

INDEX.

	PAGE
Summons	1
Complaint	2
Answer of The Borough of Bergenfield.....	7
Answer of The Borough of Dumont.....	9
Notice of Motion.....	11
Postea	13
Order for Judgment.....	14
Judgment	15
Notice and Grounds of Appeal.....	16
Stipulation	18
Motion for a Non-Suit.....	129
Motion for a Direction of a Verdict.....	162
Charge to Jury.....	163

TESTIMONY.

For Plaintiffs.

Thomas F. Bowe:	
Direct examination	20
Cross-examination	30
Re-direct examination	44
Re-cross-examination	46
David C. Boswell:	
Direct examination	48
Harry Ennever:	
Direct examination	50
Cross-examination	73
Re-direct examination	92
Mary A. Kempfer:	
Direct examination	94
Cross-examination	96
Irene I. Gilmore:	
Direct examination	100
Cross-examination	106

	PAGE
Edward L. Benson:	
Direct examination	109
Cross-examination	111
Edward G. Cram:	
Direct examination	111
Cross-examination	112
Anne G. James:	
Direct examination	114
Cross-examination	115
Clara L. Ennever:	
Direct examination	117
Cross-examination	121
Re-direct examination	125
Re-cross examination	127
For Defendants.	
Walter B. Harra:	
Direct examination	130
Cross-examination	141
Re-direct examination	144
Christopher E. Senft:	
Direct examination	145
Francis M. Murphy:	
Direct examination	147
David J. McGuire:	
Direct examination	148
Katherine Frances Leddy:	
Direct examination	149
Cross-examination	151
Everett P. Cole:	
Direct examination	151
Thomas F. Bowe (recalled):	
Direct examination	154
Cross-examination	161

Summons.

[Filed Nov. 2, 1927.]

The State of New Jersey to The Borough of Bergenfield and The Borough of Dumont:

YOU ARE SUMMONED to answer the annexed complaint of Harry Ennever and Clara L. (Seal) Ennever, his wife, in an action at law in the New Jersey Supreme Court. And take notice that unless you file your answer with the Clerk of the Supreme Court within twenty days after service upon you of this writ and the annexed complaint, the plaintiffs may proceed with their suit and judgment may be entered against you.

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WITNESS, WILLIAM S. GUMMERE, Chief Justice of the Supreme Court at Trenton, this 24th day of October, nineteen hundred and twenty-seven.

EDW. J. KELLEHER,
Clerk.

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MORRISON, LLOYD & MORRISON,
Attorneys.

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Complaint.

[Filed Nov. 2, 1927.]

NEW JERSEY SUPREME COURT.
BERGEN COUNTY.

10

HARRY ENNEVER and CLARA L. EN-
NEVER, his wife,
Plaintiffs,

vs.

THE BOROUGH OF BERGENFIELD and
THE BOROUGH OF DUMONT,
Defendants.

Action at Law.

20

The plaintiffs, residing in the Borough of Ber-
genfield, in the County of Bergen, and State of
New Jersey, say that:

FIRST COUNT.

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1. The defendant, the Borough of Bergenfield,
is a municipal corporation of the State of New
Jersey.

2. The defendant, the Borough of Dumont, is
a municipal corporation of the State of New Jer-
sey.

40

3. The plaintiff, Harry Ennever, during all the
times hereinafter mentioned, was the owner of
premises described as follows: ALL those six cer-
tain lots, tracts or parcels of lands and premises
hereinafter particularly described, situate, lying
and being in the Borough of Bergenfield, in the
County of Bergen and State of New Jersey, and

Complaint.

which on a certain map entitled "Map of Section 'A' of lots belonging to Walter Christie and Charles S. Demarest, Bergenfield, N. J." and filed in the Bergen County Clerk's office, are known, laid down and designated as lots numbered twenty, twenty-one, twenty-two, twenty-three, twenty-four, and twenty-five. All as laid down on said map. Said lots are situated on the south side of Armour Place, Bergenfield, New Jersey.

10

4. The plaintiffs, Harry Ennever and Clara L. Ennever, his wife, during all the times hereinafter mentioned, were the owners of premises described as follows:

ALL that certain tract of land and premises, hereinafter particularly described, situate, lying and being in the Borough of Dumont, in the County of Bergen and State of New Jersey, being known and designated as and by lot numbers one and two, Block H, and more particularly described on a certain map entitled "Map of Kia-ora Park", Borough of Dumont, Bergen County, New Jersey, surveyed September, 1922, by Boswell and Martens, C. E., Dumont, New Jersey, and filed in the Bergen County Clerk's office September 16, 1922, as map number 1802.

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5. The defendants, Borough of Bergenfield and Borough of Dumont, by virtue of proceedings heretofore taken by said Boroughs jointly, in accordance with the statute in such case made and provided, have constructed and are now operating on premises adjacent to the premises of plaintiffs above described, a joint sewage disposal plant.

40

6. A certain stream of water or brook flowed through the premises in which the joint sewage disposal plant was erected as aforesaid, and thence

Complaint.

to and through the premises of the plaintiffs above described which, before the grievance hereinafter mentioned, was a natural stream of pure water.

10 7. The plaintiffs had improved their property by the construction of a dwelling house and out-buildings thereon, which they used and occupied and now use and occupy as their home, and had improved and beautified the surrounding lands and the aforesaid brook of pure water in such a manner that the entire premises were of great value as a desirable residence site.

20 8. The defendants, the Borough of Bergenfield and the Borough of Dumont, so constructed and used the aforesaid joint sewage disposal plant and the sewer systems leading thereto as to bring to and concentrate in said sewage disposal plant the sewage and filth of substantially the entire population of said two boroughs, and so designed, constructed and used said sewage disposal plant that said sewage and filth were subjected to certain treatment in said sewage disposal plant and the effluent therefrom which was not water of such state of purity as a natural condition of said brook, 30 was turned into said stream in the course thereof immediately above and adjacent to the plaintiffs' premises, thereby polluting said stream to the plaintiffs' damage.

Plaintiffs demand as damages on the first count \$25,000.

SECOND COUNT.

40 1. Plaintiffs repeat the allegations of the first, second, third, fourth, fifth, sixth, seventh and eighth paragraphs of the first count.

Complaint.

2. The defendants, Borough of Bergenfield and Borough of Dumont, have continued to discharge the said effluent into said stream constantly since the plant was first put into operation and will continue to so discharge said effluent continuously hereafter, whereby the plaintiffs are damaged.

10

Plaintiffs demand as damages on the second count \$25,000.

THIRD COUNT.

1. Plaintiffs repeat the allegations of the first, second, third, fourth, fifth, sixth and seventh paragraphs of the first count.

2. The defendants have so constructed and used said sewage disposal plant as to bring thereto and concentrate therein the sewage and filth of the entire population of said two boroughs, and to hold and treat said sewage and filth therein in such a manner that the atmosphere in and about said sewage disposal plant and in and about the premises of plaintiffs is filled with noxious, foul, fetid and poisonous odors, to the plaintiffs' damage.

20

Plaintiffs demand as damages on the third count \$25,000.

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FOURTH COUNT.

1. The plaintiffs repeat the allegations of the first, second, third, fourth, fifth, sixth and seventh paragraphs of the first count.

2. From time to time during the operation of said sewage disposal plant, the defendant boroughs have negligently permitted said plant to fall into disrepair so that the same failed to operate properly and by reason thereof the crude sewage and filth collected at said plant has been dis-

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Complaint.

charged directly into the aforesaid stream, and thence over plaintiffs' premises to the plaintiffs' damage.

Plaintiffs demand as damages on the fourth count \$25,000.

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FIFTH COUNT.

1. The plaintiffs repeat the allegations of the first, second, third, fourth, fifth, sixth and seventh paragraphs of the first count.

20

2. From time to time said sewage disposal plant has failed to function so as to carry off the sewage and filth accumulated therein, and the defendant Boroughs by their agents and servants, have by pumps and other appliances emptied and discharged said crude sewage and filth directly into the aforesaid stream and thence over the premises of these plaintiffs.

Plaintiffs demand as damages on the fifth count \$25,000.

SIXTH COUNT.

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1. Plaintiffs repeat the allegations of the first, second, third, fourth, fifth, sixth and seventh paragraphs of the first count.

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2. By the construction and use of said sewage disposal plant by the defendant Boroughs and the bringing thereto by the sewage system designed, constructed and used in connection therewith, of great quantities of water, sewage and filth which would not otherwise have found their way into said stream, the volume of water, sewage and filth flowing through said stream is from time to time and frequently greatly exceeds the capacity of

Answer of the Borough of Bergenfield.

said stream to carry off the same, and as a result thereof the plaintiffs' premises have been flooded with such water, sewage and filth greatly to plaintiffs' damage.

Plaintiffs demand as damages \$25,000 on the sixth count.

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MORRISON, LLOYD & MORRISON,
Attorneys for Plaintiffs.

Answer of the Borough of Bergenfield.

[Filed November 10, 1927.]

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NEW JERSEY SUPREME COURT.
BERGEN COUNTY.

HARRY ENNEVER and CLARA L. ENNEVER, his wife,
Plaintiffs,

vs.

THE BOROUGH OF BERGENFIELD and
THE BOROUGH OF DUMONT,
Defendants.

Action at Law. 30

The defendant, the Borough of Bergenfield, a municipal corporation of the County of Bergen in the State of New Jersey, answering the plaintiffs' complaint says that:

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1. Paragraphs 1, 2, 3, 4 and 5 of the first count are admitted.

Answer of the Borough of Bergenfield.

2. Paragraphs 6, 7 and 8 of the first count are denied.
3. Paragraph 1 of the second count is answered in like manner as paragraphs 1, 2, 3, 4, 5, 6, 7 and 8 of the first count.
- 10 4. Paragraph 2 of the second count is denied.
5. Paragraph 1 of the third count is answered in like manner as paragraphs 1, 2, 3, 4, 5, 6 and 7 of the first count.
6. Paragraph 2 of the third count is denied.
7. Paragraph 1 of the fourth count is answered in like manner as paragraphs 1, 2, 3, 4, 5, 6 and 7 of the first count.
- 20 8. Paragraph 2 of the fourth count is denied.
9. Paragraph 1 of the fifth count is answered in like manner as paragraphs 1, 2, 3, 4, 5, 6 and 7 of the first count.
10. Paragraph 2 of the fifth count is denied.
11. Paragraph 1 of the sixth count is answered in like manner as paragraphs 1, 2, 3, 4, 5, 6 and 7 of the first count.
- 30 12. Paragraph 2 of the sixth count is denied.

DETURCK & WEST,

Attorneys of Borough of Bergenfield.

Answer of the Borough of Dumont.

[Filed November 16, 1927.]

NEW JERSEY SUPREME COURT.
BERGEN COUNTY.

<p>HARRY ENNEVER and CLARA EN- NEVER, his wife, Plaintiffs,</p> <p style="text-align: center;"><i>vs.</i></p> <p>THE BOROUGH OF BERGENFIELD and THE BOROUGH OF DUMONT, Defendants.</p>	<p>} Action at Law.</p>	<p>10</p> <p>20</p>
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Defendant, The Borough of Dumont, in the County of Bergen, a municipal corporation of the State of New Jersey, says that:

1. The defendant, The Borough of Dumont, admits the allegations contained in the first, second and fifth paragraphs of the "First Count" of the complaint herein.

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2. The defendant, The Borough of Dumont, has no knowledge or information sufficient to enable it to form a belief with respect to the allegations contained in the third, fourth, sixth, seventh and eighth paragraphs of the "First Count" of the complaint herein.

3. The defendant, The Borough of Dumont, has no knowledge or information sufficient to enable it to form a belief with respect to the allegations contained in the first and second paragraphs of the "Second Count" of the complaint herein, ex-

40

Answer of the Borough of Dumont.

cept it admits the repeated allegations in the first, second and fifth paragraphs of the "First Count" of the complaint.

10 4. The defendant, The Borough of Dumont, has no knowledge or information sufficient to enable it to form a belief with respect to the allegations contained in the first and second paragraphs of the "Third Count" of the complaint herein, except it admits the repeated allegations in the first, second and fifth paragraphs of the "First Count" of the complaint.

20 5. The defendant, The Borough of Dumont, has no knowledge or information sufficient to enable it to form a belief with respect to the allegations contained in the first and second paragraphs of the "Fourth Count" of the complaint herein, except it admits the repeated allegations in the first, second and fifth paragraphs of the "First Count" of the complaint.

30 6. The defendant, the Borough of Dumont, has no knowledge or information sufficient to enable it to form a belief with respect to the allegations contained in the first and second paragraphs of the "Fifth Count" of the complaint herein, except it admits the repeated allegations in the first, second and fifth paragraphs of the "First Count" of the complaint.

40 7. The defendant, The Borough of Dumont, has no knowledge or information sufficient to enable it to form a belief with respect to the allegations contained in the first and second paragraphs of the "Sixth Count" of the complaint herein, except it admits the repeated allegations in the first, second and fifth paragraphs of the "First Count" of the complaint.

Notice of Motion.

Wherefore, the defendant, the Borough of Dumont, in the County of Bergen, demands judgment that the plaintiffs' complaint be dismissed with the costs and disbursements of this action.

FRED W. MATTOCKS,

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Attorney for the defendant the Borough of Dumont, in the County of Bergen,

Notice of Motion.

NEW JERSEY SUPREME COURT.

BERGEN COUNTY.

20

HARRY ENNEVER and CLARA L. ENNEVER, his wife,
Plaintiffs,

vs.

Action at Law.

THE BOROUGH OF BERGENFIELD and THE BOROUGH OF DUMONT,
Defendants.

30

To Morrison, Lloyd & Morrison,
Attorneys of Plaintiffs.

Gentlemen:

Please take notice that on Monday, the 28th day of May, 1928, at ten o'clock in the forenoon, or as soon thereafter as counsel may be heard, at the Court House in Hackensack, New Jersey, we will move to amend the answers filed by the respective

40

Notice of Motion.

defendants in this matter, by adding thereto the following separate defenses.

FIRST SEPARATE DEFENSE.

10 The acts complained of in plaintiffs' complaint, if committed by the defendants or either of them, constitute and constituted a public nuisance and a public wrong to be remedied by indictment and do not afford a basis for a civil action against the defendants by the plaintiffs or by any other person who have suffered particular damage by reason of said negligent or wrongful acts.

SECOND SEPARATE DEFENSE.

20 The damages which the plaintiffs claim to have suffered were not suffered by them alone, disassociated from their membership in the general public, and therefore afford no basis for a civil action against the defendants.

THIRD SEPARATE DEFENSE.

30 There is no statute in the State of New Jersey imposing liability upon municipal corporations for the acts complained of in plaintiffs' complaint, and the plaintiffs are therefore not entitled to recover for the injuries they claim to have suffered by reason of the neglect of the defendants to perform a public duty.

FOURTH SEPARATE DEFENSE.

40 The plaintiffs, if they suffered the private injuries they complain of, did so as one of the public, and as the nuisance, complained of, is a public nuisance, is remediable only by indictment.

DETURCK & WEST,
Attorneys of Defendants.

Postea.

[Filed June 21, 1928.]

NEW JERSEY SUPREME COURT.

BERGEN COUNTY.

10

HARRY ENNEVER and CLARA L. EN-
NEVER, his wife,
Plaintiffs,

vs.

Action at Law.

THE BOROUGH OF BERGENFIELD and
THE BOROUGH OF DUMONT,
Defendants.

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This case was tried before Judge Edwin C. Caffrey with a Jury at the Bergen Circuit on May 28th and May 29th, 1928. The Jury rendered a general verdict against the defendants and in favor of the plaintiffs for Thirty-two Hundred and Fifty (\$3250) Dollars.

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EDWIN C. CAFFREY,

Judge.

40

Order for Judgment.

NEW JERSEY SUPREME COURT.

10

HARRY ENNEVER and CLARA L. ENNEVER, his wife,
Plaintiffs,

vs.

THE BOROUGH OF BERGENFIELD and
THE BOROUGH OF DUMONT,
Defendants.

Action at Law.

20

It is ordered that judgment be and hereby is entered in favor of plaintiffs and against the defendants for the sum of three thousand two hundred and fifty dollars, besides costs to be taxed *nisi*.

Entered June 21, 1928.

On motion of,

30

MORRISON, LLOYD & MORRISON, Attys.

\$3250.00

84.51

\$3334.51

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Judgment.

NEW JERSEY SUPREME COURT.

HARRY ENNEVER and CLARA L. EN- NEVER, his wife, Plaintiffs,	} 10
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vs.

Action at Law.

THE BOROUGH OF BERGENFIELD and THE BOROUGH OF DUMONT, Defendants.	}
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Morrison, Lloyd & Morrison, Attorneys.

Judgment entered this twenty-first day of June, A. D., nineteen hundred and twenty-eight in favor of plaintiffs and against the defendants for the sum of three thousand two hundred and fifty dollars damages and eighty-four dollars and fifty-one cents costs.

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\$3250.00

84.51

\$3334.51

WM. S. GUMMERE,
C. J.

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Notice and Grounds of Appeal.

[Filed August 25, 1928.]

NEW JERSEY SUPREME COURT.

BERGEN COUNTY.

10

HARRY ENNEVER and CLARA L. ENNEVER, his wife,
Plaintiffs,

vs.

THE BOROUGH OF BERGENFIELD and
THE BOROUGH OF DUMONT,
Defendants.

20

Action at Law.

To Morrison, Lloyd & Morrison, Esqs.,
Attorneys of the Plaintiffs.

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Take notice, that the defendants appeal to the Court of Errors and Appeals from the whole of the judgment entered in this cause on the following grounds:

1. Because the trial court erred in not granting a motion for a non suit in favor of the defendants against the plaintiffs, to which ruling an exception was taken.

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2. Because the trial court erred in not granting a motion for a direction of the verdict in favor of the defendants against the plaintiffs, to which ruling an exception was taken.

3. Because the trial court erred in not sustaining the objection to the following question pro-

Notice and Grounds of Appeal.

pounded by the attorney of the plaintiffs, to witness Irene I. Gilmore, to wit:

“Now, if there had been no sewage disposal plant built there, other conditions remaining the same, what would you consider the value of Mr. Ennever’s property?”

10

To the ruling of the trial court in not sustaining the objection to said question an exception was taken.

4. Because the trial court erred in not sustaining the objection to the following question propounded by the attorney of the plaintiffs, to witness Irene I. Gilmore to wit:

“Now, will you state, please, other conditions remaining as they have been, but no sewage disposal plant being there, what would the value of that property be today?”

20

To the ruling of the trial court in not sustaining the objection to said question, an exception was taken.

5. Because the trial court erred in not sustaining the objection to the following question propounded by the attorney of the plaintiffs to witness Irene I. Gilmore, to wit:

30

“And what, in your opinion, is the value of his property in that condition?”

To the ruling of the trial court in not sustaining the objection to said question, an exception was taken.

6. Because the trial court erred in permitting witness, Irene I. Gilmore, to testify over objection as to the depreciation in value of the Ennever property as a result of the construction of the sewerage disposal plant, to which ruling an exception was taken.

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Stipulation.

7. Because the trial court erred in refusing to strike out the testimony of witness, Irene I. Gilmore, on the ground that she was not qualified to testify as to the depreciation in value of the Ennever property, to which ruling an exception was taken.

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8. Because the trial court erred in refusing to strike out the testimony of witness, Irene I. Gilmore, as to the value of the Ennever property after the construction of the sewerage disposal plant, to which ruling an exception was taken.

DETURCK & WEST,
Attorneys of Appellants.

Dated August 10, 1928.

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Stipulation.

[Filed August 28, 1928.]

NEW JERSEY COURT OF ERRORS AND
APPEALS.

30

HARRY ENNEVER and CLARA L. EN-
NEVER,

Plaintiffs,

vs.

THE BOROUGH OF BERGENFIELD and
THE BOROUGH OF DUMONT,

Defendants.

Action at Law.

40

It is hereby stipulated between Morrison, Lloyd & Morrison, Esqs., attorneys of the plaintiffs, and

Testimony.

DeTurck & West, Esqs., attorneys of the defendants, that reproductions of the maps and photographs offered in evidence at the trial of this case may be submitted on the argument of this appeal with the same effect as if the same were printed as part of the State of Case and that each party shall furnish the required number of reproductions of his exhibits.

10

Dated August 27, 1928.

MORRISON, LLOYD & MORRISON,
Attorneys of Plaintiffs-Respondents.
DE TURCK & WEST,
Attorneys of Defendants-Appellants.

Testimony.

NEW JERSEY SUPREME COURT.
BERGEN COUNTY.

20

HARRY ENNEVER, and wife,
Plaintiffs,

vs.

Action at Law.

THE BOROUGH OF BERGENFIELD and
THE BOROUGH OF DUMONT,
Defendants.

30

Hackensack, New Jersey,
May 28, 1928.

Before:

HONORABLE EDWIN C. CAFFREY,
Judge, and a Jury.

APPEARANCES:

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For the Plaintiffs, MESSRS. MORRISON,
LLOYD & MORRISON; WILLIAM J. MORRI-
SON, JR., ESQ., of Counsel.

Thomas F. Bowe, direct.

For the Defendants, MESSRS. DETURCK & WEST; MESSRS. SEUFERT & ELMORE; LELAND F. FERRY, ESQ., of Counsel. FREDERICK W. MATTOCKS, ESQ.

10 A Jury was empanelled, accepted and sworn.

Mr. Morrison opens the case to the Jury on behalf of the plaintiffs.

Mr. West opens the case to the Jury on behalf of the defendants.

THOMAS F. BOWE, sworn as a witness on behalf of the plaintiffs, testified as follows:

20 Direct examination by Mr. Morrison:

Q. Mr. Bowe, where do you reside? A. Hackensack, New Jersey.

Q. And what is your profession? A. I am civil and sanitary engineer.

Q. And are you the engineer who designed the sewer system for the joint boroughs of Bergenfield and Dumont? A. I am.

30 Q. And did you design the sewage disposal plant? A. I did.

40 Q. Will you explain, please, to the jury in your own way, and as briefly as you can to make it clear, what it was you designed? A. The sewerage projects of the Boroughs of Bergenfield and Dumont consist of the sewerage system which collects the domestic sewage and trade liquors, and infiltration from the Boroughs of Bergenfield and Dumont, and is conveyed by the shortest route to some particular point for the eventual treatment and disposal of the waste materials that are in that flow.

Thomas F. Bowe, direct.

Q. May I interrupt you just there to define for the jury those technical words, "trade liquors" and "infiltration?" A. The sewage flow in any sewer system is comprised of three distinct subdivisions; the domestic sewage which is the waste emanating from domestic households, business buildings, institutions, and the like, and is derived from the public water supply, which, after passing through the various fittings in a residence, dwelling or business building or institution, carries the waste which have been derived by domestic and commercial uses; the sewage is discharged into the sewer lines in each particular street. In addition to the domestic sewage, there is a flow which is known as infiltration and, as a matter of fact, it is the ground water which seeps down through the pores of the earth and enters the sewer through, we will say, defective joints, by increased pressures of head over the sewers, through the top of manholes, and also by illegal connections which may be made to the sewer system from the dwellings, such as house leaders and the like. The industrial wastes are the wastes which may be derived from the public water supply, and are used for the manufacture of some particular product for commercial uses. As a matter of fact, the trade wastes problem in Bergenfield and Dumont is nil. So that the sewage flow is comprised principally of domestic sewage and ground water infiltration.

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30

Q. And what was the public water supply in these two boroughs? A. The public water supply is derived from the Hackensack Water Company's works at New Milford, and pumped through these two municipalities by means of a distribution system.

40

Thomas F. Bowe, direct.

10 Q. I will try not to interrupt you again. A. The sewage, after being collected throughout the various streets, passes into trunk lines, where this flow is carried to the point under discussion which is located in the northerly section of Bergenfield and in the southerly end of Dumont, and practically—

By the Court:

20 Q. Mr. Bowe, at this point, is there one trunk line to which all these tributaries converge? A. No. There is two trunk lines; that is, the municipality is sub-divided into various sections. The drainage of Bergenfield flows north, and the drainage of Dumont flows south, through these trunk lines. A small portion of the sewage from Bergenfield or from Dumont is collected at a pumping station and pumped back to this particular site.

30 Q. Was there any one time that all of the sewage of both municipalities was placed in one line? A. When it enters the sewage treatment plant site, they converge, join together, and pass out to this central location, which is the location of the sewage treatment plant, and at that point, it then passes through the works.

Q. Then, the total sewage—you are familiar with this point, this property, that is involved, are you? A. I am, sir.

40 Q. Are all of the collections, then, at the same time, the entire sewage of both municipalities driven or pumped through that section? A. Not pumped. It flows by gravity. Probably ninety per cent of the flow of both municipalities are collected together by the collecting system joined at some particular point, and enter the site of the sewage treatment plant as a joint line.

Thomas F. Bowe, direct.

By Mr. Morrison:

Q. What about the other ten percent? You said ninety percent flowed in in that way. What about the other ten percent? A. No. I say flow by gravity. The ten percent is pumped to these same trunk lines and enters the plant by gravity, toward the plant. 10

By the Court:

Q. So the hundred percent passes at this point when it passes through the large line into the plant? A. When the sewage enters the sewage treatment plant system, it passes through what is known as a grit and screen chamber. This is a concrete structure equipped with bar screens about two inches apart, set on an angle of forty-five degrees, in like manner, and as the sewage flows through these bar screens, there is retained therein the floating substances, paper, and various ingredients which are placed in the tanks in the various layers. After the sewage passes through the grit and screen chamber, it enters what is known as the settling tank. The settling tank is a concrete structure where the sewage passes through at a rate of speed which excludes the solids and suspended matters in the sewage, which settle to the bottom of this particular tank, where the solids remain, and the liquids pass on to a structure known as a dosing tank. At this particular location, the sewage is held for a certain length of time, principally to build the sewage up to an amount which may be discharged through an appurtenance into sand beds. After the sewage passes into the sand beds, or to the distribution troughs on sand beds, the sewage disburses and spreads out on the sand beds, and the liquid 20 30 40

Thomas F. Bowe, direct.

10 passes down through to what is known as the underdrainage system. I might at first relate the construction of a sand bed. It is an area composed of graded sand, free from loam and other foreign substances, about forty-two inches in depth, underlaid with a system of underdrains; in other words, pipes, small pipes, six inches in diameter, laid end to end, so that the sewage passing down through the sand may be gathered in these collectors, and discharged to the brook which runs north and south through the site.

By Mr. Morrison:

20 Q. Now, you have spoken of the solids flowing to the bottom of these settling tanks. What becomes of those solids when they accumulate in sufficient amount to require attention? A. The solids that remain in the tank are normally supposed to remain there a period of five to six months. In that time, the solid matter reduces itself in volume by a series of gasification or bacterial action and reduces itself in volume and becomes somewhat liquid. After the sewage or, rather, the sludge rises to a certain elevation in 30 the tank, the operator makes observations in the form of tests or measuring devices whereby he determines its elevation in the tank. After that reaches a certain point, the sludge, by opening valves from this tank, is discharged into sand beds, known as sand filters, with the exception that they are not as deep. The sludge is placed on this bed about a foot in depth, and this particular liquid or sludge is semi-fluid, black in color, 40 contains about ninety percent moisture. The sludge in this liquid form is discharged to the beds, where the moisture and liquid drains out of this sludge,

Thomas F. Bowe, direct.

leaving at the end a residue which is about two inches in thickness, where the residue is then removed from these beds, and may be used for filling or fertilizer if the demand is there.

Q. Now, going back to the large main which brings the flow from these two Boroughs into this first screen chamber; is that chamber open or closed? A. It is an open chamber.

10

Q. And then, from that, the sewage goes, as I remember your description, into the settling tank or tanks. How many settling tanks are there in this plant? A. There is one structure subdivided into two parts. Each one of the two parts has three sections.

Q. That would make six in all, is that right? A. Six what?

20

Q. Six parts? You say there are two sides to it, and each is divided into three; that makes six? A. I believe at the ends are what we call six hopper bottoms or sludge basins.

Q. Now, in describing the drawing off of the sludge, you said there were these sludge beds of sand. How many of those are there? A. There are two beds subdivided into three sections each, on the north and south of this settling tank.

30

Q. And the next you spoke of was a dosing tank, as I remember it. Is that an open or a closed structure? A. It is an open structure.

Q. Then, from that, it goes out on these filter beds. Where do they lie with relation to the brook? A. They lie on the westerly side of the brook.

Q. And where does the dosing tank lie? A. The dosing tank stands on the easterly side of the brook.

40

Q. And how is the sewage conveyed from the dosing tank to the beds? A. It passes through a

Thomas F. Bowe, direct.

series of channels, then distributed on the west side of the brook; and these channels convey sewage to either one line or any of the beds on the westerly side of the brook.

10 Q. How does that flow operate, by gravity, or are there pumps there? A. It operates by gravity.

Q. How large an effluent was your system designed to carry? A. The system was designed on the flow basis.

Q. And what was the basis of your design? A. Approximate, 580,000 gallons as an average dry weather flow.

Q. Do you know what the flow was when the plant was first put into operation? A. Yes.

20 Q. Did you have an opportunity to observe that? A. I did.

Q. How much, about? A. About 350,000 gallons per day.

Q. Have you observed it since that time? A. I have.

30 Q. And what are your subsequent observations? A. The observations during the month of January of this year, there flowed about 1,500,000 to 1,700,000 gallons per day.

Q. Do you know where Mr. Ennever's property is in relation to the plant? A. I do.

Q. Will you tell the jury, please? A. If I could refer to some maps, I might be able to tell.

Q. You have some maps? A. I have them there in that white package.

(Map placed on board before the jury.)

40

Mr. Morrison: By consent, we offer in evidence the tax assessment maps of each of these two boroughs, so that the lay-out of

Thomas F. Bowe, direct.

the land and the location of the property in a general sense may be known.

(Designated Exhibit P-1 in evidence.)

Mr. Morrison: This, ladies and gentlemen of the jury, is the tax assessment map of Bergenfield, and this is the tax assessment map of Dumont.

10

Do you want to have these marked, your Honor?

The Court: You had better.

(Second map designated Exhibit P-2 in evidence.)

20

Q. Mr. Bowe, will you show the jury, please, first, on the map of the entire borough, the location of the Ennever property, and then on the detail sheet which shows on the larger scale? A. This is the sheet marked "index map."

Q. In the back. A. I have before me here a map which purports to show the Borough of Bergenfield, and is drawn on a small scale, and is commonly known as an index map used to accompany the assessment atlas. And the additional sheets are the details for this particular small scale map. The location of the property in question is at this point designated as on the south side of—

30

Q. Armour Place? A. Armour Place. In the northwest section of the Borough of Bergenfield.

Q. Now, the detail? A. With reference to this map, I might identify it as, say, in this location, this (indicating) being Armour Place.

40

Q. And when you speak of this map, you refer to a map on the board which is marked or titled,

Thomas F. Bowe, direct.

“Proposed Sewage Works of Boroughs of Bergenfield and Dumont, general layout”? A. Yes, sir.

The Court: Is that P-1?

Mr. Morrison: P-1.

10

Q. Now, Mr. Bowe, have you the detail sheet in the Borough Assessment Map, P-2? If so, will you please show it to the jury? A. The detail sheet here, labeled “Sheet One of the Revised Assessment Atlas,” and the building location is shown on Armour Place, the southerly side, in the north-easterly, or northwesterly section of the Borough of Bergenfield, in this location (indicating).

20

Q. Now, will you take this map, P-3, of the Borough of Dumont, and show the jurors the location of the adjoining property in the other Borough? A. I show you sheet one of the index map of the Borough of Dumont. The location of the Ennever property is identified by a cross mark in black pencil, and shows the location to be in the Borough of Bergenfield, the northwesterly part of the municipality, and also a similar location might be designated as the southwest section of the Borough of Dumont.

30

Q. Mr. Bowe, I show you a sketch which someone else has made, and which purports to show your sewer line, your tanks and general sand beds, and the Ennever property, and ask you whether that is a diagrammatic representation of the plant and the Ennever property? Something you have not seen before, I know. (A. (Referring) I am not able to identify the extent of the Ennever property, although I know the location of the building itself with reference to the brook; I would say that

40

Thomas F. Bowe, direct.

this fairly represents the location of the Ennever property, especially the structure.

Mr. DeTurck: I would object. I do not think it is drawn to scale.

Mr. Morrison: We have called it a diagram, to show the relation of these properties.

10

Mr. DeTurck: It might mislead the jury as to the distance between the house and the plant.

The Court: Well, it is not offered for that. The witness said it is a correct representation.

Mr. Morrison: And we haven't the whole thing on any one map; that is the reason I am trying to use this because we have to use three maps and put them together to get what is shown on this one diagram.

20

The Court: I will admit it.

(Designated Exhibit P-4 in evidence.)

Q. Now Mr. Bowe, will you step to the board, and point out on the drawing which you have of the general lay-out of the sewer system, these structures which you have recently described to the jury? A. Prospect Avenue is the street running north and south in the Borough of Bergenfield and the Borough of Dumont, and at the location of the treatment plant site, both trunk lines join in a common manhole and flow westerly through a twenty-seven-inch pipe to a location labeled in here "grit and screen chamber." The sewage passing through the grit and screen chamber is then carried to the covered settling tank, and after passing through the settling tank and deposit-

30

40

Thomas F. Bowe, cross.

10 ing the solids in suspension, the sewage passes to an open dosing tank. After reaching a certain elevation at this particular point, the sewage passes through one or many channels to a location on the westerly side of a brook which is designated in this manner (indicating). The sewage is then discharged into various lines which carry the effluent to locations on the sand beds, where the sewage is disbursed to the beds and takes a downward path through the sand, is collected by the underdrainage system, which is down here (indicating), and carried to the brook, where it is discharged with the waters of the existing brook.

20 Cross-examination by Mr. DeTurck:

Q. Will you explain to the jury the reasons for the different operations of the plant? A. Will you repeat that, please?

(Question read.)

30 A. The sewage is collected in the collection system, and is carried from the location of a manhole on Prospect Avenue or Prospect Street, and flows westerly through a twenty-seven-inch line. In this line, the raw sewage exists. And that is composed of domestic sewage and infiltration in its raw state. As the sewage reaches this grit and screen chamber, the volume passes through the grit and screen chamber, from which is extracted the heavier mineral matters, such as street sweepings, sand, or any foreign or inorganic substance. The sewage then passes on through the bar screens upon which is retained the solid or larger matters in absolute suspension. The sewage then passes to the settling tank and moves through at a rate of speed so determined that the solids and matters

40

Thomas F. Bowe, cross.

in suspension are deposited in this settling tank. The effluent is then taken up in the dosing tank and discharged to the sand beds, where the sewage passes down through the sand beds and is collected in the underdrainage system.

Q. You say you drew the plans, did you not, Mr. Bowe? You drew the plans? A. Yes, sir. 10

Q. And was the sewer plant properly designed? Properly designed? A. It was.

Q. Was it properly built? A. It was.

Q. Did you supervise the construction? A. Not every day, no.

Q. But, I mean, you passed on it? A. Under my direction.

Q. Yes. But you finally passed on the plant, did you not? A. I did. 20

Q. Did you design the sewer system, too? A. I did.

Q. And was that properly installed? A. It was.

Q. Now, at the time of the installation of the sewage system and the sewage disposal plant, was it sufficient to take care of the needs of the two boroughs? A. The sewerage system itself is designed for a period of twenty-five years.

Q. Yes. A. The sewage treatment plant, of course, is only designed for a period of five to seven years, at which time additional units are added to the particular plant so that, when the ultimate growth of the community is reached, the plant will be of sufficient size to accommodate the sewage flow. 30

Q. When did you start the operation of the plant, what year? A. Late in 1925.

Q. And at that time, was it large enough to take care of the flow of sewage? A. It was. 40

Q. And you anticipated that it would work until 1930? A. We anticipated that if a certain growth

Thomas F. Bowe, cross.

existed in those communities, the flow would naturally arrive at 580,000 gallons in 1930.

Q. Is it taking care of the flow now? A. No.

10 Q. Why not? A. Because there is a total mileage of sewers connected with the plant and the ultimate sewage passing through the plant is greater than the plant is designed to accommodate.

Q. And you did not anticipate that in 1925? A. We anticipated insofar as additional units might be added to the plant to take care of any flow that the plant might be designed for it to carry.

Q. Have any steps been taken to remedy the condition which now exists? A. Yes.

20 Q. What has been done? A. The Joint Sewerage Commission, which is made up of a committee of both councils have been in consultation, conference, since January of this year, and informally prior to that, with the idea of developing the plant to a stage whereby it might efficiently and properly treat the sewage flow which is now passing through the plant.

30 Q. Have plans been prepared for the enlargement of the plant? A. Ordinances have been adopted or, rather, introduced in the Boroughs of Dumont and Bergenfield, and I as the engineer have been authorized to prepare plans and specifications for the covering of the sludge beds, and also been authorized to prepare plans, specifications and drawings to submit to the State Department of Health to design the plant up to its proper capacity.

40 Q. Now, I show you a plan and ask you if this was prepared by you? A. (Referring.) Yes, sir.

Q. And the plan of what? A. This plan purports to show a structure, this structure is made up

Thomas F. Bowe, cross.

of two parts, concrete foundation and a greenhouse top.

Q. What is the purpose of that structure? A. The purpose of this structure is to enclose and cover the existing sludge beds.

Q. And what effect will that have on the operation of the plant, if any? A. It increases the efficiency of operation. 10

Q. And in what respect? A. At the present time, the sludge beds are exposed to atmospheric conditions. When the sludge is discharged to these sand beds as they now exist, the theory of its application is simply that the moisture shall be drawn from this residue, and—and the degree of—or the time element, rather, which is an important one in the drying of this sludge, is dependent wholly on atmospheric conditions; in other words, if it rains, the sludge is not possible to dry. If we have a good, clear day, the drainage of a sludge bed takes place in about the first twenty-four hours, and after twenty-four hours, the sludge—the moisture is taken by means of evaporation. So that, in this particular instance, the sludge beds are planned to be enclosed and encased with a glass greenhouse covering whereby the sludge may be discharged to these beds and go through the drying process, irrespective of weather conditions. 20 30

Q. Well, will this structure also eliminate certain of the smells which emanate from the sludge beds? A. I have not admitted there were any smells.

Q. Well, if there were smells, will this structure eliminate them? A. Well, that is an aesthetic sense, whether the sludge smells; it depends on what the degree is, and how the individual takes it. 40

Thomas F. Bowe, cross.

through the Boroughs of—or, rather, the Township of Tenafly, of Teaneck, and part of it ran through the Borough of Bergenfield, and through the Boroughs of Dumont, New Milford, and thence to the Hackensack River.

10 Q. Before the Bergenfield plant was built, was that a pure stream? A. No; it was not.

Q. Now, in what way was it not pure? A. Well, there was a location of the sewage treatment plant in the West Englewood section discharging raw sewage into that brook.

Q. For what years, do you know? A. Well, it was constructed in 1913.

20 Q. And when you started the Bergenfield plant, was it then discharging raw sewage into the brook? A. It was.

Q. To what extent? A. Well, at the sewage treatment plant that was located there, was primarily built for about fifty houses, and at the time of my inspection in 1922, I made some tests on that plant showing that there were one hundred and sixty-one houses connected with the plant which was normally supposed to accommodate about

30 Q. In what municipality were those one hundred and sixty-one houses located? A. In the Township of Teaneck, West Englewood section.

Q. How far from the site of the Bergenfield plant, approximately? A. Approximately two miles.

40 Q. Now, how far is the plant away from the Hackensack River? A. About a mile and an eighth; a mile and eight-tenths.

Q. The effluent from the plant at the present

Q. And does that affect anybody else besides time, is that pure water? A. No, it is not.

Thomas F. Bowe, cross.

Mr. Ennever? A. I should say it affects everybody along the brook.

Q. For a distance of what? What distance? A. A mile and eight-tenths.

Q. That is from the plant to the Hackensack River? A. To its junction with the Hackensack River.

10

By the Court:

Q. That is, you are speaking now of the sewer in question? A. Speaking of the effluent which passes into this brook, and this brook passes then to a point on the Hackensack River about a mile and eight-tenths below.

By Mr. DeTurck:

Q. You are speaking now of the effluent from the Bergenfield-Dumont plant? A. Speaking, as I understand, the effluent, after it joins the brook, and then continues northerly in a rather roundabout way to the Hackensack River.

20

Q. Prior to the construction of this plant in Bergenfield and Dumont, or of the sewer system, how was the sewage taken care of? A. The sewage was taken care of in the usual manner, by discharging the sewage to tanks in the yard, commonly known as cesspools.

30

Q. There was no sewage system whatsoever in Bergenfield or Dumont? A. No, sir.

Q. Now, the plans you prepared, were they approved by the State Board of Health, as required by the statute? A. They were.

Q. The new plans you have prepared to remedy conditions, to remedy this old condition, will they remedy the conditions? A. They will.

40

Q. And what do they comprehend? A. They comprehend the covering of these open sludge beds with a glass greenhouse effect, additional di-

Thomas F. Bowe, cross.

gestion tanks, additional filtration, and the addition of, probably, chlorinating the effluent or adding germicide to the effluent after it passes the tank.

10 Q. How many digestion tanks would you have to add? A. Well, it is a matter of capacity in cubic feet that has to be added to the plant; and it depends on the economic features whether it should be one or two tanks.

Q. When your plant was first built, how many miles of sewer did you accommodate? A. When the plant was first accepted, there was about eleven and one-third miles of sewers constructed contributing to the plant.

20 Q. And when the plant was completed? A. When the plant was completed, about seven or eight miles had been added to the preparatory construction.

30 Q. With how many miles of sewer is the plant connected now? A. The mileage, the trunk lines and laterals connected with that plant, I think, sixty-one miles. In addition to that, there, of course, are the house connections connected with the trunk lines and laterals, amounting to some forty miles, and I would—I recall a figure of about one hundred and ten miles of pipe lines connected with the treatment plant at the present time.

Q. Did you ever take pictures of the conditions in West Englewood, the West Englewood plant, prior to the construction of the Bergenfield-Dumont plant? A. When I made an investigation, yes.

40 Q. Have you those pictures with you? A. Pardon?

Q. Have you those pictures with you? A. I have.

Mr. Morrison: To save time, we shall object to them unless they can show the con-

Thomas F. Bowe, cross.

dition remains unchanged. We understand West Englewood has been cleaned up some years ago. We think it is not material what the condition was in West Englewood before this suit was started. We are not asking any damages prior to the beginning of the suit. The conditions years ago in West Englewood may be very different to-day.

10

The Court: When were these pictures taken?

The Witness: 1922.

The Court: Before.

Mr. Morrison: We think that is much too early. This plant was not built until 1925. It is too remote.

20

Mr. DeTurck: At the time the West Englewood plant was being operated, it overlapped the time this plant was operated.

Mr. Morrison: You have not shown that by the witness yet.

Q. Until what time was the West Englewood plant in operation, Mr. Bowe? A. Until such time as a pumping station was built north of this present—of the site of the prior existing plant.

30

Q. Was that after the operation of the Bergenfield plant commenced? A. About the same time, 1926, I believe.

Q. 1926. And you started to operate the Bergenfield plant in 1925? A. I think the operation of both plants overlapped.

Q. Yes. They overlapped? A. Yes, sir.

Q. All right.

40

Mr. Morrison: I think the time of the overlap is so short that the pictures are not evidential in this case.

Thomas F. Bowe, cross.

The Court: Well, of course, if they portray a correct representation, I will admit them, and if there be some slight modifications, I will permit an explanation of those.

10 Q. Who took those pictures? A. I did.

Q. And do they correctly represent the conditions of the West Englewood plant? A. They did the day they were taken.

Q. I show you a picture marked "7-general-S". What does that represent? A. It shows a sand bed which was part of the sewage treatment plant covered with growth and displaying the sewage on the surface of the bed.

20 Q. And what was the condition of that sand bed? A. It was occupied by vegetation, raw sewage, and other debris.

Mr. DeTurck: I would like to have this marked for identification.

(Photograph marked Exhibit D-2 for Identification.)

Mr. DeTurck: Unless Mr. Morrison has no objection?

30 Mr. Morrison: I have no objection.

Mr. DeTurck: All right; put it in as evidence, then.

(Photograph marked Exhibit D-2 in evidence.)

40 Q. Now, the effluent, or, as you say, the raw sewage from this West Englewood plant emptied into the stream which passes by Mr. Ennever's property; is that right? A. Yes, sir.

Q. Now, I show you another picture, and ask you what that represents? A. It represents a dosing tank similar in purpose to the thought which

Thomas F. Bowe, cross.

is embodied in the design for Bergenfield and Dumont, with the exception that this is not operating; it shows one side of a siphon plug, and the sewage being retained in there to such a point that it became putrescable and highly gaseous.

Q. That is also a picture of the West Englewood plant? A. (Referring) It is a part of the plant.

10 10

Mr. DeTurck: I will offer this.

(Photograph marked Exhibit D-3 in evidence.)

Q. Have you a picture of the Bergenfield-Dumont plant? A. I have many.

Q. Well, a panoramic view of the whole plant? A. I have.

20 20

Q. Can you separate that in any way? A. Yes, sir.

(The witness separates photographs.)

Q. And who took this, who took this picture?

A. I do not recall.

Q. Well, does this correctly represent the conditions at the Bergenfield plant after it was completed?

Mr. Morrison: At what time?

30 30

A. It does.

Mr. DeTurck: I will offer it.

Mr. Morrison: How long after the completion, please?

The Witness: It is about two months.

(Photograph marked Exhibit D-4 in evidence.)

Q. Was there any other site available in either Dumont or Bergenfield for the construction of this plant? A. No.

40 40

Thomas F. Bowe, cross.

Mr. Morrison: I object to that as immaterial.

The Court: I did not hear the question. (Question read.)

The Court: Sustained.

10

Q. What system of filtration was used in the construction of this plant? What kind of a plant is this? What do you call it, what system? A. It is just a combination of units. The only definition would be describing the units that comprise the whole.

20

Q. Isn't there a difference in the sand filtration, and the different kinds of filtration? A. There are various methods of treating sewage by the filtration method. This is known as a sand filter plant.

Q. Are there any other plants like it in Bergen County? A. There are.

Q. Where? A. Westwood, New Jersey, Glen Rock, New Jersey; both in Bergen County.

Q. Did you notice any noxious odors emanating from the swamp where this was built before the construction of the plant?

30

Mr. Morrison: We object to that as immaterial, outside of the suit.

The Court: Well, I will permit it as a condition which might not—in other words, the present condition might not have resulted from this.

Mr. Morrison: I won't press it.

40

A. There was an odor from this, and there is an odor from any swamp.

Q. And what is that odor? A. Well, it is commonly known as a marsh gas; it is a vegetable de-

Thomas F. Bowe, cross.

composition that takes place. It is noticeable to anyone who has ever crossed——

Q. It is methane? A. Well, methane is a technical name. It is commonly known as a marsh gas.

Q. And does that smell still exist? A. Across the Bergen-Fort Lee Turnpike, at the proper time of day, I think the odor from the Hackensack River is noticeable to everybody who has occasion to pass through the valley. 10

Q. And that is marsh gas? A. That is known as a marsh gas.

Q. Mr. Bowe, will you explain to the jury why the plant was not constructed larger in the first place? A. From one of efficiency, and from an economic standpoint, it was not advisable to construct a sewer treatment plant any longer than a period of five to seven years, although the present requirements by the State Board of Health calls for the design and the first installation to cover a period of normally ten years, because at that time certain conditions are developing in the treatment of sewage, certain conditions arise in a municipality that only the acts of the Lord, and otherwise, can prohibit, so that the treatment plant is naturally designed so that you make an expenditure to take care of the domestic wastes which are emanating from that municipality during a period of five or seven years in the future. You also design your system so that any part of it may be part of the composite whole, that when you are eventually finished with the design, why, ultimate growth of a municipality, the plant is then suitable to take care of that sewage flow. On the other hand, the efficiency of the plant would be at a very low ebb if a sewage treatment plant were constructed on the same theory that a sewerage 20 30 40

Thomas F. Bowe, re-direct

10 system is constructed, normally for twenty-five years, because your sewage enters a plant which is over-capacitated; it is naturally held to a longer period than is suitable for proper treatment. The real theory of treatment of sewage and its success depends on whether or not the sewage arrives at the plant in a fresh condition. If it becomes stale and septic, the treatment is ineffective and troublesome.

Q. Do you know the cost of the plant?

Mr. Morrison: That is objected to as immaterial.

The Court: Sustained.

Mr. DeTurck: That is all.

20

Re-direct examination by Mr. Morrison:

Q. Mr. Bowe, what do you say was the present flow of sewage through this plant, please? A. About a million, five hundred to six hundred thousand gallons, depending on the time when you take it, and depending on the weather conditions.

Q. Gallons? A. Gallons.

30

Q. During what period of time? A. For twenty-four hours.

Q. Per day. Now, you spoke about this new design of yours to put these greenhouse glass covers over these sludge beds and, as I understand you, they would protect the sludge after it had been run out there from being wet down with rains. That is the principal purpose, is it? A. Well, that is not wholly its purpose. It is a combination of purposes.

40

Q. Now, does the sludge covered over with glass that way, which I presume would be closed, dry as rapidly on a fair day as if it were in open air? A.

Thomas F. Bowe, re-direct

Yes. Because the temperature of this greenhouse, of course, is kept at a certain point.

Q. And how is that accomplished? A. By ventilation.

Q. Well, do you mean it is kept down to a certain point, or up to a certain point? A. It depends on where you start from. 10

Q. In wintertime I presume the outdoor temperature would be too low for the proper operation of the sand beds? A. But sewage has a great deal of latent heat, due to the chemical activities of the substances in the sewage, and natural processes. In other words, a sewage flow rarely freezes, and if you notice on streets after the snow has fallen the first thing to appear is the tops of manholes which, by the latent heat in the sewage and the ventilation of those manholes, melts the snow or ice which might be on the top of the manhole. 20

Q. Now, in these dry days, would that be entirely due to latent heat, that is, the heat carried down from the hot or warm water coming out of the houses, or would it be due to heat arising from a chemical reaction in the sewage? A. A combination of both.

Q. What future flow is provided for by the plans which you have now designed? A. Ultimately our design of the sewer system concerns an item of six million gallons of sewage per day to be collected from both municipalities. The treatment plant is now planned to develop and add sufficient units to the present plant that would take the time at which the sewage will reach a certain point to a period of ten years from, say, this year. 30

Q. Now, in speaking about the plant at West Englewood which failed or was abandoned, you gave the distance from the West Englewood plant to this Bergenfield-Dumont plant. Will you tell 40

Thomas F. Bowe, re-cross.

me again what that distance was? A. Approximately two miles.

Q. And is that measured in a direct line, or along the course of the brook? A. It is along the course of the brook, but it is pretty straight from that point.

10

Q. You said, I think, that the West Englewood plant, which you described and which was shown in these pictures, is no longer in operation? A. That is correct.

Q. When did it cease operation? A. About '26, 1926.

Mr. Morrison: That is all.

Re-cross-examination by Mr. DeTurck:

20

Q. Prior to 1926, was that stream fit to bathe in? A. In my estimation, no.

Q. Because of the raw sewage from the Englewood plant? A. Untreated sewage.

Mr. Morrison: I object to that. That is putting the words in the witness's mouth.

Q. What percent of the flow, the present flow, of the plant is sewage?

30

Mr. Morrison: We object unless the witness has made tests to determine.

The Court: Have you made tests to determine that?

The Witness: I have made calculations, yes, your Honor.

Q. What percent of the flow, of the present flow of the plant is sewage and what percent is infiltrations? A. Would you repeat that question?

(Question read.)

40

A. Why, the question of infiltration is based on a number of gallons per mile of main, and in this part, and in the design of this system, we have planned an infiltration at the rate of 7500 gallons

Thomas F. Bowe, re-cross.

per day per mile of sewer connected with the plant. This flow increases in wet weather so that the basis then would arrive—upon which we would arrive at this would be, say, twice that, say 15,000 gallons per mile per sewer per day.

Q. That would be about 900,000? A. Yes. I have made some calculations here— 10

Q. Yes. All right. A. —that I may—

Q. Refer to them. A. —clean that up. On the basis of my statement that a million, five hundred thousand gallons of sewage per day was turning into this plant, that is subdivided in this manner: there are sixty miles of sewers at 7500 gallons per day per mile, or 450,000 gallons; there are about fifty miles of house connections turning in about 5,000 gallons per day, and there are about, as near as we can ascertain, 12,000 people connected with the plant, that is 75 gallons per capita per day, and which amounts to 900,000; so that the range would be between one million, five hundred thousand, and one million, six hundred thousand gallons per day coming through the plant. 20

Q. Now, infiltration: when you speak about infiltration, that is mainly rain water, is it not? A. Yes, which might come in from the surface, or come in through underground sources; and also the leaders from various houses, which may be illegally connected to the sewer. 30

Q. Is all of Bergenfield now sewerred? A. No, sir.

Q. The greater part of it? A. I should say about eighty-five percent.

Q. All right.

Mr. DeTurck: That is all. 40

A. Or ninety per cent.

Mr. Morrison: That is all.

David C. Boswell, direct.

DAVID C. BOSWELL, sworn as a witness on behalf of the plaintiffs, testified as follows:

10 Mr., Morrison: We offer in evidence, if the Court please, the deeds to Mr. Ennever for one of these properties, and the deed to his wife and him for the others.

Mr. DeTurck: No objection.

(Two deeds marked Exhibits P-5 and P-6 in evidence.)

20 Mr. Morrison: The deed which has just been marked in evidence is a deed dated November 20th, 1922, by Alpine Home Builders, Incorporated, to Harry N. Ennever and Clara L. Ennever, his wife, and conveys the premises in the Borough of Dumont, Lots 1 and 2, in Block H, on a certain map. This deed was recorded December 1st, 1922, in book 1182, page 630 of Deeds in the Bergen County Clerk's Office.

30 The deed which has been marked P-6 is a deed by Charles H. Owings and his wife to Harry Ennever for six lots in the Borough of Bergenfield, being the remaining part of the property. And this deed was recorded May 26th, 1920, in Book 1067, and page 257 of Deeds, in the Bergen County Clerk's Office.

Direct examination by Mr. Morrison:

Q. Mr. Boswell, where do you reside? A. Ridgefield Park, New Jersey.

40 Q. And what is your profession? A. Civil engineer.

Q. And are you in any way connected with the

David C. Boswell, direct.

Boroughs of Dumont or Bergenfield, or either of them? A. I am Borough Engineer of Bergenfields.

Q. How long have you held that position? A. A year and five months.

Q. During the course of the performance of your duties as Borough Engineer, have you had anything to do with this sewage disposal plant and sewer system? A. Just recently I was called upon to make a report in the matter of the construction of a glass housing for the sludge beds, which came about as a result of a report that Mr. Bowe had made to the Joint Sewer Commission.

10

Q. And did you make the design? A. I did not.

Q. Mr. Bowe has testified that he designed it. Had you no connection with the designing of it? A. Absolutely none.

20

Q. And what did you have to do? A. I was called upon by the Borough to make a report as to the advisability of constructing the glass housing.

Q. And what was your report? A. In substance, about the same as Mr. Bowe reported. I have a copy of the report in my pocket.

30

Q. In preparation for that report, did you visit and inspect the sewer disposal plant? A. I did.

Q. What did you find conditions to be there as to its operating in its proper condition and designed condition? A. I found that the efficiency of the plant would be increased by the construction of the glass housing.

Q. And you reported in favor of that being done A. I did.

40

Mr. Morrison: Take the witness.

Mr. DeTurck: No cross-examination.

Mr. Morrison: That is all.

Harry Ennever, direct.

HARRY ENNEVER, sworn as a witness on behalf of the plaintiffs, testified as follows:

Direct examination by Mr. Morrison:

10 Q. Mr. Ennever, where do you reside now? A. In Parkside Road, Harrington Park.

Q. And where did you reside prior to moving to Harrington Park? A. 34 Armour Place, Bergenfield.

Q. And is that the property adjacent to the sewage disposal plant? A. Yes, sir; it is.

Q. How long did you reside in that Bergenfield property? A. For seven years.

20 Q. And who resided there with you? A. With me?

Q. Yes. A. My wife and three children.

Q. When you first went there, what was the general appearance and condition of that property? A. Why, it was very countryfied; I thought it was a very nice place to buy.

30 Q. And what was the condition of the land which you bought? Had it been cultivated or made into lawns or was it in the raw condition at the time? A. Well, it had been at one time, and run down, and I put it back into shape.

Q. What was the condition of the surrounding property, and particularly the property behind your property which is now occupied by the sewage disposal plant? A. Why, that was all woods.

Q. And this brook, I presume, came down through that woods? A. Yes, sir.

40 Q. What was the condition of the water in the brook at the time you went there? A. The water was very clear.

Q. What use, if any, was made of the brook in the summer seasons? A. Why, we used it for bath-

Harry Ennever, direct.

ing purposes, the children used it, and the neighbor's children; fishing.

Q. I show you a photograph, and ask you whether you took this photograph, and whether it is a correct representation of what it purports to show?

A. (Referring) Yes, sir; I took that photograph.

10

Q. When was it taken? A. That was taken in August, 1924.

Q. I call your attention, Mr. Ennever, to a slip which is typewritten and pasted on the bottom of that brook; that was not part of the picture; was that something you added? A. Something I added.

Mr. Morrison: Do you gentlemen wish me to take that off?

20

Mr. DeTurck: Yes.

(Slip removed from photograph.)

Mr. Morrison: I will offer that picture in evidence.

(Photograph marked Exhibit P-7 in evidence.)

Q. I show you another picture, Mr. Ennever, and ask you whether you took it, and, if so, what it represents? A. (Referring) I did. This represents my brook, and the children in bathing.

30

Q. Date, what time? A. That was taken in August, 1924.

Q. And when you say "my brook," what do you mean by that? A. Why, that brook runs through my property. I own property on both sides of it.

40

Q. And those children were bathing in the brook, then? A. Yes.

Harry Ennever, direct.

Q. Within the bounds of your property? A. Yes, sir.

Mr. Morrison: I will offer that in evidence.

Mr. West: No objection.

10

(Photograph marked Exhibit P-8 in evidence.)

Q. I show you another picture, Mr. Ennever, and ask you if you took that, and if it represents the situation at that time? A. I did. Yes, sir.

Q. When was it taken? A. That was also taken in August, 1924.

20

Q. What does it show? A. That represents an old swimming hole. Sometimes sixty-five or seventy-five children bathed in that hole that joined my property, but it was not on it. It was in the same brook.

Q. Which way did it join it? A. On the west of it.

Q. And would that be— A. The brook has now been cut off; it is a dead brook.

30

Q. And the part of the brook that the Borough moved over in making their disposal plant? A. Yes, sir.

Mr. Morrison: We offer this in evidence.

Mr. DeTurck: No objection.

(Photograph marked Exhibit P-9 in evidence.)

40

Q. I show you another photograph and ask you whether you took it, and if so, when? A. I took this picture on August the first, 1920. It shows a picture of the house, and about the condition the property was in at the time.

Harry Ennever, direct.

Q. I show you another picture—perhaps we can offer these in groups—and what does that show?

A. This picture is a picture of the same house, and the condition of the property that I put it into in June, 1923.

Q. And I show you another, and ask you what does that show? A. That is the same thing again, in June, 1924, a year later.

10

Mr. Morrison: I offer these three pictures of the house as one exhibit, unless you have some objection.

Mr. DeTurck: All right.

Mr. Morrison: These three pictures are offered as one exhibit.

20

(Three photographs marked Exhibit P-10-a-b-c in evidence.)

Q. I show you another photograph, and ask you if you took it and, if so, when, and what it represents? A. I took this picture in the winter of 1923. That is a view taken right from my yard, showing the woods in the background that the disposal plant removed to build that plant.

30

Q. I show you another picture, and ask you when that was taken, and what it represents? Those two, I think, are similar. A. This is also the same view, taken in November, 1923, showing the woods in the background where the plant now stands.

Mr. DeTurck: I object to these pictures with the whole history written on the back of them.

40

Mr. Morrison: We will strike off anything you object to, if the Court please.

Harry Ennever, direct.

Mr. DeTurck: I know; but you cannot take that off.

The Court: We will paste them over.

Mr. Morrison: Is there something objectionable on each of these pictures, Mr. DeTurck?

10

Mr. DeTurck: Yes; on both of them.

Mr. Morrison: Well, we will strike it off.

Mr. DeTurck: Well, you cannot very well.

The Court: Well, we will get a piece of paper and cover it.

Mr. Morrison: We offer these two as one exhibit.

20

(Two photographs marked Exhibit P-11-a-b in evidence.)

Q. I show you another photograph, Mr. Ennever. Did you take that and, if so, when, and what does it show? A. I took this picture. This picture shows the plant. That was taken from my bedroom windows. It was taken on November, 1924, when they were erecting the plant.

30

(Marked Exhibit P-12 in evidence.)

Q. While you were living there and before this plant was erected, Mr. Ennever, did this brook ever overflow its banks? A. No, sir.

Q. I show you another picture and ask you whether you took that and when, and what it represents? A. I took that picture in the summer of 1922. That represents the brook at high-water mark after a storm. It never was known to overflow the banks.

40

(Photograph marked Exhibit P-13 in evidence.)

Harry Ennever, direct.

Q. Mr. Ennever, did you ever ascertain how far from the house which was occupied by you and your wife and children these sludge beds were?

A. Why, the sludge beds are 215 feet from my fence line; they are 255 feet from my dining-room window.

Q. And how far are the sand beds from the house? A. The sand beds join by Dumont property right at the fence line; they are 200 feet from the corner of our kitchen window.

Q. I show you what is apparently two photos mounted side by side, and ask you if you took that? A. Yes, sir; I took those pictures.

Q. When? A. I made a panorama of the view, and it was taken in March 1926. That shows the plant from our windows.

Mr. Morrison: I offer that picture in evidence.

Mr. West: No objection.

(Photograph marked Exhibit P-14 in evidence.)

Q. I show you a group of four pictures, Mr. Ennever, and ask you whether you took them and what they show, and at what dates? A. Why, this picture shows a picture of the sand beds December the 26th, 1926. I photographed this bed because it was almost over the bank that joins my property. This picture shows another picture of the beds full of water. That picture was taken from my bedroom windows, in March, 1927. This picture here shows a picture of the sand bed nearest to my property on April the 23rd, 1927. They removed, I guess, around about ten ton of sand from this bed, the crest of it, and so forth, to get the water through in better shape, but it didn't

Harry Ennever, direct.

seem to do any better. This picture here shows in February, the 19th, 1927, full of snow, and so forth, and one of the attendants at the plant trying to force the water through the bed with the aid of spading.

10 Q. Is that attendant using the spade a tenant of yours? A. Yes, sir; that is a tenant of mine; yes, sir.

Mr. Morrison: We offer those four pictures in evidence of the sand beds as one exhibit.

(Four photographs marked Exhibit P-15-a-b-c-d in evidence.)

20 Q. Mr. Ennever, while you were living in this property, did you from time to time observe the operation of this sewage disposal plant? A. I did.

Q. Did you go over and look at it? A. Yes, sir.

30 Q. Did you ever see it operate in any other way or being operated in any way other than Mr. Bowe has described so that the sewage would go through these tanks and sand beds and come out from these bottom pipes? Did you ever see it operate in any other way? A. Yes, sir; I did.

Q. What was one of the different ways that you saw? A. Why, the raw sewerage, the sewerage as it is called, that goes through the closed vats goes into an open tank in back of the pump house, and that sewerage was pumped for almost two days through a gasoline engine into the brook.

40 Q. Where was that gasoline engine driven pump placed? A. On the bridge of the disposal plant.

Q. Did you take a photograph of it at the time? A. Yes, sir.

Q. Or two photographs? A. Yes, sir.

Harry Ennever, direct.

Q. And are those photographs taken by you showing— A. Yes, sir.

Q. —that pump in operation? A. I took both of them.

Mr. DeTurck: I object to those unless he connects it up with the Borough. There is no proof that any official of the Borough, or any official of the Borough authorized anybody to do this work. 10

Q. Did you see anybody operating these pumps? A. No, sir; the pump was running.

Q. And who is usually around the plant there? Do they have a caretaker? 20

Mr. DeTurck: I object to that.

A. Mr. Harra and his assistant.

The Court: Who is Mr. Harra?

The Witness: The gentleman sitting over there (indicating).

Q. What is his position in the Borough? A. He is superintendent of the plant. 30

The Court: I won't permit that unless it is subject to being connected up.

Mr. DeTurck: He said he did not see anybody operating these pumps.

The Court: He said Mr. Harra was there. Was he there?

The Witness: He was there; yes, sir.

Mr. Morrison: He saw them running. I think that is sufficient connection. 40

Mr. DeTurck: Even under the cases, that is not sufficient to bind the Borough.

Harry Ennever, direct.

The Court: No. But it may show some connection with the operation of this plant.

Mr. DeTurck: How does your Honor rule on it?

110 The Court: I will permit the picture as being part of the locus in quo and you connect it up, and if not, why, I do not know. On whose property was that pump operated?

The Witness: On the disposal plant property.

120 Mr. Morrison: Right on the bridge between the two parts of the plant over the brook, and the superintendent was somewhere around there.

The Witness: The brook was very black at the time; that is how I took notice of it.

The Court: I will admit the pictures.

Mr. DeTurck: I ask an exception.

Mr. Morrison: We offer these two pictures in evidence on one mounting.

130 (Photographs marked Exhibit P-16 in evidence.)

Q. Did you at any other time, Mr. Ennever, find that plant operating in a different manner than Mr. Bowe has described, and take a photograph of it? A. Yes, sir; I did.

Q. When was that? A. That was on July the 14th, 1927.

40 Q. And was this superintendent about the place at that time? A. He was; yes, sir.

Q. How was the plant operating? A. Why, he and a couple of assistants were cleaning out this open tank in the back of the house. They opened

Harry Ennever, direct.

up a couple of gates and allowed that stuff to go into the sludge beds. The sludge beds, I believe, were designed to take sludge only, and that seeped through about a foot of sand and go out into the brook. My brook was very black and began to smell when I noticed it, and I went over and found that condition.

10

Q. And you took these two photographs? And what does the upper one show? A. The upper one shows the sludge beds.

The Court: Gate?

The Witness: Sort of a gate, they open with a gate.

Q. Is it a gate or a platform? A. It is like a platform, I guess you would call it a water gate. I had Officer Keidel of the Bergenfield police down there to stop them.

20

Q. And did the officer and this superintendent and you have a conversation at that time? A. Yes, sir; we did.

Q. What was the conversation?

Mr. DeTurck: We object to that, not binding upon us.

30

The Court: Sustained.

Q. What does the lower picture show? A. The lower picture shows that sewerage coming out of the pipe direct into the brook.

Q. Taken at the same time as the upper one? A. Yes, sir.

Mr. Morrison: We offer these two pictures in evidence.

40

Mr. DeTurck: I object to them on the same ground as the other pictures, nothing

Harry Ennever, direct.

to connect the opening of that valve with any official of the Borough or with the Borough itself.

10

The Court: I will admit the picture.

Mr. DeTurck: I ask for an exception.

(Photograph marked Exhibit P-17 in evidence.)

Mr. DeTurck: What number is that, Mr. Morrison?

Mr. Morrison: You will have to ask the stenographer. I have not kept the score.

20

The Stenographer: P-17.

Mr. Morrison: The next is a little different subject. Is it the adjournment hour now before I start something else?

The Court: Do you want to reserve your cross-examination?

Mr. DeTurck: Oh, yes.

Mr. Morrison: I have not finished my direct with this witness yet; it will be another half hour.

30

The Court: In view of the fact that it will take possibly an hour or more for transportation and take up a half hour, at least, to make observations, there is hardly any use coming back.

Mr. Morrison: Unless to come back and report and be warned by your Honor as usual with jurors who are out over night.

40

The Court: Members of the Jury, in this case you are going to view the premises; that is, you are going to have lunch now and meet at the Court House at two o'clock. Transportation has been provided and you

Harry Ennever, direct.

will view the premises in question, and I will ask you when you go there to simply look at it and converse with no one with respect to the merits of the case, and talk to nobody about the case, and then report tomorrow morning at nine-forty-five.

10

Mr. Morrison: Will there be two or three showers?

The Court: There will be three officers there.

Mr. Morrison: I mean, to show the property.

The Court: Well, you and Mr. DeTurck can go. You agree as to whom you want to point out the lot.

20

Mr. Morrison: I will be the shower for my side.

The Court: And Mr. DeTurck and Mr. Ferry.

Mr. DeTurck: There is one thing we want to bring to your Honor's attention. We want to show this jury that the effluent from the plant does not smell and, for that purpose, we wish the privilege of taking a glass-full of that water and showing it does not smell.

30

Mr. Morrison: I do not know that it smells today.

Mr. DeTurck: We will take that chance.

Mr. Morrison: We will make the view, and report tomorrow morning at nine-forty-five?

The Court: Yes.

40

(The jury retires in charge of officers to view the premises.)

Harry Ennever, direct.

Hackensack, New Jersey,

May 29, 1928, 10:00 o'clock A. M.

Trial Resumed.

10 Mr. Morrison: Mr. Ennever was on the stand. I will have him resume the stand?
The Court: Yes.

HARRY ENNEVER, recalled for further direct examination, testified as follows:

By Mr. Morrison:

20 Q. Mr. Ennever, I show you another mounting of four photographs, and ask you whether you took those? A. I took those pictures; yes, sir.

Q. And when? A. I took them in September, 1926.

Q. What, in general, do they show? A. Why, they show the sand beds.

Mr. DeTurck: I object to that. I think the pictures speak for themselves.

30 The Court: Well, you might as well identify them.

Q. They show the sand beds? A. The sand beds, with the sewerage.

Mr. DeTurck: I object to that.

The Court: I will allow that.

Mr. DeTurck: Exception.

40 Q. Have you finished your answer? A. No, sir.

Q. Go on, please. A. Why, that is sewerage, grease and filth, and so forth, flowing on the top of these beds.

Harry Ennever, direct.

Mr. Morrison: We offer these four as one exhibit.

(Photographs marked Exhibit P-18 in evidence.)

Q. Mr. Ennever, I show you another card on which are mounted five photographs, and ask you whether you took those, and when? A. These pictures were taken September, 1927; I took these pictures myself.

10

Q. What do they show? A. Why, they show the condition of the sand beds. They are pretty much filled with water. In some instances, they run over the troughs that are supposed to deliver this water——

20

Mr. DeTurck: I object to that.

A. —over the area of the beds.

The Court: Do not tell us that.

Q. Not what they are supposed to show.

Mr. Morrison: We offer these in evidence.

(Photographs marked Exhibit P-19 in evidence.)

30

Q. Mr. Ennever, I show you another card on which there are five photographs mounted, and ask you whether you took those and, if so, when? A. I took those pictures; yes, sir.

Q. When? A. Why, they were taken September, 1927.

Q. And they are five different subjects, are they not? A. Yes, sir.

40

Q. And under them you have marked the numbers from one to five? A. From one to number five.

Harry Ennever, direct.

Q. What is number one? A. Number one is the open tank in back of the pump house.

Q. And number two? A. Number two is a pump house and open tank.

10 Q. And number three? A. Number three is the sludge beds with the sludge in it.

Q. And number four? A. Number four are the sludge beds, with sewerage laying in them.

Q. And number five? A. Number five is the open grit chamber at the mouth of the plant.

Mr. Morrison: We offer them in evidence.

Mr. DeTurck: I have no objection to it.

20 (Photographs marked Exhibit P-20 in evidence.)

Q. Mr. Ennever, I show you another card with five photographs mounted on it, and ask you whether you took those, too? A. I took these pictures on August the 27th—August, 1927, sometime in August.

30 Q. What do they show? A. Well, they show the running over of the brook, the flooding of my property.

Q. And what is that structure that appears across the brook? A. That structure was a bridge that I had built over the brook; it was pretty well damaged and laying in the brook the next day, and we pulled it out.

Q. The bridge is no longer there? A. It is no longer there; no, sir.

40 Mr. Morrison: We offer this in evidence.

Mr. DeTurck: I object to that on the ground that the site is not covered by the deed.

Harry Ennever, cross.

The Court: It is part of the property, is it not?

Mr. DeTurck: Yes; but these pictures show the overflowing of the brook caused by rain storms.

Mr. Morrison: Mr. DeTurck is reading from a part that is taken off from the pictures. The witness did not say they were caused by rain storms at this time. 10

Mr. DeTurck: May I cross-examine at this point?

The Court: Yes.

By Mr. DeTurck:

Q. Did you write this on the picture? A. What is that? 20

Q. Did you typewrite that? A. Yes, sir.

Q. And this overflow was caused by heavy rain storms, was it not? A. With the aid of the sewer disposal plant; yes, sir. That never occurred before the plant was built there. Five years we lived there before that plant was built, and it never occurred before.

Q. But the—— A. Had I been home, Mr. DeTurck, the Sunday before, my neighbor said I might have been able to keep the water out of my cellar. 30

Mr. DeTurck: I move that be stricken out.

The Court: Strike that out.

Q. Since 1927, the time we had very heavy rain in Bergen County,—— A. Yes, sir. 40

Q. —last year? A. Yes, sir.

Q. The month of August? A. Yes, sir.

Harry Ennever, direct.

Q. And this brook drains not only Bergenfield, but also a part of Teaneck? A. Yes, sir.

Q. The brook rises in Teaneck? A. I believe it starts some place in Teaneck, part of it.

10 Q. And you could not tell whether this water came from Bergenfield or Teaneck, could you? A. Well, I saw enough of it coming out of the plant.

Q. But the rain water, you don't know whether it came from Bergenfield or Teaneck, do you? A. It came from all over, yes, sir.

Q. Did you go along the brook to find out? A. Yes, sir.

Q. The day it was raining? A. Yes, sir.

20 Q. How far did you go? A. I went back into Bergenfield, back at the pond, the old—

Q. You did not go to Teaneck, did you? A. No, sir.

Mr. DeTurck: I still say that this picture is not evidential.

30 The Court: Well, he has testified there is something there from the plant, and he has explained it. I think the Jury has heard the explanation of it. I will allow it.

Mr. DeTurck: I ask an exception.

(Photograph marked Exhibit P-21 in evidence.)

By Mr. Morrison:

40 Q. Mr. Ennever, in Mr. DeTurck's questions a moment ago, he asked you if you went up the brook. How far up the brook did you go? A. I went as far as the pond at the church in Bergenfield.

Harry Ennever, direct.

Q. An how far is that up the brook from this disposal plant? A. About a half a mile, or three-quarters of a mile.

Q. And did you notice any difference in the condition of the brook both up-stream from the disposal plant and at the plant and below? A. Yes, sir; I did. 10

Q. And what was that difference? A. There wasn't as much water there.

Q. And about what difference did you notice? Can you describe the difference to the ladies and gentlemen of the jury? A. Why, some property had a little of the water running onto it; but they didn't have near the flood that I had on my property. 20

Q. And where did you find the great bulk of the water coming into this brook? A. Why, part of it, about half of it, come out of the plant, out of the sluice-ways, the beds were pretty well filled up.

Q. And was it coming out of those pipes that run out from the bottom of these sand beds? A. Yes, sir; out of the five of them.

Q. How freely were they flowing? A. Pretty heavy. I couldn't get in there at the time, because I couldn't get near enough to photograph them; the water was too deep to go in. 30

Q. Now, I want to ask you a bit about these pictures. The one in the upper left hand corner shows what is apparently the parapet wall of a bridge. Where is that bridge? A. There is a concrete bridge on Armour Place in front of my property, and the water hit that bridge so heavy that it could not get through under that bridge; of course, naturally, it came back over my land. 40

Q. Now, I call your attention to the photograph in the upper right hand corner, and particularly to what is apparently a tree near the right border.

Harry Ennever, direct.

Where does that tree stand on your property? A. That stands the other side of my brook, on the west of the brook, and the water was completely over that whole section there, the berry bushes, the vegetable garden, and so forth.

10 Q. How far is that tree from the brook when that brook is in its normal condition? A. That tree is about 35—about 35 feet back from the brook.

Q. And I call your attention to the two photographs, one in the middle and one at the bottom of the left hand side, showing a bridge, and ask you where that bridge was? You say it is no longer there. Where was it? A. That bridge spanned the brook, taking the east land and the west land of the property.

20 Q. And what supported the bridge at the two ends? A. Two concrete piers. The bridge was made of trees, and bolted to these piers.

Q. And are those piers still there? A. The piers are still there; yes, sir.

Q. Mr. Ennever, when did you move away from this property? A. On February the first.

Q. Of what year? A. Of 1928.

30 Q. And you moved then, as I understand it, to your present residence in Harrington Park? A. Yes, sir.

Q. Prior to that time, had you lived continuously in your house at this Bergenfield and Dumont property? A. Yes, sir; since August the first, 1920.

Q. How much of the time were you at home? A. Oh, almost all the time.

Q. You go to business, don't you? A. Yes, sir.

40 Q. What are your hours at home and what are your hours at business, as the average? A. Why, I generally got home half past six or seven o'clock at night, very seldom went out.

Harry Ennever, direct.

Q. What time did you leave in the morning? A. I used to leave at quarter after seven.

Q. Now, while you were at home, will you describe to the jury the conditions which you found there which were different from what they had been before this sewage disposal plant was put into operation? What difference did it make? A. Well, the stench so thrown from the plant was more than I could put up with. I would come home several evenings and hear the story from my—

10

Q. No. A. —wife, all day.

Mr. DeTurck: I object to that.

The Court: Strike it out.

20

Q. Only tell what you know yourself. A. Well, those conditions were pretty bad at night. We got it more at night, I guess, than we did in the day-time, on account of the air being heavier. There was nights when we went to bed we closed the back windows of the house on account of the air carrying through there.

Q. And were there times when the condition as to stench and smell was different than at other times?

30

Mr. DeTurck: I object to that, leading.

The Court: I will allow it.

Mr. DeTurck: Exception.

A. Yes, sir; there was.

Q. Well now, will you describe to the jury what those times were, how it varied from time to time, and when? A. Well, some of those times, coming home, I could smell that plant two blocks away from my home.

40

Harry Ennever, direct.

Q. At other times? A. Other times, when I would get down into that hollow or into that road I could get it.

Q. And did you ever go over to the plant to make any observations at times when the smell was noticeably bad? A. Yes, sir.

10

Q. What did you find there? A. Why, I found the plant was overburdened with what it had to take.

Mr. DeTurck: I object to that.

The Court: Strike it out.

Q. I call your attention to Exhibit P-16 which shows the pump on the bridge. Did you find that there on one of those occasions? A. Yes, sir.

20

Q. And what did you do about it? What did you find when you went there, and what did you do about it? A. When I went over to see this pump to see what it was, there were some men there at the time. When they saw me coming up the roadway of the plant, they disappeared into the pump house; but the pump was running by the aid of gasoline.

30

Q. And what was discharging through that pump? A. There was a four-inch hose line to that pump, drawing that sewerage from the open tank directly into the brook.

Q. Did you do anything as the result of that observation, make any complaint, or anything of that sort? A. Yes, sir. I went back home and got my wife and brought her over there as a witness; and when I went back again to photograph these pumps, the men had done the same thing as they did before.

40

Mr. DeTurck: I object to that, all this line of testimony; unless it is going to be

Harry Ennever, direct.

connected up, it is not binding on the municipality.

The Court: Except we have the evidence that there was some connection between the plant and this pump.

Q. At that time, did you——

10

Mr. DeTurck: (Citing the case of Paterson v. Erie Railroad, 78 N. J. L., 592.) "Negligence in the performance of public duties by municipal agents or instrumentalities is not imputable to the municipality." Now, there is nothing to show that the town had anything to do with it. He said somebody; he does not say who the men were; he does not say it was being directed by any person in authority or any employee of the Borough. So far as we know, they may have been strangers. I do not think it makes any difference unless he can show it was done by municipal consent.

20

The Court: I will admit it as bearing upon the general state of affairs.

Mr. DeTurck: I ask an exception.

30

Q. The men who were there who went into the pump house as you have described, Mr. Ennever, do you know who they were? A. I knew one of them; yes, sir.

Q. And who was that? A. Mr. Harra.

Q. What is his position, if any, with the Borough? A. Superintendent of the plant.

Q. Have you frequently seen him about the plant? A. I did, at that time.

40

Q. Directing the operation of it? A. My wife and I walked to the door and asked him to come

Harry Ennever, direct.

out, we would like to have a talk with him. He came to the door, and two men——

Mr. DeTurck: I object to that.

The Court: I won't allow the conversation.

10

Mr. Morrison: That is the fact, he was the one in charge.

Mr. DeTurck: There is no question before the Court now. Ask a question.

Q. Mr. Ennever, I show you Exhibit P-17 which has been offered in evidence, and ask you, at the time that was taken, whether there were any of the Borough employees or officials present? A. Yes, sir.

20

Q. And who were there? A. Why, Mr. Harra and three of his assistants.

Q. And what does that exhibit show, just briefly? A. Why, they were cleaning out the open tank in back of the pump house, and by opening the valves in this open—in this open tank, it allowed that sewerage to go into the—on top of the sludge beds.

30

Q. Did Mr. Harra state to you the purpose for which that was done?

Mr. DeTurck: I object to that.

A. Yes, sir.

Mr. DeTurck: Wait a minute.

The Court: I sustain the objection.

Q. Mr. Ennever, did you at my request go and look over this plant last night? A. Yes, sir.

40

Q. And did you at my request and in my company look it over last Thursday night? A. Yes, sir.

Q. What difference, if any, did you observe? A. The difference from Thursday night and last night

Harry Ennever, cross.

Q. Yes. A. Why, last night, it seems that they had been placing more fresh sand on these sludge beds, and there was quite a bit of lime had been sprinkled over the sludges there around the beds.

Q. Was that done between Thursday night and last night? A. That was done between twenty minutes to ten yesterday morning and eight o'clock last night.

10

Mr. Morrison: You may take the witness.

Cross-examination by Mr. DeTurck:

Q. Isn't it a fact that the employees always put lime on the sludge beds? A. Not always; no, sir.

Q. Did you ever see them put any on? A. I never saw them apply it. I saw it there.

20

Q. You saw it there? A. Yes, sir.

Q. On a great many occasions? A. Not on a great many occasions; no, sir.

Q. Now, Mr. Ennever, when did you decide to build in Harrington Park? A. Last fall.

Q. Last fall? A. Yes, sir; about September, I think, I gave out the contract.

Q. That was why you bought the property in Harrington Park, wasn't it? A. No, sir.

30

Q. You bought Harrington Park property, didn't you? A. Two years ago? A. Yes, sir.

Q. You are quite sure about that? A. What is that?

Q. You are quite sure about that? A. Yes, sir.

Q. From whom did you buy it? A. I bought that property from a sister-in-law of Mr. Houston, the next door neighbor of that property.

Q. What is her name? A. I do not quite know her name.

40

Q. Caroline Erdman? A. That is her name; yes, sir.

Harry Ennever, cross.

Q. You are quite sure it was two years ago?

A. About two years ago.

Q. And at that time, of course, you had smelled these smells from the plant, hadn't you, at the time you bought this property? A. No, I did not, at that time.

10

Q. In 1926? A. No, sir. In 1926?

Q. Yes. A. No, no; I did not buy that property, I do not think, in 1926.

Q. What is that? A. I do not think I bought that in 1926.

Q. You say two years ago? A. I bought that property in 1924.

Q. Yes. More than two years ago? A. That is when I bought it.

20

Q. Yes. When did they start to operate the plant? A. In 1925; the fall of 1925.

Q. So you bought your property a year before they started to operate the plant? A. When they were building the plant, I bought it.

Q. And that was because you thought it was going to be a smell from the plant? A. Not exactly; no, sir.

30

Q. You did not want to live near a sewage disposal plant, did you? A. I certainly did not.

Q. Yes. And that is why you bought the property? A. No, sir.

Q. Did you intend to continue living in this house on Armour Place in Bergenfield?

40

Mr. Morrison: We object to that as immaterial. I have let Mr. DeTurck go a long ways, but I think his intentions of several years ago have very little to do with the present suit for damages.

The Court: I sustain the objection.

Mr. DeTurck: I ask for an exception.

Harry Ennever, cross.

Q. I show you Exhibit P-12. What does that represent? A. That represents the building of the plant in 1924.

Q. Who took the picture? A. I took it.

Q. For what purpose? A. Why, I didn't like the sight that was there; I photographed the thing from my bedroom window. 10

Q. From the bedroom window? A. Yes, sir.

Q. You anticipated at that time you were going to use it in court, didn't you? A. No, sir.

Q. Well, you must have had some purpose in taking it, then? A. I have taken pictures all my life.

Q. Why did you take this particular picture? A. I have been taking views and pictures of different places. I am a commercial artist; I sometimes use them for landscaping. 20

Q. And you do nothing else but take pictures? A. Oh, I do other things, yes.

Q. At the time you took this picture, the plant was not in operation, was it? A. Not at that time.

Q. As a matter of fact, it was taken a year before it was put into operation? A. Yes, in 1924, the fall of 1924. 30

Q. Did you take any other pictures of the plant prior to the time it was put in operation? A. Yes, sir.

Q. A great number of them, didn't you? A. Not so many, no.

Q. About how many? A. Oh, I could not tell you that.

Q. Well, ten? A. I could not tell you the number. 40

Q. Well,— A. I do not keep tabs on a thing of that kind.

Harry Ennever, cross.

Q. Isn't it a fact that you have taken five or six hundred pictures of the plant, both before and after construction? A. No, sir.

Q. And you have taken pictures besides the ones which have been offered in evidence, haven't you?

A. Yes, I have.

10

Q. Yes. You gave Mr. Morrison a great big pile of them, didn't you? A. No. I did not give him a big pile of them. I did not think it was necessary. Some of them are pretty much alike.

Q. When was this picture taken, Exhibit P-14?

A. That was taken after the plant was put into operation.

Q. What month? A. Why, that was, I think, in the fall of the year. That shows a panorama view from the windows of the house.

20

Q. I know. But when was it taken? A. I think in 1925.

Q. What month? A. I could not tell you exactly what month.

Q. Well, you say it was the fall. Was it prior to November, 1924, or 1925? A. It might have been around about November.

30

Q. Yes. And the plant was put in operation in November, 1925? A. It was put in operation in the fall of 1925; I could not tell you just which month.

Q. Now, this brook you described yesterday, was that always clear before the plant was constructed? A. Only when it rained, and then, of course, it was muddy, which any brook would do that.

Q. Is it nice and clear above the plant now? A. It is clearer than the brook that runs through my property.

40

Q. It is clearer? A. Yes, sir.

Q. Quite noticeably so; isn't that true? A. Yes, it is.

Harry Ennever, cross.

Q. Now, yesterday you tried to show the jury that you were damaged by cutting off your swimming pool, didn't you? You offered in evidence Exhibit P-9?

Mr. Morrison: If the Court please,—

A. This was not my swimming pool. 10

Mr. Morrison: —it was not offered for that purpose. Mr. DeTurck and I have agreed to make the statement to the jury with reference to that; I was waiting until this witness finished.

The Court: When the picture was offered, there was no comment, except to show the bathing there. I did not know it was offered for any specific purpose by way of comment. 20

Mr. Morrison: There wasn't any comment made, but that was the purpose, to show that the water at that time was clean enough to have children swim in it.

Mr. DeTurck: I will withdraw the question and ask another one.

Q. This swimming hole is not on your property, is it? A. Not that one; no, sir. 30

Q. I show you another one, Exhibit P-8; is that swimming hole on your property? A. That is on my property, yes.

Q. But P-9 is not? A. No, sir.

Q. And that is the one up in the bend of the brook, is it not? A. That now lies in the dead brook.

Q. Yes. A. Just outside my line. 40

Q. And that dead brook is mostly on somebody else's property? A. Yes, it is.

Q. Now, you have been paid your damages for

Harry Ennever, cross.

closing up that brook, haven't you? A. I have been what?

Q. Paid your damages for closing up that brook?

A. No, sir.

10

Mr. Morrison: The checks were handed to me this morning. I have not yet given them to him. He does not know I have them. His answer is truthful, but it is not the fact.

20

Mr. DeTurck: I want to state on the record at this time that a proceeding was brought by Mr. Ennever to recover damages from the Borough of Bergenfield by reason of the construction of the plant, and in that proceeding he was awarded damages to his property which he suffered as a result of the construction of the plant. An appeal was taken to this court and heard before Judge Porter, and the award as made by the joint Borough Councils of Bergenfield and Dumont was affirmed. So the amount was \$750.00, and a question as to any damage to Mr. Ennever's land as a result of the construction of the plant is out of this case.

30

Mr. Morrison: I think that is a little broad.

The Court: What is the basis of this action, then?

Mr. Morrison: This is operation of the plant.

Mr. DeTurck: Operation.

40

The Court: In other words, the injury to the property itself has been taken care of?

Mr. Morrison: We have here the file in the proceeding in this court which we would like to either offer in evidence or call to

Harry Ennever, cross.

your Honor's attention as part of the record of the court; what was done there is a little broader than Mr. DeTurck said. We went first to the Supreme Court. I had a writ of mandamus to compel them to institute eminent domain proceedings. They yielded before that case was heard; they instituted eminent domain proceedings under the Home Rule Act, and an award of \$750.00 was made. We took an appeal to this court as provided in the statute, and that award was affirmed. While the appeal was pending, they tendered to Mr. Ennever the checks for the award which, by my advice, he refused, and those checks have been handed to me this morning by Mr. DeTurck, and Mr. Ennever did not know that when he answered the last question. This is the appeal from that award; there is an opinion by Judge Porter there.

10

20

Mr. DeTurck: I do not think that is evidential in this case.

Mr. Morrison: I do not offer it to the jury.

30

The Court: Then you are limited now, as I see it, to the damage——

Mr. DeTurck: As to the operation of the plant.

The Court: —as the result of the operation.

Mr. Morrison: The mere construction of the plant before any drop of water or filth went through it, we have taken care of that; and then this case begins where that left off.

40

The Court: This is more on the basis of a nuisance?

Harry Ennever, cross.

Mr. DeTurck: The basis of a private nuisance. I want the jury to understand that that brook is out of the picture entirely.

The Court: The entire brook?

Mr. DeTurck: The dead end, what they call the dead end of the brook.

10

Mr. Morrison: We are not asking this jury to pay us or award us anything in their verdict for the fact that that brook was cut off; that is what we have been paid for this morning. Now, the fact that that brook, after being cut off, was made filthy as they saw it yesterday, we do ask damages, and I think we are entitled to them.

20

Q. Now, Mr. Ennever, isn't it a fact that the joint sewer commission of the two Boroughs came to your place and offered to fill in the dead end of the brook?

Mr. Morrison: We object to that as utterly immaterial.

The Court: Sustained.

30

Mr. DeTurck: He said the smell comes from that to his house, and why can't I show that?

Mr. Morrison: It would be something in the way of a proposed settlement.

Mr. DeTurck: Mitigation of damages, if they are entitled to damages.

40

Mr. Morrison: Their legal proposition was to make an award and pay it to us, and although one was made, it was only this morning paid to us.

The Court: I sustain the objection.

Mr. DeTurck: I ask an exception.

Harry Ennever, cross.

Q. Mr. Ennever, Exhibit P-21, which shows the overflowing of the brook, you testified on direct that about one-half that water came from the filter beds? A. Pretty near to it.

Q. Yes. What means has water coming from the filter beds into the brook? What means are there? A. Why, it goes through the sand into the brook. 10

Q. Yes, I know. By five pipes, is that right? A. Through what?

Q. Five sluice-ways? A. Five sluice-ways, that is what I said.

Q. Yes. And do you know the size of those pipes which lead to the brook? A. I do not exactly, no; I presume about a 15-inch pipe. 20

Q. A 15-inch pipe? A. Yes, sir.

Q. You would not deny that it is an 8-inch pipe? A. No, I would not, because——

Q. No. A. —I never took the trouble to measure it.

Q. How many pipes are there leading from the sand beds to the brook? A. There are seven in all.

Q. Seven? You are sure of that? A. Yes, sri; I am. 30

Q. And from those seven pipes, about one-half that flood emanated, is that correct? A. No. From five of them.

Q. From five of them? A. Yes, sir.

Q. Can you read a blueprint, Mr. Ennever? A. Yes, sir.

Q. Just come here and show me the size of those pipes. A. Well, here are your five sluice-ways from the sand-beds (indicating), but the two from the sludge beds here don't show. That is what I mean by seven pipes. 40

Harry Ennever, cross.

Q. Seven pipes. Five came from the sand beds?
A. Five to the sand beds. And you asked me how many pipes went into the brook. I say seven there are now there today.

10 Q. But only five were flowing at the time of the flood? A. No. There is seven really were flowing. The beds as well got full of water.

Q. Yes. A. But I wouldn't say most of the water came from those two sludge beds.

Q. You testified on direct that one-half of it came from the sludge beds? A. No. I said the sand beds.

Q. The sand beds? A. Yes, sir.

20 Q. Now, when did you first notice this stench from the plant? A. Well, that I could not tell you, the exact date.

Q. What year? A. It was not long after the plant had been running.

Q. What year? A. In 1926, anyway, plenty of it.

Q. 1926? A. Yes, sir.

Q. What part of the year? A. Why, in the spring, summer.

30 Q. So, between the time they started operation and the spring of 1926, you did not notice anything? A. I did, yes; oh, yes.

Q. Well, you just stated you first noticed the stench of the brook in 1926? A. About the spring of 1926.

Q. Yes. A. That is, from my property, yes.

Q. Yes. So, during the winter months of 1925 and 1926, you did not notice anything? A. Not unless I went into the plant.

40 Q. No. Not at your property, you noticed nothing? A. No.

Q. So, evidently, when they first started to operate the plant, the plant was operating properly?

Harry Ennever, cross.

Mr. Morrison: That calls for a conclusion.

The Court: Sustained.

Q. Now, you testified on direct that on several occasions while you were on your way home from work, you noticed the stench two blocks away? A. Yes, sir. From the corner of Quackenbush and Prospect Avenue.

10

Q. Quackenbush and Prospect Avenue? A. I guess that is a little over—

Q. Now, what road did you come home on, the West Shore? A. On the West Shore Railroad, walked down Quackenbush Avenue; as soon as I turned into Prospect, I got it; any of the neighbors got it.

20

Q. Prospect is the street on the hill? A. Yes, sir.

Q. To the east of the plant, is it not? A. Yes. It runs north and south.

Q. And it is the place where you enter—first enter the sewage disposal plant, is it not? A. Yes, sir; that is Prospect Street.

Q. The place where the main trunk line comes in? A. Yes, sir.

Q. And are there any houses along Prospect Avenue? A. Yes, sir.

30

Q. A great many? A. Well, there is enough of them, yes.

Q. How many? A. There is enough of them there. I do not know how many.

Q. There are possibly fifty houses on Prospect Avenue? A. How many?

Q. Fifty? A. Well, what part of Prospect Avenue?

40

Q. Well, say within five hundred feet of the entrance to the sewage disposal plant? A. Each way?

Harry Ennever, cross.

Q. Yes. A. Yes; each way.

Q. And you came along Prospect Avenue on your way home, is that right? A. Yes, sir.

Q. And passed the entrance to the sewage disposal plant? A. No, sir.

10 Q. Which way did you come? A. I went down Armour Place.

Q. I know. A. I did not have to pass the entrance.

Q. Oh, you did not? What course did you take from the station? A. Why, I walked two blocks south along Railroad Avenue——

20 Q. Yes. A. —to Quackenbush, through Quackenbush to Prospect, one block through Prospect to the corner of Armour Place, which is a continuation of Erie Street in Dumont, but Armour Place lays in Bergenfield, and then walked down a distance of about five hundred feet down the hill to my premises,——

Q. Did you ever see—— A. —every morning and every night.

Q. Did you ever smell this stench at a greater distance than two blocks from the plant? A. Yes, sir.

30 Q. How far did you smell it away? A. Out on Madison Avenue.

Q. And how far is that away? A. Well, that is about four blocks over.

Q. Four blocks? A. From the plant; yes, sir.

Q. Madison Avenue built up? A. What is that?

Q. Is Madison Avenue built up? A. It—yes, some of it.

40 Q. Well, the portion of Prospect Avenue which is east of the plant, that is also built up, isn't it? A. Some of it.

Q. And how far is it away from the plant? A. From the plant property?

Harry Ennever, cross.

Q. Yes. A. Why,—

Q. Less than a block? A. What is that?

Q. It is less than one block? A. Well, yes, some of them.

Q. Did you ever go north along the street A. Yes, sir.

Q. How lately? A. Why, I went through there yesterday with the car.

10

Q. North along the stream? A. Along the stream?

Q. Yes. A. Oh, I thought you said Prospect Street. No, no; not until last fall.

Q. Last fall? A. Yes, sir.

Q. And how far did you go along the stream? A. I walked up into Prospect Street, and come out at the bridge that crosses Prospect Street.

20

Q. How far is that away from the plant? A. About a couple of blocks, three blocks.

Q. And do you know who owns the property along there? A. Some of them.

Q. Who owned the property along the stream? A. Well, there is one man that collects the garbage, and so forth, of the town. I kind of forget his name. And there was another man on the other side of that bridge on Prospect Street.

30

Q. Yes. A. I know him slightly. He had quite a little place there. I think his name is Schuman.

Q. Only two property owners between those two streets? A. Is there only two?

Q. Are there only two, yes? A. Oh, no.

Q. There are quite a number, aren't there? A. Well, there is a few others; there may be seven or eight of them along there.

Q. What are the conditions along that stream between Armour Place and the bridge, the bridge you have just talked about? A. Why, I thought the stream was pretty clear, clear water.

40

Harry Ennever, cross.

Q. Any smell? A. There was nothing sticking to the sides of the rocks or trees.

Q. I am talking north, going north? A. That is what I am talking about.

10 Q. I mean up-stream, or down-stream? A. What do you mean, from the course—from the bridge at my place north towards New Milford?

Q. Yes. A. Towards Madison Avenue?

Q. Yes. A. It was pretty bad there.

Q. Pretty bad? A. Yes, sir.

Q. In other words, the water is practically in the same condition as it is when it leaves the plant?

A. Well, not as bad as where it hits into my place, I do not think.

20 Q. You think it purifies itself in the meanwhile, do you? A. Well, it may, as it travels.

Q. Did you ever go down to New Milford, the place where the button works are? A. Yes, sir.

Q. Did you notice anything down there? A. Why, they have got a couple of ponds over there, around in the button works.

Q. Did you notice the smell there? A. A little bit.

30 Q. Yes. How far is that away from the plant? A. That is probably a mile.

Q. And do you know who owns the property around that pond? A. Well, I do not. I know it belongs to the button works; I really do not know who is really the owner of the button works.

Q. And what is the condition of that pond? A. Well, those ponds were very low, always were low.

Q. Yes. A. Very low. And never amounted to much to carry the water.

40 Q. And you noticed that smell at the button works, did you? A. I did; yes, sir.

Q. You noticed the discoloration of the water? A. Yes, there was some black stuff around the edges of it.

Harry Ennever, cross.

Q. Now, at the time of this flood in August, 1927, was your property the only property flooded? A. No, it was not.

Q. As a matter of fact, all the property along that stream was flooded? A. Running north through there?

Q. Yes. A. She was pretty well over all through in there. That is all vacant land. 10

Q. And I believe you testified that June 11th and 12th, 1926, you saw someone pumping something into the stream, and you offered as your proof of that a picture which is marked P-16? A. I did not see anyone pumping this in there; no, sir.

Q. Oh, you did not see anybody pumping? A. No. I saw the pump running by itself with the aid of gasoline. The men were there when I heard it; they went into the house. 20

Q. All right. You saw something being pumped into the stream? A. Yes, sir.

Q. Did that flow away with the rest of the water? A. It came down my brook, pretty black.

Q. Yes. A. That is what drew my attention to it.

Q. And it did not stay there either, did it? It kept on going? A. Well, it couldn't; the water had to keep going through. 30

Q. It went on down towards New Milford? A. Yes, sir.

Q. Now, how far is the plant away from the Hackensack River? A. I could not tell you that.

Q. You do not know. Will you try and explain to the jury this picture marked Exhibit P-20? You have "No. 2 pump house"? A. Number 2 is a pump house. 40

Q. Yes. Why do you call it a pump house? A. Well, they have an electric-driven pump in there. There is a flood bar underneath that house, and

Harry Ennever, cross.

when that water gets to a certain height, that flood bar goes off, and the pump draws that water, throws it over into the sand beds, whichever gate they may open.

10 Q. You are quite sure about that, are you? A. Only what I have been told.

Q. Oh, I see. So, you do not know that of your own knowledge? A. Well, yes; and I saw the pump working.

Q. Well, is that an air compressor that you saw working? A. No, I do not know, I do not think so. I think it is electrically driven.

Q. Well, isn't it an electrically driven air compressor? A. That I do not know. I do not know enough about machinery for that.

20 Q. So you are not sure it is a pump, are you? A. I am not sure it is a pump?

Q. Yes. A. You bet I am sure it is a pump.

Q. Did you ever go to the source of this stream which flowed past your property prior to the construction of this plant? A. Where it started from?

Q. Yes. A. Only at one time.

30 Q. When was that? A. That was maybe back in 1922, my boy and I followed that stream and went down into Teaneck where they had been pumping dye into it, and we had the Bergenfield Police Department go down and stop it.

Mr. DeTurck: I object to that. Wait a minute.

The Court: No.

Q. Go ahead and tell your story.

40 Mr. DeTurck: I withdraw the objection.

A. That is the whole of it.

Q. The Bergenfield Police Department did what?

A. They went down and stopped that nuisance.

Harry Ennever, cross.

Q. And that was long before the plant was constructed, wasn't it? A. Oh, yes.

Q. Did you ever go down to the West Englewood sewage disposal plant? A. No, I was not.

Q. You did not. I show you Exhibit P-3, and ask you whether you ever saw that plant in West Englewood? A. No, sir; I did not; but I heard this plant was closed up by the Board of Health. It ought to be. 10

Mr. DeTurck: I move that be stricken out.

The Court: Strike it out.

A. I do not know it; I never saw it. 20

Q. I show you Exhibit D-2, and ask you whether you ever saw that condition? A. No, I never saw it.

Q. Neither did you know that this plant drained into your stream, did you? A. I knew there was some sewer lines drained into that stream, but there was enough water to take care of that.

Mr. DeTurck: I move the last part of the answer be stricken out. 30

The Court: Yes. That is not responsive.

Q. Now, when did your children discontinue swimming in this brook? A. Why, since the plant went into operation.

Q. The same day? A. Oh, no, no; because the plant went into operation in the fall of 1925; they wouldn't very well swim in the fall. 40

Q. Isn't it true that the conditions around that plant are worse on a muggy day than they are on a clear day? A. Yes, quite naturally.

Harry Ennever, cross.

Q. Now, if you had known, Mr. Ennever, that brook which flowed past your house prior to 1925 drained this disposal plant, would you have allowed your children to bathe in it?

10

Mr. Morrison: We object to that as immaterial. It is based on a supposition which is not true,—if he had known it. He said he did not know it.

The Court: Reframe your question.

Q. Assuming that it is true that the disposal plant shown in Exhibit D-3 drained into your brook prior to the fall of 1925, and assuming you had knowledge of it, would you have allowed your children to bathe in it?

20

Mr. Morrison: We object to that as immaterial.

The Court: Sustained.

Q. What are those large plants in back of your house somewhat like a cabbage? A. Something like what?

30

Q. Those plants, those nice, green plants right in back of your property that look something like a Swiss chard? A. Well, there are a few of those, Mr. DeTurck. They are skunk cabbages; they can grow almost any place.

Q. Yes. But mostly in swamps, don't they? A. Oh, no.

Q. No? A. No.

Q. Did you ever see a skunk cabbage grow on high ground? A. Yes, sir.

40

Q. You did? A. Yes, sir; right in the woods; yes, sir.

Q. The land in back of you, what was the condition of that land before the construction of this

Harry Ennever, cross.

plant, along the brook? A. Why, that land was low, it was a little lower than my land, but we could walk through that land at any time. We did not need boots or rubbers to walk through there.

Q. But you had to walk from one clump of grass to another? A. Oh, no; no, I did not. 10

Q. During the rainy season? A. I lived there for five years. I went through there.

Q. And you made a habit of walking through that marsh? A. Yes, sir; I used to go in there to pick berries, get firewood, and so forth, see the boys fish in there in the brook.

Q. The condition in back of your house, in back of your property, has not been changed by the construction of the plant, has it, immediately in back? A. It was not changed? 20

Q. Yes. A. Immediately in back of my house?

Q. Yes. A. Well, part of that land right in back of the house that I lived in belongs to Mr.——

Q. In back of your fence line? A. Well, part of that land belongs to another party.

Q. But that has not been changed, has it, by the construction? A. In back of the Dumont property, yes. 30

Q. I am talking, immediately in back of your fence line in Bergenfield? A. That is part of my fence line.

Q. I mean, it has not been filled in or has not been lowered in any way, has it? A. Has it been filled in?

Q. Yes. A. Well, they built the disposal plant.

Q. I am talking, say, within ten feet of the back of your fence? A. No, not in there. 40

Q. No. A. Not in back of the Bergenfield property.

Harry Ennever, re-direct.

Q. No. And could you walk through that? A. Could I? Yes. Not through the brook. The brook is in back of that. Could I, now?

Q. Yes. A. Yes, sir.

10 Q. And without getting your feet wet? A. Without what?

Q. Getting your feet wet. A. Yes, sir; excepting in rainy weather.

Q. I suppose all the people along Armour Place could smell this stench from the plant, couldn't they?

Mr. Morrison: That is objected to as immaterial; that would be hearsay.

20 Mr. DeTurck: I withdraw the question.

Q. In coming along Armour Place from the station, you could smell the stench from the plant, could you not? A. Yes, sir.

Q. How many houses are on Armour Place? A. Three of them.

Q. And you only owned the one house? A. Yes, sir.

30 Q. All right.

Mr. DeTurck: That is all.

Re-direct examination by Mr. Morrison:

40 Q. Mr. Ennever, Mr. DeTurck has questioned you about these five pipes that come out from under the sand beds, as to whether they were the means by which the water went out into the brook. Have you at any time seen evidence of water passing into the brook from the sand beds by any other means than these pipes?

Harry Ennever, re-direct.

Mr. DeTurck: I object to leading.

The Court: I will allow the question.

A. There was one time when the water was pumped from the middle sand bed over into the brook.

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Q. When was that? A. Well, I do not know the exact date of that. My wife drew my attention to that when I came home.

Q. You were not there at the time? A. No. She had seen it.

Mr. DeTurck: I move it be stricken out.

The Court: Strike it out.

Q. Did you see any other trace of the water passing into the brook without going through the sand beds and without going through them through the pipes? A. Yes, sir.

20

Q. What was it? A. The southerly bed had broke loose one night.

Q. What do you mean by "broke loose"? A. She flowed over the top and finally tore the road bed down and flowed into a small brook at the other end and came through into that pipe line that is hooked to that small brook into the large brook.

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Q. And is that at the end of the disposal plant nearest your house or furthest from your house? A. No, sir; further. That one also did it.

Q. Which one? A. The one at my end, too.

Q. And when did that happen? A. Well, that seemed to happen at night, too; the men filled that in the next day.

40

Q. Now, just what happened with the sand bed nearest your house? I do not think you answered that clearly. A. That broke the wall loose there

Mary A. Kempfer, direct.

where they have a runway of some kind under that road; it broke through right about there, and that water went down into that dead brook and flowed through the dead brook into the brook that runs through my Bergenfield property.

10 Q. How large a break in the wall of the sand bed, or that earth wall of the sand bed, was there?

A. About three feet.

Mr. Morrison: That is all.

Mr. DeTurck: That is all.

MARY A. KEMPFER, sworn as a witness on behalf of the Plaintiffs, testified as follows:

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Direct examination by Mr. Morrison:

Q. Mrs. Kempfer, where do you live? A. I live on First Street, Dumont.

Q. And how long have you lived there? A. I am living there since the tenth of May, seven years now.

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Q. And how far is your home from this sewage disposal plant? A. I should judge about four and one-half blocks.

Q. Now, when you lived there before the plant was built, did you have any children? A. Yes, sir; I have four children.

Q. Did they ever play in and about this brook? A. Well, my youngest daughter used to visit En-nevers and go bathing in that brook. She was fifteen years of age at the time.

40

Q. And you have seen her do that— A. Oh yes.

Q. —before the plant was built? Have you noticed any change in the condition of the brook since this plant was put into operation? A. I certainly have.

Mary A. Kempfer, direct.

Q. And what is the change? A. Oh, well, the condition of that brook is so that it is simply unbearable and unsightly.

Q. What sort of a condition is it? Will you describe it briefly to the jury? A. Well, at times, there is a thick scum that gathers on this brook, and on the 20th—or the 20th of April—we have noticed this terrible odor for the past year and a half, and on the 20th of April I made up my mind that I would investigate what this terrible odor was.

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Mr. DeTurck: Just wait a minute.

Mr. Morrison: Just wait a minute. The Judge has to go out.

20

(After a short recess.)

The Court: All right, Mr. Morrison.

Q. Now, Mrs. Kempfer, you were just saying that on April 20th of this year, this smell became so that you decided to do something about it. Will you continue from that point and tell the jury what you did and who were with you, and so forth? A. Why, we generally always get this odor more in around midnight, this terrible smell, but the smell is there at all times. But, generally, around eleven to one, that is—it seems the smell there is so that you cannot stand it. This particular night, it was quarter after eight, and the odor was so intense that it penetrated through our home, and I made up my mind that I would investigate what this smell came from. So my two sons and I went down to the brook, which I judge is about three hundred feet from our home, and when I got down there with my sons, why, the raw material was running through this brook, and we

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40

Mary A. Kempfer, cross.

followed that as far as the bridge adjoining the Ennever property; and when I got as far as that, why, I was not able to continue any more. When we got down there, it was so that I became sick to my stomach.

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Cross-examination by Mr. DeTurck:

Q. You say you live four and a half blocks from the plant? A. About four and a half blocks.

Q. And three hundred feet from the stream? A. What is it?

Q. How far from the stream? A. Oh, I judge about three hundred feet.

Q. And you can smell that plant from where you live? A. I certainly can.

20

Q. How frequently have you smelled it? A. Oh, at all times, only it seems at midnight, the odor is far more.

Q. Every day? A. Almost every day.

Q. And do any other people live in your neighborhood? A. Yes.

Q. How many people live between your house and the plant, what number? A. Four.

30

Q. Between your house and the plant? A. Oh, and the plant? Well, that I could not just say.

Q. But there are quite a number of houses? A. Yes, quite a few.

Q. And I suppose you discussed this thing with your neighbors? A. I never bother with my neighbors.

Q. But your sons noticed it? A. Oh, they go to business.

40

Q. I say, they noticed the smell? A. Oh, certainly.

Q. And what time of the day was it that you went down to the brook? A. It was a quarter after eight that night.

Mary A. Kempfer, cross.

Q. It was dark? A. No.

Q. And then you followed the brook up as far as the bridge? A. As far as the bridge.

Q. That is on Armour Place? A. Yes.

Q. Now, when did you first smell this smell from the plant? A. Oh, my goodness! That has been now for two years or more.

10

Q. Two years or more? A. Yes.

Q. And how soon after the plant started to operate? A. Why, I noticed that about the third month after.

Q. The first month it operated, you did not notice it? A. No.

Q. You did not notice it the second month? A. No.

Q. Did you notice it the third month? A. About the third month was beginning to smell, this terrible odor.

20

Q. As a matter of fact, you did notice it in the spring of 1926, when you first noticed it? A. When I first—

Q. Noticed it? A. —lived there—oh, not 1926. Yes, 1926.

Q. Did you smell it every day? A. We always smell it; we are never without the smell.

30

Q. All the time? A. All the time.

Q. All day long? A. All the time.

Q. Yes. All day long and all night long? A. Well, all night long, I do not know; but I know we smell it up to midnight. I am generally up at that time.

Q. How long would you say four and a half blocks are from the plant? How long is a block in Bergenfield? A. I am sorry I could not just say.

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Q. About how many feet, about, just to give us an idea? A. I do not know.

Mary A. Kempfer, cross.

Q. Do you think a block is three hundred feet long? A. That I do not know.

10 Q. Well, just indicate from where you sit to some building outside the length of a block? Is it as far as from here to that red brick building over there (indicating)? A. No. I do not think it is quite that far; I could not judge. Some blocks no doubt are larger than others. I do not know. I am not a very good judge.

Q. What street do you live on? A. I live on First Street.

Q. (Map produced.) Let us see if we can find you.

20 Mr. West: You want the other map. You have got the Bergenfield map.

Q. You live in Dumont? A. I live in Dumont.

Q. Now, we will see if we can find it. (Referring to map.) Yes, here is First Street (indicating). The streets between yourself and the plant are Second Street, Third Street? A. There isn't any Third Street.

30 Q. What is known now as Erie Street; is that right? A. Yes.

Q. And Maple Avenue? Isn't there a Maple Avenue? A. No. It is not that far.

Q. I know; but you live on First Street? A. Yes.

Q. Near what other street? Near Prospect Avenue? A. Yes; near Prospect.

Q. On which side of Prospect Avenue, the east or the west side? A. The—well, I am east of the brook.

40 Q. East of the brook? A. Yes; northeast of the brook.

Q. Are you east of Prospect Avenue or west of Prospect Avenue? A. West of Prospect Avenue.

Mary A. Kempfer, cross.

Q. And how far west of Prospect Avenue, which house? A. The second house; but there is 180 feet from Prospect Street.

Q. Well, you are more than three hundred feet from the brook, aren't you? A. Yes.

Q. You are possibly six hundred feet from the brook? A. No, not six hundred, not judging from the people's property that are below us. 10

Q. Now, is all this property in here owned by one person, or by a great number of persons? A. A number of persons.

Q. I mean the property between your home and the plant. A. Why, that is owned by individuals, I think.

Q. Yes. Did you ever notice that smell in other parts of the town? A. Yes. I walked down Madison Avenue at one—one evening, and over that brook below Prospect, and the odor there is just as bad as at the foot of our street. 20

Q. And how far is Madison Avenue away from the plant? A. That is just a block away.

Q. Have you ever walked along Prospect Avenue? A. Yes.

Q. Right at the head of the plant? A. Yes.

Q. Did you notice the smell there? A. I certainly did. 30

Q. And there are quite a number of houses along Prospect Avenue? A. Yes.

Q. How far down Prospect Avenue did you notice that smell? A. Oh, I walked down as far as Bergenfield.

Q. What do you mean, as far as Bergenfield? A. On Prospect Street.

Q. Did you ever walk past the plant on Prospect Avenue? A. I did. 40

Q. And how far past the plant did you walk? A. Oh, down as far as Bergenfield.

Irene I. Gilmore, direct.

Q. I know; but the plant is in Bergenfield. A. Well, it is on one side, Dumont, too.

Q. Weren't you up to the plant yesterday? A. Me? No, I was not, yesterday.

Q. But you have gone down to the plant, haven't you? A. I have.

Mr. DeTurck: That is all.

Mr. Morrison: That is all.

IRENE I. GILMORE, sworn as a witness on behalf of the plaintiffs, testified as follows:

Direct examination by Mr. Morrison:

Q. Mrs. Gilmore, where do you live? A. Dumont

Q. And how long have you lived there? A. Twenty-two years, will be, in July.

Q. And what is your business? A. Real estate operator and broker.

Q. How long have you been a real estate broker and operator? A. Since May 3rd, 1921.

Q. And during that time, what has been the field of your operations? A. Well, more or less, all over the County; but particularly Bergenfield and Dumont.

Q. And in Bergenfield and Dumont, in your operations which you have had, have they been in the neighborhood of and similar to the Ennever property? A. They have.

By Mr. DeTurck:

Q. Have you sold any buildings on—any property on Armour Place? A. Not on Armour Place, no.

Irene I. Gilmore, direct.

Q. Have you sold any property on Prospect Avenue? A. Yes, sir.

Q. How far away from the plant? A. Well, within—well, right up on Prospect, within a block; a block and a half, I would say.

Q. What is the name of the party whose property you sold? A. I cannot recall the names off-handed. I can tell you the builder whose houses I did sell.

10

Q. You had no trouble selling them, did you? A. No.

Q. The houses were all right? A. Yes.

Q. Those people that bought made no objections to the plant? A. The plant was not there at the time I sold the houses.

20

Q. I see.

Mr. DeTurck: I object to the testimony, as long as she has not sold similar property, similarly located.

The Witness: I have sold property there since the plant has come, but not on Prospect Street.

By Mr. DeTurck:

30

Q. What property have you sold near the plant? A. Madison Avenue, Prospect Street, west of Madison Avenue.

Q. How far is that away from the plant? A. Four blocks.

Q. Did you have any trouble selling it? A. No.

Q. What? A. No.

40

Q. There was no objection to the plant by those people who bought it? A. I did not sell close enough to the plant.

Irene I. Gilmore, direct.

Q. Yes. A. I sold about two hundred and ten thousand dollars' worth of property within six blocks of the plant.

10 Q. Yes. But you did not sell any property where it is affected by the smell of the plant, from the water? A. Yes; but just before the operation of the plant, that is, within sight of it.

Q. But not after the plant was in operation? A. Oh, yes.

Q. Have you sold some after, right where they had these smells, these odors? A. Well, I have, yes, sold quite a little on Madison Avenue, and within a—well, within a radius of about six blocks of the plant.

20 Q. And had you any trouble selling the property? A. No.

Q. People did not object to the smells, did they? A. Well, they do not smell it when they come out and look at a house. They go around looking at the house, and they don't smell the disposal plant so readily.

30 Q. In other words, you were holding back from these people something which was objectionable? A. No, I was not. That is why I would not sell Mr. Ennever's house.

Q. You did not try to sell Mr. Ennever's house? A. I did.

Q. You did? A. I did.

Q. But you could not sell it? A. Well, Mr. Ennever listed his house with us, and I—within three days after the listing,—

40 Q. Wait a minute; that is not the question. I say, you did not sell it? A. No. I tried.

Q. You did not sell any property which was as close to the plant as Mr. Ennever's? A. No, I did not.

Irene I. Gilmore, direct.

Q. And you did not sell any property which was as badly located as Mr. Ennever's with respect to the plant, did you? A. Well, before—do you mean after the operation of the plant?

Q. After the operation? A. Not after.

Q. No.

10

Mr. DeTurck: I submit she is not qualified.

The Court: Well,—

Mr. Morrison: The case of Ross v. Commissioners—

The Court: I am reading it now.

Mr. DeTurck: I have the Morrell case, if you wish to see that.

The Court: It is not necessary that land be sold adjoining the plant in order to qualify her as to values. It is sufficient if it is in the neighborhood, or if she knows by sales or from study of sales of other places in that neighborhood. 20

Mr. DeTurck: I will call your attention to the case of Morrell against—

The Court: Well, we have not reached this point yet. I know this case. 30

Mr. DeTurck: Well, may it please your Honor, I must make my objection at this time. If I wait until she testifies to the depreciation in value, why, I am too late.

The Court: I do not know what she is going to testify to.

Mr. DeTurck: All right.

Mr. Morrison: Do I understand the qualifications of the witness are now satisfactorily established? 40

The Court: To an extent. It depends upon what she is going to be asked. There is a

Irene I. Gilmore, direct.

difference between a witness qualifying as an expert as to values and one who can testify as to loss by reason of this sewer. Now, I do not know which you are going to predicate.

10

By Mr. Morrison:

Q. Mrs. Gilmore, did you know Mr. Ennever's property and its condition before the sewage disposal plant was built? A. I did.

Q. And what, in your opinion, was its value at that time? A. Well, the time he listed it with me, I told him——

20

Mr. DeTurck: I object to that.

The Court: Sustained.

A. I consider it in the neighborhood of ten thousand or ten thousand five hundred because of the——possibly eleven, because of the beauty of his grounds. It was the prettiest place in either town.

Q. Now, if there had been no sewage disposal plant built there, other conditions remaining the same, what would you consider the value of Mr. Ennever's property——

30

Mr. DeTurck: I object to that.

Mr. Morrison: Wait until I finish the question.

The Court: Now, you are taking into consideration the fact of the plant being there?

Mr. Morrison: I have not finished the question. I do not know whether Mr. DeTurck is a mind reader or not.

40

Q. Mrs. Gilmore, to be perfectly fair to Mr. DeTurck, I am going to ask you a question. Please

Irene I. Gilmore, direct.

do not answer until Mr. DeTurck has a chance to object and the Judge has a chance to rule.

Mr. DeTurck: All right; go ahead.

Q. Now, Mrs. Gilmore, you know, you have said, the condition of the Ennever property before this disposal plant was built? A. Yes. 10

Q. And you have stated its value at that time? A. Yes, sir.

Q. Now, will you state, please, other conditions remaining as they have been, but no sewage disposal plant being there, what would the value of that property be today?

Mr. DeTurck: I object to that.

The Court: I will allow that, subject to further consideration. There are two propositions involved in this case. 20

Mr. DeTurck: Yes.

Q. Now, you may answer, if you will, please. A. Why, I think that \$11,000.00 would be a fair price to ask for it in the condition it was at the time we had it for sale.

Q. And would that price have remained the same until today had there been no disposal plant put in there? 30

Mr. DeTurck: I object to that.

The Court: I sustain the objection.

Mr. Morrison: May we have an exception?

Q. Mrs. Gilmore, do you know the condition of Mr. Ennever's property as it is today? A. I do. 40

Q. With the sewage disposal plant there, and operating as it does? A. I do.

Irene I. Gilmore, cross.

Q. And what, in your opinion, is the value of his property in that condition?

Mr. DeTurck: I object to that.

The Court: I will allow it.

10 Mr. DeTurck: I want to state my reasons. She is not qualified to testify as to depreciation in value.

Mr. Morrison: We are not asking her to.

Mr. DeTurck: Well, conditions as they are.

Mr. Morrison: We are asking her to testify to the actual value of that property as it actually is there.

20 Mr. DeTurck: She is trying to show depreciation due to the construction of the sewage disposal plant. She is not qualified.

The Court: I will allow the question.

Mr. DeTurck: Exception.

(Question read.)

30 A. We do not consider it has any value; it might bring four thousand dollars, forty-five; possibly a certain class of people might buy it; none of our following, no one that we—at the present are interested in would consider a proposition of that kind.

Mr. Morrison: Cross-examine.

Cross-examination by Mr. DeTurck:

Q. And you attribute that to the construction of the sewage disposal plant, do you not? A. I beg your pardon?

(Question read.)

40 A. I do.

Mr. DeTurck: I move the testimony of the witness be stricken out on the ground

Irene I. Gilmore, cross.

she is not properly qualified to testify to the depreciation. Read the last question.

The Court: Read the last question and answer.

(Last question and answer read.)

The Court: It seems to me she is not qualified. The rule is, I take it, in order to predicate testimony or give an opinion as to the value that is lessened from the former value, there must be some experience with a given kind of sewer.

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Mr. Morrison: Our conception of the law on the thing is about as Mr. DeTurck says. A witness who had not certain qualifications could not testify to depreciation. Our conception is a real estate agent like this lady is who had bought and sold freely in the neighborhood before and is now buying and selling in the neighborhood may testify as to values at one time and values at another. We admit that this fixes the depreciation, but we do not ask her to state the depreciation.

20

(Further argument.)

The Court: I will permit that question to stand.

30

Mr. DeTurck: I ask an exception.

Q. Now, you say that the depreciation is approximately \$7,000.00 in the value of this property?

Mr. Morrison: Objected to as improper cross-examination. She said nothing of the kind.

40

Mr. DeTurck: She said the difference.

Mr. Morrison: She did not say that. She said what the two values are.

Irene I. Gilmore, cross.

Mr. DeTurck: I think it is proper cross-examination.

The Court: No. She has given two values.

10 Q. You say the property in 1925, that is, before the construction of the sewage disposal plant, was \$11,000.00? Is that right? A. I said somewhere between ten-five, and eleven thousand.

Q. And you say its present value is about \$4,000.00? A. It is hard to fix a value. It is almost impossible to sell a place of that kind.

Q. Well, can you fix a value? A. It would have to be to a class of people that a very small amount of money would appeal to them.

20 Q. I know; but you should fix some value. What value do you fix as the present value of the Ennever property? A. Well, if the price was set at four thousand, possibly forty-five hundred, it might induce a certain class of people to buy.

By the Court:

Q. What, in your judgment, is the value now, as an expert; not what someone would be likely to give, but what you could get; what is the value?

30 A. I consider forty-five hundred as a big value for the place at the present time.

By Mr. DeTurck:

Q. And how do you account for the difference in the value in 1925 and the value at the present time? A. Well, because of the general condition there. People buy according to general conditions.

Q. What condition are you speaking about? A. The sewer disposal plant, and the odor.

40 Q. And nothing else? A. I do not know of anything else would cause a depreciation in value.

Q. In other words, your difference in value is based on the fact that the sewage disposal plant

Edward L. Benson, direct.

has been constructed there, and is now operating?

A. The difference is that people won't buy a place of that kind and pay a fair price for it.

Q. Yes. Because there is the sewage disposal plant— A. Right in the back there, yes.

Mr. DeTurck: I again move that the testimony of this witness as to the value after the construction of the plant be stricken out.

The Court: No. I will permit it to stand.

Mr. DeTurck: I ask an exception.

Mr. West: That is all.

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By Mr. DeTurck:

Q. Wait a minute. How old is that house? A. Well, I have—I do not know just how old it is, but I know it is sixteen years old anyway, because I used to go down there around that time, my children used to bathe in the brook there.

20

Q. Of what is it built? A. Of what is it built?

Q. Yes. A. Cement block.

Q. How many rooms? A. Six.

Q. All right.

30

Mr. DeTurck: That is all.

Mr. Morrison: That is all, Mrs. Gilmore.

EDWARD L. BENSON, sworn as a witness on behalf of the plaintiffs, testified as follows:

Direct examination by Mr. Morrison:

Q. Mr. Benson, where do you live at this time?

A. Teaneck.

40

Q. Did you ever live in Bergenfield or Dumont?

A. Yes, sir.

Edward L. Benson, direct.

Q. And where? A. On Armour Place, right next to Mr. Ennever.

Q. And in what years did you live there? A. I moved there in September, 1923, and moved from there in the last week in March, 1926.

10 Q. While you were living there, did you at times visit Mr. Ennever, and go into his property? A. Oh, yes, occasionally.

Q. Will you tell the jury, please, what Mr. Ennever's property looked like before this disposal plant was erected, and what it looked like after the plant was in operation? A. Well, my idea of Mr. Ennever's property at the time I was living there was a very, very well-kept place. It was—
20 had shrubbery, fruit trees, a garden, and, in fact, he put many, many hours of good, hard work on that place, and he had that a very—one of the most attractive places in Dumont. That is my idea and impression of Mr. Ennever's property.

Q. Now, how did it look to you after this plant got in operation, just before you moved, for example? A. Well, I moved in March, and the condition of his property was about the same.

30 Q. Have you been back there since that time? A. I was back there about a year ago.

Q. What did you find the condition to be then? A. His property, in my idea, was just as well kept while he was living in it.

Q. What did you find as to the—or did you notice anything from the sewage disposal plant? A. I noticed an odor. I noticed it while I was out there; yes, sir.

40 Q. How many occasions have you been there when that odor was noticeable? A. I noticed it twice before I moved.

Q. Have you been back since then? A. Yes, I

Edward G. Cram, direct.

have been back since, and every time I have been back, I have noticed the odor.

Q. And without going into details, what was the nature of the odor? A. It was repulsive.

Q. Did you ever see the brook discolored or in any way dirty by this sewage disposal plant? A. I do not remember, Mr. Morrison.

10

Mr. Morrison: Take the witness.

Cross-examination by Mr. West:

Q. When did you say that you left Armour Place? A. I believe it was the last week of March, 1926; I think it was the Saturday following the Friday.

20

Q. Did you rent the property there, or did you own the property? A. I rented.

Q. Did you ever walk along the course of the bridge? A. Just walk northerly?

Q. Yes. To go up that way through the field up there? A. Yes, sir; up as far as Madison Avenue.

Mr. West: No questions.

Mr. Morrison: That is all.

30

EDWARD G. CRAM, sworn as a witness on behalf of the plaintiffs, testified as follows:

Direct examination by Mr. Morrison:

Q. Mr. Cram, where do you reside? A. In Closter, New Jersey.

Q. Have you ever visited Mr. Ennever at his property in Bergenfield and Dumont? A. Yes, sir.

40

Q. How frequently? A. Why, only once before the disposal plant was built.

Edward G. Cram, cross.

Q. And what was the condition of his place then? Describe it briefly to the jury. A. I should call it a very beautiful place. It was very pleasant, and very nicely kept.

10 Q. Have you ever been back there since the disposal plant was in operation? A. Yes, sir.

Q. What have you noticed on those occasions? A. An offensive odor.

Q. And, just briefly, what was the nature of the odor? A. Well, it was the odor of sewage; that is what it was.

Mr. Morrison: Take the witness.

Cross-examination by Mr. West:

20 Q. You visited him quite frequently, did you, after the sewage disposal plant was erected? A. Why, not until the first week of May, two years ago; but since that time I have been there on several occasions.

Q. You have gone there with your family? A. Yes, sir; I have.

30 Q. And noticed it the first time you were there with your family? A. I was there without my family in 1926.

Q. Yes. and then you came back and brought your family? A. With various ones, I have been there.

Q. And you continue to visit him quite frequently? A. I may have been there half a dozen times.

40 Q. All in spite of the odor? A. Well, we did not stop there. We just drove up to his house, and went away again. We were only there a few minutes, maybe a half hour at most.

Q. Did you notice this odor before you arrived at the Ennever home? A. The other evening, you

Edward G. Cram, cross.

could notice the odor all up and down the street, Armour Place.

Q. How far from Mr. Ennever's home? A. I could not say in yards or feet, but the other evening I noticed it as I approached the house; in fact, all up and down Armour Place, I would say I noticed the odor.

10

Q. When you refer to "the other evening," what evening do you refer to? A. Last Thursday evening.

Q. Was Mr. Ennever still living there? A. No, sir.

Q. You went down to his home, although he then was living in Harrington Park? A. Yes, sir.

Q. Is that true? And Mr. Ennever was there? A. Mr. Ennever was there; yes, sir.

20

Q. And, of course, you did not go to visit him, then, did you? A. I went down there with him at his request. He wanted to see me about something.

Q. You went there so that you could be a witness in this case? A. Why, I went down there,—no, not for that reason. I had already decided to do that before.

Q. You had decided to do that? A. Yes, sir; because I knew the condition.

30

Q. Then you noticed this smell as you approached the Ennever house? A. The smell was very noticeable.

Q. And when did you first begin to notice it? A. I could not say, except that at the house site, at the house site, it is so bad. You can smell it, with the window shut, inside of the house.

Q. Would you say a mile away? A. No.

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Q. Half a mile? A. Not that much.

Q. Quarter of a mile? A. Well, probably as far as that street that Armour Place goes off from.

Anne G. James, direct.

Q. And at the place where you first began to smell this odor, you passed a number of houses?

A. I passed whatever houses are on Armour Place.

Q. Yes. A. I do not know which ones they are.

Q. Yes.

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Mr. West: I think that is all.

Mr. Morrison: That is all.

ANNE G. JAMES, sworn as a witness on behalf of the plaintiffs, testified as follows:

Direct examination by Mr. Morrison:

20

Q. Mrs. James, where do you live? A. I live on Niagara Street.

Q. In what place? A. Dumont.

Q. And are you acquainted with Mr. and Mrs. Ennever? A. I am.

Q. Have you occasionally been at their house? A. I have.

30

Q. And how long have you known them? A. Well, I was first introduced to them in 1926.

Q. And since that time, until the present, have you, from time to time, visited them? A. I have.

Q. Did you know their property in Dumont before the sewage disposal plant was built? A. I did not.

Q. Only since that time? A. Yes, sir.

40

Q. Now, on the occasion of your visits to the Ennever house after the plant was built and in operation, what, if anything, did you notice? A. Well, I noticed the odor.

Q. Well, just tell the jury briefly how it affected you, and what it was, and so forth? A. Well, it

Anne G. James, cross.

was a stench, absolutely. We have often had to close the windows to keep the stench from coming into the house; even in the dining room; you could not possibly eat with the window open. It simply had to be closed.

Q. What season of the year would that be when the windows would be closed, you would have to close them? A. Well, you would have to close them in the summer. 10

Mr. Morrison: You may take the witness.

Cross-examination by Mr. West:

Q. How frequently, Mrs. James, did you visit? A. Very frequently. 20

Q. Well, what will you say, a couple of times a week, possibly? A. Oh, yes.

Q. And you had dinner there? A. No; not dinner.

Q. Any meals? A. Yes; with the windows closed.

Q. I said, did you have any meals? A. Yes; with the windows closed.

Q. And where were they served? A. In the dining room. 30

Q. Yes. And those visits continued from what time in 1926? A. Well, probably from the spring until they moved.

Q. And they moved when? A. They moved in February of this year.

Q. And your family also visited? A. My husband. 40

Q. Anyone else? A. No, sir.

Q. And how far do you live from the scene of the plant? A. About three to five minutes' walk.

Anne G. James, cross.

Q. Yes. This odor noticeable where you live?

A. Once I got it.

Q. Only once? A. Yes, sir.

Q. And on every occasion when you visited the Ennevers, correct? A. Absolutely.

10 Q. Yes. And you did not have to wait until you arrived right at their property before the odor became noticeable, did you? A. Sometimes.

Q. Other times, not? A. Well, other times, about half-way up the block.

Q. About half-way up to what street? A. Half-way down Armour Place.

Q. From what street? A. From Prospect Street.

20 Q. Yes. And from the point where you first began to smell the odor on those other occasions, you would pass the property of other people, wouldn't you? A. One bungalow.

Q. Yes. Did you ever have occasion to go down to the brook? A. Well, the brook runs through the property.

Q. Yes. And you had occasion to notice it, did you? A. I did.

30 Q. Did you ever have any occasion to follow the course of that brook beyond the Ennever property? A. I had no desire to.

Q. Did you ever follow the course of the brook beyond the Ennever property? A. I have seen it flowing past.

Q. Yes. And have you gone—have you followed it across, beyond the Ennever property,— A. I had no occasion to.

40 Q. —along the brook?

Mr. West: That is all.

Mr. Morrison: That is all.

Clara L. Ennever, direct.

CLARA L. ENNEVER, sworn as a witness on behalf of the plaintiffs, testified as follows:

Direct examination by Mr. Morrison:

Q. Mrs. Ennever, you are the wife of Harry Ennever, who was a witness earlier today? A. I am. 10

Q. And you lived with him in his home at Bergenfield during the time that he has been there, have you not? A. Yes, I have.

Q. How many persons are in your family? A. There are five.

Q. Your husband and yourself? A. And three children.

Q. And how old are your children, please? A. The youngest is seven, the next one is seventeen, and the oldest is twenty-one. 20

Q. You remember going to live in this property when there was no sewage disposal plant there? A. I certainly do.

Q. Will you tell the jury just briefly what sort of a place you had there before the sewage disposal plant came? A. I had a most beautiful place, I think. It—well, there wasn't anything in it that you could object to in any way; it was beautiful. It had a very beautiful brook going through, and which I liked to sit at very often, and used to like to bring my company down to, and I served—very often served refreshments out alongside of the brook, and, altogether, it was a very beautiful place. 30

Q. Now then, since the sewage disposal plant came in there and went into operation, when did you first notice a change other than the mere construction of the plant? A. Why, I noticed a change in the spring, the following year after the plant was built. 40

Clara L. Ennever, direct.

Q. What was the change? A. The odor was very bad.

Q. And has that continued from that time until this? A. Yes, it has.

10 Q. Has it been continuously bad, or has it been worse at some times than others? A. Worse at some times than others.

Q. And when did you notice it worse? A. Well, different parts of the time; sometimes, of course, on cloudy days, it would be worse.

Q. Did the direction of the wind have anything to do with it? A. Oh, yes. When the wind came from the disposal plant, I smelled it always.

20 Q. What have you noticed as to the condition of the brook itself as it flows through your property? A. Why, the condition of the brook, you mean, today?

Q. Yes. A. Is quite different from what it was before. It is—there is a sort of scum that floats along it, and it is filthy.

30 Q. You had some way of crossing the brook when you used to serve refreshments down by the brook, did you not? A. Yes. We had a bridge that Mr. Ennever built.

Q. Is that there today? A. No, it is not.

Q. Do you know how it came to—came not to be there? A. Yes, I do.

40 Q. And how was it? A. It was a heavy rain-storm that—that flooded the brook and raised to such a height that it broke away from the sides. And it was in such a condition that Mr. Ennever had to take it down next day, because we could not go across.

Q. Now, Mr. Ennever has spoken of one or more occasions when you went with him over into the sewage disposal plant. Do you remember going

Clara L. Ennever, direct.

with Mr. Ennever into the sewage disposal plant at any time? A. Yes, I do.

Q. And what time? A. Well, several occasions.

Q. Tell us one, please? A. One was when the pump was on the bridge.

Q. You went over and saw that? A. Yes, I did. 10

Q. Who did you see there at that time of the Borough people? A. Mr. Harra and three of his assistants.

Q. What was another time when you went there with Mr. Ennever? A. Well, we went over on several occasions.

Q. Did you ever see the water coming out of these sand-beds by any other means than through these pipes at the bottom? A. Yes. 20

Q. When? A. Well, I could not tell you exactly when, but I remember the water having flown over.

Q. And whereabouts on the sand-beds did that happen? A. On the end nearest to our property.

Q. What was the effect of the water flowing over the top of the bank of the sand-beds? A. Why, it broke away part of the bank.

Q. About how large a piece broke away? A. Well, about six or eight inches deep. 30

Q. How wide? A. Well, just a narrow stream, just enough to break through.

Q. And through that break, was there anything flowing? A. Yes.

Q. What flowed through? A. The water that was not clear.

Q. Water from the pool over the sand-beds? A. Yes.

Q. Have you ever seen the sludge drawn out from these tanks and put on the sludge beds? 40

Mr. West: I object to that——

Clara L. Ennever, direct.

A. Yes.

Mr. West: —as not binding on the defendants.

The Court: What?

10 Mr. West: Not binding on the defendants, the same question raised on Mr. Ennever's testimony.

Mr. Morrison: I will ask her who did it.

The Witness: I think Mr. Harra did it.

Mr. West: I object to that on the ground that is not binding on the defendants.

The Court: Well, it is only showing what was done.

20 Mr. Morrison: The engineer testified, in the normal operation of the plant, these settling tanks took the solids and that they were designedly thrown out on these sludge beds. Now, I am just asking the witness if she had seen that done.

The Court: I will allow it.

Mr. Morrison: I am going to ask in a moment what the effect of it was. I will say that, frankly.

30 The Court: I will allow the question.

Mr. West: Exception.

Q. Have you ever seen the sludge brought out of these settling tanks and onto the sludge beds?

A. Yes, I have.

Q. And by whom was it done? A. Mr. Harra and his assistants.

40 Q. Now, when it was done, what did you notice?

A. I noticed a terrible smell.

Q. Worse than at other times? A. Yes, worse than other times.

Clara L. Ennever, cross.

Q. How long did that last after the sludge had been drawn out onto those beds? A. For some time.

Q. Well, can you make it a little more definite, a minute or two, an hour or two, a day or two? A. Oh, yes; for a day or two, anyway.

10

Q. Or longer than that, perhaps? A. Yes; longer than that, sometimes.

Q. When would that smell from that solid, from that sludge, when would it stop? A. Well, I did not take notice to that.

Q. Did you smell this odor when you were inside of your house? A. Yes; I could.

Q. What times of the day was it most annoying? A. Well, sometimes mornings, sometimes afternoons, sometimes the whole day.

20

Q. And would you notice it when you were serving and eating your meals? A. I certainly did.

Q. Did you notice it when you were going to sleep at night? A. Oh, yes.

Q. Did it ever waken you during the night? A. Well, I did not sleep very good while that disposal plant was there for the simple reason that we had the windows closed a good many nights.

30

Mr. Morrison: You may cross-examine.

Cross-examination by Mr. West:

Q. Mrs. Ennever, I show you a picture marked P-7. Are they your children? A. (Referring) One of them.

Q. One of them. And the other children are—
A. Neighbors' children.

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Q. —neighbors' children? Is that the youngest child? A. Yes.

Clara L. Ennever, cross.

Q. When was that picture taken, do you know?

A. Why, yes; that must have been taken in nineteen—about 1924.

10 Q. Now, calling your attention to the time when you said your property was flooded, I believe you said that that was immediately following or during the course of a very heavy rain-storm, did you not?

A. Well, about the time of a rain-storm.

Q. Yes. And that was in 1927? A. Yes.

Q. Last year, in the month of August, do you recall? A. Yes.

Q. And there was a great deal of rain just about that time? A. Yes.

20 Q. Now, not only your property was flooded, is that correct, but also all the surrounding property? A. Not all the surrounding property.

Q. Well, a great deal of the surrounding property? A. A few of them, I didn't—

Q. I beg your pardon? A. A few of them.

Q. Yes. I mean the flood was not confined to your property alone, was it? A. No.

30 Q. And, generally, north along the brook, the property was flooded? A. Yes; not as much as ours.

Q. I beg your pardon? A. Not as much as ours.

Q. Not as much as yours? A. No.

Q. But to some extent? A. Yes.

Q. Yes. Now, you know the point where the drains enter the brook from the sand filter, don't you? A. Yes.

Q. I think there are some five or six different places where they enter? A. Yes.

40 Q. Now, above the brook it is perfectly clear, isn't it, the water? A. Yes.

Q. It is clear at all times? A. Well, I have not been up there at all times.

Clara L. Ennever, cross.

Q. Yes. But on every occasion when you have been up above where the pipes enter from the sand filters, the water is clear? A. Up above, yes.

Q. Yes. And it is not muddy or cloudy, or anything of that kind? A. No.

Q. Is it? And I suppose you have been up there on a great many occasions? A. Not a great many occasions. 10

Q. Well, how many shall we say, to be fair? A. Oh, I did not go up there very often.

Q. Yes. A. Perhaps two or three times.

Q. But on every occasion, there was not, apparently, as far as you could see, any pollution or any discoloration to that brook until it reached the sewage disposal plant, is that correct? A. That is correct. 20

Q. Now, the conditions which you complain of, are they worse or better on a clear day? A. Well, I would not say they were entirely all right on a clear day. It depends on the——

Q. But on a muggy—pardon me—on a muggy day such as we had yesterday, they would probably be worse than usual, wouldn't they? A. Well, yes. 30

Mr. Morrison: I object to the probability, if the Court please, speculating in this case.

Mr. West: I withdraw the question.

Q. I say, on a muggy day, the conditions would be worse, wouldn't they, than on a nice, clear day? A. More or less.

Q. Yes. Now, prior to the construction of this plant, it was all high ground right in the vicinity of your home, wasn't it? A. It was not high. 40

Q. No? And the level of the land was about the same as there exists at the present time, except so

Clara L. Ennever, cross.

far as changed by the construction of the plant?

A. Yes.

Q. Is that right? A. Yes.

Q. And the vegetation is about the same now as it was prior to the construction of the plant, except insofar as the part of the ground is occupied by the plant at the present time? A. Yes.

10

Q. Is that so? A. Yes.

Q. The type of vegetation is the same now as existed prior— A. Yes.

Q. —to that time? And it was not swampy at all, was it? A. I did not consider it swampy.

Q. No. It was so that anybody could walk down from the place where the plant is now located, out by Armour Place, without getting their feet wet, or anything of that kind? A. Yes.

20

Q. Quite dry? A. Quite dry.

Q. It was not necessary to jump from a clump of grass to a clump of grass to get up to Armour Place, was it? A. No.

Q. And the conditions then were about the same as they are now, is that right? A. Well, I do not understand what you mean.

Q. The conditions in respect to the ground around your home before the erection of the plant were about the same as they are now? A. Yes.

30

Q. Yes. Now, while your children and the neighbors' children were bathing in these swimming pools, one of which was on your property and the other on the other property, do you know anything about the sewage disposal plant at West Englewood that was emptying raw sewage into the brook? A. No, I do not.

40

Q. Did you know that into this low land, this pocket—there was generally a pocket there where the plant now exists, was there not, low land? A. Well, it depends what you mean, a pocket.

Clara L. Ennever, re-direct.

Q. Well, the water would drain, wouldn't it, from the high lands down into that section? A. Somewhat.

Q. Yes. And prior to the construction of the sewage system in the Borough of Bergenfield, there were cesspools, is that true? A. I do not know of any cesspools.

10

Q. Well, how was the sewage disposed of, then? A. Oh, yes, there were cesspools.

Q. Yes. And isn't it a fact that an overflow from the cesspools drained down into this pocket or low area and into the stream that passed through your property? A. I do not know of any.

Q. Now, you did have many friends who visited you? A. I certainly did.

20

Q. After the construction of the plant? A. Yes.

Q. Some of them have testified here today? A. Yes.

Q. And they continued to visit you, didn't they? A. Well, of course.

Q. Yes. Now, in 1926, this plant was put in operation, wasn't it? A. Yes.

Q. And in 1924, there wasn't any plant in operation? A. No.

30

Q. Was there? And you bought your property in Harrington Park in the year 1924, didn't you? A. Yes.

Mr. West: That is all.

Re-direct examination by Mr. Morrison:

Q. Mrs. Ennever, Mr. West has asked you about the conditions with reference to this smell, whether it was different on a cloudy day or a muggy day, I think he said, or a clear day. Did the condition as to smell also vary with what the men were do-

40

Clara L. Ennever, re-direct.

ing over there at the plant? A. Yes, it had a lot to do with it.

Q. And when was the smell worst in relation to what they were doing over there? A. Well, there were a good many days when they were upsetting the sludge, for instance.

10

Q. Yes. A. Working in the sludges. It was very bad those days, whether it was clear or cloudy.

Q. What do you mean by upsetting the sludge? A. Well, the sludge—I do not know, they work in the sludge with shovels, and they took the sludge from the sludge beds on shovels and put that in wagons and took it away.

20

Q. When they were doing that— A. And when they were disturbing that, it smelled very bad, regardless of the dampness.

Q. And when they were doing that, it did not make any difference whether it was a sun-shiny day or a foggy day? A. No, it did not.

Q. Now, you have walked from your house around to the plant recently, around through your Dumont property, and up on the side of the sand-beds, and walked into the plant, have you not? A. Yes, I have.

30

Q. Is the condition of the ground as you walk along there the same as it was before this sewage disposal plant was built? The kind of ground as you walk over there, can you remember how you walked, and what you stepped on, and so forth? A. Well, yes, it was all right until you got right to the disposal plant, then you had to step over some marshy ground.

40

Q. Yes. What is there now where that marshy strip comes down there? Have you noticed anything there? A. Yes. There seems to be a stream that comes from somewhere.

Q. What kind of a stream is it? A. Well, it was muddy.

Clara L. Ennever, re-cross.

Q. What was the condition of the surface of the ground there as to color? A. It was very black.

Mr. Morrison: That is all.

Re-cross-examination by Mr. West:

Q. Now, the odors you have just described, I suppose they were more or less noticeable in the entire neighborhood, weren't they? A. Well, I did not inquire. 10

Q. Well, did you only notice those offensive odors when you were at your property, or before you arrived at your property? A. Well, often before I arrived.

Q. And quite some distance away, I suppose? A. Well, as far as Prospect Street, as far as Niagara Street. 20

Q. And Niagara Street, that would be how far from the plant? A. Two blocks away.

Q. Two blocks away? A. About three.

Q. Five or six hundred feet? A. Oh, a little more than that.

Q. And that would be the general radius of the smell, would you say? A. Well, at times. 30

Q. At times? A. There were times that I—

Q. Are you talking now when the smell was at its worst or when it perhaps was not quite so offensive? A. I do not quite get what you mean.

Q. Well, when the smell was at its worst, would it extend beyond Niagara Street? A. Yes, it would.

Q. Yes. And how far beyond Niagara Street? A. Well, I have noticed it as far as Madison Avenue. 40

Q. And that would be how many blocks from the plant? A. About five.

Q. About five blocks? A. Yes.

Clara L. Ennever, re-cross.

Q. And you would say that that would be the general radius of the smell, about five blocks around the plant? A. Yes.

Q. And it was the smell, was it not, that you primarily objected to? A. Well, it was that and the proximity of the plant to our house.

10

Q. The smell and the proximity of the plant? A. Yes.

Q. Those were the objectionable features? A. Yes.

Q. And the smell, you say, could be observed, be noticed, from time to time, in a radius of about five blocks from the plant? A. At times.

20

Q. Yes. And at other times, why, possibly a radius of two blocks from the plant? A. Yes. And there were times when it only smelled at our place.

Q. I see. And that and the proximity of the plant are the two objectionable features? A. Yes.

Q. Yes. A. And the——

Q. And the proximity of the plant is very objectionable because of the fact that the smell emanates from the plant, is that correct? A. No. It is a sewage disposal plant.

30

Q. Just the idea that there is a plant there? A. Yes.

Q. Yes.

Mr. West: That is all.

By Mr. Morrison:

Q. You do object, do you not, Mrs. Ennever, on the ground that filth comes down through the water in your brook? A. Yes.

40

Mr. West: I object to that.

The Court: Sustained.

Mr. West: There is one question that I overlooked, if the Court will indulge me.

Motion for Non-Suit.

By Mr. West:

Q. When did you start to build the house in Harrington Park? A. September, 1927.

Q. 1927.

Mr. West: That is all.

10

Mr. Morrison: That is all. We rest.

The Plaintiffs Rest.

Mr. DeTurck: May it please your Honor, I now move for a nonsuit on the ground that the plaintiff has not shown he is entitled to maintain this action against the Boroughs of Dumont and Bergenfield because of the principles of law laid down in the case of Waters vs. The City of Newark, 56 New Jersey Law, 361; Harrington vs. The Township of Woodbridge, 70 New Jersey Law, 28; Buckalew v. The Board of Chosen Freeholders of Middlesex County, 91 New Jersey Law, 517; Ansbro v. Wallace, 126 Atlantic, 426; and Caruso v. Montclair, 98 Atlantic, 670; and Callan v. Passaic, 6 Advance Reports, 897.

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30

I realize that Mr. Morrison is relying on the case of Garrison v. The Borough of Fort Lee, but I think that this case is clearly distinguishable from the Garrison case in that the nuisance complained of in the Garrison case affected Garrison alone. In this case, it affects everybody in the immediate vicinity of the sewage disposal plant and for a distance of a mile down the stream and, therefore, if there is any remedy whatsoever, it is by indictment against the members of the local councils.

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Walter B. Harra, direct.

The Court: I will hear you, Mr. Morrison.

(Argument.)

The Court: I will deny your motion.

Mr. DeTurck: I ask for an exception.

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The Defendants' Case.

WALTER B. HARRA, sworn as a witness on behalf of the defendants, testified as follows:

Direct examination by Mr. DeTurck:

20 Q. Mr. Harra, what is your business? A. Superintendent of the disposal plant for Bergenfield and Dumont.

Q. Are you licensed by the State? A. I am.

Q. And what kind of a license do you hold? A. For a—to operate primary and secondary treatment plants.

Q. Now, the plant at Bergenfield, is that a primary treatment or secondary treatment or both? A. Both.

30 Q. How long have you been superintendent of the plant? A. Since September the first, 1925; that is when I took hold of the plant.

Q. And when did you start the operation of the plant? A. October the 6th, 1925.

Q. And has the plant been running ever since? A. It has.

Q. And you have been in active charge of the plant? A. I have.

40 Q. Anybody to help you? A. Well, from time to time there has been men added to my staff.

Q. How many men have you now? A. At the present time, three besides myself.

Walter B. Harra, direct.

Q. And what are your duties, and what are the duties of your men? A. To do exactly as they are told.

Q. Well, who gives you your instructions? A. My instructions come through the State Board of Health, and through the designer of the plant. 10

Q. But from day to day, what do you do around the plant? A. Take care of the sewage as it comes in, care for the plant, in general, dispose of all sewage, without a nuisance possible.

Q. The sand-beds, are they cleaned from time to time? A. They are.

Q. How often? A. Well, just when the occasion requires it; but there is a rule, that is, September—well, in the fall and the spring of the year. 20

Q. I noticed you raking the other day. A. The raking is done as soon as the water goes down on the bed.

Q. How frequently is that done? A. Every day.

Q. Every day? A. If possible.

Q. And what equipment have you for that purpose? A. A Fordson tractor, with a 120-tooth harrow; I have a scraper, Shafer scraper, for scraping the surface of the bed. I also have a cart used for to remove the sludge and other debris that accumulates. 30

Q. Is the sand changed from time to time? A. Not on the surface of the bed; it has not been changed as yet. The sludge beds, yes.

Q. Now, does any solid substance pass from the dosing tank to the sand filters? A. None that is visible.

Q. In other words, where is the solid substance taken out of the substance? A. In the septic tanks. 40

Q. And that is before it reaches the dosing tank? A. What is that question?

Walter B. Harra, direct.

Q. That is before it reaches the dosing tank? A. It is.

10 Q. And how is the water gotten from the dosing tank to the sand filters? A. It passes under the pump house, across the bridge, through five separate culverts, and it is distributed on each sand bed by means of a trough on each bed.

Q. Now, what is the nature of the water which flows from the sand beds after it has been filtered? A. Clear.

Q. I believe you took a sample from the effluent? A. I did.

Q. From the place where the effluent passes out, and showed the jury yesterday, did you? A. I did.

Q. And is that always clear? A. It was.

20 Q. I mean, does it always come out that clear? A. From my tests, it always shows the same.

Q. Have you tested that effluent from time to time? A. Every day.

Q. And what test did you give it? A. Give it the methylene blue test.

30 Q. And what does that show, if anything? A. If there is any organic matter in the water, the blue goes back to its color; in other words, the blue is decomposed and it goes back to white.

Q. Have you any method of testing the purity of the water which comes out of there? A. No, I have not.

Q. You spoke yesterday about ninety percent. What were you referring to? A. That was the stability test on the methylene test; in other words, my effluent stood up under the methylene blue test.

40 Q. Yes. That shows ninety percent pure? A. Yes.

Q. Now, Mr. Ennever has testified that on one occasion you pumped raw sewage into the brook;

Walter B. Harra, direct.

is that true? A. That is not true. There was a pump put on the bridge by a contractor to get rid of water that accumulated in the bottom of the well in the dosing tank to necessitate a repair on the guide of the float of the dosing apparatus.

Q. Who was the contractor? A. Burns & Hall.

10

Q. I show you an Exhibit, P-16, and ask you if that is the pump you referred to? A. (Referring.) That may be it.

Q. Well, did you ever use a pump to pump any sewage from the tank to the brook? A. Never.

Q. And you say that this was used in order to make some repair? A. It was.

Q. In the dosing tank? A. It was.

Q. And what was the nature of the defect which developed in the dosing tank? A. The guide for the float broke, due to a heavy flow of water, and the float twisted and broke off this guide at the bottom.

20

Q. Was there any other way of repairing that except by pumping that out? A. There was not.

Q. Now, the stuff that was pumped out by Burns & Hall, was that raw sewage? A. It was not.

Q. What was it? A. It was the sewage that had passed through three elements of the plant and had been in the dosing tank.

30

Q. Had gone through three elements, you say? A. Exactly.

Q. And all the solids had been removed; is that right? A. Yes, sir.

Q. How long was that pump in operation? A. Part of one afternoon, and the morning of the next day.

Q. Now, Mr. Ennever testified that there was some pump in the building shown in Exhibit P-17. Is there a pump in there? A. What is that, the controller house?

40

Walter B. Harra, direct.

Q. Yes. Is there a pump in there? A. There is an air compressor.

Q. Is there a pump in there, a water pump? A. No, sir.

Q. Or a sewer pump? A. No, sir.

10

Mr. Morrison: We object to that. We think that is a pump. We think he is playing with a word there.

Q. Has that compressor anything to do with the flow of the water? A. Not in the plant.

By the Court:

20

Q. What do you use it for? A. It is used to raise the sewerage from a low level to a higher level; out on Prospect near Maple lane there is a low level sewer, and there is an ejector pot set down in the lower—in the chamber, and the air is conveyed from the controller house to this ejector pot; as sewage flows into the ejector, there is a float inside there that rises and allows the compressed air to enter that chamber; as it does, the valve is shut off, the air forces the sewerage from the ejector up into the main line, and automatically closes off when the job is finished.

30

By Mr. DeTurck:

Q. That has nothing to do with the plant at all, has it? A. Nothing at all, except that the machinery is there.

Q. Now, how far is that away from the plant, the place where this air is conveyed to? A. I should judge about two thousand feet. That is approximate.

40

Q. Air is conveyed two thousand feet, down to some other point in the Borough of Dumont? A.

Walter B. Harra, direct.

In the Borough of Bergenfield, where that ejector pot is.

Q. And this house, or this controller house, merely houses the machinery to do that pumping; is that right? A. Yes.

Q. By the way, have you ever drunk any of the effluent that came out? A. I have, on several occasions. 10

Q. Have you ever used it to make coffee? A. No, not that I know of. One of the young men did.

Q. You spoke about a primary treatment and secondary treatment. You say that you give the sewage two treatments in Bergenfield and Dumont? A. We do. 20

Q. Now, do you know of any sewer that only gives it one treatment? A. Yes, sir.

Mr. Morrison: Objected to as immaterial.

The Court: Sustained.

Mr. DeTurck: I want to show the difference.

Mr. Morrison: If some sewers do not treat it at all, what difference does that make to us? 30

The Court: Well, the hour of adjournment has come. We will take a recess until two o'clock.

Recess.

After Recess. 2:00 o'clock P. M.

Mr. DeTurck: Mr. Harra. 40

WALTER B. HARRA, recalled as a witness on behalf of the defendants, testified as follows:

Walter B. Harra, direct.

Direct examination by Mr. DeTurck (continued):

Q. I show you Exhibit P-17, the lower picture of the two, and ask you whether you ever pumped raw sewage from the plant to the brook? A. Never.

10

Q. What is the water you see flowing from the pipe shown in the lower picture? A. That is the—to all appearances, it looks like the drainage from the sludge bed.

Q. And is that raw sewage? A. It is not.

Q. Through how many processes has that water gone before reaching that point? A. That is the fifth process.

20

Q. And it has to go through a sand filter before reaching that point? A. It does.

Q. Where is the sand filter, east of the brook or west of the brook? A. That is east of the brook.

Q. And located where? A. On either the north or the south side of the septic tanks. In other words, known as the sludge drying beds.

Q. Where, with relation to the sludge beds? A. What is that?

30

(Question read.)

A. That is the sludge beds.

Q. And you mean, under the sludge bed, there is a drain, is that right? A. There are drains.

Q. And a sand filter? A. Sand—sand and gravel with drainage pipes underneath.

Q. Now, is there any method of pumping raw sewage into the brook from the plant? A. Absolutely none.

40

Q. Is it possible to pump raw sewage from the plant into the brook? A. It is not.

Walter B. Harra, direct.

Q. And was that ever done? A. Not to my knowledge; and I have been there every day except Sundays and holidays.

Q. Is there a valve which permits you to drain the dosing tank into the brook? A. Yes, sir; there is one on the northeast corner of the tank, and there is one on the southeast corner of the tank. 10

Q. Of the dosing tank? A. Of the dosing tank, yes.

Q. And through how many processes has that gone when it reaches the dosing tank? A. Three.

Q. Now, how often is the sludge dredged from the septic tanks? A. Do you mean drained off from the septic tanks?

Q. Yes, yes. A. About every six months. 20

Q. And is that sludge treated in any way after you draw it off? A. It is covered with deodorant.

Q. And why is that done? A. Just to eliminate any possible odor that may arise from it, due to methane gases.

Q. Is that treatment required by the State Board of Health? A. It is.

Q. Is it lime? A. Well, I have used lime, and I—at the present time, I use “finitas,” which is a deodorant and disinfectant. 30

Q. Now, Mr. Ennever testified that you had put lime on the sludge beds yesterday morning. Is that true? A. It is not so.

Q. Was there any lime on the sludge beds yesterday? A. There was an appearance of “finitas” on the beds when I got there yesterday afternoon.

Q. And when was that put on? A. Some of it was put on there Sunday. I put it on there myself. 40

Q. Had your placing that “finitas” on there anything to do with this case? Did you put that on

Walter B. Harra, direct.

because of this case? A. No. That is a constant practice.

Q. How often do you put "finitas" on the sludge beds? A. Whenever we see that it is absolutely necessary, and especially when we pump the sludge.

10 Q. Yes. You say the sludge is drained off only about once every six months? A. About six months; yes, sir.

Q. Mr. Ennever testified that on one occasion you were pumping off raw sewage in the brook, and you were stopped by some officer. Is that true? A. At the time in question, I was cleaning the dosing tank, and there is no raw sewage going into the brook. The water from the dosing tank was being let out onto the sludge beds, which is supposed to be done. It is the only means we have of cleaning the dosing tank.

20 Q. And after the water leaves the dosing tank and goes to the sludge beds, does it go through any other process before it reaches the brook? A. It is filtered through the sludge beds and is caught up with the tile drains underneath and conveyed to the brook.

30 Q. And it is sand-filtered, also, too, is it? A. A partial sand-filter.

Q. You have not answered my question. Were you ever stopped by any officer during the work? A. The officer was called there, and he did not stop me, because I proceeded with my work until it was finished.

Q. Was Mr. Ennever— A. Mr. Ennever was there.

40 Q. What conversation took place, if any, between you and Mr. Ennever? A. There was a remark passed that I was pumping raw sewage in-

Walter B. Harra, direct.

to the brook, and I asked that that accusation be made to the officer, and I was willing to go down to the police station with him.

Q. Turn to the jury; speak to the jury. A. If that accusation was made to the officer, I was willing to go to the police station with him. 10

Q. And did he make the accusation in the presence of the officer? A. He did not.

Q. Did you go with the officer to the police station? A. No, sir. The officer left without me.

Q. Yes. And you continued your work, did you? A. I did.

Q. And your work was then cleaning the— A. Dosing tank. 20

Q. —tank? Have you ever examined the brook north of the disposal plant? No; south of the disposal plant? A. I have.

Q. That is the portion of the brook before anything from the disposal plant discharges into it?

A. What is that question, please?

Q. I say, the portion of the brook south of the point where the disposal plant discharges into it?

A. I have inspected that. 30

Q. And what condition do you find in the bed of that brook?

Mr. Morrison: I object to it unless the time is fixed.

Q. Well, when did you examine it? A. At several times, no later than one day last week.

Q. Well, how soon after the operation, the first operation, of the plant did you examine it, six months, a year? A. To the best of my recollection, about six months or so. 40

Walter B. Harra, direct.

Q. And what did you find upon your examination of the brook south of the disposal plant? A. Fungus growth due to dead vegetation.

Q. Yes. Did you discover any odor? A. Odor always where there is dead vegetation.

10 Q. Is that odor any different from the odor around the plant? A. I do not know what odor you have reference to around the plant.

Q. I mean the fungus, the smell of dead vegetation. A. Well, you will get the smell of dead vegetation all the time around the brook, especially in bad weather.

20 Q. Well, is that different, any different from any smell around the plant? A. I do not know what smell you have reference to around the plant. If you have reference to the sludge being brought out on the sludge bed,—

Q. Yes. A. —it is different.

Q. Now, at the time the dosing tank broke, how long did it take to repair it? A. The dosing tank did not break.

Q. Well, the valve? A. It was the float, or the guide of the float of the dosing apparatus.

30 Q. How long did it take to repair that? A. Well, the actual repair was done, I should say, in about six hours; three hours of one afternoon, and three hours of the next morning.

Q. Yes. And that consisted of pumping out certain of the water in it? A. A chamber at the bottom of the dosing tank where the float—

Q. And fixing the float? A. Yes.

40 Q. And was that done as soon as you possibly could? A. Absolutely.

Q. And at that time, was any raw sewage pumped into the brook? A. There was not.

Waler B. Harra, cross.

Q. Now, there has been testimony about breaks in the sand filters. Have you ever seen any breaks in the sand filters? A. Such as soak holes, I have.

Q. And in the bank, has there been? A. There has been on two or three occasions where water has gone over the edge of the driveway, due to the bed being overcharged, due to rain water, and so forth.

10

Q. Was that treated sewage or was that raw sewage? A. That was treated sewage.

Q. So, even though the bank did break, no raw sewage was released? A. Raw sewage could not get out to the sludge bed—out to the filter beds.

Q. No raw sewage can get out to the filter beds? A. It cannot.

Q. Were those breaks repaired? A. They were.

20

Q. And how soon after they occurred? A. One of them was repaired the next morning; that was on the north side; and the other one was repaired, I think, the afternoon after it had happened.

Q. Now, there has been some attempt to show that at nights a pump is operated which pumps raw sewage into the stream. Is that so? A. There is no such pump around there.

Mr. DeTurck: Cross-examine.

30

Cross-examination by Mr. Morrison:

Q. Mr. Harra, you spoke about some contractor putting in this pump on the bridge and fixing some part of your apparatus that was broken. Who employed that contractor?

Mr. DeTurck: I object to that.

The Court: I will allow that.

40

A. That I could not say.

Mr. DeTurck: Exception.

Walter B. Harra, cross.

Q. Do you know whether he was working for the Borough or working for someone else? A. I believe he was working for the Borough.

10 Q. Now, going over your sewage disposal plant in the order in which the sewage moves through it, may I ask you whether you ever have to clean out the screen chamber? A. I have.

Q. And about how frequently? A. Once a week.

Q. And how— A. Sometimes, more often.

Q. And what is the process of cleaning the screen chamber? A. We open a gate that allows the accumulation of sand and grit that accumulates in the bottom of the grit chamber to flow into the southeast sludge bed, or known as Sludge-bed Number One.

20 Q. That is done about once a week? A. About once a week.

Q. What do you do with the matter that catches on the screens there? A. That is taken out, put into a pail, and disposed of, buried, and covered with either chlorinated lime or "finitas."

Q. How often is that done? A. That is done every day, two or three times.

30 Q. Now, when you go to the next, the settling tanks, or septic tanks, how often do you have to drain those out? A. We pump sludge about twice a year.

Q. And do you pump that all at one time, or some at one time, and some at another. A. It is according to the flow of the sludge, and the amount of sludge that we remove at a time.

40 Q. Now, I noticed yesterday when I was present there and you were present and the jury, there was some sludge on some of the beds, and some was being shoveled away. How long had that sludge been on that bed? A. On which beds, for instance?

Walter B. Harra, cross.

Q. I think it was on the side toward Ennever's house, and the middle bed, as I recall it. Perhaps I am mistaken, but there was one bed there that was covered with perhaps a foot of what was apparently dry sludge. A. Well, those three beds were flooded at one time or within a day of each other, because it sometimes takes more than a day to get them flowing good; and that is about two weeks, a week or ten days, I should say.

10

Q. The sludge had been pumped out there about ten days ago? A. Yes. Part of it had been removed off one bed, and the other bed is almost entirely cleared; some of it was thrown up on the side, as you saw.

Q. And what is this difficulty you have just referred to in getting it so that it flows freely? A. Well, when the contractors connects house connections, and the like of that, there is a certain percentage of clay in flaky form gets through the grit chamber and gets into the dosing tank, and that forms a mat on the sludge, and we have to break that up.

20

Q. How do you do that? A. By means of a pole down through the man-hole, the top of the tank.

Q. You take off those manhole covers we walked over, and take it out through them? A. Yes, sir.

30

Q. How often do you have to clean out or empty out your dosing tank other than by pumping it out on the surface? A. We never clean it any other way; that is the way it is; we let the water go out on the sludge bed.

Q. That is the only means you have, outside of letting the water go out onto the filter beds? I have not made myself clear. How often do you have to empty the dosing tank by any other way than discharging the sewage, or whatever you call it, across the bridge, and onto the sand filters?

40

Walter B. Harra, re-direct.

How often do you have to send it down through your sludge beds, or anywhere else? A. When it is absolutely necessary.

10 Q. About how often has that happened, in your experience? A. Well, according to the weather; it is about a month, once a month, or sometimes once in two months.

Q. Now, crossing over to the other side of the brook to these sand filter beds, how often do your men have to get in there and rake them and fix them, as you say they do? A. That is a constant practice, an every-day occurrence, we go on the beds.

20 Q. Has there ever been a time in your experience when all of the beds were full of water at one time? A. Yes, sir.

Q. And how long did that condition last? A. Offhandedly, I could not say.

Q. A week or two? A. Possibly.

Q. And during that time, of course, you could not get at your beds to rake them? A. Could not get at the surface, no.

30 Mr. Morrison: That is all.

Re-direct examination by Mr. DeTurck:

Q. On the north side of the plant, apparently, someone had removed some sludge. Who removed the sludge from the beds? A. The sludge beds?

40 Q. Yes. A. There is a contractor that—well, you might call him a contractor, a fellow that has a team and a couple of carts; he comes around there and he gets the sludge and takes it away and sells it for fertilizer, and there were other—

Q. Do you know that of your own knowledge? A. What is that?

Christopher E. Senft, direct.

Q. Do you know that of your own knowledge?

A. Absolutely.

Q. Is there any smell in the sludge at the time he takes it away? A. No, sir. If I may say so, there are people come all the way from Jersey City and from Nyack and take it away in bags for fertilizer.

10

Q. In their cars? A. In their cars.

Q. In their pleasure cars? A. Absolutely.

Q. Is it ever necessary for you to dispose of any of the sludge in any way, or is it all taken away? A. We occasionally use it for filling in, such as you will find on the north side and on the south side of the sludge beds; where the path was only a foot-path, we have made it wider, especially to accommodate our tractor and cart.

20

Q. Well, the majority of the sludge is taken away by third persons? A. Right.

Q. All right.

Mr. DeTurck: That is all.

Mr. Morrison: That is all.

CHRISTOPHER E. SENFT, sworn as a witness on behalf of the defendants, testified as follows:

30

Direct examination by Mr. DeTurck:

Q. Mr. Senft, where do you live? A. 43 Merritt Avenue, Bergenfield, New Jersey.

Q. And are you an official of the Borough of Bergenfield? A. I am.

Q. What office do you hold? A. Building inspector.

40

Q. How long have you been building inspector of the Borough of Bergenfield? A. Since January first, 1927.

Christopher E. Senft, direct.

Q. Have you the records of your office here? A. I have a copy.

Q. Who was building inspector before you? A. Mr. Timpson.

10 Q. Have you the records of his office? A. No, sir; I have not. They are very cumbersome. It is in a great, big volume, waiting—

Q. Well, can you tell me, without your records, as to how many buildings have been built in the Borough of Bergenfield during the last—or since you have been building inspector? A. Since January, 1927, there were 279 buildings erected during 1927, and 105 up to date; I think that is all.

20 Q. 279 and 105, that is 384 buildings since January 1st, 1927? A. Correct.

Q. In Bergenfields only? A. Yes, sir.

Q. Now, were all those buildings one-family dwelling houses? A. No, sir. There are several business houses, and altogether, eight two-family houses.

30 Q. Well now, do you know anything about building in Bergenfield during the year 1926? A. The year 1927, there were 42 more buildings erected than during the year 1926.

Q. 42 more? A. More.

Q. That would be 237 buildings in 1926? A. Correct.

Q. And what was the character of the buildings built in 1926? A. Principally, one-family dwellings; a large percentage of those were one-family dwellings.

40

Mr. DeTurck: Cross-examine.

Mr. Morrison: No questions.

The Court: That is all.

Francis M. Murphy, direct.

By Mr. DeTurck:

Q. One more question: There was one apartment house built, wasn't there? A. One, I think, was an apartment house.

Q. Yes, all right.

10

FRANCIS M. MURPHY, sworn as a witness on behalf of the defendants, testified as follows:

Direct examination by Mr. DeTurck:

Q. Mr. Murphy, what is your business? A. Well, real estate and insurance.

Q. You were formerly building inspector of Dumont? A. I was.

20

Q. And for what period of time? A. About in 1921 to January of this year.

Q. And have you with you any record of the permits you issued? A. No, I have not.

Q. During the year? A. I surrendered all records to the Borough Clerk.

Q. Can you tell me without the use of your records about how many permits you issued for buildings in Dumont during the years 1926 and 1927? A. Well, probably a hundred.

30

Q. Well, did you issue more than you did during the previous two years? A. Oh yes, an increase every year.

Q. You say you also are in the real estate business? A. What is that?

Q. You are also in the real estate business? A. Yes, sir.

40

Q. And are you acquainted with the Ennever property? A. I am.

Q. Have you examined it? A. What is that?

David J. McGuire, direct.

Q. Have you examined the Ennever property?

A. Well, not very closely.

Q. You have been down around the place, haven't you? A. Yes, I have.

10 Q. And were you acquainted with the place before the disposal plant was built? A. Yes, I was.

Q. I believe you testified in this case once before as to the damage which was done to that building, didn't you? A. Well, I do not think in regards to the damage done to that building in particular, but I remember giving testimony in regards to that location.

20 Q. Yes. And how long have you been in the real estate business? A. Oh, probably twenty or thirty years.

Mr. DeTurck: That is all.

Mr. Morrison: No questions.

DAVID J. MCGUIRE, sworn as a witness on behalf of the defendants, testified as follows:

30 Direct examination by Mr. DeTurck:

Q. Mr. McGuire, you are the present building inspector of Bergenfield, are you not? A. Of Dumont.

Q. Of Dumont? A. Yes, sir.

Q. You have been building inspector since January 1, 1928? A. Yes, sir.

40 Q. Can you tell me how many building permits you have issued in the Borough of Dumont? A. In the neighborhood of about 60.

Q. Single family houses, or apartment houses, or what? A. The majority are single families.

Katherine Frances Leddy, direct.

Q. Any stores? A. One or two only, very small.

Mr. DeTurck: Cross-examine.

Mr. Morrison: No questions.

The Court: That is all, sir. •

10

KATHERINE FRANCES LEDDY, sworn as a witness on behalf of the Defendants, testified as follows:

Direct examination by Mr. Ferry:

Q. Where do you live, Mrs. Leddy? A. In Dumont.

Q. How long have you lived in Dumont? A. 20
Eight years.

Q. What is your occupation? A. Real estate broker.

Q. And how long have you been a real estate broker? A. Going on sixteen years.

Q. Six? A. Sixteen years.

Q. Sixteen years? A. Yes.

Q. And in your dealings as a real estate broker, have you sold property in the vicinity of Dumont? 30
A. Yes, sir.

Q. Are you familiar with the location of Mr. Ennever's property? A. Yes, sir.

Q. Have you examined this property? A. Not closely; from the outside, I have.

Q. You are aware of the existence of the disposal plant? A. Yes, sir.

Q. Have you bought and have you sold any properties in that vicinity? A. Yes, sir; consid- 40
erable.

Q. Considerable? A. Yes, sir.

Q. What, in your estimation, would you say the

Katherine Frances Leddy, direct.

value of that property was as of today? A. At the present time?

Q. Yes. A. About \$7,000.00.

Q. \$7,000.00? A. Yes, sir.

10 Q. Will you describe the type of house? A. Why, it is a concrete block house; there is about six rooms, if I am not mistaken, I have that listed some time ago.

Q. You have it listed? A. Not at present. I had it, why, I guess, about six years ago on the list, on my listings.

Q. Do you remember who listed it with you?

Mr. Morrison: We object to that as immaterial and too remote.

20 The Court: Sustained.

Q. You place a value on that property of \$7,000.00 today? A. Yes, I do.

Q. Could you give us your estimate of the value of that property before the erection of this plant?

A. Why, what it was in the market, for fifty-five hundred.

Q. \$5500.00? A. Yes, sir.

30 Q. In other words, you think it has increased in value during the last three years? A. Yes, it has, to that amount.

Q. To what do you attribute that increase in value? A. Why, I think the conditions of the roads and the sidewalks, that is the general objection it was to the people there, and that if the roads were in better condition and the sidewalks, which they had not had along the then streets there, that property would be more valuable and better to sell, which it has proven.

40 Q. In making your estimate of the value of that place before the erection of the disposal plant, did

Everett B. Cole, direct.

you take into consideration the natural terrain of the ground? A. Well, it was always low towards the back, all of that property along there. I have property on Prospect Avenue, fifty——

Q. A little louder, please. A. I say I have property on Prospect Avenue, fifty by four-hundred and twenty, and it always sloped toward the end very low.

10

Mr. Ferry: Cross-examine.

Cross-examination by Mr. Morrison:

Q. You say, Mrs. Leddy, that the streets and sidewalks have been improved? A. Yes, sir.

Q. Between the dates fixed by you for these two valuations? A. Yes, sir.

20

Q. What were the improvements? A. Why, sidewalks and the roads, new roads.

Q. And was that done by the municipality and the borough? The borough put in those improvements? A. No. The people paid for them, at their request.

Q. I see.

Mr. Morrison: That is all.

Mr. Ferry: That is all.

30

EVERETT B. COLE, sworn as a witness on behalf of the defendants, testified as follows:

Direct examination by Mr. Ferry:

Q. Mr. Cole, where do you live? A. Dumont.

Q. How long have you lived in Dumont? A. I was born there.

40

Q. How long? A. I was born there thirty-seven years ago.

Everett B. Cole, direct.

Q. And you were born there? A. Yes, sir.

Q. And what is your occupation? A. Builder, speculative builder, principally.

Q. And you have built dwelling houses, I take it? A. Yes.

10 Q. That is what you specialize in? A. Yes.

Q. Do you build them for sale, sell them? A. Yes.

Q. Have you ever built any houses in the vicinity of this disposal plant? A. Yes.

Q. Where, and how far from the plant? A. About two blocks and a half, I should judge, from the disposal plant I built and put in a new street of about twenty houses.

20 Q. A little louder, please. A. I say, about two blocks and a half from the disposal plant, I built and put in a new street; that was last year I finished.

Q. And how many new houses did you build on that new street? A. Twenty.

Q. Twenty? A. Yes, sir.

Q. And single-family dwelling houses? A. Yes, sir.

30 Q. What street was that? A. That was Niagara Street.

Q. Niagara Street. You say that was two blocks from the plant? A. Yes, sir; about two blocks.

Q. Did you ever have any difficulty in selling any of your houses by reason of the proximity of the plant?

Mr. Morrison: We object to that, as there is not a sufficient basis for that.

The Court: Sustained.

40 Q. Have you examined the Ennever property?
A. Why, not closely, no; not of late.

Q. You have seen it? A. I have, yes.

Everett B. Cole, direct.

Q. You know where it is situated? A. Yes.

Q. What is your estimate as to the value of that property?

Mr. Morrison: We object to that for lack of qualifications.

Mr. Ferry: He has testified that he has sold houses in that vicinity. 10

The Court: Well, that is not enough. You may be able to qualify him; suppose you do.

Q. Have you bought property in that vicinity?

A. Yes, I have bought this particular—I bought this particular piece of property that I built these twenty houses on in 1925. That was the year they started the operation of this disposal plant. 20

Q. And you sold those houses? A. Yes, sir.

Q. Do you know of any other sales that have taken place in that vicinity? A. Do I know of any other sales?

Q. Yes. A. Why, yes, several sales, I should imagine.

Q. Sales of other people's property? A. Well, I know there was a lot of them made, but I am not in a position to say how they were and when they were, for I do not sell anybody else's stuff outside of my own; I am not a broker; I am a speculative builder. 30

Q. While you have been in that vicinity, have you noticed any offensive odors coming from the plant? A. I did not, and I lived there over a year myself.

Q. You lived there? A. Yes, sir.

Q. How far from the plant is your house? A. About three blocks, I should imagine. 40

Q. And during what time did you live there?

A. Well,—during what time did I live there?

Thomas F. Bowe, recalled, direct.

Q. Yes. A. I moved in in the spring of 1926; I moved out in June 1927.

Q. Between the spring of 1926 and June 1927?

A. Yes, sir.

10

Mr. Ferry: Cross-examine.

Mr. Morrison: No questions.

The Court: That is all.

THOMAS F. BOWE, recalled as a witness on behalf of the defendants, testified as follows:

Direct examination by Mr. DeTurck:

20

Q. Mr. Bowe, the way that sewage disposal plant is designed, is it possible to drain raw sewage from any part of the plant to the brook? A. It is not.

Q. And why not? A. Because of the path the sewage has to take through the structures which are part of the composite whole.

30

Q. Just explain. I do not understand it. Possibly the jury does not, either. A. I refer to this diagram. The path of the sewage comes and passes through the 27-inch line which, in turn, passes through the grit and screen chamber. The sewage continues on, passes through either one or both of the sections of the tank to the dosing tank, and from the dosing tank across the brook to the various lines which distribute the sewage to the surface of the sand bed, and the sewage as it passes down through the sand bed and is collected in these underdrains, and then discharged to the brook.

40

Q. Well, now, is there any method of draining raw sewage from the east side of the brook into

Thomas F. Bowe, recalled, direct.

the brook, any portion of the bank east of the brook? A. When it reaches this point (indicating), it, of course, is treated sewage.

Q. I mean this side (indicating)? A. There is no way in which sewage may pass through an ap-
purtenance on this design and go directly to the
brook without passing through some form of treat-
ment.

10

Q. Now, the water which flows onto the sludge
beds, is that the proper way to handle it? A. In
operating and handling a grit and screen chamber,
it has two sections; when one is being cleaned, one
side is shut off; the sewage flows off by gravity
from the grit and screen chamber and the remain-
ing part in the sump is relieved from this chamber
by opening a valve which runs to the sludge bed
surface. After reaching the sludge bed surface,
the moisture drains out of it, passing through the
graded sand and gravel, and thence to underdrains,
where it is collected in the main collector and dis-
charged into the brook.

20

Q. Now, I show you a picture which is marked
Exhibit P-17, the lower picture of the two, and ask
you what that is? A. (Referring.) That is the
treated sewage after passing through the sludge
beds and discharged to the brook.

30

Q. And after passing through the sludge beds?
A. Passing through the sludge beds filter.

Q. The sludge beds filter. And is that raw sew-
age? A. It is not.

Q. Would it be possible for raw sewage to come
through that pipe? A. It would not.

Q. Now, some of the witnesses have described
the break in the dosing tank, the break in the float.
Could that be repaired without removing the water
from it? A. No.

40

Q. And how would that water have to be re-
moved? A. By means of a pump.

Thomas F. Bowe, recalled, direct.

Q. By a pump. You mean a pump of the character shown here, or some similar contrivance? A. Yes.

10 Q. Now, is there any pump in this building which is shown in Exhibit P-16 by means of which you could pump the water from the dosing tank to the brook? A. No, sir.

Q. What is the machinery in that building? A. This building houses mechanical equipment which is used to generate and compress air which is stored in a tank and delivered from this tank by means of a 2-inch galvanized pipe to a point on the dividing line between the Boroughs of Bergenfield and Dumont, and the air is transported to an ejector pot which is submerged in the ground, and
20 takes the low level sewage flow where the same is ejected to a higher level and then flows by gravity to the plant through the grit and screen chambers through the tanks, and taking the usual form of operation.

Q. How far is that point away from the plant? A. I should say about a thousand feet.

Q. The substance in the dosing tank, is that raw sewage? A. No; it is not.

30 Q. How many elements has that substance passed through when it reaches the dosing tank? A. It has passed through the grit and screen chamber, the settling tanks and then to the dosing tank.

Q. Now, Mr. Ennever testified that the flooding of the brook, about fifty percent of it, was due to water which came from the sand filters. How big are the pipes leading from the sand filters to the brook? A. They are twelve inches in diameter.

40 Q. How many are there? A. Five.

Q. And how big is the pipe leading from the dosing tank to the sand filters? A. Well, there is a 27-inch line which runs into the plant that controls

Thomas F. Bowe, recalled, direct.

the amount of sewage that can pass through that plant. The amount of sewage that can pass through a 27-inch line, flowing full, is in the neighborhood of five and a half millions of gallons; but that flow has never been reached at this plant.

Q. Would that amount of flow be capable of producing a flood as shown on the picture, P-21?

10

A. No, sir.

Q. Have you measured the capacity of that brook? A. I have.

Q. And what do you find it to be? A. The capacity of that brook is designed on the basis of 208 millions of gallons of sewage per day of drainage may pass through that channel.

Q. 208 million? A. 208 millions of gallons of water may pass through that size channel.

20

Q. And would that amount of water cause a flood of that kind? A. It depends on the capacity of the brook at the Ennever property.

Q. So that would be forty times the amount of water which could possibly flow through that 27-inch pipe?

The Court: I understood him to say 208 millions.

30

A. 208 millions of gallons can flow through the brook, which is planned to carry off the drainage from above the plant and passing through it, where sewage is emptied into the existing brook, the channel of which has been designed to carry a flow of 208 millions of gallons in twenty-four hours of flow. The size of the pipe running into the plant, which controls the total sewage flow of both communities, is 27 inches in size; and the amount of sewage that can pass through that 27-inch pipe is about five and a half millions of gallons, so that

40

Thomas F. Bowe, recalled, direct.

the only—if the pipe were flowing full, it could only carry that amount of sewage, which would be contributed to this channel, the size of which is designed on a basis of 208 millions of gallons.

10 The Court: So the pipes, as constructed, would never use up the capacity of the brook?

 The Witness: The pipe flows through and empties into the brook.

 The Court: I mean, as the pipes are so constructed, you would never utilize the full capacity of the brook?

20 The Witness: No, we could not. And I say that that design for the trunk line flowing into the plant is designed on the basis of 25 years into the future, and we have large gauges at this plant, and no gauging has ever reached five millions of gallons of sewage flowing into this plant.

30 Q. The plant at Bergenfield, does the sewage receive a primary and secondary treatment, or only a primary treatment? A. Primary and secondary treatment; primary through the tanks, and secondary after it passes through the filters.

 Q. Now, the plants along the Hackensack River, the one directly in back of the court house, will you tell me whether they receive the primary or secondary, or both?

 Mr. Morrison: I object as immaterial.

 The Court: Sustained.

40 Mr. DeTurck: Exception.

 Q. Well, is it customary, in the construction of disposal plants, to give it two treatments?

Thomas F. Bowe, recalled, direct.

Mr. Morrison: Objected to as immaterial.

The Court: Except as it goes to the propriety of this design.

Mr. DeTurck: Exactly.

Mr. Morrison: There isn't any question as to that.

10

A. Will you repeat the question?

Q. And is it customary, in constructing sewage disposal plants, to provide for two treatments of the sewage? A. Under like conditions, yes.

Q. What do you mean by like—under like conditions? A. A similar condition to that at Bergenfield and Dumont.

Q. And what is that condition which controls the situation in Bergenfield? A. The condition is the amount of pollution in the brook and the degree of purification to which you carry the sewage.

20

Q. In other words, a larger stream, you require less treatment? A. Depending on the quality of the larger stream of water.

Q. But the plant designed for Bergenfield and Dumont was the proper plant for that location? A. In my judgment, supported by the State Department of Health.

30

Q. And approved by the State Department? A. Yes, sir.

Q. Now, the flooding of the brook, is that due entirely to the construction of the sewage disposal plant? A. I should say that has very little to do with it.

Q. Where does this heavy flow of water come from? A. Well, there are about seventeen hundred acres of territory tributary to the brook at the beginning of our site, starting in the Borough of—or the Township of Teaneck, and that section of Bergenfields lying south of our plant.

40

Thomas F. Bowe, recalled, direct.

Q. Is the greater portion of that property in Teaneck or in Bergenfield? A. Bergenfield.

Q. How many acres in Teaneck? A. Oh, I should say a third of that.

Q. A third of the seventeen hundred? A. Yes.

10 Q. And any portion of that flow come from the streets? A. It all comes from streets and the area which is tributary to this particular brook.

20 Q. Now, there has been some testimony as to the treating of the sludge after it has been taken from the tanks. Is that proper treatment, or is that required by any rule or regulation of the State Board of Health? A. Why, the rules of the Department of Health, or any sanitary engineer, would be to abate any nuisance that might arise and grow, and conditions are to plan any plants of this type or any plant, to have means of deodorizing anything that might accrue due to operation, or due to any condition beyond the control of the operator.

Q. And what is used for that purpose? A. Well, any disinfectant, lime or some of the——

30 Q. These tanks, they were designed to be cleaned how often, or to be emptied how often? A. It depends on the number of days it takes to accumulate a certain amount of sludge, and the design of this plant calls for from four to six months, and that is really controlled by an operating schedule.

Q. Now, is the stream passing through this plant designed so that it could be cleaned? A. It was.

40 Q. And what was done in order that it might be cleaned? A. Originally, there was a natural channel through there, which was planned and proposed, and thought well to provide every means for the proper maintenance and operation of the plant. We planned to slope the brook properly, both as

Thomas F. Bowe, recalled, cross.

to sides and bottom. The natural surface was removed and replaced with crushed stone, upon which was laid Belgian block pavement.

Q. One thing I omitted to ask you: Is there any valve or any pipe leading directly from the dosing tank to the brook? A. Will you repeat the question, please?

10

(Question read.)

A. No.

Q. And would it be possible to drain from the dosing tank directly to the brook? A. No.

Q. All right.

Mr. DeTurck: Cross-examine.

20

Cross-examination by Mr. Morrison:

Q. Mr. Bowe, going back to this apparatus which is in the house that stands over the dosing tank; as I understand your explanation and answer, that apparatus is a mere—lifts sewage from a lower level to a higher level, from which it flows into the general disposal plant? A. At a distance of a thousand feet away.

30

Q. Yes. But it does lift up the sewage from one level to another; that is the purpose of it, is it not? A. At a point a thousand feet away.

Q. Well, even at a thousand feet away, that is the purpose of it, isn't it? A. Yes, sir.

Q. Now, the capacity of the brook, as you designed it and the contractors constructed it, was made greater than it had been before by this paving and sloping, was it not? A. Yes, sir.

40

Q. And how much greater than before? A. Why, I should say it is increased 150 percent.

Charge to Jury.

10 corporation to perform or its negligence in the performance of a public duty imposed upon it by law is a public wrong to be remedied by indictment, and cannot constitute the basis of a civil action by an individual who has suffered particular damage by such neglect. The exemption of the municipality, as above set forth, does not, however, extend to actions where the injury complained of is the result of active wrong-doing chargeable to the municipality."

20 Our Court of Appeals has further said, "An action will lie against a municipal corporation that designedly built and constructed its sanitary sewer with outlets into its storm-water drain, which latter empties into a brook so that such construction and use resulted in the daily and continuous pollution of the plaintiff's pond to his injury."

30 Mr. Ennever and his witnesses have testified as to the location of his property with regard to the disposal plant; he has also testified that prior to the utilizing of this plant by the boroughs his children and his neighbors' children had used it for swimming purposes, and I think he said that he fished in it; that his home was pleasant, due to the surroundings, and the water was clear; that since 40 the advent of the disposal plant, he has suffered by way of fumes and gasses and odors which have destroyed his happiness, so to speak, at that place. Some witnesses have testified with relation to the condition there. I think they testified as to the odors, both on Mr. Ennever's property, and in the neighborhood contiguous to it. Mr. Ennever has also testified as to his observations, and I think Mrs. Ennever, too, has testified as to her observations with regard to the workings of the disposal plant, and the passage of the effluent from the sludge chambers, and so forth. On the other hand,

Charge to Jury.

the engineer in charge of the plant, and Mr. Bowe, the man who constructed it, have testified that it would be impossible for the sewage to proceed in the lines as testified to by Mr. Ennever. So, you see, you have on one hand testimony as to one set of facts and, on the other hand, you have a denial. You sitting as jurors are the triers of fact and have the duty of determining which is the credible story. The plaintiff in this case is suing for the damages sustained.

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At this time I will comment upon a matter which was injected into the case, or consented to by counsel, with regard to a payment of \$750.00. As I see this case, it is not in issue at all. What Mr. Ennever is suing for is the injury that his property has sustained. If he has disposed of another portion of his property, of course, he is not claiming compensation, nor could he properly claim compensation for this; but he is claiming now for damages as a result of the injury to his present holding. So we will disregard the effect of the \$750.00 at this time.

20

Mr. Ennever and his wife have testified, as I said before, to certain observations, and particularly to the operation of the plant. I think at one time or another they testified as to their observing the use of a gas engine pump, with sewerage matter in the direction which later flowed into the brook. Mr. Harra, the engineer, said that that gasoline pump was not used at all in the service of the disposal plant, but was used by a contractor who was engaged in making repairs. Of course, that is a fact question which you must determine according to your accepted standards of credibility. I will say this, however: that, of course, if the contractor were doing necessary work, and the use of a gasoline engine was primarily for that work, we can-

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Charge to Jury.

not very well charge the municipality with the use of a gasoline engine which was used in necessary repairs to a defect which probably occurred in the disposal plant. But, as I said before, whether that is so or not, that is entirely a question for you to decide.

10

The plaintiff, through the testimony of a real-estate expert, has offered you evidence as to the value of that property prior to the installation of the plant, and also has offered evidence as to the value now. I think the witness testified that the property before the installation of the plant was worth ten thousand five hundred to eleven thousand, and is worth now from four thousand to forty-five hundred. On the other hand, the defendant has offered evidence to show that the property before the installation of the plant was worth about \$5500.00, and it is now worth \$7,000.00; that the increased value has come through improvements by way of streets and sidewalks. And so you have two varying views as to the value of that property. The matter as it stands now and I am about to leave to your deliberation is simply one to be decided on the evidence.

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Some of you are sitting for the first time as jurors, and I might say that, despite the fact that your period here is but for a short time, your position is just as important as that of one who holds for a longer or a fixed tenure. You have taken your oaths to decide this case upon the evidence. You are to decide entirely upon the evidence without thought of sympathy, or are we to consider what we would like to have done to ourselves. In other words, we are not trying individual issues; we are trying an issue as presented by these pleadings, and that is whether or not, first, the plant has been constructed so as to bring results as claimed by Mr. Ennever. As I said before, there is a sharp

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Charge to Jury.

denial on the part of the defendant that the claim of Mr. Ennever is justified in that respect. Then, on the other hand, there is a denial on the part of the defendant that the odors claimed are a product of the plant. There is evidence in the case that contiguous to this disposal plant there is a sewerage outlet running from, I think, some part of the West Englewood section. Then you have evidence, too, that there is decayed vegetation which is productive of odors. Whether or not the odors which have been testified to as existing at this place are the result of the sewage plant and its method of disposal, or whether or not it comes from a source beyond the control, and for which no one is responsible, of course, are questions for you to decide.

10

You may take this case and give it your best judgment.

20

Mr. Morrison, I will deny this request you made, and allow you an exception.

Mr. Morrison: Thank you. Plaintiffs' request denied, and exception noted.

The Court: Swear the officer.

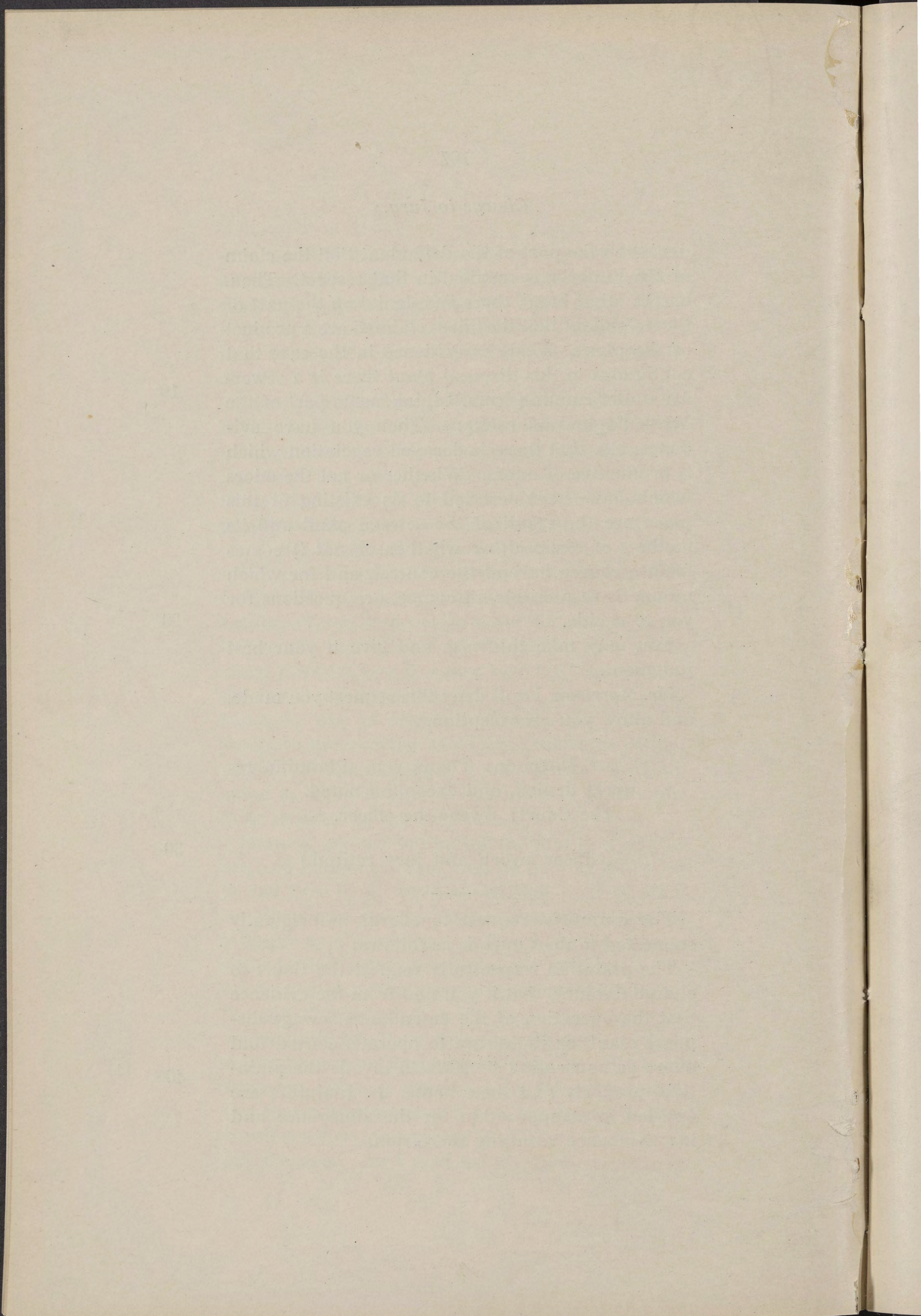
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(Officer sworn and jury retired.)

The plaintiffs' request to charge as originally submitted to the Court, is as follows:

The plaintiffs respectfully request the Court to charge the jury, that if you find from the evidence that the operation of the defendant's sewage disposal plant, or its failure to operate, caused foul odors or nauseating stenches to invade the plaintiffs' property and their home, the plaintiffs are entitled to compensation for the annoyance and inconvenience resulting therefrom.

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142

New Jersey Court of Errors and Appeals

HARRY ENNEVER and CLARA L. ENNEVER, his wife,
Plaintiffs-Appellee,

vs.

THE BOROUGH OF BERGENFIELD and
THE BOROUGH OF DUMONT,
Defendants-Appellant.

Action
at Law.

BRIEF OF DEFENDANTS-APPELLANT.

This is an appeal from a judgment entered upon the verdict of a jury, in favor of the plaintiffs, in an action to recover damages suffered by the plaintiffs as the result of a nuisance maintained by the defendants; the suit was started in the Supreme Court and was tried in the Circuit before Judge Edwin C. Caffrey and a jury.

The Facts.

The Boroughs of Bergenfield and Dumont, both in Bergen County, are adjoining municipalities and in the year 1924 they entered into a contract for the construction of a joint sewage disposal plant and a joint sewerage system; the necessary ordinances were passed to finance the project and the construction of the sewage disposal plant was actually commenced in the fall of 1924 (case, p. 31); a detailed description of the plant will be found on pages 23 to 26 of the State of Case; the site chosen for the plant was on the west bank of a

small natural stream which flowed through the lands acquired by the defendants for the construction of the plant and also through the property of the plaintiffs. During the course of the construction of the plant, it became necessary to straighten out the brook and as a natural consequence one branch of the brook, extending partly into the property of the plaintiffs, was cut off leaving a short dead channel. The plaintiffs were awarded the sum of \$750 for the damages they suffered as the result of the physical construction of the plant, and the cutting off of the brook, at a joint meeting of the Mayors and Councils of the defendant corporations and upon an appeal from said award and an affirmance, said amount was accepted by the plaintiffs (case, pp. 78, 79 and 80); this award was made under the provisions of Sec. 22 of Art. XX of the Home Rule Act of 1917.

Therefore, the only question before the court, at the time of the trial of this matter, was the legal liability of the defendants to pay the damages the plaintiffs claimed to have suffered as a result of the operation of the plant as distinguished from its construction and the amount of such damage.

The contention of the plaintiffs is that the defendants polluted the stream flowing through their property by discharging the effluent from the plant into it and that odors emanated from the plant and the brook, making their home, situated several hundred feet from the disposal plant and near the brook, undesirable and depreciated its value.

POINT I.

The Trial Court erred in not granting the motion of the defendants for a non-suit.

When the plaintiffs rested they had proven that about six months after the joint sewage disposal

plant of the defendants was put into operation (case, p. 40, ll. 40-42), the stench arising therefrom and from the brook, into which the effluent was discharged, could be detected by the plaintiffs and other persons residing in the vicinity of the plant for a distance of two blocks from the plant (case, p. 83, ll. 8-15); that there were at least fifty homes within a radius of five hundred feet of the sewage disposal plant whose occupants were similarly affected by the disagreeable odors from the plant (case, p. 83, l. 36 to l. 1, p. 84); the plaintiffs had also proven that the brook, which flowed through their property and was originally a stream of pure water, was polluted by the effluent and other impurities emanating from the plant when it was being repaired and during heavy rain storms. The testimony of the plaintiffs further showed that all the owners of property along the brook, which flowed northerly and finally emptied into the Hackensack River, were similarly affected by the pollution (case, p. 86); the motion of the defendants for a non-suit was as follows:

“I now move for a non-suit on the ground that the plaintiff has not shown he is entitled to maintain this action against the Boroughs of Dumont and Bergenfield because of the principles of law laid down in the case of *Waters vs. The City of Newark*, 56 New Jersey Law, 361; *Harrington vs. The Township of Woodbridge*, 70 New Jersey Law, 28; *Buckalew v. The Board of Chosen Freeholders of Middlesex County*, 91 New Jersey Law, 517; *Ansbro v. Wallace*, 126 Atlantic, 426; *Caruso v. Montclair*, 98 Atlantic, 670; and *Callan v. Passaic*, 6 Advance Reports, 897.”

“I realize that Mr. Morrison is relying on the case of *Garrison v. The Borough of Fort Lee*, but I think that this case is clearly distinguishable from the Garrison case in that the nuisance complained of in the Garrison case affected Garrison alone. In this case, it affects

everybody in the immediate vicinity of the sewage disposal plant and for a distance of a mile down the stream and, therefore, if there is any remedy whatsoever, it is by indictment against the members of the local councils." (Case, p. 129.)

The Court denied this motion and exception was taken; we contend that the Court erred in doing so, for if we apply the rules of law, as laid down in the cases cited, to the facts of the case, we must necessarily come to the conclusion that the wrongs complained of by the plaintiffs did not constitute the basis of a civil action, but were remediable by indictment only.

In the case of *Waters vs. Newark*, 56 New Jersey Law, 361, the facts of the case, briefly stated, were: Mrs. Waters, in the year 1875, was the owner of property on the corner of Kinney and Halsey Streets in Newark; a sewer, built by the City, ran through Kinney Street, passed the plaintiff's property and terminated at tidewater; there was a manhole in the street at the intersection of Kinney and Halsey Streets, opposite plaintiff's property, and also a sewer basin at each of the four corners of the two streets; the sewer drained a portion of the city on a hill to the west of the plaintiff's property; another sewer ran through Halsey Street, from the north, and emptied into the Kinney Street sewer at that corner; in that year a connection from another sewer was made in the Kinney Street sewer above where it passed the plaintiff's property, causing an increased amount of sewage to flow through it and another sewer was built through Halsey Street, from the south, that drained into the Kinney Street sewer at the intersection of said streets. Before these new connections were made, the Kinney Street sewer had sufficient capacity to carry off all the drainage that flowed into it; after

these connections were made, on account of the increased amount of sewage and because the water coming from the Halsey Street sewer encountered, and to some extent dammed up the flow of the Kinney Street sewer, the said Kinney Street sewer did not have sufficient capacity at all times to carry off the drainage that flowed into it; as a result, whenever there was a heavy rain, the water backed up from the sewer and flowed out of the manhole and sewer basin and ran across the sidewalk in front of the plaintiff's property and ran into the windows of the plaintiff's houses and damaged the houses and caused loss of rents.

The foregoing facts presented a case parallel with the case at bar and the Supreme Court, in deciding the Waters case, held that

“The Courts of this state have said in conclusive form that the neglect of a municipal corporation to perform or its negligence in the performance of a public duty imposed on it by law, is a public wrong to be remedied by indictment, and cannot constitute the basis of a civil action by an individual who has suffered particular damage by reason of such neglect. *Strader v. Sussex*, 3 Harr. 108; *Cooley v. Essex*, 3 Dutcher 415; *Livermore v. Camden*, 5 Id. 245; *Callahan v. Morris*, 1 Vroom 161; *Livermore v. Camden*, 2 Id. 507; *Pray v. Jersey City*, 3 Id. 394; *Union v. Durkis*, 9 Id. 21; *Marvin Safe Co. v. Ward*, 17 Id. 19; *Condict v. Jersey City*, Id. 157; *Little v. Dusenbury*, Id. 614, 636; *Wild. v. Paterson*, 18 Id. 406, 411; *Varrath v. Hoboken*, 20 Id. 285.”

“The doctrine of these cases is that where the public has been wronged there is but one redress, viz., the public remedy by indictment. Where, however, such public misfeasance has resulted not in the creation of a public nuisance for which an indictment would lie, but solely in the infliction of a private injury to the property of an individual, the remedy therefore is by a civil action by the party dam-

nified. *Jersey City v. Kiernan*, 21 Vroom 246.”

“It follows that, in any given case of special damage, the question as to the right of civil action is narrowed down to the inquiry whether such damage is or is not part of a public wrong for which an indictment would lie.”

“An examination of the statement of facts certified shows that the sewer maintained by the defendants on Kinney Street was not at all times of sufficient capacity to vent the water that reached it through the transverse sewers, and that in consequence of this neglect the public highway upon which the plaintiff abutted was overflowed. It is evident, therefore, that the condition to which the plaintiff refers her special injury was one to which the public at large was, to a greater or less extent, subjected, and that, upon proof of these same facts, an indictment would be sustained.”

“This being so, there is, upon the authorities above cited, no private right of action in the plaintiff.”

“The circumstance that the plaintiff gave notice to the municipal authorities of the condition of the sewer and of its injury to her property, cannot affect the question. Where an exclusively private nuisance has resulted from this sort of official negligence, the public authorities may still owe no duty to an individual until they have been notified by him of the condition injurious to his private rights. In such case the efficacy of the notice is not to change a public into a private injury, but is merely to put the public authorities in wrong, if, with knowledge of the misfeasance of their agents, they permit the private nuisance to continue beyond the time reasonably necessary for its removal. *Jersey City v. Kiernan, supra.*”

“But where the private injury is not exclusive of a public nuisance, notification is of no avail to the individual.”

“The Circuit Court should be advised that, in the case before it, a public nuisance was occasioned by flooding the highway for which an

indictment would lie, and that so long as this is the situation it is the only remedy, and that a notice by the landowner injured does not make the malfeasance actionable by civil suit."

Waters v. Newark, 56 N. J. L. 361.

The testimony of the plaintiffs further showed that the sewage disposal plant was properly designed and properly built (case, p. 31, ll. 10-41); that in fact, the plans prepared by Engineer Bowe were approved by the State Board of Health (case, p. 37, ll. 33-36); that the alleged nuisance was brought about by the circumstance that both Bergenfield and Dumont had grown more rapidly than had been anticipated and as a result, the sewage disposal plant was overloaded at the times the plaintiffs claimed that the nuisance existed and that steps had been taken by the defendants to remedy the condition (case, pp. 32 and 33); the testimony of the plaintiffs' witnesses shows conclusively that the sewage disposal plant was originally designed to accommodate the existing sewers of the two boroughs and did accommodate eleven and one-third miles of sewers but that at the time of the trial there were one hundred and ten miles of sewer pipes connected with the treatment plant (case, p. 38, ll. 14 to 33); a similar situation was presented in the case of *Harrington vs. Woodbridge*, 70 N. J. L. 28. The Court there held that:

"This complaint is without legal basis. The general doctrine on this subject is that in devising a plan for the construction of public sewers the public authorities discharge a quasi judicial duty, involving the exercise of judgment and discretion with regard to general convenience, and that their wisdom in the performance of that duty is not subject to review in a private suit brought to recover damages because of their error. They owe to no indi-

vidual the duty of devising such a plan as will afford to him sufficient drainage. *Child v. Boston*, 4 Allen 41; *Mills v. Brooklyn*, 32 N. Y. 489; *Johnston v. District of Columbia*, 118 U. S. 19; 2 Dill. 1046; 20 Encycl. L. (2nd ed.) 1199."

The principles of law, above set forth, were reiterated and affirmed by the Court of Errors and Appeals in the case of *Buckalew vs. The Board of Chosen Freeholders of Middlesex County*, 91 N. J. L. 517. The following is an extract from the opinion of Chancellor Walker in the last mentioned case:

"That an action will not lie in behalf of an individual who has sustained special damage by reason of the neglect of a public corporation to perform a public duty I consider the settled law of this state. This was the doctrine approved of by the Supreme Court, after much research and a careful consideration of the authorities, in the case of *Strader v. Board of Freeholders of Sussex*, 3 Harr. 108, and the same principle was reaffirmed in the case of *Cooley v. Freeholders of Essex*, 3 Dutcher (27 N. J. Law) 415. These decisions, in my judgment, rest upon the solid foundations of ancient precedent and public policy."

"This doctrine has been repeatedly reaffirmed."

"In *Hart v. Freeholders of Union*, 57 N. J. Law 90, 29 Atl. 490, Mr. Justice Magie, afterwards Chief Justice and Chancellor, speaking for the Supreme Court, remarked that it had been uniformly held by our courts that in the absence of a statutory provision a municipal corporation charged with the performance of a public duty is not liable to an individual for neglect to perform it or negligence in the performance of such duty, whereby a public wrong has been done for which indictment will lie, although such individual has suffered special damage, and also said that Mr. Justice Garrison had collected all the cases in *Waters*

v. *Newark*, 56 N. J. Law, 361, 28 Atl. 717, in which it was held:

'The neglect of a municipal corporation to perform, or its negligence in the performance of, a public duty imposed on it by law, is a public wrong, to be remedied by indictment, and cannot constitute the basis of a civil action by an individual who has suffered a particular damage by reason of such neglect. In such a case the circumstance that an individual specially injured gave notice to the municipal authorities is of no avail, if the special injury was, in fact, part of an indictable offense.'

"And Mr. Justice Magie observed in *Hart v. Freeholders*, 57 N. J. Law, at page 92, 29 Atl. 490:"

'The exemption of municipal corporations from liability to such actions has been put by our courts on the ground of ancient precedent and public policy. *Livermore v. Freeholders*, 5 Dutcher (29 N. J. Law) 245; s. c., 2 Vroom (31 N. J. Law) 507. That public interest is deemed to be conserved by this exemption from liability seems apparent from the fact that the Legislature may at any time impose such liability on municipal corporations, and has failed to do so except in a few instances. The legislation giving to boards of chosen freeholders the right to acquire and maintain public highways out of which the public duty charged in this count must arise, if at all, does not impose on such boards any liability to such actions.'

"In *Jersey City v. Kiernan*, 50 N. J. Law, 246; 13 Atl. 170, it was held that the rule that when a public sewer breaks from faulty construction, and private property is injured thereby, an action will not lie, but if the city be notified of such break it then owes a duty to the individual injured and for the breach of which an action will lie, but only when the break in the sewer occasions a private nuisance, for if a public nuisance be the result the only remedy is by indictment. In the case at bar the plaintiff suffered a private injury, but only as one of the public, for the nuisance was pub-

lic, and as such was remediable by indictment."

"The plaintiff appellant contends that the case at bar is within the doctrine of *Hart v. Freeholders of Union*, *supra*, *Kehoe v. Rutherford*, 74 N. J. Law, 659, 65 Atl. 1046, 122 Am. St. Rep. 411 and *Bailey v. Osborn*, 80 N. J. Law, 333, 78 Atl. 9, Ann. Cas. 1912A, 454, and that these cases sustain his contention and right to recover. The doctrine of *Hart v. Freeholders of Union* does not aid the plaintiff, but is an authority the other way, as above pointed out. *Kehoe v. Rutherford*, in this court, opinion by Mr. Justice Trenchard, is an authority of the same kind for there the exemption of a municipality from actions by individuals suffering special damage from its neglect to perform, or its negligence in performing, public duties, was expressly recognized and reaffirmed, while it was held, on the particular facts of that case, that an action lay for the diversion of surface water by a municipality from the course it would otherwise take, and casting it in a body large enough to do substantial injury to land, where, but for an artificial drain, it would not go. The lands and property damaged were those of the plaintiff, Kehoe; they were not public property in any sense, and the damage, consequently, was that suffered by the owner alone, dissociated from his membership in the general public."

Buckalew v. Freeholders, 91 N. J. L. 517.

The plaintiffs base their right to maintain this action upon the decision by the Court of Errors and Appeals in *Garrison vs. The Borough of Fort Lee*, 92 N. J. L. 566; 106 Atl., p. 301, where it was held that Garrison was entitled to maintain an action against the Borough of Fort Lee for discharging the effluent from a sewage disposal plant into a brook which flowed into the Garrison ice pond but the case at bar may be easily distinguished from the Garrison case in that Garrison suffered a

private injury as the result of a private nuisance, which was not a public nuisance. In this case the state of case is replete with testimony showing that the plaintiffs did not suffer a private injury as a result of a private nuisance, but that the nuisance was a public one.

The following are extracts from the testimony of the plaintiffs and their witnesses which show conclusively that the nuisance complained about was a public nuisance:

Mr. Ennever, p. 83.

A. "Now, you testified on direct that on several occasions while you were on your way home from work, you noticed the stench two blocks away? A. Yes, sir. From the corner of Quackenbush and Prospect Avenue.

Q. Quackenbush and Prospect Avenue? A. I guess that is a little over——

Q. Now, what road did you come home on, the West Shore? A. On the West Shore Railroad, walked down Quackenbush Avenue; as soon as I turned into Prospect, I got it; any of the neighbors got it.

Q. Prospect is the street on the hill? A. Yes, sir.

Q. To the east of the plant, is it not? A. Yes. It runs north and south.

Q. And it is the place where you enter—first enter the sewage disposal plant, is it not? A. Yes, sir; that is Prospect Street.

Q. The place where the main trunk line comes in? A. Yes, sir.

Q. And are there any houses along Prospect Avenue? A. Yes, sir.

Q. A great many? A. Well, there is enough of them, yes.

Q. How many? A. There is enough of them there. I do not know how many.

Q. There are possibly fifty houses on Prospect Avenue? A. How many?

Q. Fifty? A. Well, what part of Prospect Avenue?

Q. Well, say within five hundred feet of the entrance to the sewage disposal plant? A. Each way?

Q. Yes. A. Yes; each way."

Mr. Ennever, p. 84.

Q. "And you came along Prospect Avenue on your way home, is that right? A. Yes, sir.

Q. And passed the entrance to the sewage disposal plant? A. No, sir.

Q. Which way did you come? A. I went down Armour Place.

Q. I know. A. I did not have to pass the entrance.

Q. Oh, you did not? What course did you take from the station? A. Why, I walked two blocks south along Railroad Avenue—

Q. Yes. A. —to Quackenbush, through Quackenbush to Prospect, one block through Prospect to the corner of Armour Place, which is a continuation of Erie Street in Dumont, but Armour Place lays in Bergenfield, and then walked down a distance of about five hundred feet down the hill to my premises—

Q. Did you ever see— A. —every morning and every night.

Q. Did you ever smell this stench at a greater distance than two blocks from the plant? A. Yes, sir.

Q. How far did you smell it away? A. Out on Madison Avenue.

Q. And how far is that away? A. Well, that is about four blocks over.

Q. Four blocks? A. From the plant; yes, sir.

Q. Madison Avenue built up? A. What is that?

Q. Is Madison Avenue built up? A. It—yes, some of it.

Q. Well, the portion of Prospect Avenue which is east of the plant, that is also built up, isn't it?

A. Some of it.

Q. And how far is it away from the plant? A. From the plant property?"

Mr. Ennever, p. 86.

Q. "Any smell? A. There was nothing sticking to the sides of the rocks or trees.

Q. I am talking north, going north? A. That is what I am talking about.

Q. I mean up-stream, or down-stream? A. What do you mean, from the course—from the bridge at my place north towards New Milford?

Q. Yes. A. Towards Madison Avenue?

Q. Yes. A. It was pretty bad there.

Q. Pretty bad? A. Yes, sir.

Q. In other words, the water is practically in the same condition as it is when it leaves the plant?

A. Well, not as bad as where it hits into my place, I do not think.

Q. You think it purifies itself in the meanwhile, do you? A. Well, it may, as it travels.

Q. Did you ever go down to New Milford, the place where the button works are? A. Yes, sir.

Q. Did you notice anything down there? A. Why, they have got a couple of ponds over there, around in the button works.

Q. Did you notice the smell there? A. A little bit.

Q. Yes. How far is that away from the plant? A. That is probably a mile.

Q. And do you know who owns the property around that pond? A. Well, I do not. I know it belongs to the button works; I really do not know who is really the owner of the button works.

Q. And what is the condition of that pond? A. Well, those ponds were very low, always were low.

Q. Yes. A. Very low. And never amounted to much to carry the water.

Q. And you noticed that smell at the button works, did you? A. I did, yes, sir.

Q. You noticed the discoloration of the water? A. Yes, there was some black stuff around the edges of it."

Mrs. Kempfer, p. 99.

Q. "And how far west of Prospect Avenue, which house? A. The second house; but there is 180 feet from Prospect Street.

Q. Well, you are more than three hundred feet from the brook, aren't you? A. Yes.

Q. You are possibly six hundred feet from the brook? A. No, not six hundred, not judging from the people's property that below us.

Q. Now, is all this property in here owned by one person, or by a great number of persons? A. A number of persons.

Q. I mean the property between your home and the plant. A. Why, that is owned by individuals, I think.

Q. Yes. Did you ever notice that smell in other parts of the town? A. Yes. I walked down Madison Avenue at one—one evening, and over that brook below Prospect, and the odor there is just as bad as at the foot of our street.

Q. And how far is Madison Avenue away from the plant? A. That is just a block away.

Q. Have you ever walked along Prospect Avenue? A. Yes.

Q. Right at the head of the plant? A. Yes.

Q. Did you notice the smell there? A. I certainly did.

Q. And there are quite a number of houses along Prospect Avenue? A. Yes.

Q. How far down Prospect Avenue did you notice that smell? A. Oh, I walked down as far as Bergenfield.

Q. What do you mean, as far as Bergenfield? A. On Prospect Street.

Q. Did you ever walk past the plant on Prospect Avenue? A. I did.

Q. And how far past the plant did you walk? A. Oh, down as far as Bergenfield."

Clara L. Ennever, p. 127.

Q. "Well, did you only notice those offensive odors when you were at your property, or before you arrived at your property? A. Well, often before I arrived.

Q. And quite some distance away, I suppose? A. Well, as far as Prospect Street, as far as Niagara Street.

Q. And Niagara Street, that would be how far from the plant? A. Two blocks away.

Q. Two blocks away? A. About three.

Q. Five or six hundred feet? A. Oh, a little more than that.

Q. And that would be the general radius of the smell, would you say? A. Well, at times.

Q. At times? A. There were times that I——

Q. Are you talking now when the smell was at its worst or when it perhaps was not quite so offensive. A. I do not quite get what you mean.

Q. Well, when the smell was at its worst, would it extend beyond Niagara Street? A. Yes, it would.

Q. Yes. And how far beyond Niagara Street. A. Well, I have noticed it as far as Madison Avenue.

Q. And that would be how many blocks from the plant? A. About five.

Q. About five blocks? A. Yes.

Q. And you would say that that would be the general radius of the smell, about five blocks around the plant? A. Yes.

Q. And it was the smell, was it not, that you primarily objected to? A. Well, it was that and the proximity of the plant to our house."

The plaintiffs will, no doubt, rely upon that portion of the decision in the Garrison case which reads as follows:

"Whatever else the evidence in the present case justified the jury in finding, it amply justified them in finding, if they saw fit, that the defendant designedly built and constructed its sanitary sewer, with many outlets into its storm water drain, which latter emptied into the brook at the head of the plaintiff's pond (which was theretofore pure), and that such construction and use resulted in the daily and continuous pollution of the plaintiff's pond to his serious injury. Clearly for such active wrongdoing the plaintiff was entitled to recover."

In the event that the attorneys of the plaintiffs take the position that the portion of the decision, above quoted, is applicable to the case at bar we again call the court's attention to the fact that the sewage disposal plant, which is the subject of this suit, was, according to the testimony of the plaintiffs' own witnesses, properly designed and properly built, (case, p. 31, 11. 9 to 41), and the pollution and stench complained about were the result of an unanticipated increase in population in the defendant Boroughs; there was no evidence to controvert this testimony.

An analysis of the case of *Garrison vs. Fort Lee* will force us to the conclusion that the ultimate decision in said case was based on the decision of this court in *Kehoe vs. Rutherford*, 74 N. J. L. 659, for, as pointed out above, the injury in each of said cases was private and affected the plaintiff alone whereas in the case at bar the injury resulted

from a public nuisance and was therefore indictable.

It seems futile for us to attempt to point out to this court the law of this State respecting the granting of refusal of motions for non-suits and will therefore conclude our argument on our Point I by saying that if we gauge the case at bar by the rules enunciated by the Court of Errors and Appeals in the cases of *Lembeck vs. Gerken*, 88 N. J. L. 329, 96 Atl. 577; *Wilson vs. Central R. R. of N. J.*, 88 N. J. L., 342, 96 Atl. 79 and *Andre vs. Mertens*, 88 N. J. L. 626, 96 Atl. 893, we must conclude that Judge Caffrey should have granted our motion.

The attorneys of the plaintiffs may argue that they should have gotten past the non-suit stage because they proved that their bridge across the stream was washed away during a heavy storm but such contention is answered by that portion of the opinion of the Supreme Court in the Waters case which reads as follows:

“It is evident, therefore, that the condition to which the plaintiff refers her special injury was one to which the public at large was, *to a greater or lesser extent subjected, and that upon proof of these same facts, an indictment would lie.*”

POINT II.

The Trial Court erred in not granting defendants' motion for a direction of a verdict.

At the end of the whole case, the defendants moved for a direction of verdict in favor of the defendants on the same grounds as those urged on the motion for a non-suit; the testimony of the defendants' witnesses had shown that because of the manner in which the disposal plant had been designed and constructed it was impossible to drain raw sewage directly from the plant into the

brook, as testified by the plaintiffs' witnesses, (case, p. 154, 11. 29-43) and that the pump shown in exhibit P-16 did not discharge raw sewage into the brook, (case, p. 133). The testimony, however, in no way changed the situation with respect to the existence of a public nuisance and therefore there is no necessity for repeating our arguments above. We maintain that a verdict should have been directed for the defendants.

POINT III.

The Court erred in permitting Irene I. Gilmore to testify as to depreciation in the value of the Ennever property as a result of the operation of the sewage disposal plant.

Mrs. Gilmore, a real estate broker and operator, had been in the real estate business in Dumont for a period of seven years prior to the trial of this case (case, p. 100); she had sold houses located near the site of the disposal plant but before the plant was built (case, p. 101, 11. 1-20); after the construction of the plant she did not sell any property near enough to the plant to cause its existence and operation to affect its value (case, pp. 101-103). She testified that the value of the Ennever property before the erection of the disposal plant was about eleven thousand dollars (case, p. 104, 11. 10 to 60).

We, as the attorneys of the defendants objected to her testimony as to the depreciation of the value of the Ennever property by reason of the operation of the disposal plant because she was not qualified but our objection was overruled and an exception was taken; the following is the testimony of Mrs. Gilmore with respect to the depreciation of the value of the Ennever property, our objections thereto and the rulings of the court and our exceptions thereto (case, p. 105, l. 39 to l. 31, p. 106);

Q. "Mrs. Gilmore, do you know the condition of Mr. Ennever's property as it is today? A. I do.

Q. With the sewage disposal plant there, and operating as it does. A. I do.

Q. And what, in your opinion, is the value of his property in that condition?

Mr. DeTurck: I object to that.

The Court: I will allow it.

Mr. DeTurck: I want to state my reasons. She is not qualified to testify as to depreciation in value.

Mr. Morrison: We are not asking her to.

Mr. DeTurck: Well, conditions as they are.

Mr. Morrison: We are asking her to testify to the actual value of that property as it actually is there.

Mr. DeTurck: She is trying to show depreciation due to the construction of the sewage disposal plant. She is not qualified.

The Court: I will allow the question.

Mr. DeTurck: Exception.

A. We do not consider it has any value; it might bring four thousand dollars, forty-five; possibly a certain class of people might buy it; none of our following, no one that we—at the present are interested in would consider a proposition of that kind."

Mr. Morrison: Cross-examine.

Cross-examination by Mr. DeTurck:

Q. "And you attribute that to the construction of the sewage disposal plant, do you not? A. I beg your pardon?

(Question read.)

A. I do.

Mr. DeTurck: I move the testimony of the witness be stricken out on the ground she is not properly qualified to testify to the depreciation. Read the last question.

The Court: Read the last question and answer.

(Last question and answer read.)

The Court: It seems to me that she is not qualified. The rule is, I take it, in order to predicate testimony or give an opinion as to the value that is lessened from the former value, there must be experience with a given kind of sewer.

Mr. Morrison: Our conception of the law on the thing is about as Mr. DeTurck says. A witness who had not certain qualifications could not testify to depreciation. Our conception is a real estate agent like this lady is who had bought and sold freely in the neighborhood before and is now buying and selling in the neighborhood may testify as to values at one time and values at another. We admit that this fixes the depreciation, but we do not ask her to state the depreciation.

(Further argument.)

The Court: I will permit that question to stand.

Mr. DeTurck: I ask an exception.

Q. Now, you say that the depreciation is approximately \$7,000.00 in the value of this property?

Mr. Morrison: Objected to as improper cross-examination. She said nothing of the kind.

Mr. DeTurck: She said the difference.

Mr. Morrison: She did not say that. She said what the two values are.

Mr. DeTurck: I think it is proper cross-examination.

The Court: No. She has given two values.

Q. You say the property in 1925, that is, before the construction of the sewage disposal plant, was \$11,000.00? Is that right? A. I said somewhere between ten-five, and eleven thousand.

Q. And you say its present value is about \$4,000.00? A. It is hard to fix a value. It is almost impossible to sell a place of that kind.

Q. Well, can you fix a value? A. It would have to be a class of people that a very small amount of money would appeal to them.

Q. I know; but you should fix some value. What value do you fix as the present value of the Ennever property? A. Well, if the price was set at four thousand, possibly forty-five hundred, it might induce a certain class of people to buy.

By the Court:

Q. What, in your judgment, is the value now, as an expert; not what someone would be likely to give, but what you could get; what is the value? A. I consider forty-five hundred as a big value for the place at the present time.

By Mr. DeTurck:

Q. And how do you account for the difference in the value in 1925 and the value at the present time? A. Well, because of the general condition there. People buy according to general conditions.

Q. What condition are you speaking about? A. The sewer disposal plant, and the odor.

Q. And nothing else? A. I do not know of anything else would cause a depreciation in value.

Q. In other words, your difference in value is based on the fact that the sewage disposal plant has been constructed there, and is now operating?

A. The difference is that people won't buy a place of that kind and pay a fair price for it.

Q. Yes. Because there is the sewage disposal plant— A. Right in the back there, yes.

Mr. DeTurck: I again move that the testimony of this witness as to the value after the construction of the plant be stricken out.

The Court: No. I will permit it to stand.

Mr. DeTurck: I ask an exception.

Mr. West: That is all.

We contend that under the rules laid down in *Ross vs. Commissioners of Palisades Interstate Park*, 101 Atl. p. 60, 90 N. J. L. 461, and in *Morrell vs. Prieskel*, 74 Atl. 994, the ruling of the court was erroneous as a matter of law. The leading cases on the subject of expert testimony as to damage to real estate were collected by Justice Black in writing his opinion in the *Ross* case and we therefore will quote therefrom at length:

“In our reports the rule has been applied in the following illustrative instances to the opinion of witnesses on the valuation and damage to land: A witness has qualified as an expert who has a knowledge of sales of lots and portions of lands similar to and in the immediate neighborhood of the condemned land. The land so sold was within a radius of two miles from the land in question and within a period of three years from the date of the giving of the testimony. *Brown v. New Jersey Short Line R. R. Co.*, 76 N. J. Law, 797, 71 Atl. 271.”

“A farmer is not an expert as to the damage done to a farm by the building of a railroad other than for farming purposes. *Penn-*

Pennsylvania R. R. Co. v. Root, 53 N. J. Law, 253, 21 Atl. 285. Real estate agents residing six miles distant from the property who had nothing to do with property in the vicinity or anywhere near it are not on the question of rents. *Haulenbeck v. Cronkright*, 23 N. J. Eq. 413, affirmed 25 N. J. Eq. 513. Ordinary real estate agent is not, as to the value of the private title in a strip of land lying on a public highway, separated by the street from private property, nor as to damages done to the owner *J. R. R., etc., Co.*, 54 N. J. Law, 576, 25 Atl. strip to railroad purposes. *Laing v. United N.* of the abutting property, by appropriating that 409, 33 Am. St. Rep. 682. Real estate agent not an expert to give his opinion on difference between value of the property either to rent or sell estimated with the railroad in the street and the value without the railroad (*Thompson v. Pennsylvania R. R. Co.*, 51 N. J. Law, 42, 15 Atl. 833), not simply because witness resided on the property or because the witness owned and resided upon adjoining property (*Riley v. Camden, etc., Ry. Co.*, 70 N. J. Law, 289, 57 Atl. 445). A real estate agent is not an expert as to the amount of depreciation caused by the existence of a sanitary sewer running through the premises. *Morrell v. Preiskel*, 74 Atl. 994. Nor is a real estate agent an expert who is familiar with prices of property in the neighborhood as to the value of land after the construction of a tunnel with its present value. *Pennsylvania R. R. Co. v. Schwarz*, 75 N. J. Law, 801, 70 Atl. 134. The fact that a real estate agent on one occasion was able to lease a farm having a water supply in preference to one which had not affords no basis for an opinion concerning the difference in rental value between the two. *Crosby v. City of East Orange*, 84 N. J. Law, 710, 87 Atl. 341."

"Knowledge of real estate values in the locality does not qualify witness to testify to the diminution in value of property by reason of the destruction of shade trees standing in the highway in front of it (*Burrough v. New Jersey Gas Co.*, 88 N. J. Law, 643, 96 Atl. 895), or

such knowledge in a township (*Van Ness v. New York, etc., Tel. Co.*, 78 N. J. Law, 511, 74 Atl. 456). Valuation of adjoining railroad terminals is a basis of qualification of members of Board of Assessors making the valuation. *Long Dock Co. v. State Board of Assessors*, 89 N. J. Law, 108, 97 Atl. 900. An experienced real estate man of large experience not an expert on the question as to the fair value of the connection and use of a sewer condemned. *Park Land Corporation v. Mayor, etc., of Baltimore*, 128 Md. 611, 98 Atl. 157. A witness with some knowledge of real estate is not an expert on the value of shade trees. *Elvins v. Delaware, etc., Tel. Co.*, 63 N. J. Law, 243, 43 Atl. 903, 76 Am. St. Rep. 217."

Ross vs. Commissioners of Palisades Interstate Park, 101 Atl. 60, at page 62.

The case of *Morrel vs. Prieskel* presented the identical question under consideration; the following is an extract therefrom:

"This is an action for a breach of covenant against incumbrances, contained in a deed made by the defendants to the plaintiff for a piece of land, with a building thereon, in the City of Passaic. The incumbrance consisted of a sanitary sewer running through the premises from the front to the rear. The diameter of the sewer is 15 inches, and its depth below the surface about 14 feet. At the trial the defendants admitted liability, and the only question submitted to the jury was that of damages. Upon this point the plaintiff called as a witness one Delazier, a real estate agent, and asked his opinion as to the amount of depreciation caused by the existence of this sewer upon his premises. It was contended on behalf of the defendant that the witness had not qualified as an expert, and that his opinion was therefore incompetent. An attempt was then made, by an examination of the witness, to show expert knowledge. He testified that he resided in the City of Paterson, and con-

ducted his business there, that he had considerable experience in buying and selling property with easements upon it in other places than Passaic, and that in two instances the easement consisted of a sewer running through the premises. What the character of the sewer in these cases was, what their respective dimensions were, how far beneath the soil they were located, he did not state. He was then asked the question again, and it was admitted over the objection of the defendants. They excepted to this ruling, and the exception was signed and sealed. We think the question of the admissibility of this testimony is controlled by the decision of the Court of Errors and Appeals in the case of *Pennsylvania, etc., R. R. Co. v. Schwarz*, 75 N. J. Law, 801, 70 Atl. 134, that for the reasons stated in that opinion the witness was not qualified to speak as an expert with relation to the matter concerning which he was questioned, and that his testimony was erroneously admitted. For this reason there should be a reversal."

Morrel v. Preiskel et al., 74 Atl. 994, at page 995.

It seems to us that the attempt of the attorneys of the plaintiffs to prove, by indirection, depreciation in the value of the plaintiffs' property by reason of the operation of the disposal plant, especially after their concession that Mrs. Gilmore was not qualified to testify as to depreciation (case, p. 107), was an idle ceremony; the witness did not testify as to knowledge of sales of lands similarly affected and admitted that she had not sold lands similarly affected; our courts have repeatedly held that the proper proof of depreciation in the value of an automobile, damaged in an accident, is proof of value before and after the accident; *Hintz vs. Roberts*, 98 N. J. Law, 768, 121 Atl. 711; why then should the rule in the case at bar be different?

Mrs. Gilmore was the only witness for the plain-

tiffs as to depreciation and as she was not qualified, her testimony should have been stricken out.

We therefore contend that for the reasons above stated there should be a reversal.

Respectfully submitted,

DETURCK & WEST,
Attorneys of Defendants-Appellant.

New Jersey Court of Errors and Appeals

HARRY ENNEVER and CLARA L.
ENNEVER, his wife,
Plaintiffs-Appellees,

vs.

THE BOROUGH OF BERGENFIELD
and THE BOROUGH OF DUMONT,
Defendants-Appellants.

On Appeal
from
Supreme
Court.

BRIEF FOR PLAINTIFFS-APPELLEES.

Statement.

Plaintiffs are the owners of a little home on a plot of ground which is partly in the Borough of Bergenfield and partly in the Borough of Dumont. A small brook flowed through their lands and added to the enjoyment thereof. (See Exhibit P. 7-11 inclusive, Suppl. to State of Case.)

The two defendant boroughs, by appropriate municipal action, built a joint sewer system and sewage disposal plant. The disposal plant was erected immediately adjacent to the rear line of plaintiffs' property, and on both sides of the brook just above the point where it entered plaintiffs' premises. The diagram (Ex., p. 4, Suppl. to State of Case, offered Case p. 28, l. 32, et seq. admitted Case p. 29, l. 25), shows the relative location of the disposal plant and the plaintiffs' property and the photographs (Ex. P. 14-15, Suppl. to State of

Case) show the general appearance of the disposal plant.

The sewer system was designed to collect the domestic sewage and trade liquors and infiltration from the two Boroughs and to bring the same to the sewage disposal plant. (Bowe, Case, p. 20, l. 32-45).

The domestic sewage, which is the waste emanating from domestic households, business buildings, institutions and the like, is derived from the public water supply. (Bowe, Case p. 21, l. 8-12). The public water supply in these two Boroughs is derived from the Hackensack Water Company's works at New Milford and pumped through these two municipalities by means of a distribution system. (Bowe, Case p. 21, l. 36-42).

900,000 gallons per day of this domestic sewage is turned into this disposal plant (Bowe, Case p. 47, l. 23) and after passing through it is discharged into the brook and through and upon plaintiffs' lands.

110 miles of pipe lines have been laid (Bowe, Case p. 38, l. 30-32) which act as subsurface drains and collect the "infiltration," bringing the total flow of liquid, per day, up to 1,500,000 to 1,600,000 gallons per day.

It is proven that before the construction of this sewer system the brook was sufficiently large to carry without overflowing and flooding of plaintiffs' premises, so much, if any, of these waters as came in natural course to the brook (Ennever, Case p. 54, l. 30-42); that to accommodate the vastly greater quantity of water cast into the brook by the defendant's sewers, the defendants altered so much of the brook as was within their property, by widening, deepening and straightening it, and

paving it with paving stones (Bowe, Case p. 35, l. 20-30).

Aside from the question of pollution, stenches and similar nuisances (which are discussed below) it is apparent that the defendants have designedly and by these artificial means, diverted this enormous volume of water from the course it would otherwise have taken, and cast it on plaintiffs' lands, where, but for such artificial drains, it would not have gone.

The Sixth Count of the complaint is for damage by flooding (Case p. 6, l. 30 et seq) and it was proven that plaintiffs' premises were flooded, his bridge over the brook swept away and other similar damage done. (Ennever, Case p. 64, l. 22-40; Ex. P. 21, photos. 1, 2, 3, 4 & 5, Suppl. to State of Case; offered Case p. 64 l. 40 admitted p. 66, l. 35.)

The filth and drainage of these two Boroughs was concentrated at this disposal plant for treatment. Ninety per cent. was caused to flow there by gravity (Bowe, Case p. 22, l. 38-42) and ten per cent. is collected at a pumping station and pumped back to this particular site. (Bowe, Case p. 22, l. 20-22; p. 23, l. 1-10).

This enormous flow of filthy sewage is led first into an open tank fitted with bars and screens which retain all floating substances. (Bowe, Case p. 23, l. 17-26; p. 25, l. 8-11; Exhibit P. 20, photo No. 5, Suppl. to State of Case.) The defendants' superintendent testified that this screen chamber had to be cleaned out about once a week and sometimes more often (Harra, Case p. 142, l. 5 et seq) and that the substances taken out had to be covered with chlorinated lime and buried. (Case p. 142, l. 23-26.)

From the open tank or screen chamber, the sewage is led into six closed settling tanks where the solids which have not lodged on the screens, settle to the bottom. (Bowe, Case p. 23, l. 26-34, p. 25, l. 10-25); and these solids, in the form of sludge are drawn off from time to time on six sand beds or filters, open to the air, to dry out and be taken away for manure. (Bowe, Case p. 25, l. 25-30; Harra, Case p. 144, l. 37-41.)

The rest of the sewage is carried into another open tank and held there until a sufficient amount accumulates to be drawn off. (Bowe, Case p. 23, l. 34-40; Exhibit P. 20, Photo Nos. 1 and 2, Suppl. to State of Case.)

When this open tank is filled with sewage, it is discharged to sand filter beds, on the opposite side of the brook, where it lies open to sun and air until it filters through, and the effluent is discharged into the brook (Bowe, Case p. 23, l. 40-45; p. 24, l. 1-15; Exhibit P. 20, Photos 3 and 4, Suppl. to State of Case.)

There was plenary evidence that the sewage in these open tanks and on these sludge beds and sand filter beds permeated the atmosphere with nauseating odors and stenches which penetrated into plaintiffs' property, into his house, his bed rooms and his dining room. (See generally testimony of Harry Ennever, Mary A. Kampf, Edw. L. Benson, Edw. G. Cram, Anne G. James and Clara L. Ennever, as indexed in State of Case.)

The third count of the complaint is for damage resulting from these noxious, foul, fetid and poisonous odors and the fourth for the continuance of this damage.

It is admitted that this sewage disposal plant has been overloaded and does not function properly (Bowe, Case p. 32, l. 3-10) and it is demonstrated

that as a result thereof the plaintiffs' stream was grossly polluted. Mrs. Kempfer testified that on one occasion she was annoyed by the foul odors at night and went out near plaintiffs' place to see the condition of the brook and found "the raw material" running through the brook (Case p. 95, l. 43) and the filthy condition so bad that "I became sick to my stomach" (Case p. 96, l. 5-9). Many other witnesses testified to similar, if not quite so disgusting, conditions in the brook near or on the plaintiffs' premises.

The first, second and fifth counts of the complaint are for damage by this pollution of their stream.

Summarized, the facts in this case are that the plaintiffs have been deprived of the enjoyment of a beautiful little home on an attractive water course, by the active interference of the defendants who have designedly concentrated in the immediate vicinity, the filth and sewage of two entire Boroughs, in such a manner as to saturate the atmosphere with nauseating stenches, to grossly pollute the brook and to send down upon the plaintiffs' home millions of gallons of water which have flooded and overflowed his place.

For this damage the jury found a verdict of \$3,250 and the Boroughs have appealed to this court. There are but two reasons for reversal; that the only remedy was by indictment and that an active local real estate dealer called by the plaintiffs, was improperly permitted to testify, as an expert, to the value of plaintiffs' property before and after the installation of this sewer system.

I.

The defendant municipalities although performing a public duty in operating these sewers and this sewage disposal plant have committed an active wrong, have been guilty of active negligence, and are therefore liable to plaintiffs who have suffered special damage.

It is, of course, conceded that the general rule is that the neglect of a municipal corporation in the performance of a public duty is a public wrong to be remedied by indictment.

Waters v. Newark, 56 N. J. L., 361; and other cases cited by appellants.

But this exemption of municipal corporations from actions by individuals suffering special damage does not extend to actions where the injury is the result of active wrongdoing.

Kehoe v. Rutherford, 74 N. J. L., 659.

The factual situation in these two cases illustrates clearly what is meant by "active wrongdoing." In Waters v. Newark, a sewer was built through a street past plaintiffs' property and running to tidewater. It became overloaded and the water backed up out of the manholes and catch basins in the street and flowed across the sidewalk and into plaintiffs' property. The design was to carry the water to the river; it was not intended to have the water flow out of the manholes and catch basins. This was not "active wrongdoing."

In Kehoe v. Rutherford, a culvert was built which changed the direction of the natural flow of

the water and directed it toward, upon and into plaintiff's premises. The municipality intended the water to flow through this culvert and this caused the water to go upon plaintiff's place. This was "active wrongdoing."

In *Kehoe v. Rutherford* and in *Jerolaman v. Belleville*, (90 N. J. L., 206) this court held that:

"A municipality has no right, by artificial drains, to divert surface water from the course it would otherwise take, and cast it, in a body large enough to do substantial injury, on land where, but for such artificial drains it would not go."

Neither, we respectfully submit, have defendants any right to divert millions of gallons of Hackensack River water, through such artificial means as the Water Company's mains and these sewers, and cast it upon the home of these defendants to their damage; nor to divert the subsoil waters of the entire area of these two municipalities from their usual subterranean channels, and concentrate them at this plant and cast them over plaintiffs' premises.

It is, of course, conceded that by gathering the filth and sewage of these municipalities and concentrating it at the disposal plant in open tanks and upon open filter beds so as to pollute the air with noxious and fetid odors which spread about for some distance in all directions and annoyed and sickened the entire neighborhood, the defendants created a common nuisance for which they were liable to indictment. But that does not exempt them from liability to plaintiffs in this suit for it was held by Mr. Justice Magie (on demurrer) that:

"1. A count in a declaration charging that a municipal corporation, by its wrongful act, created a common nuisance from which plaintiff suffered special damage, discloses a good cause of action, notwithstanding the corporation is liable to indictment for the same act.

2. The exemption of a municipal corporation from actions by individuals suffering special damage from its neglect to perform or its negligence in performing public duties, whereby a public wrong is done for which an indictment will lie, does not extend to actions where the injury is the result of active wrongdoing chargeable to the corporation."

Hart v. Freeholders, 57 N. J. L., 90.

This case has been cited and this principle has been approved by this court in many cases, of which it is, we believe, enough to mention

Kehoe v. Rutherford, 74 N. J. L., 659;
Doran v. Asbury Park, 91 N. J. L., 651;
Olesiewicz v. Camden, 100 N. J. L., 336.

It is conceded too that ordinarily a municipality is not liable for the failure of a sewer system to function according to design, but if it be so constructed that upon its failure to function properly, there appears to be a further design that, when not functioning properly, the sewage shall be deliberately cast upon plaintiffs' lands or into his stream, this is "active wrongdoing" for which the municipality is liable.

The present case is similar in principle to Doran v. Asbury Park, 91 N. J. L., 651, and on both the facts and the law it is similar to but stronger than

the case of *Garrison v. Fort Lee*, 92 N. J. L., 566, in which this court held the municipality liable.

In the *Garrison* case, Mr. Justice Trenchard delivering the unanimous opinion of this Court, said (at p. 567) :

“The contention of the defendant is that at most the evidence disclosed that the ‘plaintiff’s damage resulted from negligence on the part of the borough in performing its duty to keep the sewer in repair or proper operation.’ Of course if that, and that only, appeared, the case would call for the application of the rule that an action will not lie in behalf of an individual who has sustained special damage from the neglect of a public corporation to perform a public duty. * * * But it was also open to the jury to find from the evidence that the plaintiff’s injury was the result of active wrongdoing in the construction and use of the sewer. * * * Whatever else the evidence in the present case justified the jury in finding, it amply justified them in finding, if they saw fit, that the defendant designedly built and constructed its sanitary sewer with many outlets into its storm-water drain, which latter emptied into the brook at the head of plaintiff’s pond (which was theretofore pure) and that such construction and use resulted in the daily and continuous pollution of the plaintiff’s pond to his serious injury. Clearly for such active wrongdoing the plaintiff was entitled to recover.”

The facts in the *Garrison* case were that the Borough of Fort Lee had attempted to keep the sewage in its sanitary sewers separate from the water in its storm water drains. The sewage was, in normal operation, led to a sump or tank and prevented

from flowing down the brook, while the drainage water was discharged directly into the brook. But in each manhole the storm water drain was at the bottom, and the sanitary sewer was carried above it on the side of the manhole. Although both were carried elsewhere in ordinary pipes of circular cross section, the design of the manholes was such that these two streams were carried through the manholes in conduits of a U shaped cross section, open at the top of the U. In behalf of the Borough it was contended that these open U shaped passages in the manholes were designed to permit the cleaning of the pipes between the manholes, and the removal of any obstructions to the flow, and were not designed to permit an overflow of the sewage into the storm water drain. On behalf of the plaintiff it was contended that these open U shaped passages were deliberately designed as overflows or spillways (See State of Case, Garrison v. Fort Lee, Testimony of Clarke for Borough, Case pp. 191, 192, 193, 196, 197, and Testimony of Eckerson for plaintiff, Case pp. 144 and 150.) It was clearly shown, however (no matter what the intended function had been), that whenever the sanitary sewer was clogged or overloaded, the sewage overflowed from the U shaped sewage conduits on the side of the manholes and spilled down into the U shaped conduits in the bottom of the manhole in which the storm water was flowing, and ran thence through the storm water drains into the brook and thence into plaintiffs' pond. This does not clearly appear in the opinion but does appear in the State of Case in the Garrison case and is, no doubt, what Mr. Justice Trenchard refers to when he says that it was open to the jury to find that the Borough of Fort Lee "designedly built and constructed its sanitary sewer with *many outlets* into its storm water

drain * * *” (at pp. 567, 3 last lines), for there is no testimony of any other “outlets.”

In the present case the defendants have designedly built and constructed this sewage plant with many outlets over the tops of its open tanks, its sludge beds, and its filter beds, directly into plaintiff's stream; with many pipes from its underdrains leading directly into plaintiff's brook, so that although, as in the Garrison case, the normal operation which was primarily intended was designed to avoid pollution of the brook, there is a clear design in case of abnormal operation or failure to operate, to direct the pollution into the brook. It is shown that on at least one occasion when the plant was out of order, the sewage was deliberately pumped into the brook. (Ennever, Case p. 56, l. 30-40; Ex. P. 16, Suppl. to State of Case.)

The intent to permit or cause the sewage to pollute the brook is far more patent in this case than in the Garrison case and it was therefore open to the jury to find that the defendants were guilty of active negligence. It is conceded here as in the Garrison case, that the sewer has not so functioned as to prevent pollution and on the authority of this court's decision in the Garrison case, the defendants are liable in this case.

IT IS RESPECTFULLY SUBMITTED THAT THE DEFENDANT MUNICIPALITIES HAVE, IN OPERATING THIS SEWER SYSTEM AND SEWAGE DISPOSAL PLANT, COMMITTED AN ACTIVE WRONG, HAVE BEEN GUILTY OF ACTIVE NEGLIGENCE AND ARE, THEREFORE, LIABLE TO THE PLAINTIFFS, AND THAT DEFENDANT'S MOTIONS FOR A NON SUIT AND FOR A DIRECTED VERDICT WERE PROPERLY DENIED.

II.

There was no error, prejudicial to appellants, in permitting the plaintiffs' real estate expert to answer the questions set forth in the reasons for reversal.

Mrs. Irene Gilmore was called by the plaintiffs and testified that she had been a real estate broker for about seven years; that the field of her operations had been in Bergen County, particularly in Bergenfield and Dumont; that she had bought and sold properties in the neighborhood of and similar to the Ennever property (Case p. 100, l. 27-38); that she had sold about \$200,000 worth of property within six blocks of the sewage disposal plant before it was in operation, and "quite a little" in the same area after the plant was running (Case p. 102, l. 1-20). As to values of properties in that vicinity, she had the qualifications required by *Ross v. Commrs. Pal. Int. Park*, 90 N. J. L., 461 on which appellants rely, and in which it was held that:

"The dominant circumstances forming the qualification of expert witnesses as to land values consist of the fact either that they have themselves made sales or purchases of other similar lands in the neighborhood of the land in question, within recent periods, or that they have knowledge of such sales by others."

As to the subject of the inquiry, i. e., the values of properties in this vicinity before and after the installation of the sewer, she was clearly shown to have special knowledge which rendered her opinion as to the value of plaintiffs' property at these times competent evidence; for this court has held:

"In order to render the opinion of a witness competent evidence, he must appear to have special knowledge on the subject of inquiry."

Laing v. United N. J. R. R. Co., 54 N. J. L., 576.

She was permitted, over defendant's objection, to testify to the value, in her opinion, of the plaintiffs' property before the plant was there, and to its value at the time of the trial.

Appellants, in the Grounds of Appeal, No. 3, No. 4 and No. 5, (Case pp. 16-17) set forth three questions put to this witness, to which they objected. Although it is stated in the grounds of appeal that an exception was taken to the overruling of their objection on each of these questions, an inspection of the record does not show any exception taken to the first and second, although there is an exception noted to the third. These questions appear in the record at pages 104, 105 and 106. When the Court stated his reason for allowing the first two questions (which were really one and the same question repeated after interruption and argument) appellant's counsel conceded that the trial judge was right:

"Q. Now will you state please, other conditions remaining as they have been but no sewage disposal plant being there, what would the value of that property be to-day?"

Mr. DeTurck: I object to that.

The Court: I will allow that, subject to further consideration. There are two propositions involved in this case.

Mr. DeTurck: Yes" (Case p. 105, l. 15-25).

The function of an objection is to direct the attention of the trial court to some reason which counsel puts forward as a legal ground for excluding the evidence then apparently about to be given in the answer of the witness. If the trial judge, as in this case, overrules the objection and states his reason for doing so, counsel may concede that the judge is right in so doing, and withdraw or abandon the objection. This is by no means unusual in the stress and excitement of a trial. If he does not concede that the trial judge is right, he should note an exception, so that the trial judge and opposing counsel may know his attitude and may be fairly warned that his ruling is to be made a ground of appeal.

The underlying principle in such matters is that the error complained of upon appeal must have been specifically pointed out to the trial judge. When, as in this case, counsel at the trial concedes that the trial judge is right after hearing his reason for the ruling, such ruling cannot lead to a reversal.

The third question (to which an exception was noted) (Case p. 105, l. 39-42; p. 106, l. 1-25) was as follows:

“Q. Mrs. Gilmore, do you know the condition of Mr. Ennever’s property as it is to-day?

A. I do.

Q. With the sewage disposal plant there and operating as it does? A. I do.

Q. And what, in your opinion, is the value of his property in that condition?

Mr. DeTurck: I object to that.

The Court: I will allow it.

Mr. DeTurck: I want to state my reasons.

She is not qualified to testify as to depreciation in value.

Mr. Morrison: We are not asking her to.

Mr. DeTurck: Well, conditions as they are.

Mr. Morrison: We are asking her to testify to the actual value of that property as it actually is there.

Mr. DeTurck: She is trying to show depreciation due to the construction of the sewage disposal plant. She is not qualified.

The Court: I will allow the question.

Mr. DeTurck: Exception."

On this question the trial judge was clearly right, for the witness was clearly qualified by her experience to testify to the then current value of the plaintiffs' property.

A witness similarly, but not so well, qualified was called for defendants and also testified to these values.

(Mrs. Leddy, Case pp. 149-151.)

It is respectfully submitted, however, that whether or not appellants are now estopped to rely upon this ground of appeal, the evidence was rightly admitted. One who knows values may testify to values, although to testify to depreciation by reason of any cause one must have had experience with other cases of depreciation from this cause. For example, a Wall Street broker is competent to testify to the values or market price of a stock in which he trades, and may state the price as it was before and after a given event, although he may not know what effect, as to depreciation or appreciation, was due to the happening of the event. A dealer in automobiles may testify to the value of a

car before and after an accident. This method of assessing the damage was expressly approved by this court in *Hintz v. Rogers*, 98 N. J. L., 768.

So it was competent for these Bergenfield real estate brokers to testify to the value of the plaintiffs' property before and after the construction of the sewage plant. Mrs. Gilmore testified that the value before was \$10,500 to \$11,500 and Mrs. Leddy said it was \$5,500. Mrs. Gilmore testified that the value after was \$4,500 and Mrs. Leddy testified that it was \$7,000. The jury had given to them, as facts, the value of plaintiffs' property before and after the construction and use of this sewage plant. They had given to them, as facts, the effect of the operation of the plant upon plaintiffs' use and enjoyment of his home. They had given to them as facts, by the defense, certain other changes in the vicinity which might have increased values (Mrs. Leddy. Case p. 150, l. 30-40), such as the construction of roads, sidewalks, etc. The whole situation was laid before the jury as fully as either party cared to go into it. It was, clearly, a jury question on all these facts and circumstances to ascertain the amount of damages for which defendants were liable to plaintiffs, and these they assessed at \$3,250.

IT IS RESPECTFULLY SUBMITTED THAT THERE WAS NO ERROR, PREJUDICIAL TO APPELLANTS, IN ADMITTING MRS. GILMORE'S TESTIMONY.

III.

It is respectfully submitted that the judgment below should be affirmed.

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with Plaintiff-Appellees.

