I was for a couple of years in the summer time.

Q. What years were they? A. From 1922 to 1926.

Q. Four years? A. Four years.

Q. How many months in the year? A. About three months in the year during the hot weather in haying time.

Q. What months were they? A. Generally July and August.

Q. Were you employed on this place of his in West Orange that we are talking about in this case? A. Yes.

Q. What was the nature of your employment? A. At the time with Mr. Heintz?

Q. Yes. A. I was working for the Public Service at that time.

Q. No. I mean what did you do for Mr. Heintz? A. Do haying, plowing and such as that.

Q. Were you there every day during these months? A. Yes.

Q. From what hours? A. From eight in the morning until five at night.

Q. And you assisted in haying and plowing and so forth? A. Yes, sir.

Q. Did he use horses at that time? A. Yes, sir.

Q. Did he have cattle? A. Yes, sir.

Q. Can you recall the brook that ran through his property? A. Yes.

Q. Can you say whether the horses and cattle would drink from the brook? A. They wouldn't drink from the brook.

Q. Would they drink from the brook at any time

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*James Albert Martzen—Direct.*

during those months that you were there, during the four years that you were there? A. No.

Q. How did you know they wouldn't drink? A. The brook was too low and covered with the oil there, kept them from drinking.

Q. Did you see oil there? A. Yes, sir.

10 Q. Did you see them refuse the water? A. Yes, sir.

Q. Where did you see the oil? A. Right back of Mr. Heintz's barn, right from there down to his line, and this lower south end line here.

Q. Where that road is marked on that black-board with a line running across the road, which is the brook, that is the beginning of Mr. Heintz's property, isn't it? A. Right at the bridge; yes, sir.

20 Q. Does the brook then take a winding course until it meets that fence? A. It takes in a sort of S shape.

Q. Until it comes to that line called the fence there? A. Called the fence, yes.

30 Q. What can you say as to the condition of the brook from the road to the fence during the time that you were there? A. Well, it was very low at that time and it was so well covered that they could not do nothing with it.

Q. Covered with what? A. Oil.

Q. How much of the brook was covered with oil? A. Well, I should imagine about six inches, stream about six inches was running down through there.

Q. All through it from the road to the fence? A. Yes.

*By the Court:*

40 Q. Six inches deep you mean? A. Yes, sir.

*James Albert Martzen—Direct.**By Mr. Seymour:*

Q. Did you notice the vegetation on the side, the grass on the side of the brook? A. Yes. It was all burned.

Q. How were the horses and cattle fed with water if they wouldn't drink from the brook? A. We had to cart it from the well or even go down to Pleasantdale Center and bring it up in milk cans when the well was dry. 10

Q. You say you carted it from the well. Where was this well situated? A. Right back of Mr. Heintz's house.

Q. Where was the water carted to from the well? A. Well, the well was right behind the house; I should judge about thirty feet.

Q. To where? A. To a tub that he had there for the cattle to drink in. 20

Q. Did you see him carting water that way? A. I carted some myself.

Q. Did he? A. He did, sir.

*By the Court:*

Q. Where did you cart it from? A. The well.

Q. You said some other place. A. When the well went dry we had to cart it from Pleasantdale Center. 30

Q. How far was that away? A. That was about a mile and a quarter to the city hydrant.

*By Mr. Seymour:*

Q. You say when the well went dry. When was that that it went dry? A. Why, in 1922, 1923 and 1924.

Q. For how long a period? A. Well, a period of about two months, maybe a little more. 40

*James Albert Martzen—Direct.*

Q. Did it go entirely dry?

*By the Court:*

Q. You mean altogether or each season? A. Each season. It didn't go entirely dry, but it was so that we couldn't get none from it.

10 *By Mr. Seymour:*

Q. Was that well on the same level with the brook? A. No. It is a little lower than the brook.

Q. You say you had to get water in Pleasantdale. How far away is that? A. About a mile and a quarter.

Q. Did you go for any water? A. Why, I went with him. I carted it out in the wagon with him, helped him lift the cans on.

Q. Over what period of time did you see him go for water? A. Well, during the eight hours that I was there with him each day during that hot spell.

Q. Eight hours each day during that hot spell? A. Yes.

Q. You were doing laboring work there, were you? A. Yes, sir.

30 Q. What pay were you receiving?

Mr. Frazer: That is immaterial, isn't it?

The Court: Well, I suppose the theory of the plaintiff is that the time spent in bringing water they are entitled to be compensated for.

Mr. Seymour: Yes, sir.

Mr. Frazer: It is a rather difficult process of calculation. Here is a man who is engaged in farming, in plowing and haying

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*James Albert Martzen—Direct.*

and the like. As an incident of that he brings up some water. How can we possibly calculate on a reasonable basis how much time he devoted to that?

The Court: Of course the jury cannot guess at it unless it is proposed to have him indicate about how much he had spent. I think it would be immaterial if he can't tell with any degree of accuracy how much time was spent. The mere fact that he did spend the time without indicating the length of time it was would not be a proper basis of damage. 10

Q. Mr. Martzen, how often did Heintz go to Pleasantdale for water? A. Every day, twice a day some days. 20

Q. And how long would that take? A. Why, that would take at least a half an hour or more each day, each load.

Q. How did he go? A. Why, with horses and wagon.

Q. Half an hour each wagon? A. Yes.

Q. That is an hour or more each day, twice a day? A. That is right.

Q. Or two hours a day. 30

Mr. Frazer: One hour a day, half an hour each trip.

Mr. Seymour: Half an hour each way.

The Court: Suppose you let the witness say how much those two trips took.

*By the Court:*

Q. How much time did they occupy? A. I should judge about an hour and a half all told the two trips. 40

*James Albert Martzen—Direct.*

*By Mr. Seymour:*

Q. Are you familiar with the prices paid for farm labor at those times? A. No, I am not.

Q. What was being paid to you?

Objected to.

10 (Question withdrawn.)

Q. Were you paid by the day? A. Yes, sir.

Q. What were you paid?

Objected to.

Objection overruled.

Q. What were you paid per day? A. I was \$3 a day while I was there.

*By the Court:*

20 Q. For how many hours? A. For eight hours.

*By Mr. Seymour:*

Q. Do you recall the fence burning in the Heintz' property? Was it burned while you were there? A. Why, I was out riding that morning.

*By the Court:*

30 Q. The question is, do you recall it. A. Yes, I do. That was May—just what day it was, but it was in May, 1926, and it was on a Sunday.

*By Mr. Seymour:*

Q. Were you working there that month? A. No, I was not.

Q. Were you in that vicinity? A. I was around that neighborhood.

Q. Did you see the fence burning? A. I didn't see the fence, but I saw the brook burning.

40 Q. You saw the brook burn? A. Yes.

*James Albert Martzen—Direct.*

Q. Where was the brook burning? A. Up here below Mr. Heintz's barn there along the fence there through that way (indicating).

Q. Between the fence and the road? A. Right along in here (indicating).

The Court: Indicating north of the fence.

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Q. The brook was burning north of the fence?

A. Yes.

Q. How near the road was that brook burning?

A. Well, I should judge 75 feet, maybe more.

Q. How much of the brook was burning? Along what length of the stream was it burning? A. Well, I couldn't just tell you how many feet was burning along in there. That brook ain't straight.

20

*Cross-examination by Mr. Frazer:*

Q. Mr. Martzen, how wide is the brook? A. How wide is the brook entirely?

Q. Yes. A. It is about two and a half feet.

Q. In these dry seasons how deep is it? A. Well, it runs various. It runs from three inches to six inches in dry weather, real dry weather.

Q. In really dry weather it is three inches? A. Yes.

30

Q. Have you ever seen it when it is quite dry? A. No, sir.

Q. You never have? A. No, sir.

Q. Not even in the year 1923? A. No, sir. It wasn't entirely dry.

Q. But you have seen it lower than three inches?

A. Well, never had a measure to measure, but I should judge three to six inches.

Q. Now, when it is three to six inches deep, how

40

*James Albert Martzen—Cross.*

wide is it? How wide is the thread of the brook?  
 A. Well, it is not very wide when it is running  
 low like that.

Q. Well, three or four inches? A. Probably five  
 or six inches.

10 Q. What is the highest you have ever seen it in  
 the summer months? A. Never seen it very high  
 in the summer months.

Q. You have seen it very high. A. No, not very  
 high unless it rained.

Q. At this time in May when the fire took place  
 was the brook high? A. That I just can't recall  
 whether it was high or low that year.

Q. Didn't that fire make some impression on  
 you? A. It made some impression upon the fire,  
 but not how deep the stream was.

20 Q. Haven't you a picture in your mind of a  
 burning brook? A. Oh, yes.

Q. Can't you say about how much was covered?  
 A. Well, I should judge about a foot, maybe a little  
 more.

Q. Had it rained just before that? A. That I  
 can't remember.

Q. You don't remember whether it was a heavy  
 rain just ahead of that? A. No; sir; I don't.

30 Q. Do you know how that fire started? A. No,  
 sir; I don't.

Q. You did not make any inquiry at the time?  
 A. No, sir.

Q. Did you know Mr. Heintz at that time? A.  
 Yes, sir.

Q. You had been working for him for several  
 years? A. Before that; yes, sir.

40 Q. And your curiosity at the time you saw this  
 burning brook was not sufficient to have you ask

*James Albert Martzen—Cross.*

him how the thing started? A. No, sir; I did not.

Q. Did you stop at all at his house at that time that day? A. I stopped for a short while. My wife asked me to go in.

Q. And did you talk to anybody? A. No, sir.

Q. You just happened to be going by and you saw this brook on fire? A. Yes, sir. 10

Q. Did you ever hear afterward how it happened? A. No, sir.

Q. You never spoke to him? You were employed by him the next year, weren't you? A. No, not that year.

Q. Weren't you employed that year? A. No.

Q. I understood you to say on direct examination that you worked for him from 1922 to 1926 inclusive. A. Up to 1926. 20

Q. Not in 1926? A. No, sir; not in 1926.

Q. You worked for him for three years, is that right? A. Yes.

Q. 1922, 1923 and 1924. A. Yes.

Q. Then you didn't go up any more except you happened to be by this day the brook was afire, is that right? A. Yes.

Q. Didn't you see the fence burning? A. No.

Q. You don't know how the fire started? A. No. 30

Q. You don't remember how deep the stream was on that day? A. No.

Q. Now, then, sir, what is the widest that you have seen the brook in the summer time? A. Well, in the heavy rain I have seen it three feet or more across the brook.

Q. Three feet across? A. Yes.

Q. How deep would it be then? A. About two and a half feet.

Q. Is it in those heavy times like that that you 40

*James Albert Martzen—Cross.*

saw this large quantity of oil? A. Well, the oil would be washed away. It would be afterwards when it settled down.

Q. When you saw the large quantity of oil how deep was the brook then? A. About six inches to a foot.

10 Q. About six inches to a foot? A. Yes.

Q. How wide was the oil spread upon the surface? A. I should judge about two inches or three inches from the land when it was wide.

Q. Two inches from the land; you mean there was a stream two inches from the land between the oil and the land? A. Yes.

20 Q. How wide was the oil stream when you got there? A. The oil? The oil I saw was three or four inches from the side of the banks out into the water.

Q. Three or four inches was the width of the oil stream? A. Yes.

Q. And the oil was six inches deep, did I understand you to say? A. That is when it was low.

Q. It was six inches when the water was low? A. Yes.

Q. When the water was low the whole stream was about six inches wide? A. About that.

30 Q. Six inches deep? A. Yes.

Q. Was that made up of pure oil? A. Covered up with oil in low water.

Q. And it went down into the water six inches? A. Went across the water. Oil will not sink.

Q. It went across the water, you mean, six inches in width? A. Yes, sir.

Q. You don't mean six inches deep? A. No, sir.

40 Q. I understood you to say on direct examination that it was six inches deep and that the horses

*James Albert Martzen—Cross.*

could not drink for that reason. A. I said the water was six inches deep.

Q. The water, but not the oil. A. No, sir.

Q. The cattle came down to drink water. A. And refused to drink it.

Q. Do you often water cattle in a running stream that is only three inches? A. Yes. 10

Q. Can a horse get into that? A. Yes.

Q. Can he nuzzle into the three inch stream? A. Yes.

Q. What is the nature of the bottom there? A. About two and a half inches.

Q. What is the character of the soil? A. That I don't know, the character of the soil.

Q. A horse to put his nose in would have to put it right down on the ground right in the mud, wouldn't he? A. No, sir. 20

Q. He would not? A. No, sir.

Q. You have got a mud bottom there, haven't you? A. Sand bottom.

Q. Sand bottom? A. Sort of a sandy bottom; yes, sir.

Q. Did you ever see any of the cattle watering at that stream? A. Yes.

Q. When did they do that? A. In colder weather. 30

Q. There wasn't any oil there? A. Well, there was, but it was on the sides. It wasn't out in the middle of the stream. It would not interfere with them. It was only when the water got low that they refused to drink it.

Q. So that most of the time they would take this water. A. That is when the stream was running full; yes, sir.

Q. When the stream was running dry then they would reject it? A. Yes. 40

*James Albert Martzen—Cross.*

Q. How long a period would that be? A. Probably three months.

Q. A full three months. A. A full three months of hot weather.

Q. But when there was a heavy rainstorm they would take it anyhow? A. Yes.

10 Q. And in some of the wet seasons they would take it regularly? A. Always.

Q. We had a pretty wet year in 1925, didn't we? A. Well, not pretty wet, not so awful wet.

Q. It wasn't so very dry? A. No, sir.

Q. Didn't they use the stream all through that summer? A. Not all the summer.

Q. The most of the summer? A. The most of the summer, all but one month.

20 Q. And 1924 was what sort of year? A. That was a dry year.

Q. That was a dry year. Are you thinking of 1923? A. No, sir; it wasn't 1923.

Q. 1923 was a very dry year, wasn't it? A. Yes.

Q. It was a dry year from somewhere in the middle of May until somewhere in early September before we had any rain? A. Yes, sir.

30 Q. Didn't the brook dry up that year? A. Not entirely; no, sir.

Q. Not entirely? A. No, sir.

Q. But it wasn't deep enough for horses to have used it or for cattle to have used it for drinking, was it? A. They could not use it.

Q. So that suppose there had been no oil there that dry year, there wasn't enough water there for cattle to use it? A. They could have drank there.

Q. You think you could have watered twelve head of cattle or horses? A. Yes, sir.

40 Q. So in 1924 and 1925 there was plenty of

*James Albert Martzen—Redirect.*

water in the brook and they all used it? A. Yes, sir.

*Redirect-examination by Mr. Seymour:*

Q. You say they did use it in 1924 and 1925?  
A. They did part of the summer, yes.

Q. When was that? A. When the water was high. 10

Q. After a rain. A. After a rain or like of that.

Q. That was only occasionally then, wasn't it?  
A. Yes.

Q. Aside from the time that you worked for Mr. Heintz, did you visit him before or after those years frequently? A. I had visited him long before I ever was there to work and have visited him afterwards. 20

Q. Now, before you went to work for him, did you notice this oil on the stream? A. Yes, sir.

Q. And after you left his employ did you notice oil on the stream? A. I have at times when I have been there on Sundays.

Q. How often before you went to work for him did you visit him? A. Well, I have been going there ever since 1915.

Q. How often before you worked for him did you go there to visit him? A. Well, quite often during the summer time; it was quite a little. 30

Q. Can you tell us how much during the summer time and how much during the winter time you visited him? A. No, I couldn't tell how many times I was there each year.

Q. When you say often in the summer time, what do you mean? A. Well, it would be some- 40

*James Albert Martzen—Recross.*

times twice a week, sometimes once a week, and sometimes three times a week.

Q. It wasn't so often in the winter time, was it?

A. No.

Q. How often was it? A. Possibly in the winter time I wouldn't go there once or twice during the winter.

10

Q. Is that the same average after you left his employ? A. Yes, sir.

*Recross-examination by Mr. Frazer:*

Q. Mr. Martzen, when you went up to make these calls afterwards, did you discuss this fire at all? A. No, sir.

Q. You never had any interest in the fire? A. Never said nothing about it.

20

Q. When this case was coming along for trial and you were asked to testify here, did they call your attention to the fact that you did see the fire in the brook? A. No, sir.

Q. Nobody called your attention to that? A. No, sir.

Q. Mr. Seymour did not know anything about what you were going to say about this? A. No, sir.

30

Q. You mean you just got up on the stand, never spoke to him? A. Never spoke to him about it.

Q. And he was surprised when you said you saw that brook on fire? A. Yes, sir.

Mr. Seymour: How does he know?

Q. Taken quite by surprise? A. I suppose he was.

Q. Mr. Martzen, did you ever see a brook on fire anywhere else? A. No, never anywhere else.

40

*Andrew Greer—Direct.*

Q. And when you first went up to see Mr. Heintz, didn't you say, "Heintz, that was a funny thing when I saw that brook of yours on fire"? A. No, sir, I did not.

Q. From that time on you never said a word to anybody about a brook being on fire? A. No, sir; I didn't.

Q. Not even to counsel in this case when you were coming up to testify? A. No, sir; I didn't.

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ANDREW GREER, sworn in behalf of the plaintiff.

*Direct-examination by Mr. Seymour:*

Q. Where do you live, Mr. Greer? A. 7 Woot- 20  
er Road, Essex Fells.

Q. Do you live in Essex Fells? A. Yes.

Q. Do you know Mr. Heintz? A. Yes, sir.

Q. How long have you lived in that section? A.  
Who? Mr. Heintz?

Q. No. How long have you lived up there? A.  
Just since 1927.

Q. 1927? A. Yes.

Q. Where did you live before you lived in Essex 30  
Fells? A. Roseland.

Q. You lived in Essex Fells since 1927? A.  
Yes.

Q. How long have you lived up in that communi-  
ty, Essex Fells, Roseland, Livingston, West  
Orange, and so forth? A. Oh, about eight years  
altogether, or nine.

Q. And you have known Mr. Heintz for eight  
years? A. Yes.

Q. Did you ever work for him? A. Yes. 40

*Andrew Greer—Direct.*

Q. When was it? A. 1923.

Q. What part of 1923 did you work for him?

A. I think about the end of August.

Q. The end of August? A. Yes, about that time.

10 Q. What did you do? A. Helped him put in some hay.

Q. Did you have anything to do with the horses or cows? A. No, only just to help him in the afternoon.

Q. What? A. Just to help him in the afternoon to unhitch or something like that.

Q. Did you ever lead the horses or cows down to the stream to drink? A. Once.

Q. When was that? A. At noon time.

Q. In August, 1923? A. Yes.

20 Q. What happened when you led them down to drink? A. The horses refused to drink the water.

Q. Did you observe the water? A. I seen the water was muddy, dirty looking.

Q. What do you mean by muddy and dirty looking? A. It looked like a yellow color. I told Mr. Heintz that the water wasn't fit for the horses to drink. He was coming down after me with the other horse.

30 Q. What did he do with the other one? A. He told me to turn the horse around and we would take them back to the well and give them a drink.

Q. Did you do that? A. Yes. I was across the brook and I turned the horse around and brought him over.

Q. During the month that you were there did you see him carry any water for the horses and cattle? A. Yes.

40 Q. How often? A. Well, many times I saw him carrying water when I passed by.

*Andrew Greer—Direct.*

Mr. Frazer: I can't hear you, Mr. Greer.

A. (Continuing) I seen him many a time when I passed by carrying water to the animals.

Q. I am talking about the month of August now for a while. Did you see him carrying water to the animals during that month? A. Yes, that day. 10

Q. Did you see him more than that day? A. Yes.

Q. Did you help him? A. Yes.

Q. Where did he carry the water from? A. The well.

Q. Did he get it anywhere else? A. No, not that day.

Q. Another day did he get it anywhere else? A. From West Orange, Pleasantdale. 20

Q. Did you see him go for it and return with it? A. Well, I didn't see him going, but I went myself for it.

Q. You went yourself and got it? A. Yes, on two occasions.

Q. What is that? A. On two occasions I went myself for it.

Q. In August? A. Not that year. It was in the year previous to that. 30

Q. Just hold yourself to August for awhile, will you? Did you see Mr. Heintz during the month of August when you worked there go for water? A. Yes.

Q. Go for water to some other place than the well? A. No, the well.

Q. Did you see him go to any other place? A. No.

Q. Now, how often did he go to the well during 40

*Andrew Greer—Direct.*

the time that you worked there? A. Well, perhaps he went there—

Q. How often did you see him? A. Morning and evening.

Q. Did you work there at any other time? A. No, not very often. I only worked there just on another occasion.

10

Q. Did you work there at any other time besides August, 1923? A. Yes.

Q. What other times? A. Some years previous to that, 1922, perhaps 1921.

Q. How long did you work in 1921 or 1922? A. Well, just about an hour in the afternoon is all that I could work for him. I was engaged in other places and I only came in the afternoon for to load hay.

20

Q. I didn't get that. A. I only came there in the afternoon to help him with a load of hay or something like that. I wasn't working regular for Mr. Heintz.

Q. For how long a time during 1921 and 1922; a month or two months or what? A. Oh, no. Just one or two or three evenings, that is all, during the season.

Q. Well, now, did you visit Mr. Heintz? A. Yes.

30

Q. At other times? A. Yes.

Q. How often have you visited him in the last six or seven years? A. Oh, about perhaps twice a month, sometimes once a month; other times apt to be two months—at other times.

Q. Did you ever take notice to this stream? A. Yes, I took notice to this stream.

Q. What did you see? A. I seen this oil floating on the water.

40

Q. What part of the stream was this oil floating

*Andrew Greer—Cross.*

on? Do you know where the road is that goes over the brook? A. Yes, sir.

Q. Well, now, from the road to the fence did you observe any oil; that is, Heintz's fence? A. That is where I gave the horse a drink.

Q. How far is it from the road to the fence?  
A. On his southern line? 10

Q. Yes. A. I couldn't say what was the width of his property. It must be over 200 feet I think.

Q. The stream runs in an S curve all that 200 feet, doesn't it? A. I can't estimate the distance, but I know it is over 200 feet, the width of his property.

Q. Begin at the road and go to the fence. How much of the stream did you see oil in? A. I seen it about the center part of it.

Q. What do you mean by the center part of it? 20  
A. Just about center ways between the road and his line.

Q. How about the rest of the brook? A. I didn't travel along the rest of the brook.

Q. That you did not notice then? A. No.

Q. Not at any time? A. No, not at any time.

*Cross-examination by Mr. Frazer:*

Q. Just a little spot of oil you saw in the middle of the brook? A. Just one place that I crossed the brook, directly across. 30

*Direct-examination (continued) by Mr. Seymour:*

Q. I want to ask you some more questions. Mr. Greer, did you ever go up to this pumping station to observe the brook? A. Once.

Q. Who with? A. Mr. Heintz. 40

*Andrew Greer—Cross.*

Q. When was that? A. It was in the evening. I don't remember what day it was on.

Q. Do you know what month it was, or year? A. No, I don't remember. It was about a year or two years. It is no more than that, I think. I just remember at the time.

10 Q. What did you see? A. I seen oil flowing out from the pumping station.

*By the Court:*

Q. Flowing out? A. The oil flowing out from the pumping station.

*By Mr. Seymour:*

Q. Where was it coming from? A. It was coming from the pipe about the very center of the  
20 pumping station.

Q. Can you show us there on that blackboard? A. Yes. I think it is about where the three dots are, somewhere about there (indicating).

Q. Where was it going to? A. Out towards the brook.

Q. What was it flowing through. Tell us about it, will you? A. It seemed—I think it must be a tarred pipe; terra cotta pipe or tarred pipe, whatever you call it, terra cotta like, a six inch or four  
30 inch pipe leading into the brook, the water flowing out. There was a little blue streak on each side of it just where it flowed out.

Q. Where did it go to? A. Right into the brook.

Q. Did you notice any other oil or discoloration around the brook? A. No, I didn't notice any, only just that particular part.

*Cross-examination (continued) by Mr. Frazer:*

40 Q. Do you know whether that was oil or water

*Andrew Greer—Cross.*

that flowed in there? A. To my belief it was oil.

Q. Well, it might have been oil and water, water going through with a little bit of oil that was mixed with it? A. It looked like oil to me, because I often washed a lawn mower with water, in wet weather I would wash a lawn mower with water; in wet weather you will see the water run out.

10

*By the Court:*

Q. With a hose, did you say? A. Yes.

Q. To what did you attach the hose? A. Just the hose for the wet grass with a lawn mower, washing a lawn mower.

Q. Did the water come from the brook? A. No.

The Court: He says he washed the lawn mower with a hose and he saw the oil come out with the water.

20

The Witness: That resembled what left the pumping station.

Mr. Seymour: Your Honor, I think he was simply illustrating how he knew this is oil, because he washed a lawn mower.

The Witness: Yes, that is the reason. It resembled the water some, what I seen at the brook.

30

Q. What is that? A. The oil that left the lawn mower.

Q. Oh, that left the lawn mower? A. Yes.

*By Mr. Frazer:*

Q. Mr. Greer, I understand that on one occasion you led the horse to the water and you couldn't make him drink? A. He wouldn't drink. I didn't want to make him drink. He had his head

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*Leo P. Heintz—Direct.*

in the water and he wouldn't drink. He pulled on the leaves, and he pulled me on the other side of the brook. I was over on the other side of the brook, and he stood up in the mud.

Q. And it was pretty good depth to the water that day? A. It was over six inches.

10 Q. It was yellow and muddy? A. It had a yellow color on the top.

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LEO P. HEINTZ, sworn in his own behalf.

*Direct-examination by Mr. Seymour:*

Q. Mr. Heintz, are you the plaintiff in this case?

A. Yes, sir.

20 Q. Where do you live? A. Eagle Rock Avenue, Pleasantdale, New Jersey.

Q. That is your property that we have been talking about? A. Yes, sir; Township of West Orange.

Q. Is that near the Roseland-Essex Fells boundary line? A. Yes, sir.

Q. How big is your property? A. Why, it consists between seven and eight acres.

30 Q. What buildings are on it? A. There is a house, a barn, two chicken coops, a shed and a milk house.

Q. What business have you been in for the last ten or fifteen years? A. Why, in the last ten years or fifteen years? A. Why, in the last ten years I have been doing nothing only farming.

Q. And before that? A. Prior to that I was in the retail dairy business.

Q. How large would you say your place was? A. Between seven and eight acres.

40

*Leo P. Heintz—Direct.*

Q. That fronts on Eagle Rock Avenue, doesn't it? A. Yes, sir.

Q. How deep is it? How many feet deep? A. Why, east side is about 350, and then it runs down to about 450 on the west side. It doesn't run straight.

*By the Court:*

10

Q. How much frontage on Eagle Rock Avenue? A. Approximately about 835 feet on Eagle Rock Avenue.

Q. And your south line is how long? A. The south line?

Q. Yes. A. Well, that I couldn't exactly say. The north side is on the road.

Q. That you say is 835 feet. Is your south line as long as that or shorter? A. Why, it is a few feet shorter. It may be a difference of about thirty feet. 20

Q. Then you are about 800 feet, aren't you? A. Yes, about 800 feet on the south, yes.

*By Mr. Seymour:*

Q. When you were in the retail dairy business, did you have any cows? A. No, sir.

Q. Horses? A. I had horses.

30

Q. How many? A. Four.

Q. When did you go out of that business? A. I sold out in 1916, April 1, 1916.

Q. And after that you did farming? A. Just done farming; yes, sir.

Q. Did you have any horses and cows since that time? A. Yes, sir.

Q. How many did you have at that time? A. Well, I had two horses and sometimes I had as high as eight head of cattle, cows and heifers, six 40

*Leo P. Heintz—Direct.*

to eight, never less than six.

Q. This stream runs through your property, doesn't it? A. Yes, sir.

10 Q. Describe the course of the stream. How does it run through your property to the road? A. Well, this here is Eagle Rock Avenue, and a neighbor of mine he owns this part here. Right from the bridge, I own the whole bridge. My fence comes on the other side of the bridge.

*By the Court:*

Q. You are only asked to show how the stream runs through your property. A. Oh, the stream.

20 Q. The stream, that is all. A. Oh, the stream. It runs—see, this is the bridge here (indicating). It runs right this way. That is about the way it runs (indicating).

*By Mr. Seymour:*

Q. How wide is that stream as it runs that course? Is it the same width all through that course? A. Through the whole property?

Q. Yes. A. Why, some places it is six feet wide, some places three feet. It varies, you know.

30 Q. How long have you lived on that property? A. It is 36, it will be 36 years in October 12th.

Q. Was that stream always full or does it go dry? Describe its volume. A. Why, it never has went completely dry ever since I have been there. It has been a little low, but never went dry altogether.

Q. Was there any difference in the volume of water before and after the wells were put in the Essex Fells Golf Club. A. Yes, sir; it was.

40 Q. What was the difference? A. Well, before the pumping station was built there, why, we could

*Leo P. Heintz—Direct.*

use the water for cattle and also for drinking purposes, nice clear water, spring water.

Q. I am asking you whether there was any difference in the volume of water, the amount of water. A. Oh, the amount. Pardon me, yes.

Q. What was it? A. Well, the stream was a good deal lower at times. 10

*By the Court:*

Q. Before or after? A. After. After the pumping station had been built.

*By Mr. Seymour:*

Q. During the time that you lived there did you use the stream for the watering of your horses and cattle? A. Yes, sir.

Q. Do you recall when the plant, the pumping station was built there? A. Why, I don't generally. I can't exactly say, but in my estimation it was about 1914 it was built. 20

Q. Up to that time had your horses and cattle watered in this stream? A. Yes, sir.

Q. How was the stream up to that time as to appearance and purity of water? A. Very nice. Very nice.

Q. Any oil on it? 30

The Court: He has told us that it was nice clear spring water.

Q. After that time since the building of the pumping station, was there a change in the condition of the water? A. Yes, sir.

Q. When did you first notice that change? A. I noticed it in 1919.

Q. How long after the plant was built? A. Well, I am not positive about when the plant was 40

*Leo P. Heintz—Direct.*

built. I think in 1914. According to that it would be five years.

Q. Do you know what was used for fuel at that plant after it was first built? A. Why, they used coal first off.

10 Q. Do you know when they changed to oil? A. I don't exactly know, no.

Q. You stated that in 1919 you saw a change in the condition of the stream. A. Yes.

Q. What brought that to your notice? A. Why, the oil on the stream.

Q. You say in 1919 you first noticed a change in the water. A. Yes.

Q. What did you notice? A. I noticed the oil on top of the water.

20 Q. Where did you notice that? A. On my property, the brook.

Q. What brought that to your notice? A. Well, when I took my cattle down there they refused to drink it.

Q. How about your horses? A. Horses wouldn't drink it either.

Q. What did you do about it? A. I watered them out of the well.

30 Q. Did the oily surface or oily condition of the surface continue from then on? A. Yes.

Q. For how long a time? A. Why, it continued up until last year about August.

Q. August of what year? A. 1928.

Q. About eight months ago? A. That would be about—well, 1928; about nine months.

Q. Nine months ago. You say it continued. What do you mean by it continued? A. Well, the oil was on there every day.

40 Q. Did you ever try to trace the source of the oil? A. I did.

*Leo P. Heintz—Direct.*

Q. What did you do? A. I went up the stream as far as the pumping station and saw the oil coming out of this drain.

Q. When was that? A. Why, I went up there on several occasions.

Q. When was the first time that you went there?  
A. 1920.

Q. What did you see? A. I seen the oil coming out of this drain. 10

Q. Where was the drain? A. The drain was coming from the pump house, pumping station.

Q. Could you point it out there? A. Yes, sir; right here (indicating).

Q. Did you see it coming from anywhere else?  
A. Why, it seemed to be a little bit on each side of it, but not so much. Most of it came from this drain. 20

Q. You say that was in 1920? A. Yes, sir.

Q. What did you do about that? A. Well, I complained to the Board of Health of West Orange, and they told me to go to Roseland because the brook that runs through my property belongs to the Borough of Roseland.

Q. Well, did you go to the Borough of Roseland?  
A. I did.

Q. Did you go to the Borough of Essex Fells?  
A. No. 30

Q. Did any of the Essex Fells people come up to see you about it? A. Mr. Waring.

Q. Mr. Waring? A. I believe that is the way it is.

Q. When was that? A. I can't just recall, but it must be about four years ago.

Q. Do you know what position he held with the Essex Fells Borough? A. At that time I believe he was chairman of the water committee. 40

*Leo P. Heintz—Direct.*

Q. What did you and Mr. Waring do? A. He came to the house. We went down and looked over the stream. I pointed out to him where the oil was and where it burned the grass, and he said that he would remedy it, but he had never done anything as far as I know.

10 Q. Did you see any other official from the Borough of Essex Fells? A. Yes.

Q. Who? A. I met the Mayor, Mayor Herr, on the day of the fire when the brook burned.

Q. What fire? Just tell us about the fire. When was that fire? A. The fire was in the month of April.

Q. Of what year? A. 1926.

20 Q. What took fire? Tell us about that. A. Well, the brook that morning was just full of oil, just covered with oil, black, and my neighbor came over and he says, "Look at the brook." He says, "It is terrible." So we went upstream, all the way up, and found that it was coming from the pump house, and we went in the pump house. We met Mr. Thorward there.

Q. Was he working there? A. He was working there at the time.

30 Q. What was he doing? A. He was engineer, I believe.

Q. What took place? A. He said that they had some kind of accident there or something. The pumps broke I believe. And then I went home and I don't think I was in the house over twenty minutes when the brook was on fire. How it got on fire I don't know.

40 Q. What part of the brook was on fire? A. Why, it started about twenty feet inside of my fence.

*Leo P. Heintz—Direct.*

Q. Now, what fence are you referring to? A.  
The line fence between my property—

*By the Court:*

Q. South line or north line? A. The west.

Q. Your west line? A. Yes.

*By Mr. Seymour:*

10

Q. The west line fence between you and your  
neighbor on the west? A. On the west, yes.

Q. Twenty feet from that fence, how far from  
the road? A. About 250 feet.

Q. What was burning besides the brook? A.  
Why, the oil on the water. The whole brook was  
on fire.

Q. From a point twenty feet in from the road,  
how far down? A. Down from the road?

20

Q. Yes. A. About 250 feet.

Q. What burned? Did anything burn besides  
the oil? A. Why, it burned the fence, burned the  
wire and everything.

Q. Where was the fence that was burned? A.  
The fence was the dividing line between my proper-  
ty and Mr. Lehr.

Q. Whose fence was it? A. My fence.

Q. How much of the fence did it burn? A. It  
burned the fence around this way, and then I had  
a fence running up to my barn. It burned, well,  
I should judge it burned about 300 feet of fence.

30

Q. Did you have to rebuild the fence? A. Yes,  
sir.

Q. Who did the work? A. I done it myself, and  
I had a man help me.

Q. How long did it take you to do it? A. I  
think that was about, it took us about a week.

40

*Leo P. Heintz—Direct.*

Q. How much did you pay the man? A. Paid him six dollars a day.

Q. For how many days? A. Six days.

Q. Did you buy the material? A. Yes, sir.

Q. How much did it cost you? A. Material cost me about \$30.

10 Q. And you worked the week yourself, did you? A. Yes, sir.

Q. Now, you say you saw Mayor Herr that day? A. Mr. Rudolph, who was on the Board of Health of Roseland, introduced me to Mr. Herr.

Q. The very day of the fire? A. The day of the fire, yes.

20 Q. Did you have any talk with the Mayor about the oil? A. Well, Mr. Rudolph introduced me to him. We got in a conversation. There were so many there that he did not do much about it.

Q. You see I asked you a moment ago if you saw any other official about this oil on the brook and you said you saw the Mayor. A. I did.

Q. This was the occasion, wasn't it? A. Yes, sir.

Q. Did you discuss with him the oil on the brook and the remedying of conditions? A. Yes, sir.

30 Q. What did you say to him and what did he say to you? A. Well, Mr. Rudolph introduced me, and I told him that the oil was on the brook and I thought it was a shame that we couldn't use it, the damage to the property, and then there was somebody came in and didn't say no more about it, didn't get a chance to talk no more about it.

Q. Did you see any other official after that? A. No, sir.

40 Q. Now, Mr. Heintz, what is the condition of the brook today? A. Why, the brook is a good deal better today.

*Leo P. Heintz—Direct.*

Q. Do you recall whether they made any change in the machinery of the pumping station? A. I believe they did.

Q. Do you know when that was? A. I think it was last September.

Q. What change was made? A. Change from oil to electric.

Q. Since that change what is the condition of the brook? A. Well, there was some oil on it for a short time afterwards, but I don't see any now at the present time.

Q. And the horses and cattle use it now? A. They drink it now; yes, sir.

Adjourned until tomorrow morning, Wednesday, May 22, 1929, at 9:30 o'clock a. m.

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20

Wednesday, May 22, 1929.

Met pursuant to adjournment.

Appearances, counsel as before stated.

LEO P. HEINTZ resumes the stand.

*Direct-examination (continued) by Mr. Seymour:*

Q. Mr. Heintz, how deep was that well on your property? A. Seventy feet.

Q. How did you get the water out of it? A. Why, two buckets on it, and chain, one goes down, and the other one comes up.

Q. Pulled it up by hand? A. Yes, sir.

Q. How high was the water in the well ordinarily? A. Well, I never measured it, but I should judge about seven feet, six or seven feet of water in the well.

Q. Six or seven feet? A. Yes.

30

40

*Leo P. Heintz—Direct.*

Q. So that you had to haul the difference between 70 feet and 6 or 7 feet to get to the top? A. No.

Q. You had to haul about 60 feet to get the water out of the well? A. Yes.

10 Q. And then where did you have to carry it to feed to your cattle and horses? A. Well, we carried it from the well to the barn.

Q. How far away was that? A. A distance of about a hundred feet.

Q. How many horses did you have all this time on the average; how many horses? A. Two.

Q. Six to eight cows? A. Yes.

20 Q. How much water would a horse drink at a time ordinarily? A. Well, a horse will drink about between ten—let us see—between ten and twelve gallons a day.

Q. How about a cow? A. A cow will drink from ten to fifteen gallons a day.

Q. How often do you have to give them water? A. I watered the horses three times a day and the cows twice a day.

Q. Did anybody assist you in doing this? A. Yes, sir.

30 Q. Who? A. Mrs. Heintz, and I had a boy helping me.

Q. Did you have any other employes besides Mr. Martzen and Greer? A. I did.

Q. Did you have any the year around or just in the summer time? A. Well, I had them for about six months during the season.

Q. What were they? Farm laborers? A. Worked by the day.

40 Q. What is the price? What are the wages of farm laborers over this period? A. Why, I paid

*Leo P. Heintz—Direct.*

them. I paid one of them fifty cents an hour with dinner, and the other one I gave sixty cents an hour with no dinner.

Q. With no dinner? A. No dinner.

Q. So that the wages is about sixty cents an hour? A. Yes.

Q. How many hours per day did you work in carrying this water to the cattle and horses? A. 10  
Well, I figured on about three hours a day.

Q. Over what period of years did you have to feed your cattle and horses this way on account of the pollution of the brook? A. Why, from 1919.

Q. To what time? A. To 1928.

Q. What part of 1928? Do you remember? A. August.

Q. It is about nine years. What happened in August, 1928? I thought you told us yesterday that they changed to electricity. A Yes. 20

Q. Over that period of nine years tell us what you noticed as to the condition of the water in the brook? A. Well, I never see it without the oil on it. There was always oil on it, on the brook, and every time we had a rain the brook overflowed, went all over this ground and saturated the whole field I used for pasture and hay. 30

Q. Did it destroy the hay and the grass? A. The cattle wouldn't eat it after this oil got on to it, couldn't eat it.

Q. Was there any time during the nine years when the horses and cattle would drink out of the brook? A. During the nine years? I tried them, but they wouldn't drink.

*Leo P. Heintz—Cross.**Cross-examination by Mr. Frazer:*

Q. Mr. Heintz, when was that water plant first established up there? Was it there when you came? A. No, sir.

Q. Was it established after you came? A. Yes, sir.

10 Q. What year? A. I don't know.

Q. Before 1919, wasn't it? A. Yes, sir.

Q. What was it that made the oil appear in 1919? A. What made the oil appear?

Q. You said it was in 1919 that you noticed oil. A. Yes.

Q. What happened in the previous years? A. Why there was no oil.

20 Q. No oil? The same plant was working there, was it? A. The same plant.

Q. When was your first complaint about the oil? A. First complaint? It must be about five years, six years ago.

Q. Four years ago you said you spoke to Mr. Waring; that is right? A. Yes.

Q. In your direct examination you said four years ago, is that right? A. Well, it was about four years. I didn't put the date down.

30 Q. Was that immediately after a fire in the house up there, in the pump house? A. No, sir, not to my knowledge.

Q. What was the circumstance that particularly directed your attention to the oil and made you think you ought to speak to Mr. Waring? A. Because I couldn't use the water.

Q. Well, that had been true for five years, six years before that, hadn't it? A. The oil?

40 Q. Yes. From 1919 you had been unable to use the water? A. Yes.

*Leo P. Heintz—Cross.*

Q. What was it that made you suddenly in 1925 decide to speak to Mr. Waring about it? A. Because, well, I spoke to the Board of Health, and they said they would see that it was cleared up, but it wasn't done.

Q. When did you speak to the Board of Health? A. I spoke to the Board of Health in West Orange and also the Roseland Board of Health. 10

Q. When was that? A. That was in 1919 I spoke to them.

Q. 1919. They did nothing about it, so you waited six years, is that it? A. No; I complained in between that too.

Q. You complained to whom? A. To West Orange.

Q. Did you consider this condition in the brook a menace to your health? A. To my health? Yes, 20  
sir.

Q. You suffered from it? A. Yes.

Q. Physically, you yourself? A. From the water, I didn't drink the water.

Q. How much did you say you paid the men? A. To one man fifty cents an hour and his dinner, and the other man I paid sixty cents an hour.

Q. Which man did you pay fifty cents an hour? A. A party by the name of Conklin. 30

Q. He is not here? A. No.

Q. Who was it you paid sixty cents an hour to? A. That was a foreigner, a Hungarian.

*By the Court:*

Q. What is his name? A. What is his name?

Q. Oh, he was a foreigner? A. Yes, a foreigner.

*Leo P. Heintz—Cross.**By Mr. Frazer:*

Q. How much did you pay Martzen? A. \$3 a day.

Q. Why didn't you say that? A. Sir?

Q. Why didn't you say that when Mr. Seymour spoke to you about what you were paying men?  
 10 A. Well, he didn't say anything about Mr. Martzen.

Q. He didn't say anything about anybody. He asked you how much you paid your labor. A. Yes.

Q. You said you paid one of them fifty cents and dinner and another one sixty cents without dinner. Why didn't you say what you paid Martzen? A. I don't know.

Q. Well, \$3 isn't as much as fifty cents an hour, is it? A. No, sir.  
 20

Q. Is that the reason you didn't say it? A. No.

Q. Trying to make the damages bigger? A. No, sir.

Q. When did you see this brook afire? A. When did I see it on fire?

Q. Yes. When did you first notice the brook on fire? A. Why, it was on Sunday.

Q. What time? A. Why, around near twelve  
 30 o'clock.

Q. In the daytime? A. Yes, sir.

Q. Was Mr. Martzen there then? A. No, sir.

Q. Did you see him that day? A. No, sir.

Q. How did you know he had seen the fire in the brook? A. I didn't know whether he had seen it or not.

Q. You did not know? A. No, sir.

Q. How did Mr. Seymour, your counsel, learn of it?  
 40 A. How did he learn of it?

*Leo P. Heintz—Cross.*

Q. Yes. He asked Mr. Martzen about it, didn't he?

Mr. Seymour: If the Court please, I will take the stand and tell that story if Mr. Frazer wishes me to. I don't know whether Mr. Heintz knows how I learned about it or not.

The Court: Well, I suppose he can tell if he does not know. 10

Mr. Seymour: He may know.

Q. Do you know? A. Sir?

Q. You don't know how Mr. Seymour learned about it? A. How he learned about it?

Q. Learned that Mr. Martzen was there at the fire. A. Oh, I don't know anything about it.

Q. You don't know anything about that? A. 20  
No, sir.

Q. Who owns the property to the west of you?  
A. Lehr.

Q. Is Mrs. Lehr related to you? A. Yes, sir.

Q. What is the relationship? A. Sister.

Q. Was there any brush being burned on the Lehr farm on that Sunday? A. I don't know anything about it.

Q. You weren't there yourself? A. Where?

Q. On the Lehr farm when they were about to burn some brush. A. No, sir. 30

Q. You did know that there had been a break in the feed pipe up at the oil pump, didn't you? A. Yes.

Q. You knew that was the reason there was oil down on the water that day? A. Yes.

Q. You knew there was more oil than you had ever seen before? A. Well, there wasn't more, no. It was pretty bad on several occasions. 40

Q. You mean to say that ordinarily you could

*Leo P. Heintz—Cross.*

light oil on the top of that water? A. Well, you could in some cases a good many times.

Q. How many times, now? A. Well, on several occasions.

Q. Come along. Tell us how many. A. Several occasions that you could. There was plenty of oil there, plenty of it, saturated with it.

10 Q. On the top of the water? A. Yes, sir; I seen it there.

Q. Now, tell us when? A. In some places where it accumulated.

Q. Tell us when you saw it that way. A. During this period.

Q. Well, at what time? A. At what time?

Q. Yes. A. I can't exactly tell the time. During this period between 1919 and 1928. I can't

20 exactly tell the time.

Q. Did Mrs. Leahr and Mr. Leahr see this fire? A. I don't know.

Q. You never spoke to them about it either? A. To the Leahrs?

Q. Yes, the Leahrs. A. Well, they spoke to me about it.

Q. They spoke to you about it. What did they say about it? A. After it burned.

30 Q. What did they say about it? A. Why, Mr. Leahr said something about burning his trees up or something; I don't know.

Q. Burning his what? A. Burning his trees or something.

Q. Did he say he had had a brush fire upon his place? A. No, sir.

Q. He didn't say that? Are you sure of that? A. I am sure.

40 Q. Did he say he was present when the fire started?

*Leo P. Heintz—Cross.*

Objected to as not cross-examination.

Objection sustained.

Q. Mr. Heintz, as a matter of fact, before that fire started you were talking to the Leahrs, weren't you? A. The young man came over and told me.

Q. Told you what? A. That there was plenty of oil on the brook. 10

Q. What young man was that? A. Why, Arnold Leahr.

Q. Arnold Leahr, that is the son? A. Yes.

Q. He came over and said there was a lot of oil on the water? A. He generally comes over every Sunday, talks to me.

Q. There was no fire at that time? A. I didn't see no fire, no. 20

Q. You went out and looked at the oil? A. He says—

The Court: No, no. Answer this question, not some other.

Q. You went out with him and looked at the oil on the water? A. Yes.

Q. And you entered into a discussion with him whether it would ignite or not, didn't you? A. No, sir. 30

Q. You did not? A. No, sir; never said about that.

Q. What did you say when you went out there and looked at that oil?

Objected to.

Objection sustained.

Defendant's counsel prays an exception to this ruling of the Court.

Exception noted as ground of appeal. 40

*Leo P. Heintz—Cross.*

Q. He did come to you and tell you there was oil on the water and you went out with him and looked at the oil on the water, is that true? A. We went right up the stream.

The Court: No. Is that true?

10 Q. Is that true? A. What is that?

Q. That the young man came into your house and told you there was a lot of oil on the water? A. Yes.

Q. And in his company you went out and looked at the oil? A. Yes, sir.

Q. How long did you stay out there? A. About a half an hour.

Q. Was there any fire while you were there? A. No, sir.

20 Q. What time of day was that? A. About ten o'clock in the morning.

Q. What did you do then? A. Why, he and I walked up to the pump house.

Q. What did you find there? A. Found there the oil was all on the floor and everything, and Mr. Thorward was there, and I spoke to him and he says, "There is an awful mess here, isn't there?" That is all there was said.

30 Q. And after that was said, what did you do? A. I went on home.

Q. You went on home? A. Yes, sir.

Q. Mr. Thorward was working there at the pump house then? A. I am not sure, but he was there. I do not know whether he was working or not, but he was inside the pump house.

Q. Was the oil still coming out at that time from the pump house, or had it stopped coming out? A. No, sir; it was coming out yet.

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*Leo P. Heintz—Cross.*

Q. And then you went back with young Lehr, is that right? A. Yes, sir.

Q. And all that time you didn't notice there was any brush fire anywhere? A. No, sir.

Q. Mr. Heintz, as a matter of fact, didn't you have a discussion with the Lehrs as to whether that would ignite and didn't you say, "It won't, and I will show you," and didn't you take a brand which you lit at the brush fire and throw it into the water? A. No, sir; no, sir. 10

Q. You are positive of that? A. I am. I didn't go near the brook. I went right to the pump house; I went home. Positive of it.

Q. So you were completely surprised when you learned that the water was afire? A. I was.

Q. How many posts did you put up? A. How many posts? 20

Q. Yes. A. I didn't count them all. I couldn't tell you exactly what there was.

Q. How long a fence was it that was burned down? A. Well, it was not—I do not know how long—maybe a hundred feet; more.

Q. I understood you to say yesterday that it was a wire fence, is that right? A. Barbed wire fence; yes, sir.

Q. The wire didn't burn, did it? A. Yes. 30

Q. The wire burned? A. Yes, sir, burned right up to crisp, too. Enough to burn anything, to see that fire going up about four hundred feet in the air.

Q. The fire went up four hundred feet in the air? A. Yes, sir; pretty near scared me and my family and children and all.

Q. Did you have another fire there on the water besides that one? A. No, sir. 40

*Leo P. Heintz—Cross.*

Q. How many of those posts that were there that day are still there? A. I don't know.

The Court: You mean posts that were there before the fire?

Mr. Frazer: Yes.

10 Q. How many of the posts that were there before the fire are still there? A. How many was there?

Q. Yes. A. I guess there is two there.

Q. I am asking you. Don't you know? A. Well, I should say two. I said there is two there.

Q. They didn't all burn, did they? A. Didn't all? No, they burned where the fire was.

Q. Those posts are not painted, are they? A. No, sir.

20 Q. They are just raw wood posts? A. Yes.

Q. And those posts that were there during the fire are a little charred, are they? A. They are.

Q. So that you can tell what posts were there during the fire by counting the number of posts that have charring on, is that right? A. No, sir.

Q. Did you char some of the other posts afterwards? A. I removed some of them.

30 Q. You removed some of them? How many of them did you remove? A. I don't know just how many. This fence runs straight this way, and then up, runs an "L" shape.

Q. The fence runs in an "L" shape? A. Yes.

Q. If we should go up today and look at the posts could we tell by the char marks what posts were there before the fire and what posts have been replaced after the fire? A. I don't think you could.

40 Q. You don't think so? Why not? A. Because the posts is there and they all look alike.

*Leo P. Heintz—Cross.*

Q. Two of them are charred, you said. A. Well, that is on the one corner and on the long side.

Q. Suppose I should find nine posts up there charred? A. Well, you can find them, I—

Q. Would that indicate that they were there before the fire? A. I don't know anything about that.

Q. Has there been anything to char the posts since the fire? A. I don't know.

Q. Well, you live up there, don't you, Mr. Heintz? A. Yes.

Q. Why don't you know what happens on your own farm? A. Well, I don't know if that happened or not.

Q. Now, has there been a fire, or has there not been a fire there on your farm since this fire we are speaking about? A. Not as I know of.

Q. Has there been anything that could char these posts except this fire? A. I don't know.

Q. You don't know whether there has been anything to char the posts since this fire? A. No, sir.

Q. You don't? A. I don't know.

*By the Court:*

Q. These posts—were they spaced about as wire fence posts are usually spaced, at 16 feet? A. No, they are closer than that.

Q. How close are they? A. Why, I should think about eight feet, some six feet; they are not even.

Q. An average of about eight feet? A. Some of them are, and I guess some of them six feet; average about seven feet.

Q. Well, if they are six feet apart that would be 16 posts for a hundred feet, wouldn't it, seventeen posts for a hundred feet? You said there

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*Leo P. Heintz—Cross.*

was about a hundred feet of fence destroyed. That would be, if they are six feet apart, that would be 16 posts, 17 posts, counting the two end ones, wouldn't it? A. Yes.

10 Q. Do you think it takes six days to put in 17 posts and string wire on them? A. Well, you have to go and get the posts, cut them in the woods, split them, cart them home.

Q. That would be three posts a day to split and set and string the wires. Do you think that is about right? Three posts a day to cut and set them and string the wire on them? A. You have to go and get the wire.

Q. I say, do you think that is about right for all that, three posts a day? A. Three posts a day?

Q. Yes, three posts a day. A. For one man.

20 Q. That is what it would amount to, three posts a day. I say, do you think that is about right? A. Well, I guess that is about right.

*By Mr. Frazer:*

Q. There are only 12 posts there altogether, aren't there, Mr. Heintz? A. Twelve posts where?

Q. On that fence. A. No, sir.

30 Q. The part that was affected by the fire, there are only 12 posts in that whole section, aren't there? A. On the one side?

Q. The part that is affected by the fire. A. Well, it was all affected. I tell you that is an "L" shape, the fence runs along here, and then it runs up to the barn. The whole thing was affected.

40 Q. Twelve posts, aren't there, in that section? A. There was more than that. I had to repair the whole fence because after the corner broke down, why, the whole fence went to pieces. I had to pull all that wire off.

*Leo P. Heintz—Cross.*

Q. Mr. Heintz, why didn't you bring in any of the Leahrs down here to tell about this fire? A. Why didn't I?

Q. Yes. A. I don't know.

Q. They are relatives of yours and saw the fire, didn't they? A. Saw the fire?

Q. Yes. Saw the fire. A. I don't know whether they did. I wasn't over to their place. 10

Mr. Seymour: I object to that line of cross examination, your Honor.

The Court: The answers may remain to the questions that are already in.

Q. How much water is there in that brook in dry weather? A. In dry weather?

Q. Yes. A. According to how dry it is. I never seen less than three—well, the brook varies. You mean on the level or in the hollows? The brook isn't level, you know. 20

Q. Well, wherever you want to pick out. describe what the brook is like. A. On the level there is from three to six inches. Some places where it goes down deeper there is twelve inches, fourteen inches of water.

Q. Did you ever see the brook dry? A. No, sir.

Q. You never did? A. Not completely. 30

*By the Court:*

Q. What do you mean by that, that the brook was always running, or that there was water in these hollows? Which do you mean? A. Well, when the brook got low, you know, these hollows is always full, and then there is a stream always continuing.

Q. Always a flow in the brook? A. Always a flow, yes. 40

*Leo P. Heintz—Redirect.**By Mr. Frazer:*

Q. What is the lowest flow you ever saw? A. The lowest? Well, one year there in 1923, the dry season, between September and November, why, there wasn't in the brook that time, but otherwise there was always water there.

10 Q. The year 1923, the dry season was during the summer and we began to get the rains in the Fall, didn't we? A. In the Fall?

*(A brief recess is taken.)*

Q. Are there any other times that you ever saw it dry or nearly dry? A. No, sir.

Q. What about the Summer of 1928? Was it ever dry then, or in the Fall? A. No, sir.

20 Q. Mr. Heintz, did they oil Eagle Rock Avenue, the road, put oil on the road? A. Put oil on the road?

Q. Yes. A. I don't remember.

Q. You don't remember? A. No.

Q. You have driven up and down that road right along, haven't you, for years? A. Yes, sir.

Q. Don't you remember of an occasion when there was a large amount of oil put on there? A. No, sir.

30 Q. Do you know whether or not there has been any oil on the roads that drained into that brook back of the golf links and in that section? A. I don't know.

*Redirect-examination by Mr. Seymour:*

Q. Mr. Heintz, how many hours a day did these laborers work? A. How many hours?

Q. Yes. A. Worked eight hours.

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*Leo P. Heintz—Redirect.*

Q. Was there any reason why you paid Martzen less than the other one? A. Any reason?

Objected to as immaterial.

The Court: I am just wondering if that would make any difference, unless there was some other consideration, if that is what you mean. 10

Mr. Seymour: I did mean that.

The Court: Very well. Then he may answer that, of course.

Q. Was there anything that Mr. Martzen received in addition to his wages? A. Why, yes. I gave him vegetables, and he had his dinner and supper, and I used to help him out once in a while.

Q. Help him out in what way? A. On his property. 20

Q. Was he a neighbor at that time? A. No.

*By Mr. Frazer:*

Q. You mean you were generous to Mr. Martzen, is that the idea, besides his regular wages? A. Yes.

*By the Court:*

Q. Mr. Heintz, the field through which this brook ran, was it meadow where the cows and horses were pastured, or was it a field that you tilled? A. Part of it was where I tilled and part of it was pasture. See, where the brook ran, there is one place that was fenced off where there was hay and where I plowed it, and the other was pasture in the back of it. 30

Q. You can't till and pasture the same field at the same time. A. No, no, but there was a line fence in between the two fields.

Q. Now, how much of the land was the pasture 40

*Leo P. Heintz—Redirect.*

field? A. About two acres, two and a half.

Q. And that was fenced off from the rest of it?

A. That was fenced off, yes.

Q. Now, during the winter time, the seasons when the cows and horses were kept in the barn, how did you water them then? A. You mean before the oil got on.

10 Q. Yes, before the oil got on. A. Well, I used to cut a hole in the ice and they went down there and drank.

Q. You mean that all through the winter you drove the cows and horses to the brook and watered them? A. Yes, sir; spring water, you know, good water, fine water.

Q. What is the source of that water, do you know? A. Spring water.

20 Q. Do you know where the springs are? A. Yes, sir.

Q. Where are they? A. Well, they are about I should judge—where the brook starts, you mean?

Q. Yes, that is what I mean. A. That is about—well, it goes about a mile and a half beyond my place, and then there is springs all the way down.

Q. To the north of your place? A. Yes, to the north of my place. This property where the pump house stands, there were several springs in there.

30 Q. Now, you spoke about the quantity of water which was consumed by the horses and cows. I suppose there is a big difference in the time of the year, isn't there, as to the quantity of water consumed? A. Well, I don't know. With some it varies. Cattle you know, some of them take more than others.

Q. And they take more at certain times of the year than others, don't they? A. Some of them

40

*Leo P. Heintz—Recross.*

might, but I have got five or ten that will drink more than others; some drink less.

Q. Isn't there a difference in all of them between the summer time and the winter time? A. In the drinking?

Q. Yes, in the quantity that they drink. A. Well, not much. 10

Q. So you think you have given us a fair average of what they drink? A. Yes.

Q. Quantity per day, and the length of time it takes to provide it for them. A. Yes.

Q. You didn't provide any place near your well for a tub, or a pipe to the barn, or anything of that kind? A. No, sir.

Q. Although this continued for several years. A. Yes. 20

*Recross-examination by Mr. Frazer:*

Q. Mr. Heintz, by the way, that stream originates in what they call Buffalo Swamp, doesn't it? A. Buffalo Swamp?

Q. Yes. A. No, sir.

Q. Up above isn't there a place they call Buffalo Swamp that this stream comes out of? A. Buffalo Swamp is to the west of that. This stream starts very near towards Verona, heading this way. 30

Q. That is another swamp, is it? A. That is another swamp altogether.

Q. The Mosquito Commission has been up there digging trenches, hasn't it, to relieve the mosquito situation?

Objected to.

Objection sustained. 40

*Ellen Heintz—Direct.*

ELLEN HEINTZ, sworn in behalf of the plaintiff.

*Direct-examination by Mr. Seymour:*

Q. Mrs. Heintz, are you the wife of Leo P. Heintz? A. Yes, sir; I am.

10 Q. And you have lived with him up in this place on Eagle Rock Avenue for the past 25 or 30 years? A. No, not as long as that.

Q. For how long? A. Since 1914.

Q. Have you noticed this brook running through your property? A. Yes, sir; I did.

20 Q. How was it when you first went there? A. The water was nice. I used to use it for washing and I took my wash down in a tub and rinsed it there because the water was clear and soft. It was as nice as you want the water to be.

Q. For how long a time did it remain in that condition after you moved there? A. Well, about for five or so years.

Q. Then what did you notice about it? A. Why, I couldn't use it. The clothes were that greasy, the oil and all, black, kind of black.

Q. Did you use it? A. No, I couldn't use it.

30 Q. You say the clothes were black? A. I went down and after that I had to take it up to the house and rinsed them all over again.

Q. What was on the clothes? A. The oil on the water.

Q. Did you see any oil on the water? A. Always.

Q. From that time on did you see oil on the water? A. I certainly did.

Q. How often? A. Steady.

40 Q. For how long a period of time? A. Why, from then until 1928.

*Ellen Heintz—Direct.*

Q. Then what happened? A. Of course it kind of slacked up then, the last year.

Q. Before you noticed the oil on that water, can you tell us whether your horses and cattle would drink the water out of the brook? A. Before the oil they certainly did, because I took them down myself.

Q. And after that, after you first noticed the oil? A. Why, they pulled me down to the brook when I took them home at night. They pulled me down the brook and the chain went through my hands. They were thirsty, they wanted to drink and they couldn't drink it; they wouldn't drink it; it was so oily. Then they ran through and I couldn't hold them. I begged my husband to stay home and help me. 10

Q. How often did you notice the horses and cattle refusing the water? A. All the time. We took them down several times, and if I didn't take them down they ran away from me. They wanted the water, they were so thirsty. They wanted the water. 20

Q. Yet they wouldn't drink it? A. No, they wouldn't drink it.

Q. How were they fed with water then? A. How were they what? 30

Q. How were they fed with water if they wouldn't drink the brook? A. Why, I had to pull it out of the well.

Q. Your husband did? A. At times, yes, when he was home. When he was out working, he had to do day's work, well, I had to do it.

Q. For over how long a time did that run? A. Well, about—well, from eight to ten years.

Q. Where did the water come from that was fed to the cattle? A. It came out of our well. 40

*Ellen Heintz—Direct.*

Q. Where was it taken to to give it to them? A. Into the stable.

Q. That is how many feet away about? A. Well, I am not good on judging length, but about a hundred feet, I think.

Q. Was the water in a trough near the stable?

10 A. No, I cart it by the pail.

Q. Oh, you cart it by the pail? A. Yes.

Q. Did your husband ever have a man named Martzen in his employ? A. Yes.

Q. Any other employes? A. Yes, sir.

Q. Do you know whether Martzen received anything from your husband besides the money for his work there? A. Why, he had eggs. I think he had several times a couple of chickens. I think twice he had it; and he had vegetables. He had  
20 rhubarb. He had practically every time he came up, every time we gave him something home.

Q. Do you remember the fire? A. I do.

Q. Tell us about that. A. Well, the first I know of the fire my little girl—no, I know in the morning the children were down the brook and came and says, "Mama," she says, "the brook is full of oil, full of oil." I says, "How is that? Worse than it was before?" And they said, "Yes. It is  
30 all oil." And it wasn't long afterwards, that was around I think, I imagine ten o'clock, and when they came a little later on it was about around twelve o'clock. My husband was upstairs reading the paper, and my little girl came rushing in. I was cooking the dinner. And she said, "Mama", she said, "the brook is on fire." I said, "Don't fool me," I said to her, because often the children come in to fool me. I said, "Don't fool me. I  
40 have too much to do to be fooled." My little girl pulled me out and I was kind of mad. So I went

*Ellen Heintz—Direct.*

out. Well, in back of the house then I heard that s-s-s-s, and I said, "My God, I think the world is coming to an end." So then I ran in. I didn't even look at anything. I came rushing in and called my husband down. I said, "Come down, come down. The brook is on fire." He came out and he seen the whole thing. He says, "I don't know what to do." 10

Q. How much of a blaze was it? A. Flame?

Q. Yes. A. Why, I thought first it was a house on fire. Why, it was about I think four hundred feet high. Why, it was higher than the house. I thought the whole neighborhood, the house back of the brook on the other side, the whole thing was on fire. It wasn't like a little smoke. It was regular flames. When there is a little oil on the brook, it is only a little oil, it only smokes, but this was regular flames and black smoke. People was coming up from Newark, seeing the smoke in Newark. 20

Q. Can you say how often there was oil on the water from the time you first noticed it? A. All the time.

Q. Did you see it every day? A. All the time. Couldn't use the water at all.

*Cross-examination by Mr. Frazer:* 30

Q. Mrs. Heintz, have you any realization how high 400 feet is? A. Why, yes.

Q. If we take an ordinary floor of a building it would be ten feet? A. Yes.

Q. That would be a 40-story building. A. Well, I couldn't really figure by that so much.

Q. Have you ever seen a 40-story building in New York for instance? There are some 40-story 40

*Ellen Heintz—Cross.*

buildings in New York, aren't there? A. I don't go up to New York.

Q. Have you seen any 16-story buildings, like the Firemen's building here? A. I don't know even where the Firemen's building is here.

10 Q. Do you know where the telephone building is here? A. No.

Q. You never saw a tall building? A. Oh, yes, I saw a tall building.

Q. Do you know this fire went up as high as that tall building, you say? A. Which tall building?

Q. The one that you said you have seen?

Mr. Seymour: I think counsel ought to be a little bit easier.

A. I know it went above the house.

20 Mr. Seymour: We rest, if the Court please, except that I would like to call upon the defendant to produce a letter with relation to John and Anna Lehr, addressed by me to the Borough of Essex Fells, January 5, 1928.

Mr. Frazer: Have you given notice to do that?

30 Mr. Seymour: No, but since the matter of Lehr came into this thing and it might have some influence or weight with the jury, I would like the original of this letter to be produced.

Mr. Frazer: I very much regret it, but I have not the letter in court. I have no knowledge of such a demand made.

40 The Court: I have here a map of Essex County. I am wondering if Mr. Heintz can identify about where his place is located.

*Ellen Heintz—Cross.*

Can you show us about where it is? There is Pleasantdale, you see, and there is Eagle Rock reservation. There is Eagle Rock Avenue. There is Prospect Avenue, and there is Pleasant Valley. Now, can you mark on there about where it is?

Mr. Heintz: Where is Eagle Rock Avenue? 10

The Court: Right here. From there up?

Mr. Seymour: It is near the boundary line of Livingston.

The Court: Maybe you can point it out.

Mr. Seymour: I think so.

The Court: Here is Eagle Rock Avenue right there. He said he lived in Pleasantdale. How far is that place from Pleasantdale?

Mr. Seymour: You see here is Essex Fells 20  
and there is Roseland and there is the boundary line.

The Court: Are you willing the jury should have this?

Mr. Frazer: Surely.

The Court: Then this can be marked as your exhibit?

Mr. Seymour: All right, sir.

(The paper referred to is received in evidence and marked Exhibit P-1.) 30

A Juror: Your Honor, I am not quite clear as to how that fence runs in connection with the creek? Is there some way we could get that information?

The Court: Suppose you come back to the stand. We will ask you two or three questions.

*Leo P. Heintz—Recalled—Direct.*

LEO P. HEINTZ, recalled.

*By the Court:*

Q. Did this fence run parallel with the brook or did it cross the brook? A. No, it runs parallel with the brook.

10 Q. Right along the brook? A. Yes.

Q. How close to the brook? A. Right on the edge.

Q. Do you mean by that within a foot or two feet or ten feet? A. Well, no, about I should say it is—it is not a foot.

Q. About a foot from the stream of the brook, the thread of the brook? A. Yes.

20 Q. Is that the fence that divides that tillable land from your pasture land? A. No, that is the dividing line between my place and the next property.

Q. And that is to the north, did you say? A. Yes.

Q. To the west? A. To the west of me.

Q. The fence is on the west side of the brook? A. Yes.

30 Q. Just show on there now where it is. A. See, this is the road, Eagle Rock Avenue. It is pretty straight down from the bridge down about a hundred feet. It is pretty straight, and then it runs into the property, but this fence is right along the

Q. Now, you are indicating the east side of the brook. That is the east side of the brook. A. Well, the fence is on the east side of the brook.

40 Q. Oh, it is? A. Yes, and then this other fence runs up to my barn up this way, see? The barn is up here. This is the dividing line between the two properties (indicating).

*Leo P. Heintz—Recalled—Direct.*

Q. I thought you said your property was east of the brook. A. Well, the brook runs right through. It goes in there a little ways, and then comes out again, winds.

Mr. Frazer: I had some idea of the fence before the explanation, but I haven't any now. 10

Q. I thought you told us that your property was east of the brook. A. It is east of the brook, yes.

Q. Then the brook does not run through your property. A. Yes, it does.

Q. Not at Eagle Rock Avenue. A. Yes, sir. The fence crosses the brook.

The Court: I guess I will give it up. That is all. 20

*By Mr. Seymour:*

Q. Mr. Heintz, just a moment. When this brook strikes your property as it goes under Eagle Rock Avenue, does it take a straight course for awhile? A. Straight course for awhile.

Q. For how long? A. Well, I should judge about maybe 15 or 20 feet.

Q. And then which way does it flow? A. Then it runs into Lehr's property. 30

Q. That is west? A. That is west. About maybe 30 feet, and then it comes in back to my property again.

Q. For how many feet? A. It runs right through my property.

*By the Court:*

Q. Is Lehr to the west of you or to the east of you? A. To the west. 40

*Leo P. Heintz—Recalled—Direct.*

Q. Is the fence on the west or the east side of the brook? A. It is on the east side of the brook.

Q. On the east side of the brook? A. Yes.

Q. Doesn't the fence at any place cross the brook? A. Yes, it crosses, and then it is on the west side of the brook when you get near the bridge.

10

*By Mr. Seymour:*

Q. The fence is in a straight line? A. Yes.

Q. And it crosses the brook and the brook turns to the east? A. Yes.

Q. So that it is on the east side at one part of the brook and on the west side where the turn is, is that right? A. Yes.

Q. Where the brook enters under Eagle Rock Avenue, is that your property? A. That is all my property.

20

Q. And yet the fence is on the east side of your property line? A. Yes, in the brook it is on the west side.

Q. I mean your property line is west of the fence then? A. Yes, west of the brook.

Q. And west of the brook? A. Yes.

30

The Court: Now, you said the fence is east of the brook. If the property line is west of the brook how is it the fence is east of the brook?

Q. The fence is not on the property line? A. No.

*By the Court:*

Q. Oh, the fence is not on the property line? The fence is not on the property line. A. It is the dividing line.

40

*Leo P. Heintz—Recalled—Direct.*

Q. Is that about right then? Eagle Rock Avenue where the brook crosses Eagle Rock Avenue, that is not on your line? A. Where it crosses Eagle Rock Avenue? Yes, sure.

The Court: That is all. I do not know whether that is a satisfactory explanation or not to the jurors. I guess that is about the best we can do. 10

Mr. Frazer: Mr. Seymour spoke about a letter. He gave me a notice to produce it, requested me to produce it. I have no objection to his putting his copy in evidence providing he will acknowledge the facts in relation to the subject matter.

Mr. Seymour: In relation to what?

Mr. Frazer: As to what action was taken. 20

Mr. Seymour: As to what action was taken in the Leahr matter? Yes, I will offer it in evidence.

Mr. Frazer: And you will acknowledge that no action has been instituted by Mr. Leahr?

Mr. Seymour: I will acknowledge that no action has been instituted by Mr. Leahr.

(The paper referred to is received in evidence and marked Exhibit P-2). 30

Mr. Seymour: I would also like to offer this letter copy.

Mr. Frazer: I object as being improper.

Mr. Seymour: The reason I offer that is this, that Mr. Frazer went in very thoroughly on cross-examination to the question as to whether Mr. Heintz had ever made complaint about this trouble he said he had.

The Court: Perhaps this might be used in rebuttal, then. 40

*Waldo S. Coulter—Direct.*

Mr. Seymour: All right, sir.

The Court: You already have that in evidence that complaint was made in 1926, and perhaps before that, because he said four or five years ago.

Plaintiff Rests.

10

WALDO S. COULTER, sworn in behalf of the defendant.

*Direct-examination by Mr. Frazer:*

Q. Mr. Coulter, you are a consulting hydraulic engineer? A. Yes.

Q. How many years' practice? A. Twenty-nine years.

20 Q. Graduated from what institution? A. I attended Worcester Polytechnic Institute, but I did not graduate, Worcester, Mass.

Q. You were employed by the Borough of Essex Fells some years ago in relation to their water plant? A. I was.

Q. You are familiar with the plant up there that has been under discussion? A. I beg your pardon?

30 Q. You are familiar with the plant up there that has been under discussion here on the little stream? A. I am, yes.

Q. Can you briefly tell the jury what that plant consisted of when you first were consulted? A. When I was first employed by the Borough of Essex Fells it was in the year 1922, and at this plant, which was known as Plant No. 2, the equipment consisted of a Delavergne engine operated on gasoline, 25 horse power, operating a single acting  
40 Goulds triplex pump. This pump drew water

*Waldo S. Coulter—Direct.*

from a series of wells by suction. There was also another engine and pump which were not used for regular service, but kept for emergency purposes. The engine consisted of a 30 horsepower Fairbanks-Morse engine operating a Rumsey single-acting triplex pump. Both of these engines in 1922 operated on kerosene, and there was no oil, no fuel oil used about the station. The only oil that was used in the station was lubricating oil, and both of these engines were lubricated by glass cups. They were lubricated by cups, oil cups. That is, there was no forced feed and there was no waste oil discharged. 10

Q. Now, in that house at that time was there any drain for the purpose of carrying oil out? A. No, there was no drain for the purpose of carrying oil out, but in the vicinity of the pumps there was a strain to carry off any water that might escape at the pistons. With the pumps working a small amount of water may escape out of the packing of the pistons, and in order to keep that from pooling on the floor there was a floor drain near the pumps which communicated with the drain shown by the dotted line marked "drain" upon the blackboard. 20

Q. Now, was there any change subsequently made in that set-up? A. Yes. In 1923, the latter part of 1923, the Delavergne engine met with an accident sometime during the night. That is, the plant operated on a 24-hour basis, and there was no night operator and the engine went to pieces. Just why we never found out, but due to some defect the engine broke down and it was then replaced by a new engine. This new engine was placed I think in November or December, 1923, to my best recollection. The new engine was a 27 horse power Otto gasoline engine. It operated on gasoline 30 40

*Waldo S. Coulter—Direct.*

and it had forced feed lubrication. It had a forced feed lubricator similar to the forced feed that is used on automobiles, and the lubricating oil was forced to the bearings and there was a certain amount escaped. This lubricating oil which escaped at that time was very small in quantity and no special means were provided for disposing of it. The next change in the station occurred in 1924. My recollection is that it was early in 1924, in February. We removed the old Fairbanks-Morse kerosene engine to another station and replaced it by a fuel oil engine, 30 horse power. This fuel oil engine had forced lubrication and of course we then commenced to use fuel oil at the station, but the fuel oil was burned in the engine, and such oil as might enter into the question of the brook pollution was lubricating oil. Now, this engine was provided with forced feed lubrication and the lubricant which escaped from the cylinders—that is, the lubricant which was applied to the cylinders—was not re-used over and over. It would be badly broken down after it left the cylinders, and it escaped at a point provided for that purpose, and a pail was provided which was placed under the spent lubricant escape. The same thing was true of the Otto gasoline engine, which had forced feed lubrication. This pail, when it would become filled, was taken out away from the premises and emptied.

Mr. Seymour: May I interrupt at this point, your Honor? Do I understand that this witness was present at all times during the operation of this plant and this engine, or was simply the engineer who instituted the units? He seems to testify that he was present at all times.

*Waldo S. Coulter—Direct.*

The Court: I suppose he is giving the method of operation.

*By the Court:*

Q. You were giving rather the method of operation than your observations, weren't you? A. Yes, I observed this method of operation. It was carried on under my direction, and I am trying to describe that method of operation. 10

*By Mr. Frazer:*

Q. You were the engineer in charge of the operation, were you not? A. Why, yes. This is not hearsay testimony. It was carried on under my direction. In October, 1924, Mr. E. H. Waring, who was the chairman of the Water Committee of the Borough of Essex Fells, told me that a riparian owner further down the brook had raised the question of that oil. This was the first time that it had been brought to my attention; and Mr. Waring suggested that I should do something to improve the collection of the spent oil at this engine, and I ordered the Essex Fells Plumbing & Heating Company to install a series of three or four kerosene barrels buried in the ground connected together by iron pipes with tight connections at each barrel, with tight wooden tops, to receive the spent oil from the engines instead of using a pail. These barrels were installed in a row just east of the pump house right here. The lubricating oil from each engine was carried in a tight iron pipe to the first barrel. When that barrel became filled with the overflow, it would flow through the overflow pipe into the second barrel, so that the operator instead of having to keep his eye upon the pail had three or four barrels capacity for the spent oil. 1 20 30 40

*Waldo S. Coulter—Direct.*

10 don't remember whether it was three barrels or four barrels we used. I think it was four barrels, but I am not positive. At any rate, it was three or more. These barrels operated successfully for a time, and upon making an inspection at the station I found that the barrels had been forced up out of the ground partly; that is, the barrels had not been forced completely out of the ground on their sides, but they had been lifted up about a foot or a foot and a half, tipped over, one one way and another another way; and at the time I saw the barrels they contained no oil, and I saw no oil upon the ground, but Mr. Skidmore, who has testified in this case for the plaintiff, who was then the operator, said that the oil did escape when the barrels were tipped up. The reason for the displacement  
20 of the barrels was the raising of the ground water at the time of a heavy rain; that is, the ground bordering the brook became saturated with water and there was an upward pressure tending to float the barrels, and the friction of the ground upon the sides of the barrels was not sufficient to hold them in place. The barrels were floated up by the water pressure and tilted over.

30 Q. On how many occasions did that happen? A. That happened just once.

Q. Once? A. So I ordered the Essex Fells Plumbing & Heating Company to replace the barrels in the position in which they first were to see that everything was tight, replace the covers and pack earth around them, and place heavy stones upon the tops to provide sufficient weight so that the barrels could not be lifted again by the upward thrust of the water. This was done, and so far as I know during the rest of my connection

*Waldo S. Coulter—Cross.*

with the Borough of Essex Fells there never was any further trouble from the oil.

Q. Did you have any connection or have anything to do with an accident to the plant there later, in 1926? A. No. My connection with the Borough was discontinued early in 1926.

10

*Cross-examination by Mr. Seymour:*

Q. Mr. Coulter, how big were those barrels that you say were placed under the ground? A. They were kerosene barrels. They would contain between forty and fifty gallons each.

Q. Was there a vent or hole in the top of each barrel? A. No, we had a wooden cover which was not hinged, but was to be laid on top of the barrel.

Q. So that that wooden cover could easily be displaced if the barrel were tipped over? A. Oh, if the barrel were tipped over it would be easily displaced; certainly.

20

Q. How far from the brook were these barrels? A. About 20 feet.

Q. How many gallons would those barrels contain? A. Each barrel would contain between 40 and 50 gallons, at least 40 gallons.

Q. If those barrels were tipped over and the contents spilled, the contents would not immediately flow into the brook, would they? It would go into the ground, wouldn't it? A. That is a suppositions question. If there was a sufficient quantity of oil discharged it would reach the brook. If there was an insufficient quantity of oil discharged it might be absorbed.

30

Q. Absorbed by the soil? A. Yes.

Q. And eventually slowly seep into the brook? A. That might be.

40

Waldo S. Coulter—Cross.

Q. That would take considerable time, wouldn't it? A. Well, of course I don't know.

Q. You say there is a drain there as indicated by the dotted line? A. Yes.

Q. Is there a terra cotta pipe on that drain? A. I know there was a drain there, but whether it is terra cotta or iron I don't remember.

10 Q. Do you recall this square here, which indicates a tank? A. No. There was no tank there in my time.

Q. Where was the fuel oil placed? A. There was a tank, but not where it is shown there. A fuel oil tank was here (indicating).

Q. What kind of tank was that. A. That was a concrete tank.

Q. How large? A. Well, I am unable to say with any certainty, but I should say it might be eight feet square and six or eight feet deep.

20 Q. And the fuel oil was placed in there and then forced into the pump house? A. Yes, draft created by suction in the pump house.

Q. Were there any oil barrels here? A. Not in my time.

Q. Do you remember any leak in the eight-foot concrete tank where the fuel oil was placed? A. I never saw one.

30 Q. You said that Mr. Waring, the chairman of the Water Committee, told you of a complaint of a riparian owner on the stream. Did he name the riparian owner? A. No. He told me at the time I think, but I don't remember the name now.

Q. Do you remember whether it was Heintz? A. I don't remember. It might well have been.

Q. Well, when he told you there was a complaint about oil in the stream, did you examine the stream? Did you look at the stream to see if there

40

*Waldo S. Coulter—Cross.*

was any oil? A. No, I wasn't engaged to do that.

Q. You took his word for it that something ought to be remedied? A. Oh, yes.

*By the Court:*

Q. Was there any provision made for taking care of the oil in the barrels if they should become full? 10

A. Well, you see the capacity of the barrel was so very large that the provision against overflow was the capacity itself. In other words, the fuel oil engine would not discharge more than half a pail of spent lubricating oil in 24 hours, and we had in the vicinity of 130 to 160 gallons in the barrels, so that we had provision to store the full amount of lubricating oil for from one to two months in these barrels. We felt that we had sufficient capacity in those barrels so that the operator could not get caught on it; that is, if he went to look after it. The oil from the barrels was removed and taken away from the premises and thrown out on the roads. 20

Q. Do you know whether that was done or not? Do you know of your own knowledge whether that was done or not? A. I know that was done sometimes, because I had personal knowledge of it.

Q. Sir? A. I know that was done sometimes because I had personal knowledge of it, and to my knowledge it never was neglected. 30

Q. That oil, then, was taken out of the barrels and thrown on the roads? A. So I understand. In fact, I know where it was thrown in two cases.

Q. Roads in Essex Fells? A. Yes.

Q. And that was just west of the pump house, wasn't it? These roads of Essex Fells are just west of the pump house? A. Some of it was thrown on the road west of the pump house. 40

*Dougal Herr—Direct.*

Q. And that road is down an incline of about how much? A. Well, I am unable to say where the incline is, but I made an inspection of the road.

Q. Is there more than one road on that incline that was oiled? A. The road is on an incline that slopes towards the brook, yes.

10 Q. I say, was there more than one road there that was oiled, that slopes towards the brook? A. I believe so.

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DOUGAL HERR, sworn in behalf of the defendant.

*Direct-examination by Mr. Frazer:*

20 Q. Mr. Herr, you are Mayor of the Borough of Essex Fells? A. I am.

Q. How long have you been that? A. Since January 1, 1926.

Q. Prior to that were you associated with the Borough in any official capacity? A. I was up to that time and from the year 1912 continuously associated as Borough attorney.

Q. And you during that whole period had resided in Essex Fells? A. No, sir.

30 Q. When did you first move to Essex Fells? A. About six years ago.

Q. Are you familiar with the property which is in discussion here and the brook which has been discussed? A. In a general way, yes.

Q. Can you briefly tell the jury what the nature of that brook is and what its condition is in varying seasons as to flowage and so forth? A. The brook has its source about a mile and a half to the north of the pump house No. 2 shown on the black-

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*Dougal Herr—Direct.*

board. The source is a swamp. It was fed by springs and comes down through woods and undeveloped land for that distance. At certain seasons of the year it is full, and at other seasons, at the point where the pump house is and north of that it is absolutely empty of water, bone dry at certain times. Now, from that point on south various drains empty into the brook, notably one almost opposite the pump house that comes down from a farm east of the golf links, known as the Nichols' farm. Other drains are at the end, which have been placed there by the Essex Fells Golf Club to drain its greens. 10

Q. Now, what is the topography of that section where the pump house is in relation to the other lands about? A. The pump house is the lowest point from the north going south. I mean up to that point. There is a very gentle grade down from the pump house following the brook south. The golf links from the east and west drain at quite a heavy grade into the brook. 20

Q. Mr. Herr, on the plaintiff's case a witness testified to the effect that along certain portions of the brook the vegetation had been destroyed, presumably by oil. Have you seen any similar condition anywhere else in that vicinity? A. Yes, sir; conditions which looked similar to me. At certain flood times pools of water go in the golf course along the banks, both banks of that brook at a point higher than the brook by two or three feet. As those pools dry out there is a scum from the top of the water which looks like oil, and the grass is blackened and sometimes killed if the water remains there long enough with that scum on the surface. 30

Q. From the contours of the land at the point 40

*Dougal Heer—Direct.*

where these pools that you have just referred to congregate, would it be possible for the oil to have come from the pump house? A. It would not, because they are from two to three feet higher than the pump house, and some of them are on the opposite side of the brook.

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*Cross-examination by Mr. Seymour:*

Q. Mayor, do you recall about 1923 the complaint of Mr. Heintz about the pollution of this brook, being referred to you as Borough Attorney, a letter from me in relation to that complaint? A. What is the date, please?

Q. Sometime in the year 1923. A. I don't recall. No, sir; I don't.

20

Q. Do you recall in June, 1926, that there was a communication addressed to the Mayor and Common Council of Essex Fells in relation to Mr. Heintz' complaint? A. I remember the communication. I have seen the letter, I remember the date of it.

Q. You don't recall having it up as Borough attorney at all before that? A. No, sir; I really don't.

30

Q. Are you a member of the Essex Fells Country Club? A. Yes, sir.

Q. How many acres of land is that country club? A. About a hundred acres in the course.

Q. Is this plant about in the center of the acreage? A. Just about in the center east and west.

Q. And over that whole hundred acres you say there is a drain or two draining that country club land into this brook? A. Several drains.

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Q. What is it, an open drain? A. Some of them are open and some are tile drains.

*Dougal Heer—Cross.*

Q. Merely to drain the water off the golf course?

A. I understand one of these drains is to drain the Nichols farm and comes all the way through the golf course. It has been there a great many years before the golf course was made.

Q. Where is the Nichols farm? A. That is to the east of the golf course about a thousand, well, more than a thousand feet. 10

Q. Well, you never noticed any oil coming out of this drain, did you? A. No, sir; I have not.

Q. You have never noticed any oil coming out of this drain? A. No.

Q. You never noticed any oil coming out of any of the other drains, did you? A. I have noticed oil coming out of a drain about 75 feet to the north of the pump house and on a level higher than the pump house. 20

Q. Where does that drain come from? A. I tried to trace it. It comes from a westerly direction, and up in that direction—well, there is a slope down from the road, what is known as Oval road on the northwest.

Q. Now, up here to the west of this pump house is the Borough of Essex Fells, isn't it? A. Yes, sir.

Q. The Borough rests upon a hill above the pump house, doesn't it? A. Well, part of it does, yes. 30

Q. And there is quite a slope from the Borough streets down into this pump house? A. Yes.

*By the Court:*

Q. I understand the pump house is not in Essex Fells at all. A. The pump house is in West Orange. It is just over the line, perhaps. The West Orange line runs just about across the links at that point. 40

*Dougal Herr—Redirect.*

Q. Do you mean Roseland? A. No, sir.

10 Q. I am referring to my map. A. I would like to correct that. The pump house is in the Borough of Essex Fells. The West Orange line runs a few feet to the east of the pump house, but the line between Essex Fells and Roseland runs to Eagle Rock avenue east and west, so that the plaintiff's farm is over that line in Roseland.

*By Mr. Seymour:*

Q. From the Borough itself down to this pump house there are several streets leading to the pump house? A. There is one road leading to the pump house.

20 Q. And there are other streets and roads leading into that one road on a slope, aren't there? A. Yes, they are all on a slope towards the brook. There is a road running east and west—perhaps I had better indicate (marking on blackboard).

Q. These roads are all on a slope? A. The natural topography is a slope down from the west to the east.

Q. And yet that drain coming from the west came from one of these roads? A. It could. That is what I thought it did.

30 Q. That is the only place you noticed oil? A. There were pockets of oil. I didn't see any oil coming from any other drains than that.

*Redirect-examination by Mr. Frazer:*

40 Q. Mayor Herr, what is the practice in Essex Fells in regard to oiling roads? A. The roads are generally speaking Telford base roads with gravel surfaces, and they are oiled regularly in the summer time.

Q. Do you know whether Eagle Rock Avenue is

*Dougal Herr—Recross.*

ever oiled? A. About two years ago, if I remember right, the shoulders of Eagle Rock Avenue were repaired and given a heavy coating of oil.

*Recross-examination by Mr. Seymour:*

Q. Can you tell me what kind of repair that was?  
A. My recollection is they put two-inch stone down on the shoulders and rolled it and oiled. 10

Q. Was that oil or tar? A. Well, it was a heavy oil or tar; I didn't examine it. I understand it was tarvia.

Q. Can't you say whether it was tar stone already prepared for the purpose of laying? Are you sure about that? A. No, sir; I am not sure.

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JULIUS MARETZKY, sworn in behalf of the defendant.

*Direct-examination by Mr. Frazer:*

Q. Mr. Marezky, you are greens keeper of the Essex Fells Golf Course? A. Yes.

Q. How many years have you been engaged in that? A. Ten years this past April 26th.

Q. Are you familiar with this section around the pump house? A. Oh, yes. 30

Q. And with the brook? A. With the brook, too.

Q. Have you ever seen the brook dry? A. Oh, I seen it a couple of times, but I don't see it now for about two years.

Q. Before that had you ever seen it dry? A. I see it in 1926, and I see it every year before two years.

Q. Every year before two years? A. Yes. 40

*Julius Marezky—Direct.*

Q. That is from 1928 back? A. Back.

Q. How long a period would it remain dry when it was dry? A. Well, as long stay when come big rain and all water from north come down and from Buffalo Swamp and from roads, and that is why all brook get filled up and flow all the way around on the golf course.

10 Q. During the period that you have been up there when there was sufficient water in the brook for cattle to drink, have you ever seen cattle drinking from it? A. Well, four years ago I had two cows. I put my cows out. Well, I can't carry water for the cows. I have to take to the brook. My cows was drinking water from there.

Q. Your cows did drink? A. Yes.

20 Q. Do you know whether Mr. Heintz' animals—did you ever see them drink? A. Well, I see his drinking, too.

Q. From the brook? A. From the brook.

Q. Now, have you ever seen pools congregating on the golf links? A. Yes, I see.

Q. After the rain? A. After the rain.

30 Q. What has been the result of some of those pools on the vegetation? A. Well, when all water go down, brook go down, water in it, and stays so to water spot, and all grass get oil, and after you can see such black oil on top of it, and grass die out.

*Cross-examination by Mr. Seymour:*

Q. This brook runs through your property? A. It is not my property. Belong to the Borough of Essex Fells.

40 Q. It belongs to the Borough of Essex Fells? A. Yes.

*Julius Marezky—Cross.*

Q. Do you pay rent for it? A. Club pay rent for it.

Q. Do you pay rent for it? A. Not me, the club. The club pay rent for it.

Q. You live there in the club's property? A. Yes.

Q. The property belongs to the Borough of Essex Fells? A. Yes, sir.

Q. Mayor Herr is a member of the club, isn't he? 10  
A. Well, I don't know. I can't tell you that.

Q. What were they, horses or cows going down?

A. I had two cows and I had two horses and three horses there.

Q. Have you got any other water on your property? A. Sure I have.

Q. Where do you get that water from? A. From pump house.

Q. Did you ever feed them that water? A. Sure 20  
I feed that water.

Q. Why? A. I feed that water, give that water for horses, too.

Q. Why? A. Well, that why it is nearest.

Q. It is nearer? A. Yes; right close to the barn.

Q. Then as a regular thing every day you give that water to your horse and cow, but other times you have seen them drink out of the brook, is that it? A. In the morning I give them from place, and then I give them from brook when I had the cows. 30

Q. Did you lead them down to the brook or did you just watch them go down? A. No, I take the horses down to the brook when I was working.

Q. What part of the brook? A. Right close to the brook on the left side, on the right side going down from Eagle Rock Avenue.

Q. Near the pump house? A. No, not near the pump house. Right close to Eagle Rock Avenue, what I said. 40

Q. How many times did you feed them water

*Julius Marezky—Cross.*

each day, the water from the pump house? A. Oh, horses or cows?

Q. Both. A. Horses once in a while when we come that way home.

Q. I say how many times did you feed the horses water from the pump house in your yard? A. I can't tell that.

10 Q. Twice a day? A. No, once in a while when I come home that way with the horse.

Q. When you come home what way? Where do you live? A. Right on the golf course I live.

Q. And that is where you keep your horses? A. Yes.

Q. And that is where you have the water from the pump house, isn't it? A. Yes.

20 Q. Every day you would feed your horses in your yard with water from the pump house, wouldn't you? A. Well, that is all right when I work outside around to Mr. Nichols' property, yes, I come down on the road on his driveway, stop with the horse right in the brook and give him a drink.

Q. And every day you would feed your cows water from the pump house in the yard, wouldn't you? A. Every morning when I have the cows and afternoon when my cows was out in the morn-  
30 ing.

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CHARLES MATZIKO, sworn in behalf of the defendant.

*Direct-examination by Mr. Frazer:*

Q. Mr. Matziko, you own property of your own near Mr. Heintz' farm? A. Yes, sir.

Q. How far away from it? A. Right next to  
40 him.

*Charles Matziko—Cross.*

Q. Right next to him to the south? A. No, west.

Q. To the west. And does this brook go through your property? A. Yes.

Q. What do you do with your property? A. Well, I keep a cow, and hay, cut a little hay; some little farm like.

Q. You farm it? A. Yes. 10

Q. For hay? A. For hay mostly.

Q. You say you keep a cow? A. Yes.

Q. How many? A. One only.

Q. Any horses? A. Two horses.

Q. What do you do about watering those animals? A. When I got to water in the brook, I water them there. If I ain't got no water in the brook, I water them from the well.

Q. You say when you got no water from the brook you water them at the well? A. Yes, sir. 20

Q. But other times when there is no water in the brook? A. Other times when there is no water in the brook I water them in the well.

Q. There are times when the brook has no water. A. Has no water.

*Cross-examination by Mr. Seymour:*

Q. Whom do you work for? A. I work for Mr. Woodward. 30

Q. Who is Mr. Woodward? A. He is, let us see, the company.

Q. It is a company? A. Yes.

Q. Is Mr. Herr in that company? A. Mr. Herr and Mr. Morris and Mr Woodward.

Q. What kind of company is it? A. Well, I don't know.

Q. What work do you do? A. Well, what comes.

Q. What? A. What comes, roads and grades. 40

*George W. Thorward—Direct.*

Q. Labor work? A. Labor.

Q. Do you live in a house on Laurel Avenue? A. Laurel Avenue; yes, sir.

Q. Where is that? In Roseland? A. No, that is West Orange.

10 Q. How far away from Heintz; how many feet? A. About five hundred, about six to seven hundred feet from Heintz.

Q. Have you got a well on your property? A. Yes.

Q. Do you get water from West Orange? Do you get any water from the town of West Orange? A. No, I haven't got only well.

Q. You have a well and this brook; sometimes you use the well and sometimes you use the brook? A. Yes.

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GEORGE W. THORWARD, sworn in behalf of the defendant.

*Direct-examination by Mr. Frazer:*

Q. Mr. Thorward, what is your business? A. Why, I am chauffeur right now.

30 Q. Were you at any time in the employ of the Borough of Essex Fells? A. Yes, sir.

Q. In what capacity? A. Assistant superintendent.

Q. Assistant to Mr. Skidmore? A. Yes.

Q. Do you remember in the year 1926 anything that happened to the plant at the pump No. 2? A. I can't say for sure. We had things happening all the time.

Q. I mean a break in the feed line, on a Sunday?

40 A. Yes, sir; I do recall something about that.

*George W. Thorward—Cross.*

Q. Do you remember the occasion when there was a fire on the brook? A. Yes, I do.

Q. Do you remember anything that happened in the pump house immediately preceding that fire?

A. No, I don't.

Q. Well, let me direct your attention to an occasion when there was a break in the feed line. Do you remember at what date that occurred? A. I think that was on a Sunday. 10

Q. Will you tell me what you did in relation to that break. A. Repaired it.

Q. What did you do while you were repairing it? A. Why, I cleaned things off the best I could.

Q. Did the pump continue operating while you were repairing it, or did you shut the pump down. A. It was impossible for it to operate while I was repairing it. 20

Q. While you were repairing it did the oil continue to flow or did you shut that off? A. I shut that off.

Q. How soon after you discovered the leak in the line did you shut it off? A. Immediately.

Q. What did the place look like when you came in and discovered the leak? Was it a serious leak? A. Yes, it was a pretty serious leak. 30

*Cross-examination by Mr. Seymour:*

Q. How long were you employed there? A. Close to three years I think it was.

Q. From what year? A. I think it was around 1924. I am not sure.

Q. 1924 to 1926? A. I think so.

Q. At that time during those two years were they using fuel oil? A. Yes, sir.

Q. Anything else? A. Gasoline. 40

*Edward H. Waring—Direct.*

EDWARD H. WARING, sworn in behalf of defendant.

*Direct-examination by Mr. Frazer:*

Q. Mr. Waring, are you chairman of the Water Committee of Essex Fells? A. No.

10 Q. You have been? A. Yes.

Q. You were in 1926? A. Yes.

Q. Do you remember the occasion when there was a break in the feed line at pump No. 2? A. Yes.

Q. When did that occur? A. One Sunday morning, as I remember it.

Q. Who directed your attention to it? A. Why, Mr. Thorward.

Q. Mr. Thorward? A. Yes.

20 Q. The gentleman who was just on the stand? A. Yes.

Q. And he was then assistant superintendent, as I understand it, of the water works? A. He was.

Q. What time was that in relation to the fire which occurred upon the brook, that has been testified to? A. Well, in my recollection it was that morning, that Sunday morning, that the fire occurred, in the afternoon or about noon, as I remember it.

30 Q. So that the fire occurred on the same day that the break occurred in the feed line? A. Yes, it did.

Cross-examination waived.

Defendant Rests.

40 Mr. Seymour: I would like to offer this letter in evidence, your Honor. I showed a copy to the Mayor and he says he remembered having received it.

*Edward H. Waring—Direct.*

Mr. Frazer: Well, I think I shall object to the admission of the letter. It is conceded not to be denied.

The Court: Upon what theory do you think it is admissible?

Mr. Seymour: Well, on cross examination, or on part of the cross examination a question was directed as to whether or not Mr. Heintz during this time that he suffered from this condition made any complaint to the Borough. 10

The Court: It is not disputed that complaint was made. He says that he did. He says that he spoke to Mr. Waring. He spoke to Mr. Thorward; and that is not questioned. It seems to stand undisputed in the evidence. 20

(Counsel argue.)

The Court: I will sustain the objection.

(Mr. Frazer sums up the case in behalf of defendant.)

(Mr. Seymour sums up the case in behalf of plaintiff.)

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#### CHARGE OF THE COURT.

The Court charges the jury as follows:

DUNGAN, J.:

The plaintiff in this case is Mr. Leo P. Heintz, who has a small farm in West Orange right near where, according to this map which is in evidence, the municipalities of West Orange, Roseland and

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*Charge of the Court.*

Essex Fells come together. It is on an unnamed stream. To the north of his place is located the pumping station of Essex Fells Borough, and all around the pumping station is the Essex Fells Golf Club.

10 Mr. Heintz says he has lived there for, I think he said, thirty-six years; that prior to 1919—I may not be just right about these dates; your recollection is just as good as mine if you differ; but I think he says the pumping station was put there in 1918 or some time prior to that; and that in 1919 he noticed for the first time that there was an oil scum on the brook; that before that time this brook, which ran through a two-acre tract which he had fenced off for a pasturing place, had  
20 been used for his cattle and horses for drinking purposes; that in 1919 he noticed that when the cows and horses were taken to this brook, they refused to drink. He traced up the source of this oil which appeared upon the brook and found that it came from the pumping station, he says; that is, he found a drain there, he found kerosene oil barrels in the ground, from which he saw a discharge of oil into the brook; and that thereafter from 1919 continuously until sometime in 1928  
30 this oil appeared upon the surface of the brook; and he says that during that whole period and prior thereto he had never known a time when this brook was entirely dry.

This is against the municipality the Borough of Essex Fells, as I have told you. A municipality, like an individual, has no right to actively wrong any person or corporation within or without the limits of that municipality, the pumping station being, according to the mayor, Mayor Herr, in the  
40 Borough of Essex Fells, the plaintiff living as I

*Charge of the Court.*

have already told you in the town of West Orange. So whether or not they are in the same municipality makes no difference. The municipality has no right to do such things as will injure him or other individuals. It has no right, in its special application to this case, to discharge refuse or oil from its pumping plant into a stream, the effect of which is to render the water therein, which before such discharge was unpolluted and fit for use by people and animals, unfit for such use; and if this municipality did pollute the stream which passed through the plaintiff's property and made it unfit for watering his horses and cattle, and he has been damaged thereby, the municipality of Essex Fells is liable for such damage as has been shown by the evidence.

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So in this case four questions arise for you to consider. The first is: Did oil discharge from this pumping plant of this defendant into this brook? Second, did the oil pollute it? Third, was there damage to the plaintiff? Fourth, if there was, what was the amount of that damage?

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I have already called your attention to the testimony on behalf of the plaintiff as to the presence of oil upon the brook. A number of witnesses who testified for the plaintiff testified to the fact that there was at certain periods, the periods about which they testified, oil found there; and that upon one occasion it was found in such quantity that it produced a fire for a hundred feet along that brook, the flames going up into the air, according to the testimony of Mr. and Mrs. Heintz, 400 feet. Whether they know just how high 400 feet would be and how high that would carry the flames, I leave it to you to decide. It is not necessary for the Court to comment very much upon whether

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*Charge of the Court.*

they are mistaken about its height or not, because I did not see it any more than you did; but that is the evidence in the case, and it is to that evidence that I am calling your attention.

10 On behalf of the defendant there is one witness who testifies that he is the adjoining owner to the plaintiff. He works upon the Essex Fells golf links. He keeps a cow, and he says that during this period his cow has not refused to drink from the waters of this brook. His cow goes down there and drinks of these waters.

20 Of course if this water was pure and unpolluted prior to the time of the discharge into it of oil from the defendant's pumping plant, if it did discharge oil into it, and afterward it was of such a character that it was unfit for such use and the cattle and the horses of the plaintiff refused to drink it, then that was such pollution of waters in that stream as would entitle the plaintiff to his damages if the pollution was caused by the defendant in this case.

30 Mr. Coulter, who from 1922 up to 1926 was the consulting hydraulic engineer, explains very fully just what conditions were there from the time he took charge as consulting engineer. In 1922 when he went there there were two engines, one a gasoline engine and the other a Fairbanks-Morse, both operated, I understood him to say, by kerosene, and no fuel oil during that period was used at all, and during that period there was no lubricating oil that could escape because he says that these engines which were used in that plant had large oil cups which fed the oil, not by force, but by gravity, I understood him, into the bearings of these engines, and there was no waste at all. The

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*Charge of the Court.*

fuel which was used, the kerosene, was consumed in the engines, and the lubricating oil was not discharged.

But he says that in November or December, 1923, the Delavergne, which was one of the engines, was replaced by an Otto gasoline engine with a force feed lubricator; and thereafter in 1924 the Fairbanks-Morse was replaced by a fuel engine that had force feed lubrication; and while he insists that the fuel oil was entirely consumed in the engines themselves, he states that there was an accumulation of oil from the force feeding amounting to about a half a pailful a day. He says that in about 1924 complaint was made to him of oil in the brook, and then he ordered that these kerosene oil barrels be put down in the ground to receive this waste from the lubrication of these engines. He says they had a capacity of over 125 gallons, and that his orders were that when these barrels were as full as they should be, the oil should be removed; and he said it was removed and placed upon the roads.

Of course, it may be assumed from the evidence in this case that the oil which was placed upon the roads was within the limits of Essex Fells. The Mayor tells us that oil was put upon those roads. It may be that some of this oil which came into this brook came from the oil which was put upon those roads; but the municipality had not any more right to discharge oil from its roads, if it knew that that was the effect of placing the oil upon the roads, into this brook and polluting it than it had to discharge oil from its plant.

So the preliminary question for you to decide is whether or not there was oil in this brook, whether or not it was discharged from the defendant's

*Charge of the Court.*

plant, and whether or not the effect of that oil was to pollute that stream. If it was, then as I have told you, the plaintiff is entitled to be compensated for such damage as was done to him.

10 The only damage which has appeared in this case is that the fence was destroyed by this fire which has been mentioned and that a great deal of his time has been taken up in watering his cattle. He said his cattle would not drink. If they would not and it was due to this pollution and the pollution was caused by the defendant in this case, then he is entitled to be compensated for the loss of time; and if the discharge of oil and the fire was due to the wrongdoing of this defendant, then he is entitled to the cost of repairing and building his fence.

20 He says that it took six days to rebuild that fence and it cost him \$6 a day for a man to build that fence. That would be \$36. But it appears that there was only about a hundred feet out, that the fence posts, he says, were six to eight feet apart, which would mean, if they were eight feet apart, that there would be about twelve or thirteen fence posts, and if six feet apart, sixteen or seventeen posts. He said he had to get them out of the

30 woods, set them, get the wire and put the wire on them. There seems to be no dispute about that amount, if it seems to be reasonable to you gentlemen, if you decide he is entitled to your verdict. Of course the cost must be reasonable. You remember that his attention was called to the fact that that would mean less than three posts a day to get them out and set them and get the wire to be put upon them and put the wire upon them. Then

40 he says the materials cost \$30. Just what these

*Charge of the Court.*

materials were, whether he meant just the wire or the wire and the posts, is not explained. Those two items together, if you find them to be reasonable, would amount to \$66.

The important item appears to have been the cost of time in carrying water to these animals. He insists that it was necessary for him to do that during the entire year. He had a well about a hundred feet from his barn, and when there was water in that well he carried the water from the well. At other times he carted it, according to the testimony of one of the witnesses, from a tap in Pleasantdale, I think. He says during all that period it took him about three hours a day to feed with water those six to eight cows and two horses. The horses he watered three times a day, the cows twice a day. He says that he paid for labor during that period fifty cents an hour to a man to whom he gave his dinner and sixty cents to a man who brought his own dinner, but it appears that during at least three of those summers Mr. Martzen worked for him and he paid Mr. Martzen only \$3 a day, which would be 37½ cents an hour for eight hours as I figure it; but he insists that Mr. Martzen received other compensation. That is, he said he gave him vegetables. His wife said she gave him eggs sometimes and on two occasions gave him a chicken. Other witnesses in the case state that there were certain times when the water was usable, and one of the witnesses produced for the defendant testifies that he found the same conditions (I suppose I ought to have mentioned this under the point of whether or not the oil which came into this brook came from the defendant's plant) he says that he found oil upon higher

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*Charge of the Court.*

ground, found conditions the same upon ground higher than the plant, and consequently that it could not have come from the plant. But the man who worked on the golf links says that when the brook would rise and go down, then these deposits, which would kill the grass upon the golf links, appeared.

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If you decide that the greater weight of the evidence shows, for the burden of proof is upon the plaintiff to establish by the greater weight of the evidence, as I have already indicated to you, that this brook was polluted, and that it was polluted by oil from the defendant's pumping station and that the plaintiff was injured thereby, then it will be for you to find by your verdict such amount in his favor as will compensate him for the injury which has been done to him during these years by this pollution.

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Counsel for the defendant prays an exception to so much of the Court's charge as implied in effect that the Borough of Essex Fells would be equally liable in damages whether the oil came from the water plant or whether it came from the public highways.

30

Exception noted as ground of appeal.

40

## New Jersey Court of Errors and Appeals

LEO P. HEINTZ,  
Plaintiff-Respondent,

vs.

THE BOROUGH OF ESSEX FELLS,  
a municipal corporation,  
Defendant-Appellant.

On Appeal  
from the  
Essex County  
Circuit Court.

### BRIEF FOR DEFENDANT-APPELLANT.

#### Facts.

The action was brought for injuries alleged to have been sustained by the Plaintiff by reason of oil which formed upon the surface of a small brook or waterway, on the banks of which one of the pumping units of Defendant's water system was located. It was claimed by the Plaintiff that this oil was present upon the surface of the brook in such quantities during a period of years as to make the water unusable for the purpose of watering his cattle, and that on one occasion it was present in such quantities that it caught fire and destroyed certain fences and other property on the Plaintiff's premises. Expert testimony was introduced to show the quantity of oil present on a given date subsequent to the injury complained of and losses were sought to be proven first on account of expenses to which Plaintiff was put in hauling water for his cattle, and secondly, for the damages sustained as a result of the fire.

In order to base his action Plaintiff offered evidence to prove that the source of the oil was the pumping plant maintained by Defendant in the supply and sale of water as a municipal business. In defense the Defendant offered evidence showing the existence of conditions similar to those complained of by the Plaintiff as due to oil at points upon the brook above the pumping station and necessarily due to oil sources other than the pumping plant. There was offered testimony to the effect that the Borough of Essex Fells in the exercise of its governmental function of maintaining roads used oil in substantial quantities upon roads which sloped to the brook. This testimony was of a character as would have justified the jury in drawing an inference, should it have so desired, that the source of the oil was not from the pumping plant, but from the roads. The drawing of this inference was prevented by the instruction of the trial court, which will be referred to hereafter in the argument of the law.

Two grounds of error are asserted: One of them relating to the charge of the jury, and the other relating to the exclusion of a question asked the Plaintiff on his cross-examination.

**LAW.****I. The trial court prejudicially limited the cross-examination of the Plaintiff.**

Upon cross-examination it appeared that just prior to the fire the Plaintiff was in discussion with one Arnold Lehr, the son of the owner of the property along the brook adjoining Plaintiff's. Some question was raised as to the conversation between young Lehr and the Plaintiff, especially in relation to what had caused the oil to ignite. The examination was directed to the ascertainment of whether or not at that time there had not been a discussion as to whether the oil was present in sufficient quantities to ignite for the purpose of eliciting from the Plaintiff evidence of contributory negligence and of statements made by him inconsistent with his statements on the stand. After questions directed to the appearance of young Lehr and his report of oil on the water prior to the fire, the following questions were addressed to the Plaintiff with answers as set forth:

Q. "And you entered into a discussion with him whether it would ignite or not, didn't you?"

A. "No, sir."

Q. "You did not?"

A. "No, sir; never said about that."

Q. "What did you say when you went out there and looked at that oil?"

This question was objected to and the objection sustained, although no grounds for the objection were stated.

It is our contention that this question was wholly

proper as cross-examination. Should it have developed, for instance, that the Plaintiff had said, "There is not enough oil there to ignite" and in order to prove such assertion had kindled a blaze which resulted in the fire, the plaintiff would clearly have been guilty of contributory negligence. Moreover, had it appeared that the Plaintiff was maintaining close to the bank a brush fire or similar source of conflagration the fact that his attention was called to the presence of oil in unusual quantities would have been further evidence of contributory negligence. The difficulty of proofs in a matter of this kind where the parties cognizant are closely related—young Leahr under the evidence being a nephew, son of a sister of the Plaintiff—is such as to permit a wide field of cross-examination and to elicit from the Plaintiff all relevant matters tending to minimize the credence to be given his story of the event.

In refusing to permit this cross-examination the court over-stepped the bounds of judicial discretion and limited to the prejudice of the defendant his right of proofs from the lips of the Plaintiff.

## II. The Court erred in its charge.

In relation to the oiling of the roads and the finding by the oil of its way into the brook, the Court charged as follows: "The Mayor tell us that oil was put upon those roads. It may be that some of this oil which came into this brook came from the oil which was put upon those roads; but the municipality had not any more right to discharge oil from its roads, if it knew that that was the effect of placing the oil upon the roads, into this brook and polluting it, than it had to discharge oil from its plant." Under the evidence,

except for this charge, the jury might well have found that only on one occasion, to wit, the occasion of the fire, was the source of the oil on the stream the pumping plant. There is strong evidence to the effect that the other oil came from sources other than the water system, and this evidence the jury had a right to consider.

The Court charged that the damages proven as a result of the fire would amount to sixty-six dollars. The jury found damages in the sum of twelve hundred dollars, and obviously must have awarded the major portion of the damages for the pollution covering, as was alleged by the Plaintiff, a large number of years. However, if this pollution was due not to the water system but to road construction and maintenance, the municipality is not liable. It is an elementary distinction that while the liability of a municipality growing out of business undertakings, as water supply systems, is the same as that of a private person, there is no liability in the case of injuries growing out of the exercise of governmental functions, as is stated in the opinion of Mr. Justice Voorhees, speaking for this Court in *Bisbing vs. Asbury Park*, 80 New Jersey Law, 416:

“It is not controverted, and could not well be under the law as expounded in this state, since the year 1840, that, in the absence of statute, an action will not lie against a municipal corporation at the instance of an individual who has sustained special damage in consequence of the neglect of such corporation in the performance of a public duty.”

Citing *Freeholders of Sussex vs. Strader*, 18 N. J. Law, 108, 35 Am. Dec. 530; *Livermore vs. Free-*

holders, 29 N. J. Law, 245, affirmed 31 N. J. Law, 507; Pray vs. Jersey City, 32 N. J. Law, 394; Wild vs. Paterson, 47 N. J. Law, 406, 1 Atl. 490; Carter vs. Rahway, 55 N. J. Law, 177, 26 Atl. 96, affirmed 57 N. J. Law, 196, 30 Atl. 863; Paterson vs. Erie Railroad, 75 Atl. 922. The Bisbing case has been followed not only by our own courts, but by the courts of Maryland and Connecticut: Gutowski vs. Baltimore, 96 Atlantic, 630, where the court referred to the distinction between corporate and governmental powers and duties of municipalities as discussed in Barron vs. Detroit, 19 L. R. A. 452, and Dickinson vs. Boston, 1 L. R. A. (N. S.) 665. The Connecticut court follows it in the case of Carta vs. Norwalk, 145 Atlantic, 158, while recent decisions of our own courts following it are Stevens vs. Interstate Park Commissioners, Court of Errors and Appeals, 93 New Jersey Law, 500; Johnson vs. Board of Education of Wildwood, 102 New Jersey Law, 606, Court of Errors and Appeals; Kuchler vs. New Jersey and New York Railroad Company, 104 New Jersey Law, 333, Court of Errors and Appeals. The principle is thus so firmly grounded in our jurisprudence as no longer to admit of dispute. In the case at bar the Court, by this charge, effectively removed from the consideration of the jury the question of whether the pollution through the years was caused in whole or in part by oils coming from road construction and maintenance and whether, if only in part, any other source of pollution for which the Defendant might have been liable would have been sufficient to have caused the damage complained of. Under the evidence as submitted to the jury, had this restriction upon its deliberations not been imposed by the Court, the jury might well have found that no oils flowed down the stream except

on the one occasion of the fire other than oils deposited by the Defendant in the carrying out of a municipal function. Had the jury so found as we have above pointed out, the utmost damages it could have assessed under the charge of the Court in relation to that subject was the sum of sixty-six dollars. It is obvious then that in this charge the Court not only erred, but erred to the substantial prejudice of the Defendant.

**We therefore respectfully pray that the judgment of the Court be reversed and the cause remanded for a new trial.**

Respectfully submitted,

FRAZER & TRIMBLE,  
Attorneys for and of counsel with  
the Borough of Essex Fells,  
Defendant-Respondent.



## New Jersey Court of Errors and Appeals

LEO P. HEINTZ,  
Plaintiff-Respondent,

vs.

THE BOROUGH OF ESSEX FIELDS,  
a municipal corporation,  
Defendant-Appellant.

Action at  
Law

On Appeal  
from Essex  
County Cir-  
cuit Court.

### **BRIEF FOR PLAINTIFF-RESPOND- ENT.**

This action was brought for damages for injuries sustained by plaintiff by reason of the pollution of a stream running through plaintiff's land, the water of which was drunk by and fed to his horses, cows and chickens, the pollution being caused by oil thrown into the stream by a pumping plant owned and operated by defendant borough as a part of its water system owned and operated by it to supply its inhabitants with water. The jury rendered a verdict in favor of plaintiff and defendant borough appeals.

## LAW.

The first ground of appeal is

1. The Trial Court prejudicially limited the cross-examination of the plaintiff. The cross-examination related to a conversation between plaintiff and one Laehr prior to a time when the oil on the surface of the brook became ignited—how long before does not appear. Laehr had told plaintiff that there was plenty of oil on the brook and he went out with Laehr and looked at it. The defendant's attorney asked

“Q. And you entered into discussion with him whether it would ignite or not, didn't you? A. No, sir.

Q. You did not? A. No, sir; never said about that.

Q. What did you say when you went out there and looked at the oil?

Objection to the question was sustained and defendants' exception noted.” (Case, p. 77, l. 30.)

Defendant contends that in refusing to permit this cross-examination the court overstepped the bounds of judicial discretion, the question being directed to the credibility of plaintiff, and that plaintiff might have answered that “There is not enough oil there to ignite,” and in order to prove his assertion had kindled a blaze which resulted in the fire.

The reason the question was ruled out does not appear and it might have been the form of the question that was objectionable. If the question had been phrased to ask plaintiff if he had said,

“There is not enough oil there to ignite” the Court in its discretion might have allowed it, but a question whose form would permit the answer that witness was talking about the World War or the next election, or any subject within an unlimited range, was well ruled out.

In *Disque v. State*, 49 N. J. L. 249, it is said:

“When a question is asked, the answer to which may or may not be pertinent to the trial, the overruling of such question will not constitute error in law unless the party objecting to the exclusion of such evidence shows its pertinency.”

The extent to which the cross-examination of a witness for the purpose of discrediting him may be carried is a matter resting largely in the discretion of the Trial Court, which may of its own motion interpose to protect the witness against unreasonable and oppressive cross-examination (40 *Cyc.* 2626, IV).

Some abuse of this discretion must be shown and such abuse cannot be predicated upon a ruling from which no injury has resulted (40 *Cyc.* 2511, b).

2. The second ground set out in defendant's brief is that the Court erred in its charge as follows:

“Of course, it may be assumed from the evidence in this case that the oil which was placed upon the roads was within the limits of Essex Fells. The Mayor tells us that oil was put upon those roads. It may be that some of this oil which came into this brook came from the oil which was put upon those roads; but the municipality had not any more right to discharge oil

from its roads, if it knew that that was the effect of placing the oil upon the roads, into this brook and polluting it than it had to discharge oil from its plant.

“So the preliminary question for you to decide is whether or not there was oil in this brook, whether or not it was discharged from the defendant’s plant, and whether or not the effect of that oil was to pollute that stream. If it was, then as I have told you, the plaintiff is entitled to be compensated for such damage as was done to him.” (Case, p. 123, l. 30.)

If the defendant municipality threw oil in such large quantities on its roads that it flowed off the roads and into the brook to the injury of plaintiff as a riparian owner defendant is liable to plaintiff as the charge of the Trial Judge asserts.

Pollution of a stream by the discharge of sewage into it gives a right of action to a riparian proprietor injured thereby; and a municipality, merely as a riparian owner, has no more right to pollute the stream by discharging sewage therein than any other riparian owner, although it may acquire the right to use the stream to carry off sewage by prescription, or by purchase or condemnation (40 *Cyc.* 595, b).

Pollution of a river by the discharge of city sewage gathered from a large area, and caused to flow into the stream by artificially-constructed grades, cannot be justified as a natural and reasonable use of the river (*Attorney-General v. Paterson*, 58 N. J. Eq. 1, Syllabus 3).

A city is not responsible for so much of the street wash as goes into a stream from the surface of the streets, though more will in time of

rain, on account of the paved surfaces preventing absorption by the soil, pass into the stream, but it is responsible for so much of the street wash as it by artificial means diverts into sewers emptying into the stream, for it then disposes of the matter thus diverted, as it disposes of household slops and the contents of closets (*Doremus v. Mayor, etc., of City of Paterson*, 73 N. J. Eq. 474, Syllabus 2).

The throwing of the waste oil from the pumping station onto the streets was the method the defendant borough adopted to dispose of the oil. Defendant's witness Coulter on page 105, line 20 *et seq.* of the Case says:

"The oil from the barrels was removed and taken away from the premises and thrown out on the roads."

"Q. Do you know whether that was done or not? Do you know of your own knowledge whether that was done or not? A. I know that was done sometimes, because I had personal knowledge of it.

Q. Sir? A. I know that was done sometimes, because I had personal knowledge of it, and to my knowledge it never was neglected.

Q. That oil, then, was taken out of the barrels and thrown on the roads? A. So I understand. In fact, I know where it was thrown in two cases.

Q. Roads in Essex Fells? A. Yes.

Q. And that was just west of the pump house, wasn't it? These roads of Essex Fells are just west of the pump house? A. Some of it was thrown on the road west of the pump house.

Q. And that road is down an incline of about how much? A. Well, I am unable to say where the incline is, but I made an inspection of the road.

Q. Is there more than one road on that incline that was oiled? A. The road is on an incline that slopes towards the brook, yes.

Q. I say, was there more than one road there that was oiled, that slopes towards the brook? A. I believe so."

In *Doremus v. Paterson*, 73 N. J. Eq., 486 it is said:

"The city does not deny that it is under legal obligation to make some compensation for the injury inflicted. Its effort is to minimize the amount. On this head the first contention is that it is not responsible for street wash. This is only true in part. The city is not responsible for so much of the street wash as goes into the river from the surface of the streets, even though more would, in time of rain, on account of the paved surfaces preventing absorption by the soil in its natural state and causing occasional diversion of the natural flow, pass into the stream. (*Bowlby v. Speer*, 31 N. J. Law (2 Vr.) 351; *Town of Union v. Durkes*, 38 N. J. Law (9 Vr.) 21; *Jussepe v. Bramford Co.*, 66 N. J. Law (37 Vr. 641.) I think it is, however, responsible for so much of the street wash as it, by artificial means, diverts into the sewers."

*Doremus v. Mayor, etc., of City of Paterson*, 73 N. J. Eq. 486.

In *Olesiewicz v. Camden*, 100 N. J. L. 336-338, the Court of Errors and Appeals says:

"The common law rule that a municipality in the exercise of a public duty can commit no wrong for which a person injured thereby can recover compensation has its limitations and exceptions. This

was impliedly recognized in *Freeholders of Sussex v. Strader*, 18 N. J. L. 108. At page 116 Judge Dayton, speaking for the Supreme Court, points out that for a breach or neglect of a public duty, though every individual composing that public is injured, he can have no private remedy at the common law, and that the only remedy is by indictment.

“This court in *Livermore v. Freeholders of Camden*, 31 N. J. L. 507, affirmed the doctrine laid down in the case cited, and, hence, the doctrine as there enunciated and applied may be considered as firmly settled.

“In *Jersey City v. Kiernan*, 50 N. J. L. 246, that distinguished jurist Chief Justice Beasley (at p. 250), speaking for the Supreme Court, points out, with convincing logic, to what extent the common law rule is to be applied. He says, ‘What is the legal rule when a private nuisance alone has arisen exclusively from such a source? In the principal case referred to, the neglect complained of—that is, the absence of proper care in the construction or reparation of the bridge—was a public evil affecting the body of the people; in this case the defect in the sewer is injurious, apparently, to the plaintiff and one other contiguous landowner alone. Consequently, in the case in hand, as the mischief to the community, if any, is not of a magnitude sufficient to justify an indictment, while, at the same time, it damages the property of an individual, it is obvious that unless such a suit as the present one will lie, the wrong cannot be redressed by any method known to the law.

“After careful consideration, my conclusion is that the general rule established by

the line of cases referred to is not applicable to the facts present in this instance, and that whenever an indictment will not lie for such a neglect as is here complained of, attended with such consequences as have here ensued, the person thus specially injured may, in order to right the wrong, resort to an action \* \* \*. The injustice done and the necessity for a remedy are alike obvious, and would be to push to an extreme the doctrine which under most circumstances gives immunity to the community in the case of the misconduct of public officials.''' *Olesiewicz v. Camden*, 100 N. J. L. 338.

It is respectfully submitted that the judgment of the Court below should be affirmed and the appeal dismissed.

ARTHUR B. SEYMOUR,  
Attorney for and of Counsel  
with Plaintiff.



