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Notice and Grounds of Appeal.

(Filed February 24, 1930.)

Circuit Court of Morris County,

10

NEW JERSEY.

In the matter of the application of the City of East Orange for the appointment of three commissioners to fix the compensation to be paid for certain lands of the Braidburn Realty Corporation, a New Jersey Corporation, situate in the Borough of Florham Park, in the County of Morris, to be taken and condemned for public use.

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BRAIDBURN REALTY CORPORATION
and BRAIDBURN COUNTRY CLUB,
Appellants,

v.

CITY OF EAST ORANGE,
Respondent.

On judgment entered in Morris County Circuit Court on appeal from award of commissioners.

On Appeal to New Jersey Court of Errors and Appeals.

NOTICE OF APPEAL AND
GROUNDS OF APPEAL.

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*To the City of East Orange or Walter C. Ellis, its
Attorney:*

TAKE NOTICE that the Braidburn Country Club and Braidburn Realty Corporation appeals to the Court of Errors and Appeals in the Last Resort in all Causes in New Jersey from the whole of the judgment entered in the Morris County Circuit Court, in this cause, fixing and determining the amount to be paid the Braidburn Country Club

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Notice and Grounds of Appeal.

and Braidburn Realty Corporation in the sum of Seventeen thousand Two hundred dollars (\$17,200.00) on the following grounds:

10 1. THE COURT ERRONEOUSLY WITHDREW FROM THE CONSIDERATION OF THE JURY ANY QUESTION OF DAMAGES THAT WILL ACCRUE TO THE APPELLANTS BY REASON OF INJURY TO THE ADJACENT AND CONTIGUOUS LANDS OF THE APPELLANTS, RESULTING FROM THE USE TO WHICH THE CONDEMNED PROPERTY IS TO BE PUT, AS SET FORTH IN THE PROCEEDINGS, CONSISTING OF THE WITHDRAWAL OF TWO MILLION GALLONS OF WATER PER DAY FROM THE LAND IN QUESTION, THE PERTINENT PORTION OF THE COURT'S RULING BEING AS FOLLOWS:

20 "Perhaps I ought to say for the benefit of Counsel and with the idea that the further trial of this matter may be shortened, that I have concluded that the question of damage to the remainder of the tract which is now the golf club proper of the Braidburn Company will be taken from the consideration of the jury. In other words, I shall not submit to the jury the question of damage to which the testimony yesterday related with regard to the diversion of water through subterranean channels."

30

(After discussing the ruling in the case of Meeker against the City of East Orange, *Supra*, and the Court's opinion as to its application to this case, the Court continues:)

40 "In other words, the owner here alleges that it has the right to anticipate that if the City of East Orange puts down its wells on the tract in question, it will necessarily divert the subterraneous water from the use of

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the land of the Country Club and among other things cause the well now there on the property to go dry. I am inclined to the view that that is in the speculative realm, as it were, and that there is no proof in advance of the actual use of the land by the City of East Orange which would justify the Court in sending that question to the jury; and I shall leave it therefore to the remedy indicated in the case of Meeker against East Orange, and if it should appear after the operation by the City of its water works on the land in question, if they do use it, that there is the consequence which is claimed here, then of course, the Country Club would have a right of action against the City of East Orange and the question as to reasonable use by the City would be the issue in such an action. My theory, therefore, is that the present claim of damages is purely speculative. That there is no evidence which would justify submitting that question to the present jury, and, therefore, the only question involved will be the market value of the land that is sought to be taken by the City for the uses indicated." 10
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(After referring to authority of the State Board of Conservation over the supply of water, the court continued:)

"Then this case to which I have referred, namely Meeker against the City of East Orange, sets up the criterion of reasonable use, not that they have no right at all to use; that the property owner has no right to use water under his land; under the sur- 40

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10 face, but that he is limited to the reasonable use. Now, surely this jury could not pass upon this question here because there is no evidence. In other words, the Court of Appeals holds that the landowner has the right to use the water of subterranean sources, but it is confined to reasonable use. Now, since it has such right, apparently, then how can it be said that the Country Club is damaged until it actually occurs? How can we anticipate to what extent the Country Club is going to be damaged in the use of these wells, for example, because the City of East Orange would be entitled to reasonable use and apparently that is controlled by the

20 State Board of Conservation, as I see it, under the statute creating it. So it would seem to me peculiarly a question for inquiry when the condition that is feared actually arises; and that being so, surely this jury cannot pass upon the damage which is merely anticipated and then say that they will assess damages in favor of the owner as against the taking party, namely, the City. I do not see that there is any evidence here than can be controlling as the source of an intelligible fact or at least an inference of fact for the

30 jury. That arises in the future. When that situation does arise, then undoubtedly they have the right to go to the proper forum and there ask for an injunction or the recovery of damages directly due to the ascertained injury. That is my theory about it. Whether I am correct about it, I don't know. However, it goes here, and you may have an exception."

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Notice and Grounds of Appeal.

to which an exception was prayed by the appellants on the following grounds:

“Understand the reason; understand that this suit is brought because of the fact that in this case the City of East Orange having been permitted to extract or abstract from the lands intended to be taken or condemned two million gallons of water per day; that in this case the possible damages, not only of the present, but in the future, are to be taken care of and an award made by the jury. I am referring first to the fact that we are entitled to assume that the use to be made will be the most injurious or possible under the terms of their grant and that injury will accrue to the remaining lands of the Braidburn Realty Corporation by reason of the abstraction of this water. That that injury will be to their pumping plant and to their water supply; further that such testimony so offered indicated the reasonable probability of such an occurrence and establishing the cost of a substantial supply and fixing the amount of damage that would accrue to Braidburn Realty Corporation when such a damage would happen. That we are compelled to bring that claim for damages in this case under the case of *Van Schoick v. The Delaware & Raritan Canal Company*, 20 New Jersey Law, Page 249, and various opinions in cases citing this case with approval, which we regard as the existing law today which, while there may be a cause of action in the future, nevertheless in this case we are barred from bringing any action against the City of East Orange for any sub-

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sequent injuring accruing to the lands of the user of the lands in question, except such as may arise through negligent operation of the plant on this land."

10 Exception allowed.

2. THE COURT ERRONEOUSLY RULED THAT:

"The sole question to be submitted to this jury will be the value of the land sought to be taken; I will allow that."

to which the appellants duly excepted.

20 3. THE COURT ERRONEOUSLY REFUSED TO CHARGE THE JURY IN THE LANGUAGE PRAYED BY THE APPELLANTS IN THEIR REQUESTS TO CHARGE, AND APPELLANTS DULY ACCEPTED, SAID REQUESTS BEING AS FOLLOWS:

(a) It is the province of the jury to find facts. That is, the fact that you must find is: What is the market value of the property that has been taken, plus the consequential damages, if any, to the remaining lands of the owner?

30 (b) The Constitution of the State of New Jersey provides that private property shall not be taken for public use without just compensation. The statute passed, the Eminent Domain Act of 1900, providing for means for condemnation for public purpose, requires the determination of the just compensation referred to in the Constitution in cases on appeal, by jury, who shall assess the value of the land or other property and the damages sustained. Your verdict in this case must be in a single lump sum which sum shall be made up as follows:

40 1. The value of the land taken;

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2. Damages to the remaining lands belonging to the property owner, if any, by reason of the taking away of the property condemned from the entire tract;

3. Damages, if any, sustained by the remaining tract, arising in the future by reason of the use to which the property condemned is to be put by the City of East Orange as set forth in the pleadings in this case.

10

(c) The amount of compensation should be made upon the basis that the condemning parties will make the most injurious use to the owner that can lawfully be made within the right taken by them as disclosed in their petition.

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(d) In estimating the value of the property taken from the owners, the jury should consider all the capabilities of the property, and all the uses to which it may be applied or for which it is adapted.

(e) That the jury should take into consideration and determine under the evidence in the case the best use to which the property taken is adapted, and award to the owners such sum as in their judgment will afford the owners just compensation for the lands taken in view of such use.

30

(f) If, from the situation and surroundings of the property of the landowner, you feel that there resulted to the land taken a special value growing naturally out of the best use to which, from its situation, it was presently adapted, then the owner is entitled to secure for the land that compensation in which these elements will be accounted for.

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(g) That when the jury have determined all the

Notice and Grounds of Appeal.

10 capabilities of the property and all the uses to which it may be applied and for which it may be adapted they are to estimate its value in relation to such capabilities, uses and applicability, and not merely in relation to the condition it was in on February 9, 1929, and the use to which it was then applied by the owner.

20 (h) The ultimate question for you to determine is: What is the property worth in the market viewed not merely with reference to the uses to which it was applied at the time this condemnation proceedings was commenced, February 9, 1929, but with reference to the uses to which it was then plainly adapted. That is to say, the question is: What was the property worth on that date from its availability for valuable uses? The property is not to be deemed worthless because the owner lets it go to waste, or to be regarded as valueless because the owner has not put it to any use. The capability of being made thus available gives it a market value which can be estimated by you.

30 (i) The special value of land due to its adaptability for golf purposes is an element which the owner is entitled to have considered in determining the amount to be paid as the just compensation upon a taking by eminent domain.

40 (j) In weighing the testimony of experts on real estate value, you may consider the reasons given by them for the opinions which they have expressed on the witness stand. Consider their testimony as to the properties which they referred to as being comparable to the lands taken, and the sales price of such comparable property which

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were particularly described to you by the various real estate experts.

(k) In the foregoing statements in regard to the amount of compensation to which the owner is entitled, the Court has referred only to the value of the property taken. You are to understand, however, that the owner is also entitled to be compensated for any damage which the taking does to its contiguous lands which are not taken. You are not to bring in a special verdict for the amount of this damage, but if you find that the taking does any damage to lands not taken, you are to add the amount of such damage to the amount of damage you find for the lands to be taken.

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(l) It would be contrary to economic law and repellent to common justice to permit the fact that the lands are selected by the City of East Orange because of their availability for Water Supply purposes, to strip them of any elements which, independently of the City of East Orange and prior to its taking, they possessed. The owner is to be given by way of compensation for his land not only its fair price for any use for which it is adaptable at the time of the taking or in reasonable anticipation in the near future, but, in addition he shall be compensated for any consequential damages to the remainder by reason of the taking.

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(m) If you believe from the evidence submitted that the land in question is adaptable for golf lands, and that the 42 acres in question, in conjunction with the other lands of the owner immediately adjacent thereto, are the only available lands in the tract of the owner on which the present nine-hole course can be re-vamped to make a regulation 18-hole course, then your ver-

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dict should include such a sum of money as in your opinion will properly compensate the owner for the loss sustained, by preventing this extension of the golf course.

10 (n) Pleadings in this case show that the City of East Orange intends and is permitted by law to erect water works on the land condemned and to be taken, by and through which they may abstract water to the amount of Two million (2,000,000) gallons per day, and the property owner, the Braidburn Realty Corporation, is entitled to receive an award of damages at your hands to be included in the general award for any injury resulting in the future to the use of their remaining lands adjacent to the lands condemned, 20 arising out of the use of the condemned lands by the City of East Orange, in the manner set forth in the pleadings.

(o) Pleadings in this case show that the City of East Orange intends and is permitted by law to erect water works on the land condemned and to be taken, by and through which they may abstract water to the amount of Two million (2,000,000) 30 gallons per day. If you find from the evidence that the abstraction of Two million (2,000,000) gallons per day from the premises taken will injuriously affect the water supply of the Braidburn Realty Corporation now in operation on the remaining lands of that company and located adjacent to the lands condemned, you have a right to include in your award for damages such amount as in your judgment will compensate the Braidburn Realty Corporation for injury arising out of 40 a depleted water supply.

Notice and Grounds of Appeal.

(p) In cases of this kind, no amount can be mathematically fixed as to the amount of your verdict. You must, therefore, trust somewhat to your own judgment in arriving at this definite amount, and one of the objects and purposes of the view which you have made is to enable you to use your own senses and judgment by obtaining such information as an eye witness can gain of the general quality and condition of the land, the uses to which it has been put or to which it is applicable, and better to understand and apply the evidence of the witnesses who have testified before you. If, in your judgment, the evidence is conflicting as to the value of the property taken and the injury to the balance, you should resort to the knowledge gained upon your view as bearing upon the weight to be given to the various and conflicting statements and estimates. 10
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(q) Under the statute by which proceedings are governed the City of East Orange has the right, if it desires, to abandon these proceedings at any time within twenty days after the rendering of your verdict, upon payment to the owners of their reasonable costs, expenses and counsel fees to be determined by a Justice of the Supreme Court, and upon filing a discharge of lien of notice of *lis pendens*. On the other hand, the owner cannot in any manner prevent the City of East Orange from condemning and taking the property if it desires to do so. His only right is to make claim to the compensation to which the law entitles him. 30

(r) All compensation for the taking under these proceedings must now be allowed to the owner of the property taken once for all, including all damages that the owner may ever hereafter sus- 40

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tain due to such taking, in as much as any damage that the owner may hereafter sustain for all times to come on account of the taking under these proceedings cannot be hereafter recovered.

10 (s) If the land condemned and taken has an available use within the meaning of the law when used in connection with adjacent and contiguous property and notwithstanding it may be limited solely to a joint use with such adjacent property, the owner is to be allowed the value to it of the land taken with such available use.

4. THE COURT ERRED IN CHARGING THE JURY AS FOLLOWS:

20 "A purely imaginative or speculative value cannot be considered; for example, where a tract taken by eminent domain is used as a farm, the owner is entitled to have its present value for building purposes considered, but the jury is not to determine how it could best be divided into building lots nor conjecture how fast they could be sold nor at what price per lot."

30 to which an exception was prayed by the appellants on the ground that:

40 "There was no evidence in this case proffered or offered by the property owners which covered anything of a speculative nature, and therefore the comment of the Court to the jury from that standpoint would of necessity create an erroneous impression in the Jury's mind as to the evidence offered by the property owner as to the available use of the property naturally for golfing purposes."

Exception allowed.

*Notice and Grounds of Appeal.*5. THE COURT ERRED IN CHARGING THE JURY AS
FOLLOWS, NAMELY:

"Whether similarity between properties
 in fact does or does not exist in order to
 permit a comparison of the value, the rights
 of way and easements through the property
 or of the fee of the property, is usually a
 preliminary question to be decided by the
 Court, and therefore with reference to that
 testimony regarding the sale by Mrs. Bus-
 hauer, I have allowed that to come to you
 because it may be of some evidential value
 in that respect. You will recall that it was
 described as largely high land, adjoining as
 I now recall, or bounding upon the highway
 or country road that runs through this tract.
 It appears that it extends from the highway
 to the shore of the Passaic River and at the
 shore end may have some similarity to the
 tract that is here involved, but of course, you
 will understand that whether the criterion
 of a thousand dollars an acre for that land
 is a fair one to adopt must depend upon
 the finding of a similarity in the land. Now,
 here the forty-two acre tract is said to be
 in part low land. It is unnecessary for the
 Court to go in detail. You have had enough
 of that for the past three days and moreover
 you have seen the land and know more
 about it than I do and whether there is,
 therefore, any justification in the claim that
 is now made that that sale of the Bushauer
 property indicates the market value of land
 of a similar nature and character of that
 sought to be taken depends upon the proof

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Notice and Grounds of Appeal.

of the similarity. As a matter of law, I have allowed that question to come to you, because on the shore end the Bushauer property may have some semblance or similarity to the land in question.”

10 to which an exception was prayed by the appellants on the ground that:

“There was no evidence submitted which said that the property was largely high land, or at least the evidence on that point was the subject of dispute, and that the language used by the Court in charging the jury in that regard stated as a fact something which at least was a matter of dispute for the jury.”

20 Exception allowed.

6. THE COURT ERRED IN CHARGING THE JURY AS FOLLOWS, NAMELY:

30 “Now I have ruled out of the case, and therefore you are not to consider what apparently was originally predicated by the owner as an anticipated source of damage to its property as a whole; for example, those water rights, and you will recall that Counsel in opening to you laid particular stress upon the anticipated injury that the golf club, as it were, or golf property, would experience in the event that the City of East Orange actually took the land in question, and sank its wells as contemplated by the permit, which was obtained from the State Board of Conservation and Development. It was there stated that the City intended to

40 utilize the land sought for the purpose of

Notice and Grounds of Appeal.

driving wells and taking out two millions of gallons of water per day. However, as the Court considered the matter, it discovered that not only it but the jury as well were precluded from considering that phase of the claim of the landowner entirely for this reason; the Braidburn Company is not without remedy independently of this proceeding, and therefore if it should appear in the future that the City of East Orange upon driving its wells and attaching its pumps and extracting water did in fact cause the well referred to on the golf property to run dry, the state of the law is such that the Braidburn Company has the right upon proving the fact to be that the well goes dry or runs dry because of the operation of the wells and use of the wells and the withdrawal of water therefrom by the City of East Orange, I say the Braidburn Company has a perfect remedy either to sue the City because of its unreasonable use of that water supply or for any injury or damage that the Braidburn Company may necessarily and reasonably experience or any expense it may be put to in providing a water supply other than that from the well now upon the premises, because the Court of Appeals in this State has laid down this rule: 'Percolating underground waters may not be withdrawn for distribution or sale if it therefrom result that the owner of adjacent or neighboring land is interfered with in his right to the reasonable use of sub-surface water, or if his wells, springs, or streams are thereby materially diminished in flow, or his land

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rendered so arid as to be less valuable for agriculture, pasturage or other legitimate uses, such as golf playing,' and that is a legitimate use, I might say."

10 to which an exception was prayed by the appellants on the ground that:

20 "Under the law we were obliged to seek our relief by way of damages in the present proceeding by proof before the jury to that effect. And that under the law we should not be forced to the expenditure of prosecuting these rights in a subsequent proceeding. And to clarify that situation, it is further our contention that the condemnation matter when completed is conclusive as to the rights of the property owner under the law as to the damage then existing or which will probably follow from the taking of the land."

Exception allowed.

7. THE COURT ERRED IN CHARGING THE JURY AS FOLLOWS, NAMELY:

30 "Now, there is rather an interesting situation developed here with which I confess I am not familiar. Examination, however, shows that the State Legislature has now lodged in a State Board, called the Department of Conservation and Development, the authority and control of any underground water area which may be productive of potable water; that is, water for public use for drinking purposes, and that Board, apparently, is given authority and power over all
40 land in the State, that is to say, where there

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is subterranean sources of a potable water supply, and it regulates the reasonable use that any City, for example, such as East Orange, may attempt to exercise, having acquired the right under a permit from the Department in question. So you are to observe that if it should appear as a fact in the future, in the event that the City undertakes to drive its wells and operate them on this land, that it is injuring the water supply or limiting the water supply, or indeed, taking it away entirely from this golf club property the owner thereof has a remedy either by an appeal to the State Department in question or to resort to the Courts to recover compensation for any damage it may suffer in that regard, and indeed, it may apply for an injunctive relief in the Court of Chancery of the State to restrain an unreasonable use by the City of such water supply. Therefore, the rule of reason has been adopted, apparently, by the Appellate Court, the highest Court in the State, and that becomes the rule of law for our guidance here. You are therefore instructed to disregard entirely the suggested damage or claim thereto on the part of the Braidburn Company with regard to the water supply, or the possible drying up of its well, as originally claimed.”

to which an exception was prayed by the appellants on the ground that:

“Under the law we were obliged to seek our relief by way of damages in the present proceeding by proof before the jury to that

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10 effect. And that under the law we should not be forced to the expenditure of prosecuting these rights in a subsequent proceeding. And to clarify that situation, it is further our contention that the condemnation matter when completed is conclusive as to the rights of the property owner under the law as to the damage then existing or which will probably follow from the taking of the land."

Exception allowed.

8. THE COURT ERRED IN CHARGING THE JURY AS FOLLOWS, NAMELY:

20 "Whether or not there is any damage to the remainder of the tract upon which there is now a golf course or courses of the Braidburn Country Club is not entirely withdrawn from your consideration, for this reason; if there is any evidence in the case showing damage to that remaining land you would, of course, have a right to consider it, but I may say rather candidly I am not aware of any such evidence, and then if you find that is so, then in accordance with the request that I have here from the representative of the City of East Orange, the damage assessable would be nominal. I am not so sure that you will have any difficulty in passing on that question of damages even though it be in the nominal phase, for the reason that the real question here is, what is the market value of the tract of land sought to be taken, or what was it on February 1st, 30 1929, when the petition was filed, having in mind the market value of this tract sought 40

Notice and Grounds of Appeal.

to be taken for any commercial value of its own in the immediate present or in reasonable anticipation in the near future. Now, you see that relates to market value and that is the question of damages which I have rather briefly referred to, and as I say it would seem to have very little consideration because the water question has been taken out entirely and you are directed to disregard it. After all, the real question here is what sum is to be awarded the owner of this land in compensation, just compensation, bearing in mind in view of its taking by the City of East Orange. Therefore, it would seem to me that the sole question, and I am inclined to think that the Counsel for the owner agrees with me, that the damage involved is not susceptible of any ascertainment in fact, but after all that question really relates to the ascertainment of the market value of the land and the sum to be awarded within the definition I have given you. I do not think I should say anything more to you. The question is not a difficult one and I have laid down the rules, and while you may or may not be able to digest them it seems to me quite necessary that I give them to you. Therefore I leave the case to you with the injunction that you ascertain the just compensation to be awarded the landowner here for the taking of the land that is sought by the City of East Orange."

to which an exception was prayed by the appellants on the ground that:

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Judgment Record.

(Secretary of Walter C. Ellis) and leaving with her a duplicate of same.

HAROLD W. GAMMON, JR.

Subscribed and Sworn to before me }
 this 21st day of February, 1930. }

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ISABEL E. COLLINS,
 Notary Public of New Jersey.

Judgment Record.

(Filed May 8, 1930.)

(Judgment record in the Morris County Circuit Court.)

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In the Matter
 of the
 Application of the City of East
 Orange for the appointment of
 three commissioners to fix the
 compensation to be paid for cer-
 tain lands of the Braidburn
 Realty Corporation, a New Jer-
 sey Corporation situate in the
 Borough of Florham Park, in
 the County of Morris, to be
 taken and condemned for pub-
 lic use.

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The City of East Orange presented to the Honorable Charles W. Parker, one of the Justices of the Supreme Court of the State of New Jersey the following petition:

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Petition.

*To the Honorable Charles W. Parker, Justice of
the Supreme Court of Judicature of the State
of New Jersey:*

10 The petition of The City of East Orange, in the
County of Essex and State of New Jersey, respect-
fully shows:

20 1. The petitioner is a municipal corporation
in the County of Essex and State of New Jersey,
incorporated under Chapter 250 of the Laws of
1908, and possesses all the rights, powers and privi-
leges conferred upon municipalities by the act en-
titled, "An Act Concerning Municipalities" Chapter
152 of the Laws of 1917, approved March 27, 1917,
and the supplements and amendments thereto, and
by other acts to take lands for public use. Your
petitioner has determined to acquire lands in the
borough and county aforesaid, which lands are
fully described in schedule included herein, but
cannot acquire such lands by agreement with the
owner, owing to the owner's refusal to sell at any
price.

30 2. By virtue of the provisions of Article XXXII,
Section 1, Subdivision D, of the said last men-
tioned act (Chapter 152 of the Laws of 1917):

40 "Any municipality may purchase, con-
demn or otherwise acquire the necessary
lands, and rights or interest in lands, and
water rights and rights of flowage or diver-
sion, within or without such municipality,
for the purpose of a water supply, or an
additional water supply, and for the connec-
tion thereof with such municipality, and in
case of highway or other public or quasi-

Petition.

public structures, may require the same to be abandoned as far as necessary for such purposes, and to be relaid, if necessary, by some other route or in some other location. Damages for the taking of such property, as well as the value of such property taken, shall be ascertained and paid for according to law * * *.” 10

3. By virtue of Chapter 304 P. L. 1910, Section 5, same being an act entitled,

“A Supplement to an Act entitled ‘An Act to establish a State Water-Supply Commission, and to define its powers and duties, and the conditions under which the waters of this State may be diverted’ approved June, Seventeenth, One Thousand Nine Hundred and Seven.” 20

“Whenever application is made to the State Water-Supply Commission, in conformity with this act or the act to which this act is a supplement, by any municipal corporation, or whenever any municipal corporation now legally engaged in diverting and supplying water, either surface, sub-surface, well or percolating, to the inhabitants of any municipal corporation, shall request the commission by petition in writing for permission to exercise the right of eminent domain for the acquisition of the necessary lands and water rights, either in case of surface, sub-surface, well or percolating waters, for the purpose of diverting the same for the supply of the inhabitants of any municipal corporation, the commission may, in its discretion, grant such per- 30 40

Petition.

10 mission, first being satisfied that it is for the public interests so to do, and after such permission is granted, the necessary lands, water rights and interests in lands and water rights affected may be condemned by the applicant in the manner now provided by law.”

4. In accordance with the provisions of its charter (Chapter 250, P. L. 1908), your petitioner has established a Board of Water Commissioners, which said Board of Water Commissioners is by Section 37, Subdivision 38, of said act, empowered as follows:

20 “Said Board of Water Commissioners, when established and appointed, shall have the custody, control and management of the water works and water supply of the city; and the said Board shall have power and authority to maintain, repair, equip and extend the water works and water supply system of the city and each and every part thereof * * *.”

30 5. In compliance with the provisions of the foregoing acts and amendments thereto, your petitioner, by its Board of Water Commissioners, did on May 26, 1928, file with the Board of Conservation and Development of the State of New Jersey, an application to exercise the right of eminent domain for the acquisition of lands referred to in schedule included herein, and for approval of plans for diverting an additional water supply from said lands, and after hearings held thereon, and by action taken by said Board of Conservation and Development on August 8, September 5, 40 September 12, and September 26, 1928, said applica-

Petition.

tion was approved and permission granted your petitioner to exercise the right of eminent domain for the acquisition of said lands (a copy of which approval and permission is annexed) and was duly accepted by your petitioner.

6. At a regular meeting of the Board of Water Commissioners of The City of East Orange, held on January 10, 1929, the following resolution was unanimously adopted:

“WHEREAS, the Board of Water Commissioners has given study and consideration to the question of acquiring additional lands and water rights to increase the water supply of The City of East Orange, and in the judgment of this Board the necessity exists for the immediate acquisition of additional water, and

WHEREAS, The City of East Orange, by its Board of Water Commissioners have petitioned to the Board of Conservation and Development for permission to condemn lands described in Schedule “A” annexed hereto, and the said Board of Conservation and Development has granted to The City of East Orange the right to acquire said lands and to extract water therefrom, and

WHEREAS, the Board of Water Commissioners have negotiated with the Braidburn Realty Corporation, owners of said lands, and the said Braidburn Realty Corporation has refused to sell said lands or otherwise grant to The City of East Orange the right to take water from said lands, and

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Petition.

WHEREAS, this Board has sufficient money in its construction account to pay for the value of said lands,

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BE IT RESOLVED that the Board of Water Commissioners of The City of East Orange does hereby determine to acquire by condemnation the lands located in the Borough of Florham Park, Morris County, New Jersey, and more particularly described in Schedule "A" annexed hereto, and set forth on map entitled; 'Lands of the Braidburn Realty Corp. to be acquired under authority of the action taken by the Board of Conservation and Development on Aug. 8, 1928,' and

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BE IT FURTHER RESOLVED that the City Counsel be and he hereby is instructed to institute and continue any proceedings necessary, and to represent the Board of Water Commissioners in any proceedings for the acquisition of said lands, and

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BE IT FURTHER RESOLVED that the officers of this Board be and they hereby are authorized and requested to sign for this Board any papers necessary in the proceedings for the acquisition of said lands, and

BE IT FURTHER RESOLVED that a copy of this resolution be forwarded to the Mayor and the City Council of East Orange and that they be requested to concur in the resolution.

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Petition.

SCHEDULE A.

IN THE MATTER OF THE ACQUIRING LANDS IN THE
BOROUGH OF FLORHAM PARK, MORRIS COUNTY,
NEW JERSEY, FOR THE CITY OF EAST ORANGE.

The names, interest and residence or address of the owner, occupant and other persons interested in the lands to be acquired for the purpose set forth in the annexed resolution are as follows:

NAME	INTEREST	RESIDENCE OR ADDRESS
Braidburn Realty Corporation	Owner	Florham Park, N. J.
Braidburn Country Club	Occupant	Florham Park, N. J.
Prudential Insurance Co. of America	Mortgagee	Newark, N. J.
Steneck Trust Company	Mortgagee	Hoboken, N. J.
Public Service Electric & Gas Company	Lessee	Newark, N. J.

DESCRIPTION OF LANDS TO BE ACQUIRED:

BEGINNING at a point in the center of the Passaic River where the same is intersected by the dividing line of lands of Braidburn Realty Corporation and lands now or formerly of one Twombly; thence (1) along said dividing line North 54 degrees 55 minutes West 622.23 feet; thence (2) South 36 degrees 45 minutes West 433.50 feet to an iron for a corner; thence (3) parallel with Brooklake Road and distant 225 feet East-erly at right angles from the center line thereof South 19 degrees 30 minutes West 552.70 feet to the Northerly side line of a right-of-way 25 feet in width; thence (4) along the Northerly side line of said right-

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Petition.

of-way North 67 degrees 44 minutes West
 225.26 feet to the center line of Brooklake
 Road; thence (5) along the center line of
 Brooklake Road; South 19 degrees 30 min-
 10 utes West 25.03 feet; thence (6) along the
 Southerly side of said right-of-way South 67
 degrees 44 minutes East 225.26 feet to an iron
 for a corner; thence the following eleven
 courses parallel with Brooklake Road and
 distant 225 feet Easterly at right angles from
 the center line thereof (7) South 25 degrees
 02 minutes West 118.46 feet; (8) South 28
 20 degrees 53 minutes West 141.65 feet; (9)
 South 34 degrees 41 minutes West 198.01
 feet; (10) South 37 degrees 52 minutes West
 222.34 feet; (11) South 40 degrees 34 minutes
 West 207.49 feet; (12) South 45 degrees 26
 minutes West 174.65 feet; (13) South 48 de-
 grees 58 minutes West 120.11 feet; (14) South
 55 degrees 40 minutes West 167.65 feet; (15)
 South 61 degrees 27 minutes West 184.99
 feet; (16) South 63 degrees 54 minutes West
 265.26 feet; (17) South 69 degrees 00 minutes
 West 39.81 feet to the center of a brook;
 30 thence (18) down the center of said brook
 South 82 degrees 57 minutes East 114.84 feet;
 thence (19) still down the center of said
 brook South 65 degrees 43 minutes East
 259.05 feet to a point in the center of Pas-
 saic River; thence the following eight courses
 down the center of said River (20) South 78
 degrees 51 minutes East 411.46 feet; (21)
 South 65 degrees 22 minutes East 181.60
 feet; (22) North 64 degrees 19 minutes East
 40 98.11 feet; (23) North 43 degrees 44 minutes
 East 310.90 feet; (24) North 67 degrees 53

Petition.

minutes 139.80 feet; (25) North 84 degrees 13 minutes East 159.40 feet; (26) South 67 degrees 30 minutes East 314.50 feet; thence (27) down the center of said River, North 82 degrees 26 minutes East 44.88 feet to lands of Convent of Saint Elizabeth; thence (28) 10 along lands of said Convent North 37 degrees 17 minutes West 1037.98 feet; thence (29) still along lands of said Convent North 33 degrees 29 minutes East 394.06 feet to an iron in the center of a ditch; thence (30) still along lands of said Convent South 30 degrees 55 minutes East 995.47 feet to a point in the center of Passaic River (note this line passes through a group of large maple trees standing on the bank of said River); thence the following ten courses 20 down the center of said River; (31) North 31 degrees 28 minutes East 22.64 feet; (32) North 29 degrees 12 minutes East 559 feet; (33) North 22 degrees 30 minutes East 107.75 feet; (34) North 6 degrees 16 minutes West 127.06 feet; (35) North 59 degrees 21 minutes West 239.45 feet; (36) North 66 degrees 42 minutes West 257.35 feet; (37) North 2 degrees 16 minutes West 61.48 feet; (38) 30 North 16 degrees 10 minutes East 153.00 feet; (39) North 55 degrees 04 minutes East 240.08 feet; thence (40) down the center of said River, North 42 degrees 04 minutes East 305.75 feet to the point or place of BEGINNING. Containing 42.977 acres.

EXCEPTING, however, and reserving to the owner, its agents, representatives, successors, or assigns, an easement and right of access 40 in and to a strip of land eight feet in width,

Petition.

10 extending 4 feet on each side of the center line of the existing drain from the owner's present sewerage tank, now located in premises adjoining on the west, and any laterals thereto, for the purpose of using, maintaining and repairing or otherwise caring for said drain and laterals thereto, said strip of land to run from the most northwesterly boundary of the above described premises southeastwardly to the bank of the Passaic River."

Said resolution was signed by all the Water Commissioners, attested by its Secretary and was approved by the Mayor on January 11, 1929.

20 7. That at a regular meeting of the City Council of The City of East Orange, the same being the duly constituted governing body of said City, the following resolution was duly and regularly passed and adopted:

30 "WHEREAS, the Board of Water Commissioners has by resolution, a copy of which is annexed hereto, determined that the water supply of the City must be increased and that additional lands situated in the Borough of Florham Park, Morris County, New Jersey, shall be condemned, and

WHEREAS, the City Council of The City of East Orange deems it necessary that said lands be acquired in the manner provided for in said resolution,

40 BE IT RESOLVED that the Mayor and City Council of the City of East Orange do hereby concur in the resolution of the Board of

Petition.

Water Commissioners hereto annexed and does hereby determine that the lands described in said resolution, and described in Schedule A annexed hereto, be acquired by condemnation, and

BE IT FURTHER RESOLVED that the City Counsel be and he hereby is requested to institute any condemnation proceedings necessary to acquire said lands and that the Mayor and City Clerk be and they hereby are authorized and requested to sign for the City the application for condemnation and any papers necessary for the acquisition to said lands and to affix the corporate seal thereto.

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SCHEDULE A.

WHEREAS, the Board of Water Commissioners has given study and consideration to the question of acquiring additional lands and water rights to increase the water supply of The City of East Orange, and in the judgment of this Board the necessity exists for the immediate acquisition of additional water, and

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WHEREAS, The City of East Orange, by its Board of Water Commissioners have petitioned to the Board of Conservation and Development for permission to condemn lands described in Schedule "B" annexed hereto, and the said Board of Conservation and Development has granted to The City of East Orange the right to acquire said lands and to extract water therefrom, and

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Petition.

10 WHEREAS, the Board of Water Commissioners have negotiated with the Braidburn Realty Corporation, owners of said lands, and the said Braidburn Realty Corporation has refused to sell said lands or otherwise grant to The City of East Orange the right to take water from said lands, and

 WHEREAS, this Board has sufficient money in its construction account to pay for the value of said lands,

20 BE IT RESOLVED that the Board of Water Commissioners of The City of East Orange does hereby determine to acquire by condemnation the lands located in the Borough of Florham Park, Morris County, New Jersey, and more particularly described in Schedule "B" annexed hereto, and set forth on map entitled: 'Lands of the Braidburn Realty Corp. to be acquired under authority of the action taken by the Board of Conservation and Development on Aug. 8, 1928', and

30 BE IT FURTHER RESOLVED that the City Counsel be and he hereby is instructed to institute and continue any proceedings necessary, and to represent the Board of Water Commissioners in any proceedings for the acquisition of said lands, and

40 BE IT FURTHER RESOLVED that the officers of this Board be and they hereby are authorized and requested to sign for this Board any papers necessary in the proceedings for the acquisition of said lands, and

Petition.

BE IT FURTHER RESOLVED that a copy of this resolution be forwarded to the Mayor and City Council of East Orange and that they be requested to concur in the resolution.

January 10, 1929

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BOARD OF WATER COMMISSIONERS OF THE
CITY OF EAST ORANGE, N. J.

By—Frank H. Taylor
President
William H. Ragsdale
J. Edward Ashmead

Attest:

Roswell M. Roper
Secretary

20

Approved: 1/11/29

Vetoed: _____

Charles H. Martens
MAYOR OF THE CITY OF EAST ORANGE

SCHEDULE B.

IN THE MATTER OF THE ACQUIRING LANDS IN
THE BOROUGH OF FLORHAM PARK, MORRIS
COUNTY, NEW JERSEY, FOR THE CITY OF
EAST ORANGE.

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The names, interest and residence or address of the owner, occupant and other persons interested in the lands to be acquired for the purpose set forth in the annexed resolution are as follows:

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Petition.

	NAME	INTEREST	RESIDENCE OR ADDRESS
	Braidburn Realty Corporation	Owner	Florham Park, N. J.
	Braidburn Country Club	Occupant	Florham Park, N. J.
10	Prudential Insurance Co. of America	Mortgagee	Newark, N. J.
	Steneck Trust Company	Mortgagee	Hoboken, N. J.
	Public Service Electric & Gas Company	Lessee	Newark, N. J.

DESCRIPTION OF LANDS TO BE ACQUIRED:

20 BEGINNING at a point in the center of the Passaic River where the same is intersected by the dividing line of lands of Braidburn Realty Corporation and lands now or formerly of one Twombly; thence (1) along said dividing line North 54 degrees 55 minutes West 622.23 feet; thence (2) South 36 degrees 45 minutes West 433.50 feet to an iron for a corner; thence (3) parallel with Brooklake Road and distant 225 feet Easterly at right angles from the center line thereof South 19 degrees 30 minutes West 552.70 feet to the Northerly side line of a right-of-way 25 feet in width; thence (4) 30 along the Northerly side line of said right-of-way North 67 degrees 44 minutes West 225.26 feet to the center line of Brooklake Road; thence (5) along the center line of Brooklake Road South 19 degrees 30 minutes West 25.03 feet; thence (6) along the Southerly side of said right-of-way South 67 degrees 44 minutes East 225.26 feet to an iron for a corner; thence the following 40 eleven courses parallel with Brooklake Road and distant 225 feet Easterly at right angles from the center line thereof (7) South 25

Petition.

degrees 02 minutes West 118.46 feet (8)
 South 28 degrees 53 minutes West 141.65
 feet (9) South 34 degrees 41 minutes West
 198.01 feet (10) South 37 degrees 52 minutes
 West 222.34 feet (11) South 40 degrees 34
 minutes West 207.49 feet (12) South 45
 degrees 26 minutes West 174.65 feet (13) 10
 South 48 degrees 58 minutes West 120.11
 feet (14) South 55 degrees 40 minutes West
 167.65 feet (15) South 61 degrees 27 minutes
 West 184.99 feet (16) South 63 degrees 54
 minutes West 265.26 feet (17) South 69
 degrees 00 minutes West 39.81 feet to the
 center of a brook; thence (18) down the
 center of said brook South 82 degrees 57
 minutes East 114.84 feet; thence (19) still 20
 down the center of said brook South 65
 degrees 43 minutes East 259.05 feet to a
 point in the center of Passaic River; thence
 the following eight courses down the center
 of said River (20) South 78 degrees 51 min-
 utes East 411.46 feet (21) South 65 degrees
 22 minutes East 181.60 feet (22) North 64
 degrees 19 minutes East 98.11 feet (23)
 North 43 degrees 44 minutes East 310.90 feet
 (24) North 67 degrees 53 minutes East 139.80 30
 feet (25) North 84 degrees 13 minutes East
 159.40 feet (26) South 67 degrees 30 minutes
 East 314.50 feet; thence (27) down the
 center of said River, North 82 degrees 26
 minutes East 44.88 feet to lands of Convent
 of Saint Elizabeth; thence (28) along lands
 of said Convent North 37 degrees 17 min-
 utes West 1037.98 feet; thence (29) still
 along lands of said Convent, North 33
 degrees 29 minutes East 394.06 feet to an 40

Petition.

iron in the center of a ditch; thence (30) still along lands of said convent, South 30 degrees 55 minutes East 995.47 feet to a point in the center of Passaic River (note this line passes through a group of large maple trees standing on the bank of said River); thence the following ten courses down the center of said River (31) North 31 degrees 28 minutes East 22.64 feet (32) North 29 degrees 12 minutes East 559 feet (33) North 22 degrees 30 minutes East 107.75 feet (34) North 6 degrees 16 minutes West 127.06 feet (35) North 59 degrees 21 minutes West 239.45 feet (36) North 66 degrees 42 minutes West 257.35 feet (37) North 2 degrees 16 minutes West 61.48 feet (38) North 16 degrees 10 minutes East 153.00 feet (39) North 55 degrees 04 minutes East 240.08 feet; thence (40) down the center of said River, North 42 degrees 04 minutes East 305.75 feet to the point or place of BEGINNING. Containing 42.977 acres.

EXCEPTING, however, and reserving to the owner, its agents, representatives, successors or assigns, an easement and right of access in and to a strip of land eight feet in width, extending 4 feet on each side of the center line of the existing drain from the owner's present sewerage tank, now located in premises adjoining on the west, and any laterals thereto, for the purpose of using, maintaining and repairing or otherwise caring for said drain and laterals thereto, said strip of land to run from the most northwesterly boundary of the above

Petition.

described premises southeastwardly to the bank of the Passaic River.”

8. Your petitioner further shows that during a period of six months last past, your petitioner, by its Board of Water Commissioners and City Counsel has negotiated in conference and by correspondence for the purchase of the lands herein referred to, and has made a tender to the Braidburn Realty Corporation, the owner of said lands, of the value of the same, but the said Braidburn Realty Corporation has refused to sell lands to the petitioner for any price whatsoever, and has refused to convey or to dedicate the lands described herein, or any rights therein, for the purpose applied for, but has wholly declined to make or offer any terms for the sale of said land.

9. And your petitioner further shows that the said Braidburn Realty Corporation, a New Jersey corporation, are, as the records of the County of Morris show, the true and lawful owner of the lands in question, and that there are no other persons whatsoever interested in said lands except the following:

Prudential Insurance Company of America, which holds a mortgage in the sum of \$80,000.00 which mortgage is a lien on the lands herein described and other lands of the Braidburn Realty Corporation aforesaid; Steneck Trust Company, a New Jersey corporation, which holds a mortgage of \$200,000.00 on the lands herein described and other lands of the Braidburn Realty Corporation; Public Service Electric & Gas Company, which by deed of the Braidburn Realty Corporation was given an easement in certain lands of the Braid-

Petition.

burn Realty Corporation and which may affect lands in question; Braidburn Country Club, a New Jersey corporation, which is the occupant of other lands of the Braidburn Realty Corporation, and which may have some interest in the lands in question.

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10. And your petitioner further shows that the principal office of said owner of said lands as far as can be ascertained, and the principal offices of other corporations or companies having an interest in said lands, in so far as same are known, are shown in schedule included herein.

11. Pursuant to the above mentioned laws and resolutions, your petitioner, by its Board of Water Commissioners, and by its Mayor and City Council, has determined that it is necessary to acquire and take the lands and property of the Braidburn Realty Corporation, described in schedule included herein, for the purpose of obtaining an additional water supply and for other needs for the city by condemnation, according to the statutes thus made and provided.

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12. Your petitioner therefore prays that your Honor will appoint under your hand three freeholders, residents of the said County of Morris or elsewhere, as your Honor shall determine, commissioners to examine and appraise the said lands, and to assess the damages on proper notice to be given to the persons interested in the property, in such manner as your Honor may direct, pursuant to the provisions of an act entitled, "An Act to Regulate the ascertainment and payment of compensation for property condemned or taken for public use" (Revision of 1900) and the supplements and amendments thereto; and to that end

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Petition.

that your Honor shall assign by order a time and place for the hearing of this petition before your Honor, or before another Justice of the Supreme Court, and directing proper notice thereof to be given to said owners and persons interested.

And your petitioner will ever pray, etc. 10

THE CITY OF EAST ORANGE
By Board of Water Commissioners
Frank H. Taylor
President.

Attest:

ROSWELL M. ROPER
Secretary

THE CITY OF EAST ORANGE 20
By Charles H. Martins
Mayor

[THE CITY OF EAST ORANGE,
1909
CORPORATE SEAL]

Attest:

LINCOLN E. ROWLEY
City Clerk

Dated January 22, 1929. 30

WALTER C. ELLIS,
City Counsel,
Attorney for Petitioner,
810 Broad Street,
Newark, N. J.

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

ROSWELL M. ROPER, being duly sworn upon his 40
oath according to law, deposes and says, that he is

Petition.

10 the Chief Engineer of the Water Department of
The City of East Orange; that the statements made
in the foregoing petition are true, according to the
best of his knowledge, information and belief; and
further says that he is the Secretary of the Board
of Water Commissioners of The City of East
Orange, and that the adoption of the resolutions
and proceedings of the Board of Water Commis-
sioners, as set forth in said petition, are true.

ROSWELL M. ROPER.

Sworn and subscribed to before me }
this 23rd day of January, 1929. }

20 WALTER C. ELLIS,
Master in Chancery
of New Jersey.

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

30 LINCOLN E. ROWLEY, being duly sworn upon his
oath according to law, deposes and says, that he
is the City Clerk of The City of East Orange; that
the facts stated in the foregoing petition, so far as
they relate to the resolution adopted by the City
Council of The City of East Orange are true, and
that all matters and things stated therein are true
to the best of his knowledge and belief.

LINCOLN E. ROWLEY.

Sworn and subscribed to before me }
this 29th day of January, 1929. }

40 WALTER C. ELLIS,
Master in Chancery
of New Jersey.

Petition.

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

FRANK H. TAYLOR, being duly sworn upon his oath according to law, deposes and says:

1. I am the President of the Board of Water Commissioners of the City of East Orange, and have represented said Board in negotiations to acquire lands of the Braidburn Realty Corporation in Florham Park, Morris County, New Jersey, set forth in the petition annexed hereto. 10

2. I have represented the petitioner in correspondence and in conferences with representatives of the said Braidburn Realty Corporation, and have tendered them the market value of the lands in question, but that said Braidburn Realty Corporation, by its authorized representatives, has refused to accept the sum offered, or any other sums, but has wholly declined to sell said lands to the petitioner and said offers were refused. 20

FRANK H. TAYLOR.

Sworn and subscribed to before me }
 this 21st day of January, 1929. } 30

HARRY A. TAYLOR,
 Notary Public,

My Commission Expires Jan 11—1934.

[HARRY A. TAYLOR
 NOTARY
 PUBLIC
 STATE OF NEW
 JERSEY]

Petition.

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

WALTER C. ELLIS, being duly sworn upon his oath according to law, deposes and says:

10 1. I am the City Counsel of The City of East Orange, and have been in charge of proceedings of the petitioner to acquire lands of the Braidburn Realty Corporation for public use, said lands being located in Florham Park, as set forth in petition annexed.

20 2. By correspondence and in conversation with representatives of the Braidburn Realty Corporation, I have negotiated for the purchase by the City of the lands in question, and in addition have endeavored to purchase the water rights therein, but said offers have been refused.

3. On information and belief I am satisfied that the Braidburn Realty Corporation is not interested in selling the lands in question to petitioner for any price whatsoever.

WALTER C. ELLIS.

30 Sworn and subscribed to before me }
 this 24th day of January, 1929. }

EDWARD DILLON,
 Master in Chancery of N. J.

Petition.

EXHIBIT F.

STATE OF NEW JERSEY
DEPARTMENT OF CONSERVATION &
DEVELOPMENTAPPROVAL OF APPLICATION OF
CITY OF EAST ORANGE

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for an additional water supply from wells
in Florham Park Borough, Morris County,
New Jersey.

Approved August 8, 1928.

In compliance with the provisions of Chapter
252, P. L. 1907 and Chapter 304, P. L. 1910, the
Board of Water Commissioners of The City of East
Orange, Essex County, filed with the Board of
Conservation and Development on May 26, 1928,
an application for approval of plans for divert-
ing a maximum of four million (4,000,000) gallons
daily for the purpose of obtaining an additional
source of water supply from wells in glacial de-
posits, the point of the proposed diversion being
located on lands in the Borough of Florham Park,
Morris County, said lands being about 40 acres in
extent, owned by the Braidburn Realty Corpora-
tion and located about 600 feet north of the Dick-
inson Well No. 1 belonging to The City of East
Orange, and directly across the Passaic River from
the said well, as shown on map accompanying said
application, for the purpose of supplying water to
The City of East Orange; also a petition request-
ing permission for The City of East Orange to ex-
ercise the right of eminent domain for the acqui-
sition of said lands and water rights.

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Petition.

The following supplementary papers were filed with the application and made a part thereof;—

1. General data regarding water supply system.
- 10 2. Map showing the information required by the Board of Conservation and Development.
3. Map showing lands in Florham Park, Morris County (area 42.977 acres), owned by the Braidburn Realty Corporation, which it is proposed to condemn.

20 The Board of Conservation and Development directed that a public hearing on said application be held at its office in the City of Trenton on June 13, 1928. Notice of this hearing was advertised in accordance with the orders of the Board, and proofs of this advertising were filed with the Board of Conservation and Development.

In accordance with the notice as above set forth, the Board of Conservation and Development held a public hearing on said application in Trenton on June 13, 1928, and also on July 10, 26, and August 2, 1928, at which all municipalities, corporations and persons affected by the proposed plans who desired to be heard were heard.

30 The Board of Conservation and Development having heard the testimony and argument presented at the hearings does hereby decide that the plans proposed by The City of East Orange, through its Board of Water Commissioners, for the diversion of an additional water supply from wells in glacial drift, as set forth in the application and the testimony presented at said hearing, are justified by public necessity or reasonably anticipated public use to the amount of two million
40 (2,000,000) gallons daily, and that they will not interfere unduly with the opportunity of other

Petition.

municipalities to obtain a water supply by the taking of water necessary for their use and that they will not unduly injure public or private interests.

The Board of Conservation and Development does, therefore, approve the application of the Board of Water Commissioners of The City of East Orange and hereby consents to the diversion of water from wells in glacial drift as proposed therein, and does, also, approve the application of The City of East Orange for permission to exercise the right of eminent domain for the acquisition of said lands and water rights, subject, however, to the following limitations, terms and conditions:

1. The applicant shall pay to the State such annual charge for the diversion of water as is now made or may hereafter be authorized by law. Said applicant shall keep accurate records by meter or other approved method of the amount of water diverted and shall report the same quarter-yearly to this Board, as required by law.

2. The amount of water which shall be diverted under this approval shall not exceed an average of two million (2,000,000) gallons per diem during any month.

3. The territory to be supplied under this approval shall be The City of East Orange, Essex County.

4. The applicant shall in good faith begin the construction of the works necessary to utilize the proposed source of supply within one year from date of this approval and shall complete the construction of said works within three years from said date.

Petition.

5. If the applicant shall at any time abandon this source of supply, all rights and privileges conveyed by this approval shall revert to the State, it being distinctly understood and agreed that the permission herein contained to divert water is
10 given to the applicant alone and shall not be assigned or set over to any corporation or person without the consent of this Board.

6. The approval of the application herein and all rights covered thereby or arising by reason thereof are granted and accepted upon the express condition that the applicant herein, its successors or assigns, shall surrender or sell any or all of its rights under this permit and any or all lands,
20 rights of way, reservoirs, pipe lines and other property, real or personal, corporeal or incorporeal, acquired in good faith, for or in connection with the exercise of the rights or any of them herein granted, to the State of New Jersey or to any board, body or commission thereof having authority to acquire or consolidate existing public water supplies, or to exercise any like power,
30 whenever said board, body or commission may so elect, at the fair cost of such property less a fair allowance for depreciation. In determining such cost interest on the investment shall be included for the period of construction, but not after the date when said applicant, its successors or assigns, shall begin the sale of water or the distribution thereof.

7. This approval shall not be construed to empower or permit the applicant to use any of the waters mentioned in the application for which it
40 shall not have first obtained the permission of the State Board of Health.

Petition.

8. This approval shall not become operative unless and until the applicant shall file with the Board within ninety days from date hereof its written acceptance of the terms and conditions hereby imposed.

9. In the event that any of the conditions hereby imposed are violated and such violation shall be established to the satisfaction of this Board, this approval may thereby be abrogated upon the passage by this Board of a resolution to that effect.

IN TESTIMONY WHEREOF, we, a majority of the members of the Board of Conservation and Development, do hereunto set our hands and cause the official seal of the Board to be affixed hereto and attested by its Secretary this eighth day of August, one thousand nine hundred twenty-eight.

Dated: Trenton, New Jersey.

H. F. McCONNELL
President

H. L. MOELLER

A. W. DRAKE

W. E. FLORENCE

JOHN L. KUSER

OWEN WINSTON

WALTER E. ROBB

Members of the Board of Conservation
and Development

Attest:

H. B. Kummel
Secretary.

This is to certify that the foregoing is a compared and true copy of the approval

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Order re Appointment of Commissioners.

(SEAL) of the Board of Conservation and Development of the plans of The City of East Orange for obtaining an additional water supply.

HENRY B. KUMMEL
Secretary

10

September 12, 1928.

Which petition was filed on the First day of February, Nineteen hundred and Twenty-nine.

Upon said petition the said Justice made and filed the following order:

20

Order Fixing Time and Place for Appointment of Commissioners.

Upon reading and filing the petition herein, and on motion of Walter C. Ellis, Attorney of Petitioner;

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It is on this 29th day of January, Nineteen Hundred and Twenty-nine, ORDERED, that Saturday, the ninth day of February, Nineteen Hundred and Twenty-nine, at ten o'clock A. M., at the Morris County Court House, Morristown, New Jersey, is hereby assigned and fixed as the time and place for the hearing of said petition and the appointment of commissioners in said proceedings;

40

And it is further ORDERED that notice of this order be served not less than six days before said appointed time, upon the owner, occupant, and other persons interested in the land described in said petition, by service upon the said parties personally, or by leaving the same at the residence of any individual party, and by mailing, or deliver-

Order Amending Petition.

ing, a copy of such notice upon the attorney of any such party if represented by an attorney, or by leaving a copy of such notice at the office of any corporation interested in said lands, and where such residence or corporation office is unknown, or for any reason service of said notice cannot be made as above directed, notice shall be given by publication of the same in a newspaper, published and circulating in Morris County, New Jersey, not less than one week before said appointed time and by mailing a copy of the same to the last known post office address of said parties. 10

And it is further ORDERED that said petition and this order be filed in the office of the Clerk of Morris County.

CHARLES W. PARKER, 20
Justice of the Supreme Court.

On motion of Walter C. Ellis.
Attorney for Petitioner.

Which order was filed on the First day of February, Nineteen hundred and Twenty-nine.

On December 3, 1929, the following Order Amending Petition was entered and filed in the Morris County Clerk's Office: 30

Order Amending Petition.

This matter being opened to the Court by Walter C. Ellis, Attorney for the Petitioner, upon application for leave to amend the Petition heretofore filed in the above entitled matter, and good cause being shown why said Petition should be amended; and upon reading the consent of the Attorney for the Owner, 40

Order Amending Petition.

It is, on this third day of December, 1929,
ORDERED, that the exception to the description and
the reservation of rights to the owner at the con-
clusion of the description of lands in the Petition,
wherever such description may occur, be and the
10 same is hereby amended to read as follows:

“EXCEPTING, however, and reserving to the
owner, its agents, representatives, succes-
sors or assigns, a right of way and user in
and to a strip of land four hundred feet
in width, extending two hundred feet on
each side of the center line of the existing
drain from the owner’s present sewerage
tank, now located in premises adjoining on
the West for the purpose of using, maintain-
20 ing, operating and repairing or otherwise
caring for a sewerage drainage system in
and upon said strip, said strip of land to run
from the most Northwesterly boundary of
the above described premises Southeast-
wardly to the bank of the Passaic River.

“The owners of the land adjacent to the prem-
ises described in the Petition shall have the right
to maintain and operate in connection with the
30 right of way and user herein described the present
sewerage tank or system, or any system or tank
that may be at any time substituted therefor, on
the lands immediately adjacent to the premises
described in these proceedings and the said right
to maintain and operate said sewerage plant on
the lands described in the Petition and those adja-
cent thereto is hereby expressly consented to by
the Petitioner herein; and in case the owners of
40 the adjacent land operating said sewerage system
are compelled by law or the order of any State

Order Amending Petition.

or municipal Board to remodel, alter or abandon or re-locate the sewerage system herein referred to because of its location adjacent to and the use of the lands herein described as a part of such system, because it affects any water supply taken from said lands, the Petitioner will pay to the owners of such sewerage system the cost and expense necessary to obey the order of any State or municipal Board or the decree of any court; provided, however, that the petitioner shall be given immediate notice by the owner of any direction or order of any kind or of any proceedings which may be started against the owner in connection with the present location and operation of its sewerage system, and the Petitioner shall have the right to join in with the owner in the reasonable defense of its system." 10
20

All proceedings, orders and notices subsequent to the filing of the Petition are hereby amended so as to agree with this Order.

RULIF V. LAWRENCE
Judge

We consent to the making of the above Order:

WALTER C. ELLIS 30
Attorney for Petitioner

SEUFERT & ELMORE
Attorneys for Owner

On the return day of the Order fixing the time and place for the appointment of commissioners the said Justice made the following Order Appointing Commissioners: 40

Order for Appointment of Commissioners.

10 The City of East Orange having made applica-
tion to me by petition in writing, to which refer-
ence is hereby made, to appoint three disinterested
freeholders, residents of the County of Morris, to
examine and appraise the land and property of
the Braidburn Realty Corporation, a New Jersey
corporation, and others having interest in said
lands, mentioned in said petition, and to assess the
damages, on at least six days notice to be given
to the parties interested in said property, in such
manner as I may direct, and in such order of ap-
pointment to fix the date on or before which such
commissioners must file their report; and I having
20 ordered that Saturday, the 9th day of February,
1929, at ten o'clock in the forenoon shall be the
time, and the court room in the Court House in
the Town of Morristown the place for the hearing
of said petition before me, and that notice of such
hearing be served not later than six days before
said appointed time upon the owner, occupant and
other persons interested in the land described in
said petition, by service upon the said parties per-
sonally or by leaving the same at the residence of
any individual party, and by mailing or delivering
30 a copy of such notice upon the attorney of any such
party, if represented by an attorney, or by leaving
a copy of such notice at the office of any corpora-
tion interested in said lands; and the hearing now
having been had on the day and at the hour and
place named in said order; and evidence satisfac-
tory to me having been presented by affidavits that
notice has been served as required by said order,
and I having heard what was to be said in the
matter by the attorneys for the parties interested;

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Order for Appointment of Commissioners.

It is on this 9th day of February, 1929, ORDERED that the following be appointed, and I do hereby appoint Joshua R. Salmon of the Borough of Mountain Lakes, Vincent D. Roache of the Town of Morristown, and William G. Hurtzig of the Town of Morristown, three disinterested freeholders, residents of the County of Morris, commissioners to examine and appraise the lands and property described in said petition, and to assess the damages to be sustained in taking and condemning the said lands and property for the public use of The City of East Orange, and for the purposes set forth in said petition, and to proceed therein in all respects as is directed by the act entitled "An act to regulate the ascertainment and payment of compensation for property condemned or taken for public use (Revision of 1900)" and acts supplementary thereto and amendatory thereof.

And it is further ORDERED that said commissioners give six days' notice to each of the persons or corporations interested in the lands or property described in the said petition of the time and place, when and where, they will meet and proceed to execute their duties under this appointment.

And it is further ORDERED that said commissioners shall file their report on or before the thirty-first day of March, 1929.

CHARLES W. PARKER,
Justice of the Supreme Court.

On motion of
WALTER C. ELLIS,
Attorney for Petitioner.

Which Order Appointing Commissioners was filed on February 9, 1929.

Order for Appointment of Commissioners.

Upon the application of all parties in the above entitled matter:

10 It is ordered on the Second day of April, 1929 that the time to file the Commissioners Report herein be and the same hereby is extended to June 1st, 1929.

CHARLES W. PARKER
Justice Supt. Ct.

Which Order was filed on June 1, 1929.

Upon the application of all parties in the above entitled matter:

20 It is on this first day of June 1929 ORDERED that the time for the filing of the Commissioners Report herein be and is hereby extended to July 15, 1929.

CHARLES W. PARKER
J. S. C.

Which Order was filed on June 13, 1929.

30 We, Joshua R. Salmon; Vincent D. Roache and William G. Hurtzig, commissioners appointed in the above entitled proceedings on the application of The City of East Orange, to examine and appraise the lands or property described in the petition herein as amended, said to be owned by the Braidburn Realty Corporation, and to assess the damages to be sustained in the taking and condemning of said lands or property for the public use of said The City of East Orange, for the purposes set forth in said petition, and to proceed therein in all respects as is directed by the act entitled "An Act to regulate the ascertainment and payment of compensation for property condemned
40 or taken for public use (Revision of 1900),

Order for Appointment of Commissioners.

and acts supplementary thereto and amendatory thereof, and having duly taken and subscribed an oath faithfully and impartially to examine the matter in question, and to make a true report, according to the best of our skill and understanding;

And it having been duly proven to our satisfaction that the Braidburn Realty Corporation is the owner of said lands, and that it, and all other persons interested have been duly notified that said commissioners had fixed Monday, the 25th day of February, 1929, at ten A. M. in the main Courtroom, Court House, Morristown, N. J., as the time and place to appraise the said lands and real estate, and to make an impartial estimate and assessment of the damages to be sustained by the taking and occupancy by the said City of East Orange for the purpose aforesaid;

And the said petitioner and the owner of said lands having been represented before us at the time and place aforesaid, and at such other times and places as said hearing was adjourned to, we did meet and view and examine said lands, a description of which is contained in said petition as amended, and is embodied by reference thereto in this report; and having heard said owner of said lands as well as the petitioner, and having fully examined and appraised said land and fully considered all that was offered before us by the respective parties;

Now, we do certify, that after a full hearing in all said matters pertaining thereto, we have made a just and equitable appraisal of said lands and real estate, and an estimate and assessment of the damages the owner will sustain by the taking of said lands and real estate; and we do appraise the said lands and assess the damages to which said

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Order for Appointment of Commissioners.

owner is entitled, and which it has and will sustain by reason of the taking and occupancy of the same by said The City of East Orange for the purposes set forth in the petition as follows:

10 For the lands in the Borough of Florham Park, County of Morris and State of New Jersey, described in the petition as amended, we do appraise and assess the amount to be paid by the petitioner for such land and for damages aforesaid in the sum of Twenty-four Thousand, Five Hundred and Thirty Dollars (\$24,530.00).

JOSHUA R. SALMON
VINCENT D. ROACHE
WM. G. HURTZIG.

20 Dated—June 14, 1929.

Which Report was filed on June 15, 1929.

To

THE CITY OF EAST ORANGE,
PRUDENTIAL INSURANCE CO.
OF AMERICA,
STENECK TRUST COMPANY,
PUBLIC SERVICE ELECTRIC &
30 GAS COMPANY,

or

TO WHOM IT MAY CONCERN:

PLEASE TAKE NOTICE that the Braidburn Realty Corporation and the Braidburn Country Club appeal from the award of Joshua R. Salmon, Vincent D. Roache and W. J. Hurtzig, the commissioners heretofore appointed in the above-entitled proceeding by the Honorable Charles W. Parker, one of the Justices of the Supreme Court of the State
40 of New Jersey, which award was duly filed in the

Order for Appointment of Commissioners.

office of the Clerk of the County of Morris on or before the day limited by the said Honorable Charles W. Parker.

AND PLEASE TAKE NOTICE that we shall apply to the Honorable Rulif V. Lawrence, Judge of the Morris County Circuit Court on the first day of July, 1929, at the hour of 10 o'clock in the forenoon of said day at the Court House in Morristown, Morris County, New Jersey, to frame the issue in said Appeal, to fix a day for the striking of the jury, and to fix a day for the trial of the appeal hereby taken, and of which notice is hereby given. 10

SEUFERT & ELMORE
Attorneys for Appellants. 20

KING & VOGT,
Of Counsel.

Which Notice of Appeal was filed on June 17, 1929.

Service of a copy of the within Appeal is hereby acknowledged this 18th day of June, 1929.

WALTER C. ELLIS,
Attorney for City of East Orange. 30

Service of a copy of the within Appeal is hereby acknowledged this 18th day of June, 1929.

EDW. O. CLARK,
Associate-General Solicitor of
The Prudential Insurance
Co. of America. 40

Appeal and Notice of Appeal.

Service of a copy of the within Appeal is hereby acknowledged this 18th day of June, 1929.

M. J. TACKELLA

Attorney for Steneck Trust Co.

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Service of a copy of the within Appeal is hereby acknowledged this 18th day of June, 1929.

FRANK BERGEN

By CHARLES SMITH,

Atty. for P. S. Elec. & Gas. Co.

Which acknowledgment of service was filed on June 20, 1929.

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Appeal and Notice of Appeal.

To

BRAIDBURN REALTY CORPORATION

BRAIDBURN COUNTRY CLUB

PRUDENTIAL INSURANCE CO. OF AMERICA

STENECK TRUST COMPANY

PUBLIC SERVICE ELECTRIC & GAS COMPANY

or

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To Whom It May Concern.

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PLEASE TAKE NOTICE that The City of East Orange appeals from the award of Joshua R. Salmon, Vincent D. Roache and W. J. Hurtzig, the commissioners heretofore appointed in the above entitled proceeding by the Honorable Charles W. Parker, one of the Justices of the Supreme Court of the State of New Jersey, which award was duly filed in the office of the Clerk of the County of Morris on or before the day limited by the said Honorable Charles W. Parker.

Appeal and Notice of Appeal.

AND PLEASE TAKE NOTICE that we shall apply to the Honorable Rulif V. Lawrence, Judge of the Morris County Circuit Court on the first day of July, 1929, at the hour of Ten o'clock in the forenoon of said day at the Court House in Morristown, Morris County, New Jersey, to frame the issue in said Appeal, to appoint a day for the striking of a jury, and to fix a day for the trial of the appeal hereby taken, and of which notice is hereby given. 10

WALTER C. ELLIS,
Attorney for Appellant.

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Service of the within Appeal is hereby acknowledged this 22nd day of June, 1929. 20

Attorney for Braidburn Realty Corporation,
Seufert & Elmore.

Service of the within Appeal is hereby acknowledged this 22 day of June, 1929.

Attorney for Braidburn Country Club,
Seufert & Elmore. 30

Service of the within Appeal is hereby acknowledged this 21st day of June, 1929.

Attorney for Prudential Insurance Co. of America,
J. A. Amerman.

Service of the within Appeal is hereby acknowledged this 21st day of June, 1929. 40

M. J. Tackella,
Attorney of Steneck Trust Company.

Appeal and Notice of Appeal.

Service of the within Appeal is hereby acknowledged this 21st day of June, 1929.

Frank Bergen,
Attorney of Public Service Electric &
Gas Company.

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Which Notice of Appeal and acknowledgment of service thereof was filed on June 25, 1929.

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The City of East Orange having filed a Notice of Appeal in this cause, whereby it appears that it considers itself aggrieved by the proceedings and report and award made by Joshua R. Salmon, Vincent D. Roache and W. J. Hurtzig, commissioners appointed by the Honorable Charles W. Parker, Justice of the Supreme Court of New Jersey, to examine and appraise the lands of Braidburn Realty Corporation, and to assess the damages sustained by reason of the taking of the same by The City of East Orange for public use, for the purpose set forth in its petition for the appointment of Commissioners heretofore filed, which lands are situate in the Borough of Florham Park, in the County of Morris and State of New Jersey, and are more particularly described in the said Petition heretofore filed.

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And the said Commissioners having duly filed their report on June 15, 1929, in the office of the Clerk of Morris County within the time fixed by the orders of their appointment as extended by the orders of the Honorable Charles W. Parker, Justice of the Supreme Court of New Jersey, and heretofore filed, and having appraised the value of said lands and damages sustained by the taking thereof, and the said Appeal having been taken within Ten days after the date limited for the

Appeal and Notice of Appeal.

filing of said report, and notice of appeal having been served upon persons in possession of said lands, the respondents, and all other parties interested therein, and due notice of this application having been given for an order to frame an issue and fix a day for the striking of a jury and for the trial of said Appeal;

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And Walter C. Ellis appearing as attorney for the City of East Orange, appellant, and Seufert & Elmore appearing as attorneys for Braidburn Realty Corporation and Braidburn Country Club;

It is, thereupon, on this Tenth day of August, 1929, on motion of Walter C. Ellis, attorney for The City of East Orange, appellant, ORDERED that Tuesday, the Twentieth day of August, 1929, at the Court House in the Town of Morristown, County of Morris and State of New Jersey at 10:00 o'clock in the forenoon, be, and the same hereby is fixed as the time and place for the striking of a jury for the trial of said appeal, unless previously struck by joint action of counsel, and that said struck jury view the property herein described, and that an issue be framed in this cause as follows: that the said struck jury shall, after making view of said premises as hereinabove directed, assess the value of the lands of said respondent, Braidburn Realty Corporation described in the Petition as amended for the appointment of Commissioners, and the damages sustained by reason of the taking of the same.

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And it is further ORDERED that the trial of said issue be held on Wednesday, the Fourth day of September, 1929, at 10:00 A. M. at the Court House, in the Town of Morristown, County of Morris and State of New Jersey, and that a venire issue ac-

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Appeal and Notice of Appeal.

ording to law and the practise of this court for the appearance of said jury when struck as aforesaid for the trial thereof, and for a view of said premises.

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RULIF V. LAWRENCE,
Judge of Morris County Circuit Court.

Which Order was filed on September 13, 1929.

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Braidburn Realty Corporation and Braidburn Country Club having filed a notice of appeal in this cause whereby it appears that they consider themselves aggrieved by the proceedings and report and award made by Joshua R. Salmon, Vincent D. Roache, and William J. Hurtzig, commissioners appointed by Honorable Charles W. Parker, Justice of the Supreme Court of New Jersey, to examine and appraise the lands of the said Braidburn Realty Corporation and Braidburn Country Club and assess the damages sustained by reason of the taking of the same by the City of East Orange for public use, for the purposes set forth in its petition, for the appointment of commissioners heretofore filed, which lands are situated in the Borough of Florham Park in the County of Morris and State of New Jersey and are more particularly described in the said petition heretofore filed, and the said commissioners having duly filed their report on June 15, 1929, in the Office of the Clerk of Morris County within the time fixed by the orders of their appointment as extended by the orders of Honorable Charles W. Parker, Justice of the Supreme Court of New Jersey and heretofore filed, and having appraised the value of said lands and the damages sustained by the taking thereof, and the said appeal having been taken

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within ten days after the date limited for the filing

Appeal and Notice of Appeal.

of said report, and notice of appeal having been served upon the interested parties, or their attorneys, within ten days after the filing thereof, and due notice having been given of this application for an order to frame the issue and to advise a day for the striking of a jury and for the trial of these said appeals, and Messrs. Seufert & Elmore, appearing as attorneys for Braidburn Realty Corporation and Braidburn Country Club, 10

It is hereupon on this Tenth day of August, 1929, on motion of Messrs. Seufert & Elmore, attorneys for Braidburn Realty Corporation and Braidburn Country Club

ORDERED that the Twentieth day of August, 1929 at ten o'clock in the forenoon of said day at the Court House in the Town of Morristown, Morris County, New Jersey, be and the same hereby is fixed as the time and place for the striking of a jury for the trial of said appeal, and that said struck jury view the property herein described and that an order be framed in this cause as follows; that the said struck jury shall after making the view of said premises as hereinabove directed, assess the value of the lands of said Braidburn Realty Corporation and Braidburn Country Club described in the petition as amended for the appointment of commissioners, and the damages sustained by reason of the taking of the same, and, 20 30

It is further ORDERED that the trial of said hearing be held on the Fourth day of September, 1929, at the hour of ten o'clock in the forenoon of said day at the Court House in the Town of Morristown, Morris County, New Jersey, and that a venire issue according to law and the practice of this Court, for the appearance of said jury when 40

Transcript of Judgment.

struck as aforesaid, for the trial thereof and for a view of said premises.

RULIF V. LAWRENCE,
Judge.

10 Which Order was filed on September 13, 1929.

Transcript of Judgment.

MORRIS COUNTY CIRCUIT COURT.

No. 2316

20	THE CITY OF EAST ORANGE <i>Ads</i> BRAIDBURN REALTY CORPORATION and BRAIDBURN COUNTRY CLUB.	}	On Trial. On Joint Appeals from award of Commissioners.
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30 In an Action at Law Judgment on trial and verdict of Jury rendered in favor of the Braidburn Realty Corporation and The Braidburn Country Club and against the City of East Orange for the sum of Seventeen thousand and two hundred dollars \$17,200.00

On Motion of Walter C. Ellis
Attorney for City of East Orange

Judgment signed December 5, 1929.

Testimony.

MORRIS COUNTY CIRCUIT COURT.

In the Matter
of the
Application of the City of East
Orange for the appointment of
three Commissioners to fix the
compensation to be paid for
certain lands of the Braidburn
Realty Corporation, a New Jer-
sey Corporation, situate in the
Borough of Florham Park, in
the County of Morris, to be
taken and condemned for pub-
lic use. 10

On Appeal from
award of Com-
missioners in
Condemnation. 20

THE CITY OF EAST ORANGE,
Appellant and Respondent,

v.

BRAIDBURN REALTY CORPORATION,
BRAIDBURN COUNTRY CLUB, PRU-
DENTIAL INSURANCE COMPANY OF
AMERICA, STENECK TRUST COM-
PANY, and PUBLIC SERVICE ELEC-
TRIC AND GAS COMPANY, 30
Appellants and Respondents.

Morristown, N. J., December 2nd, 1929.

Before—Hon. RULIF V. LAWRENCE, Judge, and a
jury.

Mr. Ellis: I desire to examine the jurors as they
are called.

(There being no objection, this request was 40
granted.)

Testimony.

(After the calling of various jurors of the struck list, the Sheriff announced that the list was exhausted.)

10 The Court: Now, Counsel may consent, if they like, to try the case with ten jurors—I think I will give you access to the general panel if you require that.

Mr. Price: I am agreeable to make use of the general panel.

Mr. Ellis: If your Honor will decide in this case that they shall not be called from Florham Park, Chatham and Madison.

20 The Court: Now, Sheriff, just put in your box—no, you need not do that; you just take a jury list and call them and they may be challenged just as we have been doing. Just start alphabetically.

(Thereupon jurors were called from the general panel.)

The Court: Now, you are content, gentlemen, are you?

Mr. Ellis: Yes, sir.

The Court: You may swear the jury.

30 (Thereupon the jury having been found satisfactory were duly sworn.)

40 The Court: Gentlemen of the jury, this proceeding is what we know as a condemnation appeal. The City of East Orange is seeking to acquire for its municipal use a tract of land now owned by the defendant, Braidburn Country Club, as I understand it. It is brought under what we know as the eminent domain act, giving a municipality, such as this, the right to acquire land for public use, but only upon making just compensation, the definition of which will be given to you

Testimony.

during the progress of the trial. Under the statute, it is necessary, however, for members of the jury to view the land that is sought to be taken, and you therefore will be turned over to the sheriff, as it were and he will see that a conveyance is provided for you to go to the land, which I understand is somewhere in the neighborhood of Florham Park in this County, and view it. In that connection both the appellant here and the respondent or defendant, will be entitled to be represented by its counsel, or by anyone that may be selected, in order to indicate to you members of the jury just where the land is, but no arguments will be made to you, no evidence will be submitted to you. All that you are required to do is to go and look. In other words, view the property. Necessarily that will mean that you will have to be told where it is and the extent of it that is sought to be taken under the proceedings. Now, having done that, you will return to the Court where you will hear testimony given by witnesses who will be competent to speak upon land values such as that with which you will be concerned. In any event, don't let these lawyers talk to you, or anyone else talk to you in the way of prejudicing you any way. They won't do that, I know, but I am merely illustrating now what to avoid, and therefore you may retire. Go to the sheriff's office and he will provide a conveyance and you will be taken to the site and it will be pointed out to you, and then you may return tomorrow morning at ten o'clock for the usual and customary trial.

Mr. Seufert: Just one request; that they view the remaining part of the premises from which this part is taken.

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Testimony.

10 The Court: Yes, I understand there are forty-three acres involved and part only of the tract of forty-three acres is being taken. Necessarily you will be obliged to examine the entire tract, not only that which is being taken or the part sought to be taken, but in other words the whole tract affected by this proceeding.

Mr. Ellis: These lands are divided by a public highway and there is a section east of the highway which is not at present in use by the Country Club. Now, are they to view the entire Country Club property or the piece out of which this is taken.

20 The Court: Of course that question will have to be determined by me. It raises the question as to whether the land across the road is not part of the entire tract. I am going to let them look at it all and I am going to reserve my ruling until later.

Mr. Seufert: There is some other property alongside of it.

The Court: Same character and similarly situated?

Mr. Seufert: Yes.

30 The Court: I cannot prevent these gentlemen from using their eyes. They may look all over the horizon if they like, but bear in mind what you are to do.

Thereupon the jury retired.

Morristown, N. J., December 3rd, 1929.

TRIAL RESUMED.

40 Mr. Seufert opened to the jury in behalf of the Braidburn Realty Corporation, et als.

During the opening Mr. Ellis made certain ob-

Testimony.

jections to statements and the Court ruled that he would handle the situation during the progress of the trial.

Thereupon Mr. Ellis opened to the jury in behalf of the City of East Orange.

Mr. Seufert: I desire to offer in evidence at this time the deed—

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The Court: I understand there is no objection to this title going in. It is stipulated that the Braidburn Realty Corporation acquired title to the lands in question by virtue of the following deeds:

Mr. Seufert: The Brooklake Club to the Braidburn Realty Corporation, deed dated April 20th, 1923, recorded September 25th, 1923, book U-8 of deeds.

20

(Deed marked Exhibit B-1.)

Mr. Seufert: And also deed from Howard Cole to Braidburn Realty Corporation, dated August 6th, 1927, recorded August 25th, 1927, book S-30 of deeds, page 292.

(Deed marked Exhibit B-2.)

The purpose of offering these deeds is to show the property was purchased as an entire tract.

30

I offer in evidence corporation certificate filed in Morris County, certified copy, dated March 28th, 1923, recorded March 26th, 1923, in book G of certificates of incorporations and calling attention to the fact there is nothing in that Exhibit by which they are precluded to construct and maintain golf courses.

(Certificate marked Exhibit B-3.)

40

Joseph F. Behan, direct.

JOSEPH F. BEHAN, sworn on behalf of the appellant, testifies as follows:

Direct examination by Mr. Seufert:

10 Q. Mr. Behan, have you any official connection with the Braidburn Realty Corporation? A. I am a director of the Braidburn Realty Corporation.

Q. Have you any official connection with the Braidburn Country Club? A. President.

Q. Can you explain the relationship between the two? A. The Braidburn Realty Corporation is the owner of the property operated by the Braidburn Country Club as a golf club.

20 Q. Are both of the corporations the same proposition, the same membership?

Mr. Ellis: I object.

The Court: I will allow it; I will allow the matter to be developed.

A. The Braidburn Country Club has two classes of members. Regular members are members who are required to own a share of stock in the Braidburn Realty Corporation. The stock of the Braidburn Realty Corporation are only offered to elect members of the Braidburn Country Club.

30 Q. And what other class besides the regular? A. We have a class of members known as associate members, who are taken in some few years ago and who are not required to purchase a share of stock in the Braidburn Realty Corporation.

Q. Have they any active part in any of the functions, that is legal functions of the Country Club?

A. No, they have the privileges of the club except voting and holding office.

40 Q. They are practically paying members? A. Dues paying members.

Joseph F. Behan, direct.

Q. So that the two concerns are practically one concern? A. Practically one concern. It's very difficult to separate.

Q. Will you describe the property belonging to the Braidburn Realty Company? A. The Braidburn Realty Corporation purchased from Brook-
lake in 1903 all the property now operated as
Braidburn Country Club. That property consisted
of 403 acres of land, several buildings, including
a fully equipped club house, a nine hole golf
course. That is substantially all.

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Q. What was done with the property by the Braidburn Realty Corporation after they bought it? A. They constructed additional golf holes.

The Court: Made it eighteen?

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The Witness: No, they built an additional eighteen, so that now we have twenty-seven.

Q. And I understand, if I am right, if I am not, correct me, the 403 acres included these 42 acres that the City of East Orange has taken? A. That's correct.

Q. And can you describe generally the boundaries of your tract? A. Well, it's bounded on the north by Florham Park. On the east by the Passaic
River, the west by the Borough or Village of Brook-
lake and the south by Chatham.

30

Q. The region, then, in which this is located is substantially developed from a residential point of view?

Mr. Ellis: That's leading.

The Court: What is the nature of the property around this property?

A. From the west, the real estate development
is practically up to our property line.

40

Joseph F. Behan, direct.

The Court: That's Brookdale?

The Witness: Brooklake section.

10 Q. Describe the improvement as to roads running to the property? A. They have an improved road running right up to our property.

Q. How about sidewalks? A. There are some sidewalks.

Q. Electric lights? A. Electric lights.

Q. Water? A. Water, yes.

Q. On the east is the Passaic River? A. Yes, sir.

Q. And you have the Brooklake Road referred to? A. Yes, sir.

20 Q. Is there any residential development to the southeast of Brooklake Road?

Mr. Ellis: Brooklake Road runs toward Chatham?

The Court: He means in the vicinity of the property.

Q. In this vicinity (indicating)? A. I can't answer that question.

30 Q. When did they build the course? A. The nine holes was built before Braidburn acquired the property. In the spring of 1925 they opened up the first nine holes of the new eighteen hole course. In the fall of the following year, 1926, we opened up the second nine holes of the eighteen hole course, although some of the fairways were of a temporary nature.

Q. When the golf course was laid out for the present standard eighteen hole course, was any consideration given to the laying out of the entire property?

40 Mr. Ellis: I object. I think that is immaterial.

Joseph F. Behan, direct.

The Court: Well, it may have some bearing on the availability and adaptability in the immediate present or reasonable future. I will allow it.

A. I can't answer the question.

Q. How long have you been a member? A. Since 1924. 10

Q. That was after the Braidburn people bought the property? A. The eighteen hole golf course had been laid out at that time and practically constructed, so I can't answer your question.

Q. How many members have the golf club? A. We have 375 at the present time.

Q. Can you give us any idea of what the membership of this has been since you have been connected with it? A. At the end of 1924 there was 256 members. End of 1926 there were 356 members. If I may refer to a statement that I have taken from the official record of the club I can give you these figures more accurately. 20

The Court: That is substantially correct?

The Witness: Yes.

Q. You play golf? A. Some, yes, sir.

Q. You are using the facilities of the course? A. Yes, sir. 30

Q. You are in close contact with its operation?

A. Yes, sir.

Q. What are the dues of the club? A. One hundred and fifty dollars per year.

Q. For how long has it been a hundred and fifty dollars a year? A. Since the middle of 1924.

Q. Has those dues been sufficient to maintain and operate the club?

Mr. Ellis: I object, no relevancy. 40

Joseph F. Behan, direct.

10 The Court: I am inclined to think, Judge Seufert, that is so. After all, of course, it is the adaptability and use of the land in question. You see there are elements and features involving so many questions as to the use of a golf club. It depends entirely upon the circumstances, for which the inquiry is the market value of the land, and that would have no relation at all. As already indicated in your opening, your golf club needed more members and your theory is that to get more members you must retain this land wanted by the City of East Orange.

20 Mr. Seufert: Going back one step further then, we have the necessity of more members.

The Court: I will allow you to ask him generally whether more members are desirable, and if they are, what is needed; something of that sort. I assume you can recognize the fact if you have more members you may need more holes. The larger the membership the larger the course required.

30 Mr. Seufert: No question about it.

The Court: Especially Sunday mornings, go on.

Q. Is the club in its present condition compelled to procure more members? In order to operate at this present rate of dues, I mean, in asking the question?

40 The Court: Put it the other way. Is this land the City seeks to condemn required for golf purposes?

The Witness: To carry out the original

Joseph F. Behan, direct.

intention of the club that land is necessary in order to extend the present nine holes into eighteen.

The Court: Well, this was necessary. In other words you have a nine hole course there which you desire to enlarge to eighteen? 10

The Witness: Yes.

Q. What is your present condition in connection with your membership and finances? A. Our present membership is not sufficient to carry the Country Club. We must either go on with the original plans of organization to that thirty-six holes and the Club increase our members, or if we decide to go along with the eighteen holes and the short nine, we will have to stop taking members and increase our dues substantially. 20

Q. If you don't do so, what is going to happen?

Mr. Ellis: I object.

A. Can't live.

Q. What is the condition of your eighteen hole course now with your three hundred odd membership? A. It's very much congested.

The Court: On week-ends and holidays. 30

Q. Has that fact militated in your experience against its membership? A. It makes it almost impossible to attract golfers.

The Court: You are troubled with this congestion because you have a larger number than you can accommodate on certain days of the week?

The Witness: Yes.

Mr. Seufert: Cross examine. 40

Joseph F. Behan, cross.

The Court: Any questions, Mr. Ellis?

Mr. Ellis: Yes.

Cross examination by Mr. Ellis:

10 Q. Mr. Behan, do you know of any golf courses that's not congested on Sunday mornings and holidays? A. I am not familiar with many courses.

Q. When the Braidburn Realty Corporation purchased this property, the nine hole course was the nine holes bordering Brooklake Road? A. Its present nine holes.

Q. What you call the short nine holes? A. That is true.

20 Q. And that separated from the land now under condemnation by the public highway? A. That is true.

Q. And this public highway divides the entire property, that is from south to north? A. I think that is true, yes, sir.

Mr. Ellis: That is all.

The Court: How would you utilize that land along the river as a part of the golf course?

30 The Witness: Well, it would be necessary to first put it in condition on which we could construct the nine holes of golf.

The Court: Could you cross the public highway?

The Witness: We would have to cross the public highway.

The Court: I didn't know you would be able to cross it.

The Witness: You would have to cross it.

40 The Court: At least you would have to cross it?

Herman W. Bluhm, direct.

The Witness: Yes, sir.

The Court: That is all.

(Witness Excused.)

HERMAN W. BLUHM, sworn on behalf of the
appellant, testifies as follows:

10

Direct examination by Mr. Seufert:

Q. Mr. Bluhm, where do you live? A. Millburn,
New Jersey.

Q. What county is that in? A. Essex County.

Q. Essex County? A. Yes.

Q. What is your profession? A. Civil engineer.

Q. And how long have you been a civil engi-
neer? A. Oh, about twenty-six years.

20

Q. Accustomed to performing what branch of
civil engineering? A. Why, general work.

Q. By general work, what do you mean? A.
Well, in 1905 I was in charge of most of the grades
in the Hudson Tunnel. Running heading of the
one Jersey driven tunnel. In 1909 to 1913 I was
in the Panama Canal. That first year that work
consisted of making a map of the specific divi-
sions and general excavation computations and
then when the construction started I was con-
nected with the system of the Muro Floris Dam.
The piers and gate-walls at Balboa. In 1914 and
'17 I was with the Pressed Concrete Steel Company
on the general reinforced concrete building sys-
tem, and then went with the Child's Exploration,
working on bats and bins for copper industry.
During the war I was Assistant Constructural En-
gineer at Hog Island and after assisting in the
construction of the plant I was made assistant to
the Special Engineer of Mr. Holbrook who was

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40

Herman W. Bluhm, direct.

then president of the corporation to take care of the investigation of schools of launching vessels. In '21 I was with the DuPont organization on the designs of the General Motors Plant, and since 1922 in business for myself in Millburn.

10 Q. What has been the character of your business in Millburn? A. Mostly real estate development work, that is, road construction.

Q. Land surveying? A. Land surveying, road construction and construction and work connected with real estate development.

Q. What experience have you had in land surveying and map making? A. I just delivered a land map of the specific divisions over seventy-seven miles long—

20

The Court: I am inclined to think the gentleman is qualified.

Q. You know the Braidburn property? A. Yes, sir.

Q. Been on it? A. Quite a good bit.

Q. Surveyed it? A. Yes.

Q. Took levels on it? A. Every two hundred by a hundred.

30 Q. Examined it thoroughly? A. Yes.

Q. How about its soil condition? A. I have recently taken soil bearings there.

Q. How many parts of the land? A. Oh, about two thousand bearings.

Q. And what about the river water? A. Have taken a record of that, I have made a record for the last ten years.

40 Q. Where did you get that? A. Got it from Mr. Molitar, who is superintendent of the Chatham Disposal Plant.

Q. Will you explain what those records are?

Herman W. Bluhm, direct.

Mr. Ellis: I object. The records will speak for themselves.

The Court: Is this strip of land to be taken or sought to be taken separately described in your deed, Judge?

Mr. Seufert: No. 10

The Court: Your lines run across the highway? Right straight across the highway to the river. It's all in one tract in the deed?

Mr. Seufert: That puts me in another position as far as this is concerned. I had an understanding with Mr. Ellis that exhibits used in the last hearing which included these safety levels of the Passaic River which were obtained by Chatham and you can obtain them by getting the man up here who made the records. The same records used then will be used now. We used them for the purpose of making the graphics based on these records, at the Chatham Disposal Plant where they have their beds right on the edge of the river for taking daily reading and have taken daily readings of the Passaic River for the last ten or fifteen years. 20 30

Mr. Ellis: I would like to see these. If Judge Seufert understood that I was admitting in evidence all of the Exhibits at the hearing before the Commissioners, there was a misunderstanding between us. Most of these Exhibits were objected to by me at the time, but I did agree that the map offered in evidence before the Commissioners would be considered by me here— 40

The Court: Of course.

Herman W. Bluhm, direct.

Mr. Seufert: We are not bound to it, but I am stating to the Court I am put to a disadvantage now.

The Court: You may get some competent authority to speak for these records later.

10

Q. As you got the records of the daily height of the Passaic River, did you compile these records, that is, the daily height of the Passaic River at the land in question, or fix the daily height of the Passaic River at the lands in question? A. Yes, sir.

20

Q. Through what means did you fix it? Describe what you did? A. I first went about to carry the sight levels from the Public School in Chatham right to Braidburn. These levels were started from the government bench marks used at that point. In order to the government levels with the tide elevations of the land into the government bench marks and by that means we determined the water levels at the river through the lands in question.

30

Q. Did you construct from these figures a map or graphic showing heights at different days? A. Yes, I constructed a topographic map.

Q. I show it to you. A. Yes, I plotted the graphic from 1920 to 1929 daily.

Q. What do these graphics indicate? A. The height of the river level above the Chatham bench marks.

Q. How do they affect the Braidburn property? A. Well, they show the river levels above and below certain contours of that property.

40

Q. That is to make a line up here to tie up with the survey you made? A. Yes, on these graphics I have indicated four lines showing various eleva-

Herman W. Bluhm, direct.

tions of the property and they indicate the rise and fall of the river above and below these lines.

Q. So the jury can take these graphics as to any date in the last year and determine where the water was on this property?

Mr. Ellis: I don't think Judge Seufert should lead. 10

The Court: I don't think that is leading. Could I or the jury discover the water levels by looking at the graphics?

The Witness: Yes, sir.

The Court: That's merely a matter of observation.

Mr. Seufert: I offer it in evidence.

The Court: Is there objection? 20

Mr. Ellis: Yes.

The Court: Well, of course you have not properly proven the bench marks and other records.

Mr. Seufert: I understand the records are here.

Q. Did you make a survey of this property? A. Yes, sir.

Mr. Seufert: I would like this marked for identification. 30

(Paper marked B-4 for Identification.)

Q. As the result of your survey did you make a map? A. Yes.

Mr. Seufert: I would like this marked for identification.

(Map marked B-5 for Identification.)

The Court: I will allow the witness to verify his map. 40

Herman W. Bluhm, cross.

Cross examination by Mr. Ellis:

Q. Where did you get this elevation? A. I just described I transferred the elevations from the Chatham bench marks.

10 Mr. Ellis: I object to that.

The Court: On the assurance that Judge Seufert will produce evidence of an authentic nature of the location of that bench mark I will allow the witness to proceed.

20 Mr. Ellis: These bench marks are taken from a point I judge two miles from the place where the property is. Now, the Passaic River at some point south of the Braidburn property empties into a very large basin that I am told comprises about thirty thousand acres of land. It is flooded a great deal of the time as will be brought out in the evidence in this case. Now, the rise and fall of water in that basin depends on a great many things, the rapidity of the outlet, sometimes it may fall in twenty-four to forty-eight hours. Sometimes it will take a week.

30 The Court: The integrity of the map will be taken up at the proper season. You may examine on it. It will be marked for identification.

40 Q. Now, will you take your pointer and explain to the jury what this survey indicates? A. Well, this is Brooklake Road (indicating). And this is the present location of the present golf course. This line in here indicates a two hundred and twenty-five foot line that was shown on the map prepared by Mr. Kents, submitted by the East Orange Water Works, and this is a twenty-five foot

Herman W. Bluhm, cross.

line or right of way. This line here is the boundary line of the Convent of St. Elizabeth, which is not included in this property. These small red circles which are two hundred feet wide this way and one hundred feet wide that way indicates points at which the levels were taken throughout the whole land; and also giving elevation with respect to tide water at New York City, I believe it is. In other words, it's taken off the government bench marks. These are contours which show the elevations of the course at various points and the large figures indicate the heighth above the river level as of July, 1929. 10

The Court: Does that show the forty-two acres in question? 20

The Witness: Yes, takes in from the road to the Passaic River.

The Court: Excepting as to the boundary line of the St. Elizabeth property there?

The Witness: Yes, that's included.

The Court: And incidentally this two hundred and twenty-five foot strip is included which is not now in the Braidburn title?

The Witness: Yes, that is not in the forty-three acres. I believe the whole tract is sixty-seven acres. 30

The Court: Do you show the forty-two acres there?

The Witness: I don't indicate any acreage on the map at all.

The Court: Where are the forty-two acres?

The Witness: They would extend from this line to the river and along that way and along the boundary line and back to that two hundred and twenty-five foot line. 40

Herman W. Bluhm, cross.

The Court: Does the St. Elizabeth property cut that acreage through that way?

10 The Witness: Yes, it comes up this way to a point here and goes down back to the river. Apparently it has no outlet on the road.

The Court: Go on.

20 A. (Continued.) These dotted lines indicate ditches that we get into this property, I suppose for the purpose of draining it. The green shows wooded sections. Strips along the river and some along the ditches. Certain groups here and there. The blue is the course of the Passaic River. The brown is Brooklake Road, and that's about all, I think.

Q. Did you ascertain whether or not, that is, from the level you received, or figures you received, whether or not this land was ever under water? A. Why, judging from the river levels, why, at times it is under water.

The Court: How much of it?

The Witness: Well, that depends on the heighth of the river.

30 The Court: You have been there and seen it?

The Witness: I have been there; when I seen it, it was perfectly dry.

The Court: At other times, what was the indication?

The Witness: The last time I was there, there was about six inches of water over here (indicating).

40 Q. Was that river water or seepage? A. River water, I think.

Herman W. Bluhm, cross.

The Court: What area?

The Witness: A small area in here, like this (indicating).

Q. You have ascertained or fixed the bench marks of this property? A. Yes, sir.

10

Q. Where is the bench mark as fixed on the map? A. Why, approximately at this location (indicating).

Q. And was anything done to tie up this bench mark with the Chatham bench mark? A. Yes.

Q. By you, I mean? A. By taking the level of those bench marks, that immediately ties it with relation to the bench mark at Chatham.

Q. You took this at the same time as one was taken down below? A. Yes.

20

Q. And you made them read them together? A. They are simultaneous readings, within a day or two.

Q. So you adjusted different levels then with Chatham then so as to fix a definite graphic for levels over that property? A. The lines shown on the graphic have a definite relation to the levels.

Q. Can you tell, for instance, what is the height of the bank or what was the height of the bank at the time you made the survey above the river? A. Why, it's about four feet above the river.

30

Q. The bank at that time? A. Yes.

Q. When were you last on it? A. November 22nd was the last time.

Q. This year? A. Yes.

Q. What was the height then of the bank above the water? A. Why, about six inches, I should say.

Q. That is, the river rises and falls? A. Yes.

Q. Now, do you remember from the figures you obtained how many times in the last year that the

40

Herman W. Bluhm, cross.

river was above the bank? A. I don't remember, but it is shown on the graphic.

Mr. Ellis: I object for the reason I have shown before.

10 The Court: He says he doesn't know.

Mr. Seufert: He says it's on the graphic.

The Court: The graphic is not in yet.

Q. Did you make an examination of the soil of this tract? A. I did.

Q. Will you tell us—how did you make the examination? A. By means of auger-boring.

20 Q. Describe the instrument and its purpose? A. Just like a carpenter's auger, about four and a half inches long with a big handle that we turn down through the earth and pulled out samples of earth at different levels.

Q. Is that the method of boring? A. One method, yes.

Q. That's the method you used on this land? A. Yes.

Q. Now, how many places did you use that method of boring? A. Oh, two dozen borings I made in two or three locations.

30 Q. And will you tell us where the borings were made and what was the character of the land you found there? A. Well, the first site of borings was made in about this spot here (indicating) and the second site about in here (indicating) and several along the river bank.

Q. What was the purpose of making the borings? A. Why, to ascertain the type of material below the level of the ground or surface of the ground.

40 Q. What's the green shade on the map? A. They are wooded areas, trees.

Herman W. Bluhm, cross.

Q. Trees growing along the river bank? A. Yes, sir.

Q. What was the character of the land that you ascertained from the borings? A. Why, it showed about anywhere from six inches to eighteen inches of loom and humus and below that for a depth of four and a half feet, according to our auger was solid clay. 10

Q. Hard, or was it soft? A. What we call yellow clay.

Q. What was growing on this land? A. Sort of a grass.

The Court: Is that swampy?

The Witness: I don't know what you would define as swampy. 20

The Court: What's your understanding of swamp land?

The Witness: Swamp land is land that's wet most of the time.

The Court: Is this swamp land?

The Witness: No, sir.

Q. What's growing on the land, anything? A. Along the edge of the river there is the trees that grows there, and then you get on the line of the golf course and below that is the river course. 30

Q. From the figures of the heighth or levels of the Passaic River, did you obtain the highest heighth that the river has been at in the last ten years? A. Yes.

Q. And from your experience in construction work, can this land, these forty-two acres along the Passaic River be so banked that it will prevent the Passaic River flooding over it? A. Yes, sir.

Q. To any degree possible within the last ten years? A. Yes, sir. 40

Q. Explain how it can be done? A. Well, you

Herman W. Bluhm, cross.

can form what we call a spoil bank along the river at the heighth elevation of 172 and according to the river under line 100, that would keep the river out by a margin, I would say of about 6 or 8 inches altogether.

10 Q. Have you studied this problem in the land and territory there with the idea of keeping this land free from flooded water? A. I have.

Q. And what was the result of your study? A. That we could keep the flooded waters out of the land.

Q. By what means? A. By erecting this spoil dike along the edge of the river just outside the line of the wood there and up to the contour marked "H" here which is equivalent to 172.

20 Q. Where would the material come from to make the spoil bank out of? A. Why, from these two locations where we took the bearings.

Q. What would be constructed there if anything? A. I understand a golf architect intends to construct two links in there.

Mr. Ellis: I object.

The Court: Yes, it's not what they intend to do.

30 Q. What would be the part of your plan if you were to do it?

Mr. Ellis: I object.

The Court: I will handle the issues; he means available use.

A. I would take the material from these two locations I have just indicated.

40 Q. And in taking the material from there, is there anything you could construct out of the excavation? A. Yes, I would construct this spoil bank.

Herman W. Bluhm, cross.

Q. That is on the bank? A. Yes.

Q. What would happen to your excavation; how would that be disposed of? A. Well, it would be separated. Part could be used for the bank.

Q. No, you don't get me. What would you do with the hole that you took the stuff out of? A. Well, I would build a lake there. 10

Q. Would the lake answer any useful purpose in your judgment?

Mr. Ellis: I object.

The Court: I will determine the issues in the case.

A. Yes, I would drain all the waters into the lake. Or through the lake to a certain ditch in the spoil bank and then possibly empty out in the river. 20

Q. The object of that would be what? A. Why, to keep the grounds dry.

Q. In other words, as I understand it then, the use of the spoil banks is to keep out from the Passaic River when it got beyond the banks? A. Yes.

Q. Can that be done in your judgment? A. Absolutely.

Q. In your experience as an engineer, is it possible? A. It's a very simple problem. 30

The Court: That involves some expense?

The Witness: Certainly it does.

The Court: Large or small?

The Witness: Well, I don't know. It depends upon what you call large expense and what you would call small.

Q. Well, in these days something less than five million. A. Well, it would cost something in the neighborhood of thirty thousand dollars, I think. 40

Q. Have you prepared a plan showing the meth-

Herman W. Bluhm, cross.

od in which this spoil bank can be constructed?
A. I have drawn a cross section of it and set of specifications, rather brief.

10 The Court: Of course, you are coming rather near some of these expenses.

Mr. Seufert: I understand. I expect to keep away from them. I ask this be marked for identification.

(Paper marked B-6 for Identification.)

Mr. Seufert: This is to show that this can be done.

20 The Court: Not what the expense would be or what would happen if a large amount of money be put on it. I will allow you to state its available use within a reasonable time in the future.

Q. I hand you Exhibit B-6 for Identification and ask you if you know anything about its preparation? A. Yes, it's specifications of cross sections of the spoil bank that I have prepared.

Q. For the purpose of what? A. For the purpose of draining the land in question and keeping the Passaic River out of them.

30 Q. That's the spoil bank you spoke about in your testimony just given to the jury? A. Yes, sir.

Q. And what was the other part of it, besides the sketch? A. The specifications as to how to construct the spoil bank and build different forms and quantities required.

Mr. Seufert: Any objection?

Mr. Ellis: I have. I think that comes within the prohibition of the Manning Case.

40 The Court: Yes, I am inclined to think that is so.

Mr. Seufert: Will you allow me to argue that out? That's the situation.

Herman W. Bluhm, cross.

The Court: Of course I am not permitting you to show what it is and the cost after the improvements are made.

Mr. Seufert: Giving an idea—

The Court: It is the available use we are concerned with here.

10

Mr. Seufert: I may be a little ahead of the story because I may get it on cross examination but the object of the offer at the present time is now to show that these theories of the engineer is not speculative and besides designing, he has formed the plan which he can show the jury and the other side that can be picked apart.

The Court: I won't let you have that marked at this time. He has indicated now the available use but in order to get it, it is necessary to do certain things, namely, drain the land. That is his statement. He says that can be done. That is as far as you can go.

20

Cross examination by Mr. Ellis:

Q. What would you make this spoil bank of?
A. Principally clay and stone.

Q. And you think that would stop flood waters of the Passaic? A. I know it would.

30

Q. How high would that be? A. Four feet.

Q. What about the land of the Convent of St. Elizabeth; how would you dam the waters back that came in there? A. Well, there's two ways.

Q. Would you build a bank around here? (Indicating.) A. You could.

Q. Well, how else would you do it? A. You could build a bank across here (indicating).

40

Q. That's the lands of the Convent of St. Elizabeth? A. I agree with you.

Herman W. Bluhm, cross.

Q. Isn't it? A. Yes.

Q. And your plan—

10 The Court: Suppose you build the Braidburn property as you indicate and do not in St. Elizabeth, what would happen?

The Witness: Why, the solution would be the same. Results would be the same. Without St. Elizabeth joining in the enterprise you would get no respective results. Just the same results I am getting now.

The Court: Suppose St. Elizabeth said she was not interested?

20 The Witness: Well, I have provided for that. In other words, you must make the spoil bank of greater length. That's all.

Q. In that case, you mean the spoil bank must go long all sides of the property of the Convent of St. Elizabeth? A. Yes.

Q. How long have you known this land? A. Since July 13th, 1929.

Q. You were in the land from February 10th to April 12th, 1929, were you? A. No, sir.

30 Q. Do you know whether or not any of it was under water at that time? A. I do not, but I can determine from the river levels showing what portions were under water.

Q. You have only been on this land since July, 1929? A. Yes.

Q. And know of no flood conditions prior to that time? A. No.

Q. In July and August of 1929, they were exceptionally dry months, this year? A. Exceptionally so.

40 Mr. Ellis: That is all.

(Witness Excused.)

Willard G. Wilkinson, direct.

WILLARD G. WILKINSON, sworn on behalf of the appellant, testifies as follows:

Direct examination by Mr. Seufert:

Q. Where do you live, Mr. Wilkinson? A. Live in Westfield, New Jersey. 10

Q. And what is your professional business? A. Golf architecture and construction.

Q. How long have you been in that line of business? A. About eleven years.

Q. And during that period of time how many golf courses have you constructed? A. I have constructed forty-three and designed and supervised the construction of one hundred and five.

Q. Have you any course under construction at the present time? A. Yes, sir. 20

Q. What course? A. Oak Ridge course at Rahway, New Jersey. Copper Hill Golf Club, Flemington, New Jersey, and several courses being planned; one in Plainfield and one in Easton, New Jersey.

Q. Do you belong to any golf organization? A. Yes, sir.

Q. What kind of golf organization exists to your knowledge? A. What kind of golf organizations exist? 30

Q. Yes?

The Court: What do you mean by that?

Q. Put it this way: do you know of any purely commercial organization? A. Yes, sir.

Q. That is, I understand, where they sell golf privileges to anybody that plays? A. Yes, sir.

Q. Annually or yearly? A. Daily and annually.

Q. How many of these do you know about? A. I know five or six. 40

Willard G. Wilkinson, direct.

10 Q. And where are they located? A. One is located at Rahway, New Jersey. The largest commercial organization in New Jersey called the Locust Grove Golf Club, one in Cranford, New Jersey, one at Kenilworth, New Jersey, one at Linden, New Jersey, and one in Springfield, New Jersey.

Q. Commercially for profit? A. Yes.

Q. As against the Country Club proposition?
A. Yes, sir.

Q. Have you ever been on the Braidburn Golf land? A. Yes, sir, many times.

Q. Acquainted with their courses? A. Yes.

20 Q. What courses have they? A. They have an eighteen hole golf course and a miniature nine hole golf course.

Q. Have you examined their equipment and facilities? A. Yes, sir, in its entirety.

Q. What's its present membership? A. About 350 or 375.

Q. You acquired that information? A. Yes, sir.

30 Q. What can you say, in your judgment, knowing their facilities, Braidburn has as to golf members, as to the necessity of extending their course?
A. Well, I know their present golfing facilities are not adequate to take care of their present membership.

Q. How can that be remedied? A. By creating additional golf.

Q. What do you mean by additional golf? A. By building additional golf holes.

Q. At the present time has the Braidburn Realty Corporation additional land sufficient to make the additional course? A. Oh, yes.

40 Q. Where are these lands located? A. To the east of the present eighteen hole course.

Willard G. Wilkinson, direct.

Q. Do you recognize any of these lands shown on the map on the blackboard? A. Yes, that's the land.

The Court: Across the road?

The Witness: Yes, sir.

Q. The land between the Brooklake Road and the river? A. Yes, sir.

Q. Have you examined this land? A. Yes, very thoroughly.

Q. Have you been on it? A. Many times.

Q. For what purpose? A. For the purpose of designing the additional holes necessary and as to its adaptability for golf, fundamentally from the point of designing and also from the point of draining.

Q. And are these lands, including the forty-two acreage tract in this case, lying east of the Brooklake Road and between it and the Passaic River, in your judgment, available for golf purposes? A. They are available, yes, and adaptable.

Q. What do you mean by that? A. They are available and adaptable for golf.

Q. Can you use them for golf courses? A. Absolutely.

Q. Would the expense of construction, in your judgment, making these additional holes on this side of the road, be more than the average course of construction of any golf club? A. No, sir.

Q. Can you explain why that is? A. Only by the calculation of the average cost of golf courses. Those that I have built for myself and know of.

Q. Have you laid this land out in golf courses, as to extensions or otherwise? A. Yes, sir.

Q. From your study of the situation? A. Yes, sir.

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Willard G. Wilkinson, direct.

The Court: How many holes?

The Witness: Nine additional holes and a reforming of the present miniature nine hole course.

10 The Court: In other words, you would annex the additional nine to the original nine?

The Witness: Yes.

The Court: In other words, this property originally had the other nine hole course?

The Witness: Yes.

The Court: What would be a defect of making that cross the highway?

20 The Witness: It is never advisable to play across the highway and in this case it's not planned to do so. It must cross the road twice at the same point, both on the property.

The Court: Would that affect the availability of the land?

The Witness: Not at all. It's done in many courses.

30 The Court: What sort of a highway is that?

The Witness: Just a dirt road. I would not call it a main highway.

The Court: A main thoroughfare.

The Witness: It's a thoroughfare, but just a dirt road.

The Court: Country road?

The Witness: Yes, many clubs crosses the highway that is a real highway.

(Map marked B-7 for Identification.)

40 Q. Is this the plan you referred to as having

Willard G. Wilkinson, direct.

prepared in laying out this course? A. This is one of them, yes, sir.

Q. I understand this plan indicates the availability of this land for this purpose. That is the forty-two acre tract? A. Yes, sir.

Mr. Ellis: I object. 10

The Court: I think you need not use that except that the witness may illustrate his testimony. I will allow him to use that map merely in the nature of an illustration.

Mr. Ellis: Exception, your Honor.

The Court: The expense of laying that out has nothing to do with the cost. It's particularly the adaptability of the land.

Mr. Ellis: That was also the case in the Morrison-Cummings case. 20

The Court: Now, this west side, this land is available for golf purposes?

Mr. Ellis: This shows lay-out, fairways and holes. After the plot has been changed. The purpose of this testimony now is to enhance the value of this land to the jury after it's been changed.

Mr. Seufert: Merely it's availability.

The Court: I think it is within the ruling of the Currin case. I am not going to let this map go to the jury at all. I am going to let the witness illustrate what in his opinion is the adaptability of this land; that's all. 30

Q. Will you explain why this can be used as a golf course? A. Simply because it is sufficient acreage in conjunction with additional land to the west of the Brooklake Road.

The Court: Now, I am not going to allow that map to go to the jury and the witness 40

Willard G. Wilkinson, direct.

will understand he is merely using it to illustrate his testimony.

(To witness): That map shows that?

The Witness: Nine hole course. Just the nine holes laid out in that property.

10 The Court: That's as far as I will allow it to go.

Q. Now, I show you this other plan. Did you prepare that plan? A. Yes.

Q. What does that show? A. This shows the complete plan and the relation of the proposed eighteen holes which has no relation to the present eighteen holes, which has been in plan for a number of years.

20 Q. That is, the linking of these nine holes between the proposed nine holes and the old nine holes, making a new eighteen hole course? A. Exactly.

Q. On both sides of the road? A. Exactly.

Q. Now, how close would this new eighteen hole course be to the golf club; that is, the club house?

A. The same property that has been described—

The Court: How near is it?

30 Q. How near is it, close or far? A. Very close.

The Court: Across the road?

The Witness: No.

The Court: The present miniature course and the new course are near this. You build the nine hole course and then go across the road?

The Witness: No.

40 Q. How do you get across the road? A. The holes run, two holes here and the others on the new property.

Willard G. Wilkinson, direct.

Q. Has there been any rearrangement of the old nine hole course in the planning of the eighteen hole course? A. Yes, sir.

Mr. Ellis: I would like to make an objection to these questions.

10

The Court: I think you are going far enough, in order for the jury to say as to whether there is any integrity and what weight is to be given to his testimony.

Mr. Seufert: Exception.

The Court: Yes.

Q. Now, this new course when laid out, would it have any disadvantage whatsoever in your judgment, from location or otherwise? A. No, sir, not at all.

20

Q. What would you have to say about its location, as to the possibility of construction, as to possibility of availability and use in connection with the other plant?

The Court: He is talking about use now.

A. It's adaptable, of course.

Q. Where is the golf plant located? A. In this area (indicating).

Q. Where are the club houses located? A. Right in the center of the park.

30

Q. How close are the club houses to this forty-two acre tract on which it is proposed to put nine holes? A. About three hundred yards, from the furthest point.

Q. Three hundred yards. A. From the furthest point.

Q. The extreme point of the forty-two acres to the club house? A. Yes.

40

Q. So the whole proposition is within the proximity of the club house? A. Yes.

Willard G. Wilkinson, cross.

Q. Are you acquainted with all of the lands of the golf club? A. Yes.

Q. Examined it? A. Yes.

10 Q. Are there any other lands available for the extension of the golf club? A. Not belonging to the club.

Q. In your judgment is there any other method in which the course could be extended except by the use of this forty-two acre tract? A. No, sir, none whatever.

Q. Compelled to use that course if you want to get another course? A. If you want to follow the proper sequence of holes and proper direction of holes, this property must be used.

20 The Court: Anything more?
Mr. Seufert: That is all.

Cross examination by Mr. Ellis:

Q. Mr. Wilkinson, are these lands, I may say, golfable at the present time? A. No, sir.

Q. They have to be changed in character before they can use them for golf playing purposes, isn't that so? A. Yes, sir.

30 Q. You testified at the hearing before the Commissioners in this case? A. Yes, sir.

Q. And you know that the lands in question are almost entirely under water from about the 15th of February until the 22nd of April, don't you? A. Yes, sir.

Q. And you know they are under water practically every time the Passaic River floods? A. I have seen it in that condition, or practically in that condition.

40 Q. And sometimes the land remains under water for days and weeks at a time, isn't that so? A. I presume it does.

The Court: Is that all.

Willard G. Wilkinson, redirect.

Q. Mr. Wilkinson, the testimony that you have given to the Court and jury with respect to this land is predicated upon a change of the character of the land before it's used for golf playing purposes? A. Changed in drainage.

Q. You would have to fill it in? A. Some parts, yes. 10

Q. So that does contemplate a change of character? A. As any golf course would use any, parts of the property would be required to fill.

Q. This land requires something else besides grading, doesn't it? A. Requires drainage.

Q. And requires filling in from lots of other grounds? A. No, sir.

The Court: Carting in? 20

The Witness: No, sir.

The Court: No carting in?

The Witness: No, sir.

The Court: In other words you can drain it and take the soil as it is and form it in a golf course?

The Witness: Yes.

Q. What about the flood condition? A. That would be taken care of by the spoil bank.

Q. That is contemplating the erection of a spoil bank? A. Yes. 30

Q. But you call that change in character, building a spoil bank for thirty thousand dollars and the other things you testified to about that property? A. Yes.

Redirect examination by Mr. Seufert:

Q. Can be done without any trouble? A. Absolutely.

Q. In your judgment, have you had any other 40

Willard G. Wilkinson, redirect.

properties or other experiences of any similar performance? A. Yes, sir.

Q. Any hardship, as far as golf was concerned, to change this to a golf course? A. No, sir.

10 The Court: I suppose you could do anything if you had the money.

Q. Have you any idea of what the cost of construction would be of this golf course as laid out by you, laying out this new course, in comparison with the usual cost of construction in other places?

Mr. Ellis: I object. I think that is entirely immaterial.

20 The Court: Well, it may have some relation to the condition in which this land is and he says it can be done without changing any the character of the property whatever.

Mr. Ellis: He has said the land would be changed in character.

The Court: To the extent of building the spoil bank.

Mr. Seufert: The point is to show the cost would not be prohibited.

30 The Court: I will allow him to answer that question.

Q. The average cost construction? A. Cost about fifty thousand dollars.

Q. That is for forty-two acres? A. Yes, sir.

The Court: Of course I shall have to tell the jury, Judge, that they are not concerned with what it would cost.

Mr. Seufert: Absolutely.

40 The Court: You are scarcely within the range of this case in the Court of Errors on that subject.

Robert White, direct.

Mr. Seufert: No question about it.

The Court: I will permit you to show the present available use.

Mr. Seufert: Right.

Q. In your judgment, would the cost of construction of this course exceed the average cost of construction of other courses? 10

Mr. Ellis: I object. I don't think that's material at all.

A. No, sir.

The Court: Well, the principle isn't material. It would depend entirely on whether there's any greater difficulty or not.

Mr. Seufert: That is all. 20

(Witness Excused.)

At this time the Court adjourned until one-ten P. M.

AFTER RECESS.

Mr. Seufert: I offer the map in evidence.

Mr. Ellis: Subject to my right to examine the elevations and contours. 30

(Map marked Exhibit B-5.)

ROBERT WHITE, sworn on behalf of the appellant, testifies as follows:

Direct examination by Mr. Seufert:

Q. Mr. White, where do you live? A. Mt. Vernon, New York.

Q. What is your business? A. Golf architect.

Q. How long have you been a golf architect? 40
A. Some thirty odd years.

Robert White, direct.

Q. What experience have you had? A. I have been doing it continually since 1894.

Q. How many courses have you constructed? A. I haven't the faintest idea. Approximately several hundred.

10 Q. Still in that line of work? A. Still in that line of work.

Q. Have you constructed any courses in this vicinity? A. Echo Lake Country Club, Roselle Country Club, Greenbrook at Caldwell, Manasquan down the Jersey coast, starting some work at Phillipsburg, New Jersey.

20 Q. Will you give the jury an idea how you conduct your work; what do you do? A. Well, what I generally do is to start in with a contour map of the property on which the golf course is going to be. And after having laid out and been approved by the committee, arrange with the contractor to build it or put a superintendent on the job and hire the labor, and do it one way or the other, according to which way the club wants I do it.

Q. So your work is to turn the rough and ready land, as you find it, into a golf course? A. Yes, sir.

30 Q. And in that line of work, I suppose you run across all character of land? A. Yes.

Q. High and low? A. Yes.

Q. Wet and dry? A. Yes.

Q. Wood land and rocky land? A. Yes.

Q. And all of this you turn into golf courses? A. Yes, sir.

Mr. Seufert: Any questions about qualifications?

40 Mr. Ellis: I don't know what he is going to testify.

Robert White, direct.

Mr. Seufert: The same thing as Mr. Wilkinson, as to availability of this land for golf purposes.

Mr. Ellis: I am not willing to admit qualifications unless he knows something about the land. 10

The Court: Yes, that necessarily must develop. If he doesn't, then you may move to strike.

Q. Have you examined—you know the Braidburn Country Club course? A. Yes, sir.

Q. And all of the land in connection with it? A. Yes, sir.

Q. Have you examined the land? A. Why, I went over it within the last week or ten days and it happened that some eight or seven or nine years ago Mr. Cole had me over there on several occasions and I tramped all over it with the idea of building thirty-six holes in it. Mr. Cole had an idea of putting thirty-six holes on the property that time. 20

Q. Did the location of the thirty-six holes include any of the land we are talking about now? A. Yes, sir. 30

Mr. Ellis: Object to any idea Mr. Cole had.

The Court: That doesn't prove anything about the fact. It merely acquainted the witness with the land.

Q. You have been on this land; the land between Brookland Avenue and the river? A. Yes, sir.

Q. And acquainted yourself closely with their character? A. Yes.

Q. Do you know the location of the other course? A. Yes, sir. 40

Robert White, direct.

10 Q. Will you indicate on this map here, if possible, where the other course or part of the course is? A. Well, there is kind of a hook back here that runs across back here to the Club house and there are eighteen holes in here and nine holes here, which is called the short course.

Q. Is the location of that nine hole course that you now speak of adjacent to this land? A. Yes, just across the road.

Q. Right alongside of it? A. Yes, practically.

20 Q. After your examination of these lands, the lands in question and line between Brooklake Avenue and the river, can you give us your opinion as to whether or not they are available for golf courses? A. Oh, there is absolutely no question about their availability. Any number of golf courses have been built where the problem was practically the same thing.

Q. Your judgment is these lands are available for golf courses? A. Yes, sir.

The Court: Having in mind now, the land itself as it is?

The Witness: Yes.

30 The Court: Not changing the character?

The Witness: Well, it's a drainage problem but it's a thing that comes up all the time. They are doing that thing all over the country all the time.

The Court: In other words, they are increasing the hazards?

The Witness: Yes.

Q. By hazards, you mean golf courses? A. Yes.

40 Q. Now, can you say whether or not this land appeals to you in any way on account of its character?

Robert White, direct.

The Court: No, that isn't the question. That is of no consequence.

Q. Why do you say that it is available? A. Well, the advantage it has as to its proximity to the lands across the road. It's almost impossible to find a piece of land that isn't available for a golf course. I mean you can build a golf course anywhere but I have in mind about this particular piece and there isn't any problem there except drainage and after you get the drainage done you have got a very simple problem for golf construction and a golf course could be built on this land with the drainage much more cheaply than if you got it all rocks and woods. 10

Q. Have you examined it at all with the idea of it being drained? A. Yes. 20

Q. What is your judgment? A. It's a simple engineering problem. There is no question at all about the possibility of draining it.

Q. So as far as your examination shows, this land is available within reasonable means of the situation of their present golf course?

Mr. Ellis: I don't think Judge Seufert ought to put the answer in the mouth of the witness and ask him to say yes or no. 30

The Court: Of course he does have a tendency of being leading.

Q. How does this hook up with the present nine-hole course? A. Why, it hooks up with it first straight and even after you plan—

The Court: You see the question we are interested in is, is the land available now or within a reasonable anticipation in the future. 40

Robert White, cross.

A. Well, I consider that it's not an impossible thing as far as cost or anything else is concerned.

The Court: Not whether it's impossible. You can do anything in engineering these days. But is it available now?

10

The Witness: After it is drained.

The Court: Well, is it available in the immediate present or reasonable anticipation in the future?

The Witness: I should say yes. I should say with reasonable drainage proposition.

The Court: Have you taken into consideration there is another owner of a portion of the land there, the College of St. Elizabeth?

20

The Witness: Yes, that doesn't affect it at all.

The Court: You can build around it?

The Witness: It's a question of laying out a golf course.

Cross examination by Mr. Ellis:

Q. You don't think that is any handicap? A. I don't think it's a dangerous handicap. I think it would be better without it.

30

Q. When you say you can build a golf course on any land, it's only a question of drainage; do you mean by that, that you have to change the character of the land before you build the golf course? A. You would have to drain it.

Q. In the condition it's now in, it's not adaptable for golf course? A. Nobody would think of building a golf course on it without draining it.

40

Q. I suppose you could build a golf course on the Atlantic Ocean if you drained it? A. Well, things grow on this.

Robert White, cross.

Q. Now, Mr. White, you live in Mt. Vernon, New York? A. Yes.

Q. Did you ever live in New Jersey? A. Yes.

Q. Where? A. Montclair.

Q. Did you ever live anywheres along the banks of the Passaic? A. No.

10

Q. Do you know anything about the Passaic River? A. Just in a general way.

Q. What do you know about this area in question? How long ago have you been there? A. Since the day I spoke about, May, 1920.

Q. How many times were you there? A. A good many times.

Q. What does that mean? A. Seven or eight times.

Q. Summer time, spring time, fall or winter? A. I think in the fall and again in the spring. I never happened to be there when the river was not flooded.

20

Q. Mr. Cole didn't decide to build the course? A. What Mr. Cole was trying to do was to organize the club and we talked it over, the way to plan a golf course. He wasn't able to do it.

The Court: How long ago was that?

The Witness: I can't quite figure, along about 1920.

30

Q. Do you know how much of the time this land is under water? A. I don't.

Q. You don't know anything about the flood conditions of the Passaic, do you? A. No; except I know it's very low, sluggish stream and I know that it only floods, but of course the number is taken from the report.

Mr. Ellis: I move to strike out the testi-

40

Robert White, cross.

mony as to the adaptibility. He testified he doesn't know about the flood conditions.

The Court: The motion will be overruled.

(Exception allowed and sealed.)

10 The Court: It is for the jury to say what weight and credence they will give his testimony and apply the issue in the case.

Q. Mr. White, this land is not now golfable until it has been drained and changed in character?

A. I don't know exactly what you mean by change in character.

Q. Would it change the character if you drained it? A. Well, it just depends on what you mean by character.

20 Q. Don't you understand what I mean by the character of the land there for golf purposes? A. I don't know what you mean by that.

Q. Well, would you consider—

The Court: In the dry season, the land is dry?

The Witness: Yes.

The Court: Should it be wet?

The Witness: No, dry.

30 The Court: Therefore if you drained it, it would be dry?

The Witness: Yes.

The Court: One of the witnesses said he was there when it was dry. Mr. Ellis brought out it was a peculiarly dry season. Go on.

Q. You still say this land could not be used for golf playing purposes until it has been drained?

40 A. Yes, it would have to be drained.

Q. Mr. White, the land on which the present

Robert White, redirect.

courses are built is considerably higher than this land, isn't it? A. It's some higher. I can't tell you the elevation.

Q. Well, have you any idea of the elevation? A. Well, I know for instance that the roll near the golf house must be about thirty feet higher. 10

Q. And about the other land? A. On the other side I think it may be fifteen to eighteen feet higher. An engineer could answer that question.

The Court: Immediately adjoining the road there?

The Witness: Immediately adjoining the road as shown particularly on this map.

Q. I am asking you, Mr. White—Mr. White, there's a gradual rise of this land on the left generally from the river? A. Yes, that's right. 20

Q. The present twenty-seven holes are located on land considerably higher than this? A. Yes, the location of the holes is four or five feet higher than this.

Q. Isn't the lowest spot four or five feet lower? A. I don't know the lowest spot, but the lower part is four or five feet.

Q. That's the land in question? A. Yes. 30

Redirect examination by Mr. Seufert:

Q. Do you know the location of the lake on the main course? A. Yes.

Q. Do you know whether or not that level there is higher or lower than this land? A. I don't know. I should say it must be higher.

Q. You think it is higher? A. Yes.

Q. Now, do you know of any course that you have constructed or had any experience in that has had a problem similar to this? A. Well, none 40

Robert White, redirect.

I have actually constructed but I have seen quite a good bit of it done.

The Court: Bearing in mind he says a golf course can be built anywhere?

Mr. Seufert: I understand that.

10

Q. In comparison with the ordinary course of construction of golf courses, would the cost of construction of a golf course with drainage of this property be within the fair average of the general cost? A. Yes, sir.

Mr. Ellis: I move to strike that out.

The Court: Yes, strike out the answer.

Mr. Seufert: Exception.

20

The Court: Immaterial.

Q. Are there any courses that you know of that don't require some drainage?

Mr. Ellis: I object to that.

The Court: Suppose I judicially recognize it.

Mr. Seufert: Well, if the jury will do the same, all well and good.

The Court: Well, all golf courses require drainage?

30

The Witness: Yes.

Mr. Seufert: They require water in dry weather?

The Witness: Yes.

Mr. Seufert: That is all.

(Witness Excused.)

40

Edward P. Molitor, direct.

EDWARD P. MOLITOR, sworn on behalf of the appellant, testifies as follows:

Direct examination by Mr. Seufert:

Q. Mr. Molitor, what's your business? A. Sewer plant operator. 10

Q. Employed how and where? A. Employed by the Boroughs of Madison and Chatham at the Madison-Chatham joint sewer construction work, Chatham, New Jersey.

Q. Where is that located with respect to the Passaic River? A. Their property adjoins the Passaic River.

Q. So it's located on the banks of the Passaic River? A. A portion of it.

Q. How far away from this Braidburn property, do you know? A. Why, I should say a few miles; three or four or five miles. 20

Q. Approximately, have you estimated the distance at all? A. No, I really don't know exactly where the Braidburn property is at.

Q. Then you can't give us an idea of that distance? A. No, I know in a general direction where it is.

Q. Now, what is your line of duties, your work? A. Well, operate the sewerage plant that's located there. 30

Q. Is the taking of levels of the Passaic River part of your work? A. That's one thing that's always been done at that plant. A record kept of the level of the river, above and below our affluent outlet.

Q. What is the purpose of taking level? A. Why, it has direct bearing on the operation of the plant. 40

Q. And have these records been kept? A. They have.

Edward P. Molitor, direct.

Q. How often would you take them? A. Daily; every morning at eight o'clock.

Q. Who kept the records? A. Since I have been there, I have taken that reading.

10 The Court: How long have you been there?

The Witness: Four years.

The Court: Every morning?

The Witness: If I didn't take them, somebody would be designated to take them.

Q. Was a record kept of the readings? A. There was.

20 Q. And in what shape were they kept? What did they indicate? A. They indicated the height of the river below and above the outlet.

Q. Was it between the pipe and bench point?
A. The zero point.

Q. Have you these records with you? A. Yes.

Mr. Seufert: I offer them in evidence.

30 The Court: I assume counsel will want them in. The jury will want to know as to the extent of flow there of the river and what area is covered by the flow from time to time.

Mr. Ellis: I would like to have them if they have any relation.

The Court: Of course it would have to be shown here where these records were taken and how far away from the lands of the Braidburn Realty Corporation. In other words, you would have to show the same general condition at the point where these records were taken.

40 Mr. Seufert: We expect to.

The Court: And at the *locus in quo*. If

Herman W. Bluhm, direct.

you are going to show that, I will allow that to come in.

Mr. Ellis: If this had any relation whatsoever to the Braidburn lands I want that in evidence. But these records are taken up the river and not at the Braidburn land.

10

The Court: I will allow them to be marked for identification and when Judge Seufert has produced the testimony that makes them competent to come in as full exhibits, then I will allow it to be done. On the assurance that he is going to do that, I will allow them to be marked.

Q. Are these the records you gave to Mr. Bluhm, the engineer? A. They are.

20

(Papers marked B-8 for Identification.)

(Witness Excused.)

HERMAN W. BLUHM, recalled.

Further direct examination by Mr. Seufert:

Q. I show you a bundle of records just testified to in connection with the Chatham Disposal Plant, showing levels of the Passaic River. Are these the records you used in making your survey of the river levels in connection with the Braidburn property? A. No, sir, I used a copy of them, I believe.

30

The Court: In any event, they are identified as the records?

The Witness: Yes.

The Court: To which you referred this morning?

The Witness: If they copied the same thing, I used these records.

40

Herman W. Bluhm, direct.

Q. And will you just tell us how you used these records to establish the levels of the river at the Braidburn property?

Mr. Ellis: I object.

10

The Court: I will not allow him to do that, and first I am going to require that it be identified whether there is any similarity; if not, it will go out.

Mr. Seufert: Similarity—

The Court: Go on further.

Q. Do you know anything about the Passaic River? A. Yes, sir.

20

Q. What is the distance from the Braidburn lands to the Chatham plant? A. Two and a half miles as scaled along the river banks.

Q. And what is the nature of the flow at Chatham?

The Court: What is there there?

A. Why, there is an affluent pipe that leaves the Disposal Plant and the river just goes up there like it does any other place.

Q. Well, is the river inclosed there? A. No, sir.

30

Q. Well, what is there? A. You walk down to the river bank just like you do in any other lands along there.

Q. What is the heighth of the bank? A. I did not identify that but I have connected the elevation of the affluent pipe with the levels at Braidburn.

40

Q. Is there any difference in the level of the water at Chatham and the level of the water at the same time at the Braidburn land? A. Yes, two and a half foot drop. In other words, the

Herman W. Bluhm, direct.

water level at Braidburn is two and a half feet lower than at the Chatham Plant.

Q. You have measured that out? A. Yes.

Q. And established that difference between the level at Braidburn and the level at Chatham in your figuring in making out your charts? A. Yes, sir.

10

Q. So that difference in level at Chatham will be two and a half feet higher than at Braidburn?

A. Yes, sir.

Q. Taking them into calculation in making out your flood levels at Braidburn? A. I have taken them into consideration because I actually measured it.

Q. Have you checked up the levels at various times or at different times at Braidburn and compared them with Chatham so as to establish the record?

20

Mr. Ellis: I object, I don't want to be objecting to Judge Seufert questions all the time but he is asking the witness to answer him yes or no.

The Court: The judge is admonished as a Judge, in the presence of Counsel that he must not do that sort of thing.

30

Mr. Seufert: I understand.

Q. Have you established the levels of the river at various times at the Braidburn property? A. Yes, sir, within a period of about fifteen or twenty days.

Q. And from the records, were you able to establish or could you establish the levels at any previous time? A. Oh, yes.

The Court: How?

40

The Witness: Because I had them tied

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in with the bench mark elevation at Chatham.

10 Q. And as the result of the use of the records at Chatham and your measurement of the levels at the Braidburn property, have you prepared any chart or graph to indicate what those levels have been over a period of time? A. Yes, I have drawn up charts for a period of ten years.

Q. Using the records—

The Court: Are the river conditions at Braidburn substantially the same as at the Chatham Plant?

20 The Witness: With the exception of the difference in height of two and a half feet. Well, the cross section of the river, you mean?

The Court: Yes.

The Witness: Well, the cross section is somewhat different.

The Court: At Chatham?

The Witness: At Chatham. It seems the river is more confined at that point than it is at the Braidburn place.

30 The Court: How confined?

The Witness: Well, the bank is open on the East Orange Water Works side, opposite the Braidburn plant, but more confined at the Chatham Plant.

The Court: Why do you then adopt the Chatham flow as the normal or unit?

The Witness: We don't adopt it, we just add in the elevation.

40 The Court: Because they happened to keep records there?

The Witness: That's the reason for it.

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The Court: That's the only reason?

The Witness: That's the reason there.

The Court: Have you any actual knowledge of the nature of the flow there over the Braidburn property?

The Witness: No, no other than what we have taken during the course of fifteen days. 10

The Court: And what did you discover in fifteen days?

The Witness: I discovered the river showed at a certain heighth, which compared with the same heighth at Chatham with the exception of two and a half feet elevation.

The Court: What area would that cover? 20

The Witness: In these days the river was confined in its channel at both places. A well definite record of these fifteen days because the banks hadn't been overflown.

Q. It's merely an engineering problem to figure out the level from time to time from the data received? A. Very simple problem.

Q. And you have done that? A. I have, yes.

Q. Is this graph the result of your calculation? 30
A. Yes, sir.

Mr. Seufert: I offer it in evidence.

Mr. Ellis: It's objected to, your Honor.

The Court: On what ground?

Mr. Ellis: Objected, because the conditions of the Passaic at Chatham, where this witness obtained all his information, is by his own admission entirely different of the conditions at the Braidburn property. Now, the Passaic at the Chatham Plant which is estimated two and a half to three miles 40

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10 away is confined within its two banks, whereas after it reaches into this large basin, at the Braidburn land, the area is more, it spreads out in an area covering thirty thousand acres of land. I don't see how it's possible for any man to obtain from the conditions of the river at Chatham— which is two and a half feet higher, as he says, in the river bed in normal times than Braidburn—can have any relation so as to indicate in any way the condition of the land at the Braidburn station.

The Court: What is your theory?

20 Mr. Seufert: This much about it: The question the jury is going to ask is how many times a year this land floods and what extent—

The Court: What area was covered?

30 Mr. Seufert: And to what extent the rising of the river affected the usability of this property. Now, we have data that the Chatham plant was keeping accurate records of the rise and fall of the river. That's the adopted level of the water. And the rise and fall of the Passaic River subject to the difference in measurements that the engineer has actually measured and given to me to be the same; there's no change in the physical—

The Court: That is the river itself?

Mr. Seufert: Yes. And in order to get these facts in—

40 The Court: I think I will allow this record in with the qualification that the jury will be instructed to observe that the conditions at Chatham are not precisely the

Herman W. Bluhm, direct.

same as those at the Braidburn property. For example, there's a difference in heighth of two and a half feet at Chatham, higher than Braidburn. It may be of some evidential value to ascertain the heighth of the river involved in this question we are now discussing, and therefore the jury may regard it as of some value to have that information. With that qualification and with the statement that the City of East Orange is not bound by these records as being conclusive, but merely being used as an aid in the inquiry as to the availability of the land in question, I will allow them to come in. But it will be understood that they do not represent the exact condition encountered at the Braidburn property. And moreover the records now are taken two and a half to three miles from the Braidburn property.

Mr. Ellis: Exception. I object to these admissions by the Court.

The Court: Yes, objection overruled. Exception allowed. I will make the same ruling as to these records. But you will understand there is a difference in conditions although there may be here some similarity with reference to the flow of the river.

Q. When you examined these lands, what if any evidence of flood did you find on the land? A. There wasn't any evidence at all.

The Court: When was that time; fifteen days, you say?

The Witness: From the 13th of July until about the 30th.

The Court: Last year?

The Witness: 1929.

Herman W. Bluhm, cross.

Q. What evidence, if any, or affects of any prior flood did you note? A. I haven't seen any floods at all, not even a trace of silt.

Q. Did you examine the banks of the river?
A. Yes.

10 Q. What indicates did they show, if any, of any flood affects? A. Well, upon the higher levels, you could see the traces of flood there.

The Court: How far back?

The Witness: Oh, I should say about four or five feet back from the river edge.

Q. What evidence of an erosion did you find?
A. None whatever.

20 The Court: By erosion you mean wearing away from the banks or ground?

The Witness: Yes.

Q. Was there any evidence indicating a flood condition? A. Not that I could see.

Mr. Seufert: Cross examine.

Cross examination by Mr. Ellis:

30 Q. Then from your examination of the Braidburn lands, they have never been flooded? A. Never in my time.

Q. I did not ask you that. I asked you from your examination whether in your opinion they never have been flooded? A. I would not say that.

Q. You saw no evidence of it? A. That's true.

Q. You were there in the middle of July this year? A. The 13th day of July.

Q. This was an unusually dry season, wasn't it?
A. Yes, the records will show that.

40 Q. One of the driest seasons in your memory?
A. I would not say that. I am forty-five years old.

Herman W. Bluhm, cross.

Q. Are you familiar with the records? A. Yes, the last ten years.

Q. Isn't it one of the driest seasons the records indicate? A. You have to examine the records to see that.

Q. Your knowledge of the flood conditions of the Passaic is limited to fifteen days' examination acquired in July, 1929? A. Not my knowledge of the Passaic floods. My knowledge of the land is confined to eighteen days. 10

Q. What do you know about the river? A. The flood and levels for ten years.

Q. I am asking you where?

The Court: What spot?

A. These were at Chatham. 20

Q. You examined the records of ten years? A. No, I plotted them.

The Court: You plotted them from the records of Chatham.

The Witness: Yes.

Q. Your knowledge of the flood conditions of the Passaic has been limited to your examination of these records at Chatham plus your examination of fifteen days or less in the month of July? A. Absolutely. 30

Q. You did not see the land from the middle of February until the 25th of April, 1929? A. I did not, no.

Q. You don't know whether that was all under water or not? A. I never saw the land before the 13th day of July, 1929.

Q. Do you know the dimensions of the Passaic basin in flood conditions? A. No, sir. 40

Q. Don't know a thing about it? A. Not a thing.

Herman W. Bluhm, redirect.

Q. You don't know anything else about the flood conditions on the Braidburn property? A. Not before that time, July 13th, 1929.

Mr. Ellis: That is all.

10 *Redirect examination by Mr. Seufert:*

Q. Will you explain this graph now to the jury to indicate how it is made up and what it shows?
A. Well, I took the levels submitted to me by Mr. Molitor and plotted this, which showed the height of the river above the bench mark at Chatham at the affluent pipe of the discharge—

The Court: Discharge pipe?

The Witness: Of the Disposal Plant.

20

Q. Is there anything on the graph to indicate where the levels are at Braidburn? A. Yes, sir, I have four lines on there which correspond with the four lines on the graph here (indicating).

Q. Will you explain to the jury what you mean by that? A. Well, on this graph here there's an elevation of 166 feet and a large two, which corresponds with the large two and 166 on this graph.

30 Q. That's the lowest part, the lowest upon the property? A. Yes. On the next graph from there, the elevation of 167 was a foot higher and corresponds with the third contour here and there, and down there (indicating). The same way with the fourth. Then 168 corresponds to the fourth contour shown on this map. This black line shows the top of the spoil bank, elevation 172, which corresponds to the eight or 172 contour.

40 Q. Can you tell from that graph, for instance, in the year 1929 from the 1st of January how many times that land was flooded?

Mr. Ellis: Object, your Honor. This

Herman W. Bluhm, redirect.

witness has already testified he know nothing of the flood condition of the Passaic.

The Court: Of course that's the difficulty. In other words, he says he has no actual knowledge about what you are asking him now. You rely on affirmative fact upon a mere calculation by someone else. 10

Mr. Seufert: Records at the time of the property and levels here—

The Court: I will allow this. If the same conditions prevailed at the Braidburn property and the property at Chatham when the record was taken, what would it indicate the average to be?

Mr. Seufert: In respect to the height?

The Court: In respect to the height. 20

Q. Can you answer that question?

Mr. Ellis: But, your Honor, he has said he never seen the Braidburn lands—

The Court: Not flooded. In view of the facts I have admitted these records with the qualifications I have indicated, I am going to allow him to answer.

Mr. Ellis: I object.

The Court: Objection overruled. 30

(Exception allowed.)

Q. Can you indicate from that line of questioning how many times this land was flooded in 1929?

A. Yes, it all depends on which land you take.

Q. Well, take the lowest part first? A. That's the green line?

Q. Yes? A. Every time the river goes above the green line that means the land has been flooded to that extent. 40

Herman W. Bluhm, redirect.

The Court: How many times does it indicate?

The Witness: I would have to count the number of days.

10 The Court: Well, you can. I assume East Orange would want to know how often that was flooded, too, wouldn't it?

The Witness: They have been flooded about 105 days this year up to the 22nd of November.

The Court: That's the lowest part?

The Witness: Yes.

The Court: The small area there in the circle?

The Witness: Yes.

20 The Court: What's your next one?

The Witness: 54 times.

The Court: And your next one?

The Witness: About 33 times.

Q. And the highest point? A. The 172 elevation?

Q. Is that the highest elevation? A. That's the elevation at the top of the spoil bank.

30 Q. How many times was that flooded, beyond the spoil bank? A. The top of the spoil bank has always been higher according to the records during the last ten years.

Q. That is the bank that has been designed to keep out the river? A. Yes.

The Court: Now you are talking about the bank over there (indicating)?

The Witness: Yes.

The Court: That which you propose?

40 The Witness: Absolutely.

The Court: Rather than the actual con-

Herman W. Bluhm, redirect.

dition. What is the actual condition independent of the spoil bank?

The Witness: Well, the top of the spoil bank is equivalent to the eighth contour on this map.

The Court: You make that about four feet? 10

The Witness: Four feet high, yes.

Q. And that bank in your judgment then would do what? A. Keep the river out.

Q. Effectually? A. According to the records of the last ten years it has.

Q. Did it never flow over the top of that bank?
A. Yes.

The Court: Is the Passaic always a peaceful stream? 20

The Witness: Never gets impetuous.

The Court: What do you know about the flow? Have you seen the Passaic in a flood condition?

The Witness: I have seen the Passaic with the river practically up to the top of the bank.

The Court: What heighth was that?

The Witness: That's within six inches of the fourth contour. 30

Q. Have you ever seen the Passaic flooded? A. Over the bank, you mean?

Q. Yes? A. Not at this particular point, have in other places.

The Court: You were there fifteen days?

The Witness: Yes, but my time the river was never flooded, it was way down beyond the bank three or four feet. 40

Herman W. Bluhm, recross.

Q. What do you mean by "your time"? A. Between the 13th of July—

The Court: These thirteen days?

The Witness: Yes.

10 *Recross examination by Mr. Ellis:*

Q. Mr. Bluhm, looking at contour number five, which is elevation 169? A. Yes, sir.

Q. Will you give us the depth of the water at contour five on February 8th, 1929, from your records there? A. The depth of the water was 32 inches above the Chatham zero; which is below the 168 contour or the fourth on our line.

Q. You mean contour 169 was not flooded on February 8th, 1929, according to your records?
20 A. No, sir.

Q. Mr. Bluhm, let me show you some photographs. Look at this for a moment, and I ask you if in your judgment this condition would leave any evidence of a flood four months later? A. Well, they have not—

Q. I ask you to look at that and say? A. Yes, sir.

Q. And such a flood condition as that would not leave any evidence four months afterwards? A.
30 It has not, no, sir.

Q. Then your observation along the river as to flood conditions doesn't mean very much, does it?
A. Just what do you mean by that?

Q. I mean if the evidence of the flood that was in affect on May 1st was obliterated in July, then your examination of evidence for flood doesn't mean very much? A. I don't quite understand that.

40 Q. In other words, you would not expect to find any evidence of flood two and a half months

Herman W. Bluhm, redirect.

later? A. You might. There might be driftwood there.

Q. You have looked at these photographs? A. Yes.

Q. And do you think that that condition if it existed on the Braidburn property on May 1st, 1929 would leave any evidence of it in July? A. I don't see any driftwood in your photograph here. 10

Q. I am not asking what you see in the photograph. I am asking you to look at the condition as indicated in the photograph and then tell us whether or not you would expect to find evidence of flood two months and fifteen days later? A. It would depend on the type of river, whether the river has any driftwood or silt. If it deposits silt on the ground, you would see it, and driftwood you would see it. 20

Q. Does the Passaic carry down silt and driftwood ordinarily? A. It may.

Q. Do you know? A. No, I do not.

The Court: He is hardly qualified on that.

Redirect examination by Mr. Seufert:

Q. If, within the last year, the floods on this land had done any damage, what would you find on the land? A. Well, you would find driftwood lying around— 30

The Court: Now, would a flood, like an automobile accident, always leave the same result?

Mr. Seufert: It's rather important in this case, because one of the questions the jury will have, if an occasional flooding of this land by the Passaic River did any damage, will it do the golf course any harm? 40

Herman W. Bluhm, redirect.

Q. If the floods during 1929, in May, had done any damage to the land there, would it be observable in July, 1929? A. Why, certainly.

Q. And you didn't observe any? A. Didn't observe a thing as far damage done by the river.

10

The Court: Now, Mr. Ellis might ask the question, and how do you say there was no flood in May.

The Witness: I can't say that, Judge.

The Court: Anything more?

Mr. Seufert: Yes.

Q. Can you tell, between May 1st and November 15th of this year, how many times this land was flooded at your mean elevation there? A. Which elevation do you mean?

20

The Court: Is there a mean elevation?

The Witness: Yes, low one, 169—no, the one is 166.

The Court: And the high one is what?

The Witness: 169.

Q. Now, 167 would be about mean? A. 168.

Q. Yes, between those two columns? A. Yes, you want to get the average elevation of land.

30

Q. Now, between May 1st and November 15th, how many times was the land at the 168 elevation under water?

Mr. Ellis: Object, because he says he doesn't know.

Q. From the graph?

The Court: So far as the graph shows with the qualification that has heretofore been put on record by the Court.

40

Mr. Ellis: It being understood this wit-

Herman W. Bluhm, redirect.

ness is giving this estimate from the graph and not from his observation.

The Court: That's all.

A. It's never been flooded in that time.

Q. Just one more question. What is your customary manner from an engineering standpoint of preparing records in connection with a question of this sort? 10

Mr. Ellis: Object. I don't think what his custom might be is binding on us.

The Court: No, not his custom. What is the accepted practice among engineers?

Mr. Seufert: I won't object then to the general engineering custom of calculating water heights at a particular point. 20

A. Why, we take records—

Mr. Ellis: That must be where conditions are the same.

The Court: Yes, that is assuming conditions are the same, however, this particular question doesn't involve that. It merely states how it is done. (To witness): How is it done?

The Witness: In preparing any kind of a graph from records, the plot is made from the record and then carefully checked by another man before filling ink in for this man to use. 30

Q. And this is the method—what method did you follow in making this graph? A. Same method.

The Court: Did you say this graph would not be conclusive of a given spot two and a half miles away at a given time? 40

Herman W. Bluhm, recross.

The Witness: It would in this case.

The Court: If any flood was shown in May, 1929, on the Braidburn property?

The Witness: I mean to say so far as the graph was concerned.

10 Mr. Seufert: There's no evidence of any flood at that time.

The Court: Of course, not yet.

Mr. Seufert: We contend that the river levels, the entire flow of the river was confined to its channel, which it was at the time we took the levels.

Recross examination by Mr. Ellis:

20 Q. Mr. Bluhm, if you found as a matter of fact that on February 8th, 1929, there were flood conditions on the Braidburn land, then you would assume that this graph method as to your elevations was wrong, wouldn't you? A. I don't know just exactly how you mean that.

Mr. Seufert: Object to that, it calls for a conclusion.

The Court: The question is proper, put it in a different form.

30 Q. You say on February 8th, 1929, according to your graph there, there were no flood conditions at elevation 169 at Braidburn? A. No, sir, I did not.

The Court: I am afraid I misunderstood you now.

A. You are referring to 168, the average?

40 Q. The Judge asked you what flood conditions were between May 1st and November 15th at 168, and you told him there wasn't any?

Herman W. Bluhm, recross.

The Court: I misunderstood you. I mean Judge Seufert.

Q. Now, I ask you what the flood conditions were at elevation 169 on February 8th, 1929, and you said there was no flood condition?

10

Mr. Seufert: No, he said May 1st.

A. You show a February picture for a May picture here.

The Court: You ask that question again and he will answer it.

Mr. Seufert: February is a different proposition than May 1st.

Q. Well, you can look at your graph and tell us what the flood conditions were at elevation 169 on February 8th, 1929? A. On February 8th, 1929, at 169 was fifteen inches above the height of the river.

20

The Court: Flood? Where was it fifteen inches higher?

The Witness: That's the river's level at that point.

Q. Then the mean elevation, 169, was not under water? A. Absolutely, according to this graph.

30

Q. And if you found as a matter of fact that elevation 169 was under water on February 8th, 1929, would you still say your method of computing elevations at that point are correct? A. No, I would say it was flooded at that time.

Q. At elevation 169? A. Yes, if I found 169 flooded—

The Court: You don't have to argue that. In other words, what he is trying to bring out, Mr. Witness, is that if your graph

40

Clyde Potts, direct.

showed no flood, but if fact there are witnesses produced plus the photographer who took a picture showing floods, which would be right in the circumstances, your record here or the fact of a flood.

10 The Witness: Yes, there would be a difference somewhere.

The Court: There would be some error made?

The Witness: Absolutely, I agree.

The Court: And it might be due to the fact you were two and a half miles below the Braidburn property where these records were kept?

20 The Witness: Yes, that's true.

The Court: The variation may bring about that result?

The Witness: Yes.

Mr. Ellis: That is all.

(Witness Excused.)

CLYDE POTTS, sworn on behalf of the Appellant, testifies as follows:

30 *Direct examination by Mr. Seufert:*

Q. Mr. Potts, you live in Morristown? A. I do.

Q. What is your profession? A. I am a consulting engineer.

Q. In what line? A. In the construction of water and sewer and other public work.

40 Q. Will you state some of your experiences in reference to hydraulic engineering, which covers water works and water conditions? A. At the present time I am consulting engineer of the Bound Brook Water Company, building a dam in back of

Clyde Potts, direct.

Chimney Rock for the Bound Brook Water Company. I am engineer for the City of Bayonne for their water works, and understand the conditions. Acting consulting engineer of the City of Jersey City and Lambertsville Water Company. Up until a short time ago I was consulting engineer for the Port Jervis Water Company until that sold out, then the City. And built two pipe lines or one pipe line from Boonton to Jersey City for Jersey City a few years ago. And I am consulting engineer for the Atlantic City Water Development and Improvement of the Water Works. The Atlantic City Sewer Company who intend to build a sewer plant there and also other sewer disposal works. Engineer of Madison and Chatham in the construction of a new sewer disposal plant at Chatham, and Rockville Center, building a sewer system, and—

The Court: Is there any question that the witness is qualified to speak?

Mr. Ellis: No objection to his qualifications.

The Court: I guess he is qualified.

Q. In the course of your experience, have you made any study of water supply?

The Court: Subterranean streams?

A. I have been engaged in studying sources of water supply in the last twenty-seven years.

The Court: Where?

The Witness: New Jersey, Passaic River Water-shed.

Q. Are you acquainted with the water supply in this district? A. I am.

Q. Have you made any study at the source of

Clyde Potts, direct.

water supply in this district, having particular reference to the Braidburn lands? A. I studied the question of water supply and water works for Florham Park two or three years ago. I designed the system for Florham Park and recommended the
 10 location of the wells and had actual charge of the location of the wells. I have been engineer for Chatham on the improvement to their water supply which is about a mile or a mile and a half from this location and have been consulting engineer in connection with their water supply, and as Mayor of Morristown, I have developed the water supply for this city, which includes the lines from Littleton, which draws from the same flow of water which East Orange proposes to tap at Florham Park.
 20

Q. When you say proposes to tap at Florham Park, you mean where? A. The Braidburn property.

Q. Are you acquainted with that locality and sources of supply? A. At Braidburn?

Q. Yes? A. Yes, sir, I think I am.

Q. And is it the same source of supply across the river where they have their wells now? A. I believe so.

30 Q. Are you acquainted with the method of pumps of East Orange on their side of the river? A. I have examined all of the East Orange pumping plant and their data in connection therewith.

Q. And the wells located along the shore of the river, on the Dickerson tract? A. Yes, I have studied the record of the Dickerson wells.

Q. And that supply taps on the same supply—

Mr. Ellis: I object.

40 The Court: Leading.

Clyde Potts, direct.

Mr. Ellis: Leading all the way through.

The Court: Yes, undoubtedly.

Q. What connection—

The Court: What relation is there to that supply and the other one? 10

The Witness: I don't just understand what you want to know.

The Court: I am suggesting, that's all.

Q. Is there any connection between the supply from the Dickerson wells and the proposed supply from the Braidburn property? A. The Dickerson wells and the proposed wells on the Braidburn property which East Orange proposed to put down, and the well now used by Braidburn for the supply of its property are all directly connected in that they take water from the same subterranean source. 20

The Court: How do you know that?

The Witness: The study of underground geological conditions.

The Court: You have made a study of it?

The Witness: I have made a study of it, yes. 30

The Court: What is the nature of your study? In reaching your conclusions, by what method did you arrive?

The Witness: Well, I took all the geological data available of this land along the Passaic and it indicates that the old bed of Lake Passaic is underlaid with gravel and boulders and that gravel and boulders substruction is supplied with water, running water which follows on a terrane from Madison to Morristown and there along to Boon- 40

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10 ton and sinks through the strata and replenishes this underground basin or reservoir, and it indicates that Madison and Chatham and Florham Park and our wells at Littleton and the wells at the Braidburn now used and these proposed wells which East Orange propose to sink all tap that same underground basin for their water supply. There is a theory and there is evidence to support it that there is a gap in the old substructure along the Passaic River at the Braidburn property where part of this underground water that's stored in this underground basin escapes through this gap. It was the old percolative outlet of Lake Passaic and this underground water was stored in this basin and now percolates through this gap, and comes out somewhere down around Millburn. That theory is subscribed to. These wells on the Dickerson property now—

20

The Court: The Dickerson property across the river?

30

The Witness: Yes, immediately across the river from the site they now seek. That these wells on the Dickerson property catch probably to a more or less extent water which percolates through this gap of the substructure and then back out up through the Dickerson land. Now, the wells which they intend to put up will cross this gap and comes back into Morris County and tap this vein.

40

The Court: Aside from this theory, has there been any demonstration of that?

The Witness: I think so.

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The Court: Where?

The Witness: I think the fact that they drove these Dickerson wells and the fact of these proposed wells in Morris County—

Mr. Ellis: Objected to.

The Court: All right, strike it out. I will allow my question to stand, aside from the theory has there been practical demonstration. 10

The Witness: I think so.

The Court: Do you know of nothing—

The Witness: Nothing further.

The Court: Well, if that be so, Mayor, the Dickerson wells were sunk when, if you know? 20

The Witness: Four or five years ago, I think; perhaps longer than that.

The Court: Did they affect other wells in that immediate vicinity?

The Witness: They affected one well on the Braidburn property.

The Court: Where was that?

The Witness: Located across the lake from the present well. The present well is just south. 30

The Court: How do you know that well was affected?

The Witness: Well, it dried up and they had to put down a new well to get more water. A deeper well.

The Court: Same site?

The Witness: Very close to it.

The Court: But you do designate it as a theory?

The Witness: Yes, a theory that I think is well founded. I think there is evidence 40

Clyde Potts, direct.

10 to support it. The wells of Madison and Chatham have been developing steadily for the last—my knowledge of that goes back fifteen years and there has been a steady drop in the mean water level at the Madison and Chatham wells and the Littleton wells of Morristown there has been a drop of water there. And then I spoke of the Florham Park well being dried up. All that tends to show that this great underground basin is being tapped and water being removed from it to a greater extent than it is being replenished by running flows and then the geological formation underneath is such as to retain this water in this bed of
20 old Lake Passaic.

Q. Have you made any examination of the present water work system of the Braidburn Club? A. I have.

30 Q. What does it consist of? A. Six inch well, 113 feet deep, from which water is obtained by a deep well pump run by a five horse power electric motor. They pump water at the rate of about 35 to 60,000 gallons a day there for use in and about the club house and on the grounds.

Q. And assuming you know the distance between the Braidburn well and the one you just described from the forty-two acre tract that the City of East Orange is contemplating— A. Do not know the distance.

Q. Have you any idea of the distance of that well from the tract east of the road? A. I would say about eight hundred or a thousand feet.

40 Q. And assuming that East Orange will erect wells on this property that's being condemned and extract from those wells 2,000,000 gallons per day, do you know what's going to happen—

Clyde Potts, direct.

The Court: In all reasonable probability.

Q. —to the Braidburn wells, in all reasonable probability?

Mr. Ellis: I object to this examination.

The Court: On what ground? 10

Mr. Ellis: Because this piece across the highway is not a part of the land of which we are taking a part. Bear in mind we are not even taking to the Brooklake Road. We are taking between 225 feet of the Brooklake Road, and the piece we are taking is forty-eight acres from the end of their land as far as water is concerned. I maintain it's not evidential as to damages.

The Court: Well, I am inclined to the view that since the damage sought to be compensated is this very one of this experience as to water supplies, that it's not unlike that case of the Lehigh Valley against New Jersey District Water Supply Commission, before Vice-Chancellor Foster, in which he held that may very properly be a proximate cause of damage. 20

Mr. Ellis: But, it seems to me—

The Court: Of course, I must tell the jury here that they must distinguish between fact and theory. Between speculation and that which is a reasonable inference of fact based upon reasonable probability, and therefore the jury will be confined to the testimony that satisfies them as reasonable persons that in fact there is a reasonable probability that any loss would result. Now, I must confess that you may well argue that it's pure speculation and therefore if I allowed 30 40

Clyde Potts, direct.

10 it to go the jury they would have testimony of the evidence upon which they could base the finding of damage and then specifically no damage was actually developed then the Braidburn Company would profiteer, as it were, I don't mean that offensively, of course, but it would be profiting when it should not have.

20 Mr. Ellis: I am rather up against a peculiar situation. It is true the City is condemning this land to put down wells if there is water there. It may be a year or five years or ten years. The City is taking an active part in this Chimney Rock water project and if possible we will negotiate proceeding to use the Chimney Rock water supply, and in event of that, we probably will not use these wells.

30 The Court: It infringes very closely on mere speculation as against fact or reasonable probability rather. I think I shall allow the witness to answer this question. My first impression was this was in the entire tract; that it was the entire property the golf club was holding because it was divided by the road. It does appear they acquire the property as a whole and ordinarily, I will say, that the compensation must be confined to the part actually taken and the damage to the remainder of the tract of which it is a part. While it does appear that the Holding Corporation acquired by deed this entire property as a whole, in view of the ruling here in this Lehigh Valley case, I am rather inclined to think that the jury has
40 a right to consider that, if it would be dam-

Clyde Potts, direct.

age. The jury may go without entirely and say it is pure speculation.

Mr. Ellis: That's a separate tract.

The Court: It wasn't acquired separately.

Mr. Ellis: It doesn't agree with my description in the deed, the one tract where it is a physically separated tract should determine the question. (Argument.)

10

The Court: I think undoubtedly the question is here whether this road changes that what otherwise might be considered in this proceeding. In other words, isn't that a separate tract over there? The tract is divided by the road but it's not separate, it is not separated as far as the user is concerned. It's a question of the user. Objection overruled. You may have an exception. The witness may answer.

20

Q. Assuming the City of East Orange is going to pump from the land condemned 2,000,000 of gallons a day, what effect, if any, will it have upon the Braidburn well located on adjacent property, in all reasonable probability?

30

Mr. Ellis: I object.

The Court: Objection overruled. You may have an exception.

A. From my knowledge of the underground condition and conditions prevailing in the Passaic Valley Water Shed, it's a reasonable conclusion that the well of the Braidburn Company will be dried up in whole or in part.

Q. What effect will the drying up of the Braidburn well have upon its water plant? A. It will

40

Clyde Potts, direct.

compel them to buy water from the Borough of Florham Park.

Mr. Ellis: I object to that.

A. (Continued.) Or seek a supply.

10

The Court: May they not dig another well in there?

The Witness: It would not do them any good to dig another well when the wells East Orange propose to project taking a million gallons of business—

The Court: Why not? You say these other wells have not gone dry?

20

The Witness: Yes, but they are a mile and a half away. They will be affected too to a less extent. The wells in nearest proximity will be dried up in whole or part. Those at more distant points will be affected to a less degree.

The Court: A well at a distant point will be less affected?

The Witness: Yes.

The Court: I thought you said this basin was the source of supply of all of them?

30

The Witness: It is, but the point is the water—

The Court: Nearer to the basin, the greater the supply of water?

40

The Witness: No, the nearer to this new point of digging the well, they are nearer to this new point of digging, it will be greater affected as you get further away from the new point of taking the affect will be less because when you pump water from a well to draw ground water, down pretty near the suction of your pump the water in

Clyde Potts, direct.

the ground then takes the slope from that hydraulic force, depending on the ferrets of the well.

Q. Are you acquainted with the cost of supplying water by Florham Park? A. Yes, I built their plant and recommended the rates they charge. 10

Q. Do you know what rates are in affect now?

Mr. Ellis: Object to that.

The Court: Overrule it and exception allowed.

Q. (Continued.) For 60,000 gallons per day?

The Court: What the reasonable cost would be.

Mr. Ellis: In the first place the witness has not testified what would be loss of the 60,000 gallons a day. 20

The Court: He has not. You may ask him what the loss would be.

The Witness: That would be a mere trifle to Florham Park with the competent wells they operate there.

Q. Your judgment is they should seek a new source of supply? 30

The Court: Well, what's the answer as to reasonable cost?

A. The reasonable cost for 60,000 gallons a day—I have it figured up—

Mr. Ellis: Before this question is answered I think I would like to make another objection. There is no evidence before the jury or Court now that Braidburn uses 60,000 gallons a day. 40

Clyde Potts, direct.

The Court: That was what they produced. Do you know how much they use?

The Witness: The Chairman of the Committee told me—

10 The Court: No, you will have to prove that.

Mr. Seufert: I can afterwards.

A. (Continued.) Based on 60,000 gallons a day.

The Court: The assumption is you are going to connect it.

A. (Continued.) On the basis of 60,000 gallons a day the present water supply of Braidburn Club is over the 66,117—

20 Mr. Ellis: Now, that wasn't the question. The question is the cost of a supply of water. 60,000 gallons a day bought from Florham Park.

The Court: In other words, a substitute water supply, not a new plant.

A. The net cost would be three thousand dollars a year.

30 The Court: For water?

The Witness: Yes, sir.

Q. And have you examined the plant; what would replacement of the plant, the pump and pumping machinery be?

The Court: Why would you have to do that; what do you mean by that?

40 Mr. Seufert: Why, the proposition, as far as the situation here is concerned now, they will become obsolete, the well and pump is useless.

Clyde Potts, direct.

The Court: You can't do it that way.
What is its actual value at the present time?
(To witness): You have seen it?

The Witness: Yes.

Mr. Ellis: Are there to be two elements
of damage—Judge Seufert trying to esti- 10
mate damages—

The Court: I am going to forget the
rules and let this evidence come in. Now, I
may reserve the right, if I see fit, to take
this testimony entirely away from the jury,
if there is no tangible value to it that I may
discover. I am going to let you put in your
testimony and the other side. You may
have jurors here that comes along and 20
says there's no such theory at all that the
Mayor is talking about. On the other hand,
I may conclude that the questions are to be
limited. Proceed.

A. If you have to buy water of Florham Park,
there would have to be a six inch pipe laid from
the present pumping station to the nearest point
of the Florham Park main. And in my calculation
I allow a sum of money for connection and I allow 30
nothing for the obsolescence of the present pumping
station. My judgment was if you laid a new main
from the present pumping station of Florham
Park and brought water from Florham Park, that
would be in lieu of the present pumping station
and let the present pumping station be counted as
junk. The well would have no further use of it
and the pump as a matter of fact very little value.

Q. Did you allow a sum for this 125-foot con-
nection from Braidburn Club to Florham Park
main? A. I assume you use three thousand dol- 40

Clyde Potts, direct.

lars and that would cover the item. The average use of 60,000 gallons a day.

Q. That would be the cost per year? A. Yes.

10 Q. We don't know whether to capitalize that cost? A. Yes, that's a customary practice in engineering where you have to substitute something, you take the upkeep and capitalize it. I figure up so much money laid aside, the interest of which would be for substitution in years; that would be in this case.

Q. What's your figure?

Mr. Ellis: Object, I don't think that's a measure of damage in this case at all.

20 The Court: I will allow him to answer. You may have an exception. I will define the measure of damages, if any.

A. Well, I took the cost of three thousand dollars a year and arrived at the capital for the year. It would be fifty thousand dollars at six per cent. In other words fifty thousand dollars laid aside drawing interest. If you take four and a half per cent., your principal income for the next few years would have to be pretty close to seventy thousand dollars, in other words, the sum that would buy water from Florham Park in case they make this connection, six thousand one hundred and twenty-five dollars.

30 Q. Now, Mayor, you are acquainted with the Passaic River in this vicinity? A. Yes, sir.

40 Q. Do you know anything about the flow during flood times? A. Well, I designed the original Madison-Chatham plant which was built about 1912, somewhere there, and I studied the flood conditions of the Passaic River at that time and directed that they gauge up such readings, of which were put in evidence here sometime ago.

Clyde Potts, direct.

Q. These records were one designed by you? A. No, I had the records kept so that in the operation of the plant they would know what river heights were expected there in the ordinary operation of that sewer disposal plant and I have followed these gauge reports almost since the gauge was put in. That was suspended during the war because Mr. Molitor was in the army, a captain in the army and left the plant during that period. But it's been kept continuously since that time.

10

Q. Do you know the location of the Braidburn property on the Passaic River? A. Yes, sir.

Q. Is there any difference there in the flow of the river; between the Braidburn property and Chatham; the nature of the flow? A. No, the same amount of water that passes the Chatham plant would pass the Braidburn Club, which is located about two miles or so down the stream, but there is some difference in the width and shape of the river at the two places. I think ordinarily, under ordinary circumstances the gauge reading at the Madison-Chatham plant would fairly well take the height of the river at Braidburn plant; with this possible exception, that there are times when there is a back water from the Passaic River that might reach up to the Braidburn Club and of course in case of extreme high water the flood conditions that happen at intervals on the Passaic River, why, that whole country is covered so you practically have dead water laying up through that territory.

20

30

Q. You refer to the term "dead water." What do you mean by "dead water"? A. I mean it backs up so high that your currents are practically eliminated; your currents eliminated in the high water. Under ordinary circumstances the flow that passes the Chatham plant would be fairly con-

40

Clyde Potts, cross.

sistent with the flow passing the Braidburn plant, and by that I mean some years practically all the year and in wet years probably the similarity would be wiped out a good part of the year.

10 Mr. Seufert: That is all.

Cross examination by Mr. Ellis:

Q. Mr. Potts, you don't think a check on the Passaic at the Chatham bridge is the accurate method to determine the correct water level at the Braidburn property, do you? A. I think it's reliable within certain limits. If I was designated to take the thing along the Braidburn property I would be guided by the Chatham reading.

20 Q. The so-called Passaic basin covers an area during flood times of about thirty thousand acres? A. I can't tell; it's a great acreage. You are better informed on that than I do.

Q. That's water that comes down the Passaic and dumps into this basin during flood times? A. Well, I have seen it pretty well watered. If you mean flood times, why, the water is very, very high, yes. But ordinarily it doesn't dump in any reservoir near the Braidburn property.

30 Q. But it has to fill these thirty thousand acres before it backs up to Chatham? A. Yes, probably thirty thousand acres, I don't know; before it backs up to Chatham.

Q. Mr. Potts, what is the flow at the present time of the Braidburn well? A. What do you mean, flow?

Q. What is the capacity of the Braidburn well? A. 120,000 gallons a day.

40 Q. Well, they only took out 60,000 gallons a day? A. They did, so I am informed by the Chairman of the Committee.

Clyde Potts, cross.

Q. Are you familiar with well number one? A. The Dickerson well?

Q. The one nearest the river? A. Yes.

Q. The operation of that well in connection with the other two wells is not affecting the supply of the Braidburn well? A. I think it dried up the other Braidburn well. 10

Q. Did it affect the well in question? A. If it dried up the other, it affected this to some extent.

Q. Has there been any appreciable or marked effect to your knowledge of the Braidburn well since East Orange commenced operation of the Dickerson field? A. Of my own knowledge—

The Court: You had no complaint?

The Witness: I would not be the one that got the complaint. 20

The Court: Didn't you design the present Braidburn well?

The Witness: No, the gentleman who did it is here and I suppose ready to testify.

Q. Do you know anything about the construction of the Braidburn well? A. Only what I was told by the man who is present in the room.

Q. Do you know the depth of it? A. 113 feet.

Q. It goes down to the same shale rock as the East Orange well, don't it? A. Now, what well are you talking about? 30

Q. The Dickerson well? A. Did that go down into shale rock?

Q. I am asking you? A. I don't understand you good, whether that is shale rock, I don't believe you did.

Q. Well, I am asking where East Orange gets its supply? A. From the gravel, substructure. 40

Q. From what source do you say Braidburn gets their water? A. Gravel and substructure.

Clyde Potts, cross.

Q. They are down to the same structure, same depth? A. No, I don't think so, I think yours are deeper.

10 Q. Do you think sinking the other wells on this property under condemnation would affect these other East Orange wells?

Mr. Seufert: How is that material?

The Court: Cross examination and goes to the weight.

A. I think your three wells interfere with each other now when you are pumping to capacity.

Mr. Ellis: Read the question.

20 Q. (Question read.) A. Yes, I just answered it. I think they would, because they interfere with each other now. I think it's a reasonable conclusion that one across the river would interfere with the others.

Q. Do you know whether they interfere with each other? A. I have heard your expert testify to that.

30 Q. Do you know? A. I don't know of my own knowledge because I never operated the Dickerson wells.

Q. Do you know we have taken out 4,000,000 gallons a day out of the Dickerson field? A. I have heard that testimony.

Q. Do you know whether that's a fact? A. I know you never gave us any to use. I believe from these records in Trenton that you say that 2,000,000 gallons is all you can safely get out of the Dickerson wells in Essex County.

40 Q. Well, if you knew we were taking 4,000,000 of gallons a day out of the Dickerson field without affecting over to the Braidburn wells, would

Clyde Potts, cross.

you find there was any sympathy between? A. If you were getting 4,000,000 gallons out of the Dickerson wells you would not need to cross the river and take this property.

The Court: That's hardly responsive.

The Witness: It's the truth, though.

10

The Court: Well, I don't know. I am not going down with you to the subterranean streams to find out.

Q. Mr. Potts, if you knew we were taking 4,000,000 gallons a day from the Dickerson field without interfering with the flow of the Braidburn well, would you say there was much sympathy between the two sites? A. I don't believe you could take 4,000,000 gallons without interfering.

20

The Court: No, you can't answer it that way.

Mr. Seufert: I object to it for this reason—

The Court: If his hypothesis is correct that the 4,000,000 were being taken from the Dickerson field without affecting the Braidburn well on the golf property, would you say there was any relation between them?

30

The Witness: If his hypothesis is correct, certainly there's no connection between them.

Mr. Seufert: That is the effect of distance from the Dickerson well from this property.

The Court: How far are the Dickerson wells on the Dickerson property from the Braidburn well?

Mr. Ellis: I have a memorandum and I can stipulate the well is located about 150 feet from the river.

40

Clyde Potts, cross.

The Court: You may concede it's a certain distance.

Mr. Ellis: The well is located within 100 feet of the river bank.

The Court: Do you agree?

10

The Witness: I don't know how far their wells are from the river bank and I don't know how wide the river is at that point. I would want to see a map before I answered that question. It would just be a guess.

The Court: How far is the Braidburn well from the Passaic River across the property in question?

20

The Witness: I think it's about 1,200 feet or 1,400 feet.

The Court: And the Passaic is 50 feet wide, so one witness said this morning. You are 100 feet from there; 150, 1,200, 1,400, 1,500 feet, Mr. Ellis?

Mr. Ellis: I think it's around 1,500 feet.

30

Q. Now, Mayor, you say you think if we put three wells down in this new area, we would dry up the Braidburn well? A. No question in my mind.

Q. You think the three wells would dry up each other? A. No, I think if you put down three wells of your depth and put down three powerful pumps to the bottom of these wells that you are going to lower the ground water level at that point down to your pumping level.

40

The Court: Where is the subterranean basin you speak of, where is it located?

The Witness: This property is on part of it.

Clyde Potts, cross.

The Court: Right over?

The Witness: It's the edge of it. The old Passaic bed is practically the land that is owned, that is, land that is covered by these fields (indicating). In the old days the gap at Little Falls was filled in and the water then flooded this entire basin, but prior to that time it had had an outlet to a gap in the mountain above Summit. When the ice came down and brought the debris from the north, it dammed this up around there and in doing that it filled up that gap through to Millburn and that backed the water up and formed Lake Passaic. Then later the water wore a channel there at Little Falls and Great Falls and the Passaic River then ran out that way.

10

20

The Court: How long ago do you think that happened?

The Witness: Probably millions of years.

The Court: How do you prove it now?

The Witness: Well, geologists all think they have proved it.

The Court: Are you talking of geology somewhat as a geologist yourself?

30

The Witness: No, my study of geology—when I start to investigate, I may study geology in connection with other data in the engineering business, but judgment leads me to believe they are perfectly correct.

The Court: The sinking of wells?

The Witness: Yes.

Q. Now, Mayor, just now I think you said that if we put down these three wells they would affect the three wells in the Dickerson field, do I understand your answer to be you think these three

40

Clyde Potts, cross.

10 wells if we put down in this new area would not affect each other? A. No, I didn't say that. I don't say that at all. I say that all depends on how you put the wells down. Suppose you put them apart and both on your pump down the well. They will affect each other if you attempt to put down big wells there. But if you are going to take 2,000,000 or 3,000,000 gallons a day on these other wells and you distribute your pumps to get that much water you will get that much water. It's there and you will get it.

Q. You think it's there? A. Yes, there's no question about it.

20 Q. How do you know it's there? A. I am satisfied from the work I have done in this field it's there.

Q. Have you had any tests of the well at Florham Park how more than 2,000,000 a day could they get? A. I can't say that.

Q. But through a larger area they would? A. The water is there.

30 The Court: Now, Mr. Ellis says they got three wells across the river from which they get 4,000,000 gallons a day; your judgment is they will get that much out of three wells they intend to put in there?

The Witness: They are limited to 2,000,000 from their grounds.

The Court: You know they are limited in this condemnation to 2,000,000 gallons?

The Witness: I don't know the fact.

The Court: It is indicated 2,000,000.

Mr. Ellis: It's in the petition.

40 Q. Now, do you think these three wells would interfere with the Dickerson well? A. I believe they will.

Clyde Potts, cross.

Q. In that event, they would be drying up each other? A. No, you would be getting less out of your Dickerson wells but your gross will be greater. Your net out of the three Dickerson wells would be less, but your gross supply would be greater.

10

Q. Now, if the three East Orange wells in the forty-three acres would dry up the Braidburn well, why wouldn't they dry up each other if they are in the same supply? A. You will pump down the whole level, down the well, as you have to get to your height. When you get that to where the Braidburn Company is, then you go down deeper, dig a deeper well and bigger pump and that will be the affect. If you put down deeper wells and bigger pumps, they will interfere and that will be the result.

20

Q. You know whether you have only a certain structure underground— A. If you went down a thousand feet you would get more water than a hundred and sixty, you know that, you go down for water.

Q. And there's no water below that stream? A. I think the water is in the gravel of this old Lake Passaic. There would be no advantage of sinking any deeper wells; until you get to the bottom of the lake, you put your pumps down the well and you could get that.

30

Q. How deep do you say that water can be found? A. Probably a 135 to 140 feet.

Q. How deep is the Braidburn well down now? A. 113 feet.

Q. How deep are the East Orange wells now? A. You mean the Dickerson wells?

Q. Yes? A. I think that showed 132 to 133 feet.

40

Q. So if Braidburn would sink their well 15 feet

Clyde Potts, cross.

deeper, they would be on an equal basis with us anyhow? A. They would get some water. It would cost them that much before they get there and besides I would not advise Braidburn to go in competition with East Orange, going for water.
10 Then there are four pipes in parallel, there was two-inch pipe and one-inch pipe and if they all began to pump simultaneously they would dry up the pumps to some degree, other things being equal.

Q. That would be the Braidburn well and East Orange? A. If they were on an equal basis.

Q. About the same depth? A. Yes, they would all get water all the time with exhaustion.

Q. Now, you spoke awhile ago about some falling of the water level in the Chatham and Madison and Florham Park area. You say that took place within a period of about eighteen years?
20 A. Well, eighteen years ago those wells of Chatham and Madison flowed, the water rose above the surface of the flow. Now, the water at these places is five feet below the overflow and doesn't rise about that.

Q. Now, all these municipalities are also taking a lot of water from that area these eighteen years?
30 A. Yes.

Q. And that also had something to do with the dropped water? A. Yes, I brought it out to show we were all taking water out of a great underground reservoir, and the more taking, the greater lowering of the underground water level. It doesn't make any difference who takes it, it's going lower. Anybody who discusses it to any length knows there's a lower flow of water.

40 The Court: Anything more.

Q. Mayor, in computing, you gave some figures

Clyde Potts, cross.

awhile ago about three thousand dollars a year's cost to Braidburn Company if they did take water from the Borough of Florham Park. Have you deducted from that figure the present expense of operating the well of the Braidburn Country Club?

A. I have, yes, sir, that's in the cost. The gross cost is larger.

10

Q. Is that three thousand dollars made up on the consumption of 60,000 gallons a day? A. Yes.

Q. For every day in the year? A. Yes.

Q. Don't you think that's an unfair figure? A. Well, they may have to buy 60,000 gallons a day, and if they do—

The Court: No—

A. (Continued.) I don't think it's unfair.

20

The Court: They don't pump 60,000 gallons a day a year now.

The Witness: No, sir.

Q. Well, why do you compute the cost of supplying water to Braidburn at 60,000 gallons a day when you know they don't use that much water?

A. That was the maximum figure given me by them and it was a question which Judge Seufert asked me. He asked what was the cost to secure 60,000 gallons; he didn't ask me my judgment whether that was a proper figure or not.

30

Q. Now, how much water does the whole Borough of Florham Park use per day? A. Not much over 60. They was not using 50 when I started the plant.

The Court: What's the population of Florham Park?

The Witness: 1,200, I think about that. I think about 200 houses took water.

40

Frank W. Richardson, direct.

Q. You know that country clubs are not open for golf playing purposes during the winter months? A. Yes, in this climate I know they are not.

Mr. Ellis: That is all.

10

(Witness Excused.)

FRANK W. RICHARDSON, sworn on behalf of the appellant, testifies as follows:

Direct examination by Mr. Seufert:

Q. Mr. Richardson, are you a member of the Braidburn Golf Club? A. Yes, sir.

20

Q. Have you any official connection with the Braidburn Realty Corporation? A. Yes, sir.

Q. What is that connection? A. A member of the Board of Directors and treasurer.

Q. Treasurer of the corporation? A. Yes.

Q. How long have you been connected with the Braidburn Realty Corporation? A. I think two years.

Q. How long have you been a member of the club? A. Since the fall of 1923.

30

Q. And who constructed the course? A. The present eighteen-hole course?

Q. Yes. A. The original nine-hole course was there and the eighteen-hole course was originally constructed by a contractor and finally finished by the club itself.

Q. You mean the Realty Corporation? A. Realty Corporation.

40

Q. What have you had, if anything, to do with the construction of that course? A. Part of the time I was on the grounds committee.

Q. What was contemplated at the time in con-

Frank W. Richardson, direct.

nection with the laying out of the entire land for golf purposes?

Mr. Ellis: I object to that, your Honor.

The Court: How is that material?

Mr. Seufert: To show not only the availability of this land and its usefulness— 10

The Court: I will allow him to testify, if he is competent to speak, as to the availability.

Q. Did you make an examination of the grounds at the time the course was laid out? A. Yes.

Q. How many courses were contemplated to be laid out? A. Two.

Mr. Ellis: I object to that; he is not qualified. 20

The Court: Was any formal action ever taken, Mr. Richardson, by the club?

The Witness: At the time my stock certificate was sold me, it was pointed out to me there would be two eighteen-hole golf courses in that property. It was on that basis I bought my membership.

The Court: I think the objection must be sustained. What was pointed out at the time; after all, it gets up to the question whether the land now sought to be taken is available or not. 30

Mr. Ellis: I move the answer be stricken out?

The Court: Yes, strike it out.

Mr. Seufert: Exception.

Q. What's your business? A. I am a mechanical engineer.

Q. Do you know anything about a pump and pumping equipment? A. Some. 40

Frank W. Richardson, direct.

Q. Have you had anything to do with the pump on the Braidburn ground? A. Yes, sir.

Q. When and to what extent? A. At present and at that time I was chairman and still am chairman of the building and equipment.

10 Q. Under whose jurisdiction was that last well built? A. Mine.

Q. Why was it built? A. Because we had a lack of water.

Q. Where had you gotten water from before that? A. From so-called springs that ran into an open well.

Q. Upon reservoir area? A. It would be out that way.

20 Q. How was the water disposed of from that well? A. By means of a pump up to our tank and then distributed over the course in various places.

Q. Of what capacity was that supplied?

Mr. Ellis: I object to that; what supply or some other source may have been at Braidburn some time ago.

The Court: I think I will allow it.

30 Mr. Ellis: I don't see how that is relative.

The Court: If they have another source of supply it may be developed. Proceed.

A. I would say somewhere between 15 and 20,000 gallons per day.

Q. What happened to it? A. It went dry.

40 Q. When did it go dry? A. The first evidence I would say actually showed up when we had no water for our golf players. Naturally in the summer time, and that was the latter part of the summer of 1925 or '26, 1926.

Frank W. Richardson, direct.

Q. Was that before or after the Dickerson wells were operated? A. I believe after.

Q. Have you been using any of the water from that supply since that time? A. Twice this year.

Q. How much supply is there now? A. I don't know how much supply. 10

The Court: What did you get when you say you used it twice this year?

The Witness: Our present well failed to give us enough water and we immediately hooked on to this old supply which stays in a reservoir. It is stoned up a considerable way and we used that until we caught up with the reserve again.

The Court: Was that exhausted? 20

The Witness: Yes, we exhausted it at the time.

The Court: The old reservoir?

The Witness: Yes.

Q. How deep is your well? A. 113 feet.

Q. And what is the size of the well? A. Six inches.

Q. What's the capacity of the well? A. 60,000 gallons per twenty-four hours.

Q. Is that its maximum capacity? A. Yes, sir. 30

Q. Can you pump more than that? A. No, sir.

Q. That's its capacity? A. Yes.

Q. Has it pumped 60,000 gallons a day? A. On numerous occasions.

Q. What's been its average pumping? A. Oh, from the 1st of May to the middle of November I would say it has averaged from 25 to 60,000 gallons a day, 30,000 a day.

Q. Was it used from November to May; was it used at all? A. Continuously every day; going every day. 40

Frank W. Richardson, cross.

Q. During the winter months? A. Yes, we have water for the house and horses.

Q. To what extent? A. Probably fifty per cent., about forty per cent., between summer seasons.

Mr. Seufert: That is all.

10

Cross examination by Mr. Ellis:

Q. What do you use 25,000 gallons of this for in the winter time? A. I didn't say so.

Q. Well, from November 15th to May? You testified here that the whole capacity was 60,000 a day, or what the Braidburn Company would have winter operation in Florham Park? A. During winter months.

20 Q. No, I am asking you now from November to May on what occasion would you use 25,000 gallons per day? A. My testimony, I have said we used between 30 and 60,000 between May and November and between November and May we used about forty per cent. of that amount.

Q. Can you tell us in gallons about how much you use in the winter months? A. Then it's down to forty per cent., the 1st of December.

30 Q. You don't use any showers to amount to anything in the winter? A. Frequently.

Q. Now, you say that the well went dry in 1926; which well? A. The old supply, I should say.

Q. And that water supply failed you in 1926? A. Yes, sir.

Q. Well, did that fail you or was it because you had increased the demand for water to 60,000 gallons a day that you put down the new well? A. May I refer to some data I have here?

40 Q. No, I don't think you need to do that when you are an officer of the corporation and know all

William A. Helm, direct.

about it. A. This ran dry, but I can't keep the stock membership, numbers and members from one year to the other.

Q. Here's what I want to know. I want to know whether you put down the well because you were not able to get 60,000 gallons from the first well? 10

A. Very true.

Q. So the old well at its best did not meet the demands of the club in 1926, is that right? A. Very true.

Q. And you know the East Orange wells across the river had been in operation since 1922, don't you? A. No.

Q. You know they were in operation several years before you put your well down? A. No.

Q. You don't know anything about that? A. No. 20

Q. Who was president of the Country Club in July, 1920, the Realty Corporation? A. Dr. Jewett.

Mr. Ellis: That is all.

(Witness Excused.)

WILLIAM A. HELM, sworn on behalf of the appellant, testifies as follows: 30

Direct examination by Mr. Seufert:

Q. Mr. Helm, where do you live? A. Florham Park.

Q. What's your business? A. Auctioneer.

Q. How long have you lived at Florham Park? A. All my life, nearly sixty years.

Q. And you are there now? A. Yes, sir.

Q. What part of Florham Park do you live in in reference to the Braidburn land? A. I live along Brooklake Road. 40

William A. Helm, direct.

Q. How near the Braidburn land? A. Hardly a half a mile; probably a half a mile.

Q. And on Brooklake Road? A. Yes, on Brooklake Road.

10 Q. You acquainted with the land belonging to the Braidburn Club east of the Brooklake Road, between that road and the river? A. I am.

Q. How did you become acquainted with it? A. I have known it all my life; ever since I have been there.

Q. In what capacity? How have you known it? A. Well, I have gathered hay over all of it ever since I was a boy. Rode a mowing machine up over it years after years.

20 Q. What's the character of the land? A. The land is—well, there's a little sod over it naturally and underneath is what I would call hard clay. I don't remember it being soft clay, but sort of a hard clay. It's hard to dig a post hole there in the summer time.

Q. What kind of hay would you take off of it? A. Why, it's the hay we always called the fowl meadow.

30 Q. How do you spell fowl, f-o-w-l or f-o-u-l? A. I don't know the difference, the old farmer's name for it.

Q. It's a good hay? A. Good feeding hay; that is, it used to be. I don't know what it is now. They have let it go for the last few years.

Q. How long has it been since you have been on the land? A. Well, I haven't been tramping on all of it lately. Over, well, I have been down around there but not to do any work on it.

40 Q. When have you been on it lately, the last time? A. I don't just remember the last time.

William A. Helm, direct.

Q. You have lived in that vicinity all your life, have you? A. Yes.

Q. How often does the land there become flooded on an average, if you know? A. Oh, sometimes it will go every summer for a summer or two and then again it will go four or five years without flooding in the summer time. 10

Q. And to what extent is it flooded generally? A. Oh, you can go over it in—well, in different places; all down these places you have reference to, I don't know just how deep it is, but it floods over any place there, I can't remember.

Q. Has it ever done any damage to your knowledge? A. Damage to what?

Q. To the land? A. No.

Q. While you were farming, did you ever know it to become flooded? A. Yes, it floods. 20

Q. Did it do any damage to the land when it was flooded those times? A. No, not swift there, no current to it at all. More or less backed up. The river is very crooked, goes this way and that way and it will back up.

Q. Can you give us any idea of the length of time it will remain flooded? A. Well, that all depends. If it is a wet season, before it gets off there may be another heavy rain and bring it up, and then again it will go down in a few days. 30

Q. You say you live on Brooklake Road? A. Yes.

Q. Have you got a well on your premises? A. I did have.

Q. How long ago did you have a well? A. You mean when there was water in it?

Q. Yes? A. I don't just remember how many years. I know about when it went dry.

Q. Did it go dry? A. Yes. 40

William A. Helm, direct.

Q. Has it been dry ever since that time it went dry? A. Yes.

Q. Can you fix approximately when it went dry in reference to any particular event?

10 Mr. Ellis: I object to that. This well might go dry for a great many reasons. It's been testified to—

The Court: Locate the well.

Mr. Seufert: This is a question of reasonable probability.

20 Q. In reference to the location of the East Orange Water Plant, where is your land? That is, the Dickerson wells? A. Why, probably in a straight line, I am anywhere from three-quarters of a mile to a mile from the Dickerson wells. I think there are three of them there.

Q. How close are you to the Braidburn property? A. Well, you see I live toward Chatham and the Braidburn is right here and these wells are over here (indicating). And I am just that way toward Chatham. There's not much difference in the distance between the Braidburn Club and these wells unless you come by the Braidburn Club and then of course you refer to that.

30 Q. And you are off to one side? A. In a straight line, it's about the same.

Q. Now, can you fix the time or fix an event in connection with the drying up of your well?

Mr. Ellis: I object to the question, it involves a conclusion that we damaged the well. Now, he is nearer to Chatham and Florham Park and Madison than the East Orange wells.

40 The Court: I will allow it to go along and you may cross examine.

William A. Helm, direct.

Q. When did you dry up? A. About the time they drove the first well.

Q. What first well? A. On the Dickerson property.

Q. And it's never been used since that time? A. I can't use it.

10

Q. Do you know of any other wells in your vicinity that anything happened to? A. The McManey.

Q. How close is that to you? A. Well, it was the next neighbor at that time, I think. There's been a house built in between since.

Q. Is that nearer to the Braidburn property or further away than your house? A. Nearer.

Q. What happened to that well? A. It went dry.

20

Q. When? A. Well, about the time my well went dry. I can't remember the date. I never put them down, I didn't know I would ever have to use them.

Q. But they both went dry the same time? A. About that time.

Q. Are there any other wells in your neighborhood you know of? A. The other well below me, Mr. Young's well.

Mr. Ellis: I object. I don't see how this can be held against the City of East Orange.

30

The Court: I can't tell yet.

Q. Have you had any water out of your well since? A. No.

Q. Has McManey?

The Court: Of your knowledge?

A. I don't think so, no.

The Court: Well, do you know?

40

William A. Helm, cross.

The Witness: They had to pipe from Madison to get water.

Q. How about the other man? A. The other side of me?

10 Q. Yes? A. Why, they drove a pipe down further in their well and they got a little water. They pumped a pail that time and after they tried for a half a day they got another pail out.

Q. Well, how did they get along for water ever since? A. They have a cistern, the same as I have.

Q. What kind of a well did they have before that? A. Well, just by hand, stoned up.

Q. What kind of a supply of water? A. Well, we had a good supply, we had four or five feet.

20 Q. What kind of a supply did you have? A. I had four feet two inches.

Q. What was McManey's supply? A. That was a deep well. That was six or seven feet there.

Mr. Seufert: Cross examine.

Cross examination by Mr. Ellis:

Q. Mr. Helm, you know what year your well went dry in? A. I don't know.

30 The Court: How long ago?

The Witness: I don't know just exactly how long ago but I know I used to go over and walk on your well fields over there before you put the gates to it.

Q. You think it was about the time East Orange put down their first well? A. I think it was about that time; though you had it rented there a year before you occupied it.

40 Q. I am asking you? A. I think it was around about that time.

William A. Helm, cross.

Q. You knew what was going on about it; you spoke to Mr. Roper once about it? A. I spoke to somebody out there and they said I would have to prove it dried up my well, so I never bothered to prove it.

Q. Do you fix the time as being about the time East Orange put down its first well? A. About that. 10

Q. Don't you know East Orange didn't pump any water out of the Dickerson field for years after the first well was put down? A. That may be. I know it was running out of there.

Q. Now, you never brought any suit against the City of East Orange? A. No, I didn't have money enough.

Q. That your reason? A. Yes, that was the reason. 20

Q. Are you financially— A. I may do it yet.

Q. Maybe I gave you an idea. Well, have you any more money now—

The Court: Of course a lawyer never does have.

Q. Mr. Helm, have you any more money now than you had before? A. Naturally. 30

Q. Are you an official of Florham Park? A. No, sir.

Q. You have been? A. Yes, I was Mayor for four years and was Councilman over there for eight years.

Q. Were you the Mayor or Councilman at the time your well went dry? A. My well went dry before that.

Q. You said you were Mayor for four years and Councilman for eight years? A. Well, that was eight years ago when I was Councilman; and only 40

Lyman J. Fish, direct.

two years ago I retired as Mayor, which is quite a difference.

Q. But were you an official at the time your well went dry? A. Oh, my well went dry before that.

Q. Before you ever became an official? A. I didn't say that. I said before I retired.

Q. Did your well go dry before you were Mayor? A. Before I was Mayor?

Q. Yes? A. I don't think so.

Q. Do you know? A. I don't remember just how that was.

Mr. Ellis: That's all.

(Witness Excused.)

20

LYMAN J. FISH, sworn on behalf of the appellant, testifies as follows:

Direct examination by Mr. Seufert:

Q. Mr. Fish, where do you live? A. On Brooklake Road, Florham Park.

Q. How long have you lived there? A. Well, seventy years, I suppose or a little over.

Q. Your land is just north of the Braidburn Club? A. About a half a mile from the club house at the north.

Q. Adjacent to the land of the club? A. My property joins the Braidburn Club.

Q. And do you know this land east of the Brooklake Road and between that road and the river? A. I have known it all my life.

Q. Will you describe its character as you know it to the jury? A. Well, it's of a hard clay formation with places over the surface of the lower section of it that is filled in more or less with black

40

Lyman J. Fish, direct.

muck, probably six inches some places to a foot or eighteen inches of soil and black muck. I should think 19/20 of it is hard clay. Hard surface, all over.

Q. Of this forty-two or three acres you speak of? A. I know every inch of it because I have went over it since I was ten years old and dug a ditch through it on similar grounds just below. 10

Q. Have you ever worked it? A. My ditching off, all my life; but not by plowing or cultivating.

Q. How did you work it? A. I say, just by ditching through, cutting ditches.

Q. Did you farm it in any way? A. Nothing, only cutting hay.

Q. To what extent did you cut hay off of it? A. Well, practically every year since I have been able to work, I worked on these old meadows. And then up to about twenty rods below these forty-three acres of ground, still further north. I call it below because it's down the river, the river runs north there. 20

Q. Have you ever cut any hay on this land? A. Yes, I have.

Mr. Ellis: I object to this, it is not shown this land is similar to the East Orange land. 30

A. (Continued.) I have cut it all over, all over this property.

The Court: That's what I understand him to say.

Q. And the land you are speaking about now was land different or did it resemble the forty-two acre tract? A. The same sort of land.

Q. You cut hay on this forty-two acre tract? A. I have. I have cut every acre of it. 40

Lyman J. Fish, direct.

Q. And with what? A. Mowing machine and horse.

Q. How did you rake it up? A. With a horse rake.

10 Q. Any trouble cutting off and on with your machinery? A. Not a particle. I considered it was solid as the upper lands.

The Court: Wasn't it swampy land?

The Witness: No, it was not swampy land, Judge. There is probably an acre or two you have on that map there with the green border on top. Where there's woods there there's some flood, the black border. This is grass, that green section and water never comes up on that.

20

Q. Is any of the rest of that one there swamp? A. No, I can't say there was, it was solid, not what I would call a marshy wet ground. A swamp is wet and boggy ground. That ground is not. It's solid ground that you can drive a team over any time in the year. I don't care if the water is up to your waist, you can drive your team over it, because it's solid. That's in all that forty-three acres.

30 Q. What's the source of your water supply? A. Well it's the old fashion well with two buckets.

Q. Has it ever gone dry? A. Never has, no.

Q. Any other water on your land? A. A spring, about thirty-five or forty rods from the house where I live, where years ago and in very cold times in the winter the brook and pasture would all freeze up and I drove our cattle to that spring for to get their water. And that is dry now; I can't tell just how many years, but for the last

40 four or five years anyway, that's perfectly dry and

Lyman J. Fish, direct.

no longer ago than Tuesday or Wednesday, just before this cold weather began, I went there just to see how it was and it was perfectly dry. The bottom of that spring dried, whereas, as I remember the spring for fifty or sixty years before that, it was always supplying quantities of water so we used to dam it up and flood over the banks until spring. 10

Q. How long ago was this it dried up? A. Not more than three or four years.

Mr. Ellis: Just a minute.

The Court: Where is that spring with reference to the East Orange land?

The Witness: About a half a mile, just to the north. 20

The Court: With reference to the Braidburn wells?

The Witness: The same distance.

The Court: And with reference to the well of this gentleman who was just on the stand before, Mr. Helm?

The Witness: It's a mile and a half to two miles.

The Court: And the two neighbors there he spoke of? 30

The Witness: About the same distance. They are not far apart.

Mr. Ellis: One of my objections is that he is going back fifty years ago when he knew this spring.

The Court: When did it go dry, how long ago?

The Witness: Well, I have got no date of it, only I would say three or four years. It may be longer. 40

Lyman J. Fish, cross.

The Court: How long has it failed to supply water?

10 The Witness: At least three or four years. It may be five. And in the last year or two years absolutely no water in it unless there was a heavy shower and flushed in surface water.

Q. Before that, what was the condition of the water supply from that spring? A. Always good, winter or summer. The coldest weather it was always open.

Mr. Seufert: Cross examine.

Cross examination by Mr. Ellis:

20 Q. Mr. Fish, you say you walked over this land? A. Since I was probably ten years old.

Q. Did you ever swim over it? A. I could have waded over it and swam over it and plowed over it.

Q. Ever fish over it? A. Fish over it.

The Court: Old swimming hole there?

The Witness: Yes, there's an old mill ran down to this same property.

30 Q. But you have fished over these forty-three acres? A. Yes.

Q. And shot any duck? A. Many a pair of them.

Q. So there must be considerable water in there to fish and duck? A. This is the river we are speaking about.

Q. I am asking about the forty-three acres? A. Oh, I have hunted snipe and ducks and practically everything that goes around the grass.

40 Q. And you found them in the forty-three acres? A. Yes.

Lyman J. Fish, cross.

Q. And it must have been pretty wet to attract snipe and duck? A. No, not necessarily.

Q. Now, this land floods a great deal of the time, doesn't it? A. (No response.)

Q. Well, would you say a good deal of the time? A. (No response.)

10

Q. From the 1st of February until the 1st of May, 1929, it was nearly all covered with water?

A. I think likely at that time it's usually more or less water.

Q. Well, in the summer time whenever there's a freshet, it floods? A. Sure it does.

Q. Have you ever seen the land look like it appears in these pictures, Mr. Fish? A. Where is this place?

20

Q. I ask you if you have ever seen this Braidburn land as it appears in that picture? A. Well now, these photographs, I am not conversant with them at all. The first one you showed me here, the man standing would apparently be in grass to his knees and grass all over the meadows. And in the next picture it must be the water.

Q. Have you seen it in that condition? A. I have seen it about that condition. I have seen it in the condition it appears in this photograph, I have many times.

30

Q. And when the water comes in that basin it stays there for weeks at a time, doesn't it? A. Not in winter, but seldom does it stay very long.

Q. You just said you assumed it stayed here from February 1st to May 1st? A. Not continuously.

Q. Well, most of the land was covered from February 1st to May 1st? A. No.

Q. I am eliminating now the Convent piece?

40

Lyman J. Fish, cross.

A. Well, the Convent piece is lower than the rest of it in a certain way.

10 Q. Are you sure about that, Mr. Fish? A. Yes. The land over here, way up here doesn't flow on the land over here (indicating). Here is the Convent piece. This is rather low ground. Here's a strip through there that's high.

Q. Now, isn't that high ground? A. Well, it's high. It's hard ground.

Q. It's the highest ground in the piece that's the Convent ground? A. No, it is not.

Q. Well, generally speaking, it's the high field? A. Up here and way up here (indicating).

20 Q. But from a point 225 feet of the road to the Convent piece, generally speaking, is a high field in it? A. No, not as high as other places. There's one little strip that runs through there that's high and this is rather low (indicating). And ordinarily a freshet would come on this and descends from the high field and goes to the low piece of ground.

Q. You said awhile ago you have mowed every acre of that Braidburn piece east of the road? A. I think I have mowed every acre.

30 Q. Now, it's been testified to— A. I think I know it well enough to know it's all woodland and the woodland is shown along here (indicating). I think I explained that before. This slope is up there where that green is. I haven't mowed that.

Q. Then you haven't mowed every acre? A. What I did not mow is clear land. You know you can't mow a foot there, here to over here (indicating).

40 Q. I just want a pure estimate from you. Eliminating from this tract the Convent piece, what percentage of the whole tract would you say is wooded land?

Lyman J. Fish, redirect.

Mr. Seufert: That's a matter of calculation.

The Court: He may answer.

A. Probably five or six acres birchwood and half timber.

10

The Court: Out of the forty-two?

The Witness: Yes, out of the forty-two.

Q. And of course you never mowed the five acres permanently under water? A. Not over where the timber stands.

Q. But looking at that map where it now appears green, you have never mowed any part of that? A. Yes, the upper part next to Brooklake Road.

20

Q. Where it now appears to be green? A. Where it is woods now. Fifty years ago there was no trees up there.

Mr. Ellis: That's all.

Redirect examination by Mr. Seufert:

Q. Mr. Fish, have you ever—what damage have you observed, if any, to this ground after they were flooded or held water on it for any time? A. Unless it was damage to the hay crop or grass crop, it was a blessing and benefit.

30

Q. In what way? A. Well, the water carries a sediment always when it is high. That settles on the ground and enriches it.

The Court: Sort of a fertilizer?

The Witness: Yes, that's it exactly.

Q. Was there any damage observable, as a matter of fact? A. None whatever.

40

*Lyman J. Fish, recross.**Recross examination by Mr. Ellis:*

10 Q. Why didn't you cultivate that land in the summer time if it wasn't flooded? A. There was—until Mr. Krap cultivated the right side to use. And he raised some of the best grain that ever was growed in New Jersey.

The Court: No, why didn't you cultivate it?

The Witness: Well, it takes a strong team to clear up that old surface.

The Court: Your team was not strong enough?

The Witness: We didn't have a team to do it.

20 The Court: Then the land wasn't so rich, after all?

Mr. Seufert: He didn't say it was rich. He said it was hard.

The Witness: The ground is rich, very rich. I never saw better crops growed there in my life.

The Court: But hard to cultivate?

30 The Witness: The soil was set and uniformly deep and then some of the Braidburn people tried it and I guess they put it through.

Q. Do you call that set or boggy, which? A. Well, I suppose in English they would call it boggy, but what we call bog in New Jersey are those where the stubbles grow up.

Q. But there are no such things on this ground? A. Oh, yes. There are in places. Other places just as smooth as that floor.

40 Mr. Ellis: That is all.

(Witness Excused.)

James E. Shea, direct.

The Court: Counsel may know tomorrow whether you admit them.

(Referring to photographs.)

Mr. Ellis: Some of these are above the Braidburn property.

The Court: You are objecting to those that are another property? 10

Mr. Ellis: Yes.

Mr. Seufert: Some of them include other property but—

Mr. Ellis: We would also like to know from what point these photographs were taken.

The Court: Now, the photographer may mark them. You let him mark them on the back from what point they were taken. 20

The Court: We will take an adjournment until tomorrow morning at 9:50.

(Thereupon the Court adjourned until Wednesday, December 4th, 1929, at 9:50 in the forenoon.)

Morristown, N. J.,
Wednesday, December 4th, 1929.

TRIAL RESUMED. 30

Mr. Seufert: By agreement with counsel of the other side, these exhibits are marked in evidence.

(Thereupon photographs marked Exhibits B-10 to 32, inclusive.)

JAMES E. SHEA, sworn on behalf of the appellant, testifies as follows:

Direct examination by Mr. Seufert: 40

Q. Where do you live? A. Chatham.

James E. Shea, direct.

- Q. What's your business? A. Real estate.
- Q. Where is your office? A. 1 Passaic Avenue.
- Q. In what locality do you operate? A. Summit, Chatham, Livingston, Madison, Florham Park, Morristown, Mount Tabor, Denville.
- 10 Q. How long have you been in the real estate business? A. At this address since the 1st of February, 1926.
- Q. How long have you been in real estate at other addresses? A. Since 1906.
- Q. Steadily? A. No, not steadily.
- Q. How long have you been in that business steadily? A. Since 1920.
- Q. And in this locality? A. This locality and New York.
- 20 Q. What has your real estate operations consisted of? A. Sales of acreage, residence, business property. Grouping together large parcels for golf club purposes.
- Q. You know the locality where the Braidburn property is situated? A. Very well.
- Q. What borough is it in? A. Florham Park.
- Q. Have you been on the property? A. I have.
- Q. Do you know the land that is the golf grounds of the Braidburn property? A. Very well.
- 30 Q. Where is the location of the course? A. The location of the course as pointed up was Madison Avenue, Brooklake Road and some of the streets in the Kline development, which is part of the Dr. Ward property.
- Q. Brooklake Road has been referred to and laid out on this map? A. Yes.
- Q. How close is any of the course on the Braidburn property to the premises described on the map? A. Why, I would say within a few hundred feet.
- 40

James E. Shea, direct.

Q. Whose lands are there on the west side of Brooklake Road; on the map? A. The west side of Brooklake Road?

Q. On the map there, yes? A. Why, there's the Braidburn Golf Club on the west side of that property. 10

Q. Is it all a continuous piece of land? A. Along the road, yes.

Q. And have you been on the forty-two acres described here, which is on the river side of the blue line? A. I have.

Q. What do you know about the character of the ground? A. Why, it's similar to all of that ground on the east side of Brooklake Road; from Helm's property down to McManey's property. 20

Q. Would you say there was swamp or dry land? A. I would not call it dry land or I would not call it swamp.

The Court: What would you call it?

The Witness: I would call it low land, your Honor.

Q. Has this land any available use in your judgment? A. Yes.

Q. Can you give us the value of this land, these forty-two acres, in your judgment at its best available purpose? 30

Mr. Ellis: I object.

The Court: Qualify him as to whether he has made any sales of similar property in the immediate vicinity within some reasonable period.

Q. Have you sold any property in that vicinity? A. I have. 40

The Court: When?

James E. Shea, direct.

Q. When and how? A. 1926—'27.

Q. Whereabouts? A. Brooklake Road, a distance from this point three-quarters of a mile, I have sold some rearage.

10 The Court: In along the river?

The Witness: It didn't carry to the river, your Honor, no. It's rearage of what was sold at an occasional sale for building lots.

Q. Who did you sell it to? A. I sold it to the Public Service or the Holland Company.

The Court: Any similarity between that and this land?

The Witness: Yes.

20 The Court : In what respect?

The Witness: It's laid down in the same level.

Q. Have you made any other sales? A. Carrying on further down nearer the property, we sold out a considerable in there running from Brooklake Road through a depth of some four hundred feet, as I recall.

Q. In what direction? A. Why, that would be east of Brooklake Road.

30 Q. And running— A. To the Chatham water line.

Q. To the river, towards the river? A. Yes.

Q. What character of land was it in comparison with the forty-two acre strip? A. Similar.

Q. When was that sold?

The Court: 1926, he said.

A. '26 or '27, I am not just positive.

40 Q. And any other sales? A. Why, the latest, that is easements—

James E. Shea, cross.

Q. Where? A. Why, across, what is called the Bushauser property was owned by a man named Moskowitz. We negotiated the easement for that, that is the Holland Company across the rear strip of that property. That was in '27.

Q. That was for their high tension right of way? 10
A. Yes.

Q. Where did that run? A. It ran from Roseland to Chatham. Kearny to Athenia and Athenia to Roseland and Roseland to Chatham.

Q. Did that cross any property of the Braidburn Company? A. It did.

Q. How close to the premises in question? A. Why, I believe it crossed part of the premises.

Q. Do you know whether or not the Braidburn people sold any for this right of way? A. I understand they did. I did not negotiate that. 20

Q. Did you get any information in connection with the sale? A. Why, I had some information at the time, but I was not with the officers of the Braidburn or with the officers of the Public Service or the Holland Company.

Q. Do you know what price was paid?

Mr. Ellis: I object. Hearsay.

Cross examination by Mr. Ellis: 30

Q. You say you sold a strip of land four hundred feet frontage on Brooklake Road? A. No, I didn't. I said a strip to the depth of four hundred feet.

Q. How much frontage on Brooklake Road? A. Fifty feet.

Q. You would not call land fronting on Brooklake Road similar to this rear land backing up to the Passaic River? A. I did not know you were going to predicate the whole question on land frontage. 40

James E. Shea, direct.

Q. Do you think land on Brooklake Road ought to be the same anywhere as land backing up on the Passaic? A. No.

Q. Then it isn't similar land? A. It is, yes. For the whole depth, yes.

10 Q. Then you think the land fronting on Brooklake Road is of no more value than the land backing up to the Passaic River?

The Court: He hasn't said. He is going to be asked that question in a few minutes.

Q. Do you think land fronting on Brooklake Road is similar in comparing the places with land backing up on the Passaic River? A. No.

20 Q. Then it isn't similar land? A. It may be similar land.

The Court: I am inclined to think the gentleman's qualified.

Further direct examination by Mr. Seufert:

Q. What in your judgment is the value of the forty-two acres in question for its best available use at the present time?

Mr. Ellis: I object.

30 The Court: Objection overruled.

Mr. Ellis: Exception.

A. Why, as it is at the present time, its present ownership, it's worth approximately two thousand dollars an acre.

The Court: I notice you qualify it's present ownership; why?

40 The Witness: Because experience has taught me in trying to assemble land for a golf club, when you start out to actually

James E. Shea, cross.

bid the first parcel you get that very cheap, but once the word gets out that you want a golf club acreage—

The Court: But you don't let it out as a rule?

The Witness: I have tried hard at times. 10

The Court: The test is what is the market value in your opinion.

The Witness: The market value in my opinion to the present owner is two thousand dollars an acre.

The Court: Not the present owner. But a willing buyer, not obliged to purchase would pay to a willing seller, not obliged to sell, in the market.

Mr. Seufert: At its best available purpose. 20

The Court: That's all right, you can adopt that. What do you think that's worth in the market?

The Witness: A thousand dollars an acre right this minute.

The Court: Now, having in mind its most available use, is that what you say, a thousand dollars an acre? 30

The Witness: Yes, at the present time.

Q. What is its most available use? A. For a golf club purpose at the present time.

Q. And what is its value in your judgment for that purpose? A. Two thousand dollars an acre.

Cross examination by Mr. Ellis:

Q. What would you use the land for other than golf purposes? 40

Mr. Seufert: I object.

James E. Shea, cross.

The Court: No, this is cross examination. He may probe the witness' statement, of course.

10 Q. What could you use it for other than golf playing purposes? A. Why, the land could be used for various things. More particularly for farming.

Q. Then that land is worth a thousand dollars an acre in its present condition for a farm? A. Counsellor, there isn't an acre of ground along the Passaic River that isn't worth a thousand dollars an acre.

Q. Are you serious about that? A. I am.

20 Q. Do you know the Passaic River between Chatham and Mountain View? A. I know there is a river there, yes.

Q. Do you know anything about the Passaic River Basin Chatham and Mountain View? A. Only what I have read.

Q. Do you know any extensive development anywhere along the boundary lands of the Passaic River? A. No, I can't say that I do just now.

30 Q. Did you ever sell any land backing up to the Passaic to anyone in all your experience, and you say you have had a lot to do around here? A. No, Counsellor, but I know of several sales that have taken place.

Q. You have only been operating in Chatham for about three years, haven't you? A. That's wrong. I established a residence in Chatham May 1st, 1920.

Q. When did you establish an office? A. I established an office the 1st day of February, 1926, at 1 Passaic Avenue and shortly after that I had an office on Main Street.

40 Q. Tell us what you know of the development of

James E. Shea, cross.

boundary lands of the Passaic? A. I know nothing.

Q. What makes you think it's worth a thousand dollars an acre? A. Because in this State I know there isn't an acre of land that's not worth a thousand dollars an acre.

10

The Court: Do you say in New Jersey?

The Witness: I do. A thousand dollars an acre.

Q. Are you testifying value now from your knowledge or your experience in making sales along this river or from what you just think they are worth without any such knowledge? A. Why, part of it I expect from experience. Part is my knowledge of what remaining land has leased for.

20

The Court: Part from inquiries you have made?

The Witness: Records, your Honor.

Q. And from your knowledge a thousand dollars an acre boundary land of the Passaic, anywhere? A. I would not say anywhere.

Q. You just said anywhere, as I understand, in New Jersey was worth a thousand dollars an acre?

The Court: No farm land.

30

A. (Continued.) Any land along the Passaic River will be worth more around five years from now than it is at the present time.

The Court: No, we don't do that. We don't think the prospective value. It's the market value, having in mind the available use in the immediate present or anticipation of reasonable future. Reasonable time. Five years, of course, would be too far.

40

The Witness: Now, the most reasonable

James E. Shea, redirect.

thing this land could be used for at the present time is golf club extension and that price is two thousand.

The Court: And as farm land a thousand?

10 The Witness: Yes.

Q. Do you know of any golf club that wants to buy this land at two thousand dollars an acre?

A. There isn't enough land.

Q. Then what do you predicate your figure on?

A. The present holding.

The Court: You are predicating that value as the value to the present golf club?

The Witness: Yes.

20 The Court: I say that's not the test.

Q. What we want is the market value of this land? A. A thousand dollars an acre.

Q. Do you think you could see it for a thousand dollars an acre? A. Yes.

Q. Why didn't you sell some of the other land along the Passaic boundary at a thousand dollars an acre? A. Well, I had no reason for going out to try it.

30 The Court: He didn't say that.

Q. You know all this land is undeveloped practically from Chatham to Mountain View along the Passaic Basin, don't you? It's not accessible to railroad trains, stations, bus centers and trolleys? A. Yes.

Q. You think it's accessible to railroad trains? A. Yes.

Redirect examination by Mr. Seufert:

40 Q. Mr. Shea, do you recognize where the McManey property is? A. I know where it is.

James E. Shea, redirect.

Q. Where is it with relation to the Braidburn land and this land in question? A. Why, it's close by; to the south.

Q. Where is it in reference to the boundary lines of the Braidburn land? A. Why, it runs close to it.

10

Q. Is it located east or west of Brooklake Road?

A. Why, east and west.

Q. Is there any part of it running down from the Brooklake Road toward the river? A. As I understand, there is.

Q. Do you know whether or not any sale has occurred of the lands there in connection with these lands within the last year or so? A. I understand there's a sale about to close now. The contract has been drawn at the price of three thousand dollars with the application for three acres.

20

Q. Do you know when McManey bought this property? A. Quite recently.

Q. Do you know what he paid for it?

Mr. Ellis: I object. No evidence that these are similar lands. That's road frontage he is talking about now.

The Court: That is not the present question. I will allow it, if you know. Do you know what it sold for?

30

The Witness: No, I don't.

Q. The lands of McManey, east of Brooklake Road, how did they compare with the lands of the Braidburn Corporation east of the road? A. Very similar.

Q. You have been on both of them? A. Yes.

Q. Do you know anything about the property adjoining McManey's, known as Bushhauser's? A. That's right, the property that belonged to one

40

James E. Shea, redirect.

Moskowitz. This one, three acres sold his entire place.

The Court: A thousand dollars?

The Witness: A thousand dollars.

The Court: An acre?

10

The Witness: An acre.

Mr. Ellis: I move that be stricken out. There is no evidence of the same value.

The Court: He is just trying to tell you in his judgment it's similar land. Didn't he say so? (To the witness): Is there any similarity there?

The Witness: Yes, about the same thing.

20

Mr. Ellis: I think it's within your Honor's discretion to allow this witness to testify when it's so apparent; everybody knows that road frontage has two or three times the value of other land.

The Court: That's a matter of argument. You can discuss this witness' testimony with the jury. On the other hand, you are going to produce experts who will disagree with him entirely and then it becomes an issue of fact for the jury to decide.

30

Mr. Ellis: In this case there's a contract. The contract is no evidence of value. He says he is talking now about a contract.

Mr. Seufert: No, the Bushauser.

The Court: In the Bushauser land he says a contract has been signed for three thousand dollars. There must be a sale. You may strike his answer afterwards.

Mr. Ellis: He has not testified he knows anything about the Bushauser property.

40

The Court: Do you know the Bushauser property?

James E. Shea, recross.

The Witness: I had it listed in my office a long time, four years ago.

The Court: And it was sold?

The Witness: Yes.

Mr. Ellis: You sold it?

The Witness: No, I turned it over to Pruden and when I turned it over to him, they traded it in for other property. 10

Q. Was it finally sold? A. It was sold by Moskowitz at a price of fifteen hundred dollars an acre in this trade.

Mr. Ellis: I move that be stricken out.

The Court: No, I won't do that. You see there was a price agreed on, fifteen hundred dollars an acre in that trade. I will let it stand. Of course you can cross examine him, but the weight and credence to be given the testimony is for the jury. 20

Recross examination by Mr. Ellis:

Q. What do you know about the Bushhauser exchange; did you handle it in your office? A. No, I was asked to recall what it closed for.

Q. All you know is what somebody else told you? A. No, I was down on the exchange. 30

Q. When the transaction was closed? A. Yes.

Q. That was an exchange of two pieces of property? A. Yes.

Q. How did they come then to fix any price per acre when there was an exchange of properties?

A. Well, they had to fix a price.

Q. You mean it was that price they fixed in your office when they asked you to sell it? A. That's the price Moskowitz told me he was going to charge in exchange for this property. 40

James E. Shea, recross.

Q. Now, this buyer had a contract made when he was talking about the closing? A. Why, of course.

10 Q. And did the question of fifteen hundred dollars per acre come up between the parties when they had the contract in writing already made? A. No, Counsel, that wasn't the question, he told me he charged fifteen hundred dollars an acre.

Q. Who told? A. Moskowitz told right in my office that the price was fifteen hundred dollars an acre.

Mr. Ellis: I move that be stricken from the record. That's no evidence this property was sold at fifteen hundred dollars an acre.

20 The Court: Yes, I don't think that's properly proven. It will go out. The question as to the value of the land will stand.

Mr. Seufert: Exception.

The Court: I won't strike his answer, you can have an exception to that.

Mr. Seufert: Exception.

30 The Court: It is hearsay, the statement of Moskowitz as to him that he was valuing the property at fifteen hundred dollars an acre. The best evidence would be Mrs. Moskowitz—

Mr. Seufert: We have Mrs. Bushauser here.

The Court: All right.

Mr. Seufert: That is all.

(Witness Excused.)

George W. Morse, direct.

GEORGE W. MORSE, sworn on behalf of the appellant, testifies as follows:

Direct examination by Mr. Seufert:

- Q. Mr. Morse, where do you live? A. Boonton. 10
- Q. And what's your occupation or profession?
- A. Real estate.
- Q. How long have you been in the real estate business? A. Past thirteen years.
- Q. And what are your connections—do you belong to any real estate organization? A. Yes, I do.
- Q. What? A. Morris County Real Estate Board. The New Jersey Association of Real Estate Board and National Association.
- Q. Have you occupied any office in either of these? A. Yes. 20
- Q. In what capacity? A. Past president of the County Board and past president of the State Association and vice-president of the National; vice-president elect.
- Q. Have you examined the Braidburn property? A. I have.
- Q. These forty-two acres? A. Yes, sir.
- Q. Are you satisfied that it has any available purpose? A. I am. 30
- Q. What is it? A. Its best use would be for golf purposes.
- Q. Now, have you had any experience in buying and selling golf land? A. I have.
- Q. Where and when? A. The Knoll Land Company or the Knoll Golf Club.
- Q. Where located? A. Seven miles from this property on the Rockaway River.
- Q. Knoll Land Company or Knoll Country Club? A. Knoll Golf Club. 40

George W. Morse, direct.

Q. And when was this assembled or transaction occur? A. I can't give you the exact date.

Q. Approximately? A. It's just simply a question of equipment, it was about May of this year.

Q. From whom? A. May I refer to my records?

10

The Court: You may.

A. Afonasy Keverchenck, the Keverchenck Land Company, that deed was January 11th, 1929.

Q. The entire land was bought from this man?

A. The entire land is bought from this man, yes, sir.

Q. Have you assembled any other lands besides that? A. I have.

20

Q. Where and when? A. I might modify that answer. I haven't assembled lands for any other country club. I have bought and sold lands adjoining the Rockaway River Country Club.

Q. For what purpose? A. Its private sale.

The Court: Private use?

The Witness: Private use.

Q. Have you bought or sold any for club use? A. Only the Keverchenck Country Club property.

30

Q. Any other combinations that you bought for any country club purpose? A. No, sir.

Q. And you say this sale was made in 1929? A. Yes, sir.

Q. Have you assembled any other lands for any other similar purpose? A. Well, I have bought and sold property for various property owners. The Rainbow Lake tract. Chrystal Lake, for Mr. Chrystal. Bought and sold property at Arrow Head Lake, at Lake Belhella, Indian Lake.

40

The Court: Mohawk?

George W. Morse, direct,

The Witness: Only had one sale up at Mohawk. Haven't assembled any.

Q. Is there any unusual phases of the land for the organization for which you assembled? A. Yes, sir.

10

Mr. Ellis: I object.

The Court: It's harmless yet. Is there any similarity is the question.

Mr. Ellis: That hasn't been established at all.

The Court: Of course he can't do it all at once.

Q. This Keverchenck property, what's its character? A. The entire golf course is upon this particular tract I speak of.

20

Q. Is it a golf course? A. Yes, sir.

Q. Was it used for a golf course? A. They have started ten holes.

Q. Has it been finished? A. No, it will be finished in May.

Q. In process of construction? A. Yes.

Q. Have you had any experience in buying land for golf clubs outside of this one? A. No, sir, I have purchased land adjoining. This is the only one that comes in the assembled tract of a golf club.

30

Q. The adjoining land you purchased was for private use, however? A. Yes, similar property.

Q. Was the sale of this land for private purposes referred to situated adjacent to a golf club? A. Yes.

Q. Affected to any extent; little or large? A. Yes, sir.

The Court: In what direction?

40

The Witness: Increased in value.

George W. Morse, cross.

Mr. Seufert: I submit he is qualified.

The Court: You haven't shown he knows this land.

Q. Do you know this land? A. Yes.

10 Q. Know its character? A. Yes.

Q. And examined it for available use? A. I have.

The Court: And what is it?

The Witness: Its best use would be for golf purposes.

The Court: Can it also be used for farming purposes?

The Witness: I would not recommend it for farming purposes. It has better use than for farming purposes.

20

Cross examination by Mr. Ellis:

Q. You say that land for the Keverchench Company compared in character with this land? A. The part tract. It is very similar, runs right along the Rockaway River.

Q. Is the land which the Keverchench Company have for a golf club on the Rockaway River similar to this land? A. Not the entire golf course, but this particular land is flooded during the flood season.

30

Q. How much of it? A. About thirty-five acres of this particular tract I speak of is flooded.

Q. And what are the dimensions? What's the area of the entire tract? A. The entire golf course is slightly over three hundred acres.

Q. Then about ten per cent. of the acreage is at times flooded? A. I was only speaking of this particular tract which I sold to them that's comparable to this particular tract.

40

Q. Then only about ten per cent. of the golf

George W. Morse, redirect.

club, rather, is flooded at times? A. I think that's just a little bit more than that.

Q. Where did you say this is located? A. Along the Rockaway River.

Q. Near what? A. Near Boonton.

Q. How many miles would you say that is from Florham Park? A. It's seven miles exactly, to the nearest boundary of Florham Park, as I measured it on my speedometer. 10

Q. But that's eight miles or more to the Braidburn land? A. To the Braidburn land it's eight miles.

Mr. Ellis: I object to his testifying to any value.

The Court: Having in mind its available use for golfing purposes, I think I will allow him to answer. 20

Mr. Ellis: Will your Honor hear me on this before you rule? I have this in mind. I don't think we can establish any standard of golf lands anywhere. It depends on so many other elements.

The Court: Instead of arguing that to me, remember you are going to argue to the jury.

Mr. Ellis: Exception. 30

The Court: He may explain.

Redirect examination by Mr. Seufert:

Q. What in your judgment is the value of this tract of forty-two acres for golf purposes?

Mr. Ellis: I object.

The Court: You have been over this land?

The Witness: Yes. 40

George W. Morse, recross.

The Court: Do you know of any sales in the immediate vicinity to this particular tract?

The Witness: I do.

The Court: For example.

10 The Witness: The Bushauser sale right near by.

The Court: You know that sale?

The Witness: Yes.

The Court: And what was that?

The Witness: Three acres taken out of a thirty-three acre tract.

The Court: On which side of the highway?

20 The Witness: The same side as this property in question.

The Court: How far away?

The Witness: Approximately—well, I should say about a thousand yards.

The Court: And you know that sale, do you?

The Witness: Yes, sir, part of the Bushauser tract practically adjoins this property.

30 The Court: There was actually a sale?

The Witness: Yes, actually a sale.

The Court: It's on the record?

The Witness: Yes, I have the deed.

Recross examination by Mr. Ellis:

Q. Did you handle that sale? A. I did not make it. It's on the record.

Q. Well, you are going to tell us what someone else told you or what you read? A. No, it's a fact, it's on record.

40 Q. What record? A. Morris County record.

George W. Morse, recross.

The Court: Consideration included in the deed?

The Witness: Consideration of the deed is stated at one dollar, but that's not the sale price of the property.

The Court: How do you know the sale price? 10

The Witness: I have seen the contract of sale and I am convinced that the three thousand dollars in cash was paid. It's common knowledge.

Mr. Ellis: In the Ross case and Ringwood case, it's passed the Court of Errors that the contract of sale is not evidence.

The Court: Show me in the Ringwood case? 20

Mr. Seufert: I think there is a statement in there which refers to a real estate expert's opinion based on knowledge.

The Court: Well, of course, it's well known that an expert may qualify in a number of ways. In other words, he may study conditions. He may pick up information and may have an actual knowledge. A number of sources of qualifications. 30

Mr. Seufert: This is one of them where his investigation has shown—

The Court: He hasn't told us yet. (To witness): You say you know three thousand dollars was paid. How did you get that information?

The Witness: In the sale contract—

The Court: You saw the contract?

The Witness: I did. Was dated February 21st. Title was passed April 19th, ac- 40

George W. Morse, recross.

ording to Morris County records in Book "Q" page 43.

Mr. Ellis: I object to his telling the jury.

The Court: I am going to allow him to testify. Objection overruled.

10

Mr. Ellis: Exception.

The Court: The question is, what in your opinion was the market value of the land in question, having in mind its available use?

Mr. Ellis: Now, your Honor, he is testifying now, he says he is going to testify to value for golf link purposes.

The Court: I will let you ask him what it's worth for any other use, such as farming.

20

Mr. Ellis: He hasn't sold any golf playing land within eight miles.

The Court: I don't know. I am inclined to think that golf land is discoverable by a real estate agent.

Mr. Ellis: Does your Honor hold lands within eight miles—

The Court: If he says similar in character and similarly situated.

30

Mr. Ellis: And eight miles from the Braidburn land? The closest case we have is two miles. This is eight miles from the Braidburn land, and the witness admits further it isn't similar in character. He says only ten per cent. of this land is flooded at times.

The Court: That would not be of any particular consequence. I will allow him to answer.

40

A. Sixteen hundred dollars per acre.

George W. Morse, recross.

The Court: For what purpose, at least having in mind what use?

The Witness: For golf purposes.

The Court: Now, as farm land, what would it be worth?

The Witness: I would say the next best use would be for cheap bungalow sites along the Passaic River. 10

The Court: Well, is that an available purpose?

The Witness: Yes.

The Court: How much would it be worth an acre for that?

The Witness: About half that price.

The Court: A thousand dollars an acre?

The Witness: About eight hundred. 20

Mr. Seufert: That is all.

The Court: He hasn't stated what the land sold for eight miles away. He was merely giving that as source of information and his knowledge with reference to his qualifying as an expert in this line. Nor would that be the criterion, I will tell the jury so.

Q. What do you say that land is worth for golf playing purposes? A. Sixteen hundred dollars an acre. 30

Q. Upon what do you base that? A. That would be based on my experience and knowledge as a real estate expert, taking into consideration sales and parcels of property that's comparable.

Q. In the vicinity of this land? A. In a reasonable vicinity, yes.

Q. What do you mean, reasonable vicinity? A. From the standpoint of golf purposes. Our golf courses are not very close together. 40

George W. Morse, recross.

Q. You have testified in this case before? A. Yes.

Q. You know the criterion of this value, the market value?

10 Mr. Seufert: I object, it calls for a conclusion and is not cross examination.

The Court: That would not necessarily be so. It may be proper cross examination of what the witness stated as an expert.

Q. You know these lands are owned by the Braidburn Realty Corporation? A. Yes.

Q. Do you think they could see these lands at sixteen hundred dollars an acre for golf playing purposes? A. If the ownership was in the golf club, yes.

20 Q. I am asking you, if you think the Braidburn Realty Company can sell these lands at sixteen hundred dollars an acre for golf playing purposes? A. It would make a difference who the purchaser was.

Q. You think that's the market value for your people? A. Yes, the market value.

30 The Court: In other words, you could go out in the market and get a buyer who would pay sixteen hundred dollars?

The Witness: Yes, taking the market into consideration.

The Court: Do you fix that for the entire tract of forty-two acres?

The Witness: Oh, no.

The Court: This tract we are talking about, the forty-two acre tract?

40 The Witness: Yes, the entire tract is worth sixteen hundred dollars an acre.

The Court: You think that's the market

George W. Morse, recross.

value for other people besides the Braidburn Realty Corporation?

The Witness: Absolutely, if they pass there today.

Q. And you think that someone buying that forty-two acres on the market, having in mind that this piece in here, Mr. Morse, is owned by the Convent of St. Elizabeth, and that this land under condemnation doesn't begin until it gets 225 feet east of Brooklake Road? A. Yes, you haven't got much value in that Brooklake Road. There's not much value there. 10

Q. Now, Mr. Morse, look at this map. The Braidburn land consists of forty-three acres, five acres of which are permanently under water; you think you can sell the thirty-eight acres remaining, having in mind this jog of the Convent of St. Elizabeth with the outside piece for golf playing purposes, at sixteen hundred dollars an acre? 20

Mr. Seufert: I object.

The Court: Why?

Mr. Seufert: My objection is this: I think as far as this case is concerned, the value of this property in which we are concerned now is the value to the owner. 30

The Court: No, sir.

Mr. Seufert: At its most available use.

The Court: No, you can't do that. That is never the test, Judge. How much is it worth to the owner? He never would sell at all, he would want a million dollars. That would not be the test.

Mr. Seufert: Not what the witness—

The Court: It isn't what the value to the owner is at all; it's the market value. 40

George W. Morse, recross.

Mr. Seufert: But the market—

10 The Court: Having in mind its most available use. What is its market value, having in mind a golf course; if farm land, what's its market value in that. What is its value to the Braidburn Country Club or Holding Corporation is not the test, undoubtedly.

Mr. Seufert: The value is as it stands.

The Court: Objection overruled. You may have an exception. He may answer.

A. Now, the question has said something about some acres that were continually flooded. I have never seen that land—

20 The Court: Permanently flooded. You never saw any of it flooded?

The Witness: Not all the time.

Mr. Ellis: I think, your Honor, what he has in mind was: In my question I made the remark that five acres of the forty-three acres are in the bed of the Passaic River and constantly under water.

30 The Court: Of course it runs from the center of the Passaic. In other words, thirty-seven acres are—thirty-eight acres are above water level?

Mr. Ellis: In normal times.

The Court: In normal times. (To witness.) Having in mind five acres of the tract permanently flooded, do you still say that the entire tract would be worth sixteen hundred dollars an acre?

The Witness: Yes, I do.

40 Q. How long have you known this particular

George W. Morse, recross.

property, Mr. Morse? A. Well, I should say the past five years.

Q. How often have you seen it during the past five years? A. Oh, probably twenty times. I get over this area on my business to the Shade Tree Commission. I was over here a week ago Saturday. 10

Q. I show you three photographs offered in evidence, and ask you if you have ever seen the land in that condition? A. Yes, I have seen it similar to that.

Q. And you still stick to your value of sixteen hundred dollars an acre? A. Yes, because it don't stay that way very long. The same conditions exist on our own Country Club property.

Q. Do you know of any sales or estimates for property for golf playing purposes anywhere in the vicinity of the Passaic anywhere from Chatham to Mountain View? A. No. 20

Q. And along the land of the river, that's about twenty to twenty-five miles? A. Something like that.

Q. You don't know of any golf clubs backing up to the Passaic River, do you? A. No, I do not. I do on other rivers.

Q. You don't know of any bungalow developments, more than perhaps three or four in a group between Chatham and Mountain View? A. Your largest development is Mountain View or Lincoln Park. 30

Q. You don't know any along the twenty-five mile course between Chatham and Mountain View? A. Not extensive.

Q. So you would not say there is any demand? A. It could be created along there. 40

The Court: How is the water there? Is

George W. Morse, recross.

it clear and fresh and uncontaminated? I have heard that Passaic River question about a thousand times.

The Witness: No, it's a pretty good river.

10 The Court: Is this land available for bungalow purposes now?

The Witness: Yes, it is, for cheap bungalow sites. They are buying them down at Mountain View. I am not encouraging that.

The Court: Mountain View is twenty-five miles away?

The Witness: Just about that.

Q. But you will admit there is no demand along the Passaic between Mountain View and Chatham?

20 A. I know this, it can be created.

Q. I wish you would answer: Is there any demand from Mountain View to Chatham along the twenty-five mile course of the Passaic? A. I do not say there's any demand at the present time, no. Furthermore that isn't the best use of the property.

30 Q. Mr. Morse, on this Keverchenck three hundred and some odd acres, did they build the course on the high land or did they build the course down in the land bordering the Rockaway? A. They practically covered that land, they are building on this particular property I am speaking about.

Q. But the eighteen holes do not occupy the three hundred odd acres? A. No, they are building a water hole down on this property.

Q. That's where they are building the water hole? A. There's a water hole there.

Mr. Ellis: That is all.

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(Witness Excused.)

Emma Bushauser, direct.

EMMA BUSHAUSER, sworn on behalf of the appellant, testifies as follows:

Direct examination by Mr. Seufert:

Q. Mrs. Bushauser, where do you live? A. Newark. 10

Q. Did you ever own any real estate in Florham Park? A. Yes.

Q. And do you own any now? A. Yes.

Q. Have you sold any of the property in Florham Park recently? A. I sold three acres. I had thirty-three and sold three in Brooklake Road, now the high tension line.

Q. Did you ever sell any land to a man named Reynolds? A. Yes.

Q. When? A. February 1st, 1929. 20

Q. This year? A. Yes.

Q. And have been paid for it? A. Yes.

Q. Cash? A. Cash.

Q. How many acres did you sell? A. Three.

Q. What were you paid in cash for that? A. A thousand dollars an acre.

Mr. Weeks: Object to that on the ground the location of the property hasn't been identified. 30

The Court: I thought it was located. (To witness.) Where is the property located?

The Witness: Brooklake Road.

Q. Do you know that property? A. Yes.

Q. You went over it? A. Adjoins one part of the Braidburn Club ground.

Q. And is it on the Passaic side? A. Yes, runs in the Passaic River from Brooklake Road. 40

Emma Bushauser, cross.

The Court: My recollection is the other witness identified that.

Cross examination by Mr. Weeks:

10 Q. This strip of three acres you sold to Mr. Reynolds fronts on Brooklake Road, doesn't it? A. Yes.

Q. What is the road frontage? A. 147 feet, I believe. It's in the contract.

Q. 147 feet on the road? A. Yes.

Q. Do you know the depth of it? A. Yes, I have it there in the contract. I think twelve hundred something in depth.

20 Q. And what kind of a location is it? A. Well, the frontage is on the road.

Q. The back is a little marshy; the extreme end of it, it's a little marshy? A. I never went in that far.

Q. What portion of the rear of the property is low, Mrs. Bushauser? A. I should judge about 600 feet in the rear runs low at times, not always.

Q. And from the road back 600 feet is high land? A. Yes, sir.

30 Q. And then it begins to run down gradually toward the rear of the property on the 1,200 feet of land? A. Yes.

Mr. Weeks: Now, if your Honor please, I object to the introduction—

The Court: I think the testimony is all for the jury to consider. There is a similarity apparently, at least so far as this witness states. The objection will be overruled and you may have an exception.

40 *Further direct examination by Mr. Seufert:*

The Court: What did you sell that for?

Emma Bushäuser, direct.

The Witness: I sold that for a thousand dollars an acre. I needed the cash and that thousand dollars cash looked good to me.

Q. Do you own any other land in that vicinity?

A. No.

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Q. Do you own any land besides this particular land you sold to Reynolds? A. Yes, thirty, adjoining to Mr. Reynolds.

Q. Where is it located in respect to the Braidburn people? A. Why, the same I sold to Reynolds that adjoins into the Braidburn people.

Q. The Braidburn property? A. Yes.

Q. What is the character compared with the Braidburn land? A. I don't know—

The Court: You have not qualified this lady.

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Mr. Seufert: I know.

The Court: You can't qualify her as an expert.

Q. I show you two photographs and ask you, Mrs. Bushäuser, whether you recognize these photographs as any part of your land? A. Well, I do not. I never took such a good look that I could recognize it by the picture. All I know, the objects are on the bank.

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Q. Does it look like that? A. Yes.

Mr. Weeks: I don't think the Judge should lead this witness.

Mr. Seufert: That is all.

Mr. Weeks: No further questions.

(Witness Excused.)

Mr. Seufert: I offer the deed in corroboration of Mrs. Bushäuser's testimony—

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Case.

The Court: Oh well, she makes the positive statement she made the sale and got the money and you may offer the deed, I suppose, bearing that out.

10 Mr. Seufert: I offer the deed bearing date April 19th, 1929, made by Emma Bushauser to Frank H. Reynolds recorded in Morris County Clerk's office, conveying three acres of land in the Borough of Florham Park; recorded in book 231, page 443, April 20th, 1929.

The Court: It may be marked.

Mr. Seufert: The property owners rest.

The Court: Proceed with the respondents.

20 (A short recess taken before proceeding with the respondents.)

The Court: Perhaps I ought to say for the benefit of counsel and with the idea that the further trial of this matter may be shortened, that I have concluded that the question of damage to the remainder of the tract which is now the golf club proper of the Braidburn Company will be taken from the consideration of the jury. In other words, I shall not submit to the jury the question of damage to which the testimony yesterday related with regard to the diversion of water through subterranean channels, for the reason that I am of the opinion that that question is controlled by Meeker against the City of East Orange as found in 77 Law, at page 623, and in which the opinion was written by Chancellor Pitney. My impression was that the old English rule applied. That is to say, that unless it appeared that the proof of di-

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version indicated that the subterranean stream was involved, that no liability could arise or damage accrue from the mere diversion actually of subterranean water that may have been collected from surface sources. I recall that Vice-Chancellor Bird referred to the rule to that effect in the case of *City of Asbury Park* against the *Ocean Grove Camp Meeting Association* in my own County some years ago; that case being afterwards reported in *3 Atlantic Reporter*. I find, however, that the old English rule as to property rights in percolating underground water was rejected in this case of *Meeker* against *East Orange*, and I am not aware there is any other case shown that has overruled this case. Is that correct? 10

Mr. Ellis: That is still the law. 20

The Court: And therefore it would seem to be the reasoning of the Court of Appeals on the subject, for there it appears that the suit was brought by the plaintiff, *Meeker*, against the *City of East Orange* in the District Court, alleging there had been diversion of water in somewhat similar circumstances as this present suit. That is to say, the *City* was either attempting to establish and had established, as I recall from reading the case, a water supply on land adjoining that of *Meeker* and he claimed that either his spring or well, I have forgotten which, had gone dry after the *City of East Orange* had begun the operation of its works. The Chancellor there laid down the rule on the action of law for damages for such diversion, and the Court refused to fol- 30 40

Case.

low the old English rule for the collecting of underground water in a basin from surface sources on private property to be used by the property owner; as I say, that was repudiated and the test appears to be reasonable use although it is sometimes said that unless the English rule be adopted, landowners will be hampered in the development of their property because of the uncertainty that would thus be thrown about their rights. I quote: "It seems to us that this reasoning is wholly faulty. If the English rule is to obtain, a man may discover upon his own land springs of great value for medicinal purposes or for use in special forms of manufacture, and may invest large sums of money upon their development; yet he is subject at any time to have the normal supply of such springs wholly cut off by a neighboring landowner, who may, with impunity, sink deeper wells and employ more powerful machinery, and thus wholly drain the sub-surface water from the land of the first discoverer. In the case before us the City of East Orange might have its underground water-supply cut off or materially impaired by the establishment of deeper wells and more powerful pumps upon some neighboring tract—even upon the tract owned by the plaintiff. In short, under that rule, might literally makes right, and we are remitted to— The simple plan, that they should take who have the power, and they should keep who can."

Therefore the Court goes on to say the English rule is repudiated, and the rule in

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New Jersey appears to be that "reasonable user" is the test. Not the right of absolute use on the part of the landowner. In other words the Court goes on to say, "upon the whole we are convinced, not only that the authority of the English cases is greatly weakened by the trend of modern decisions in this country, but that the reasoning upon which the doctrine of 'reasonable user' rests is better supported upon general principles of law and more in consonance with natural justice and equity. We therefore adopt the latter doctrine. This does not prevent the proper user by the landowner of the percolating waters subjacent to his soil in agriculture, manufacturing, irrigation or otherwise, nor does it prevent any reasonable development of his land by mining or the like, although the underground water of neighboring proprietors may thus be interfered with or diverted. But it does prevent the withdrawal of underground waters for distribution or sale for uses not connected with any beneficial ownership or enjoyment of the land whence they are taken, if it results therefrom that the owner of adjacent or neighboring land is interfered with in his right to the reasonable user of sub-surface water upon his land, or if his wells, springs or streams are thereby materially diminished in flow, or his land is rendered so arid as to be less valuable for agriculture, pasturage or other legitimate uses."

The result was that they held the landowner in this case had a right of action

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based upon the question of reasonable use. In other words, they apparently applied there the rule of reason. And in the circumstance, I am inclined to the view that Meeker against East Orange applies to the situation here and that the proofs of the landowner are of such a nebulous and uncertain character at the present time that we cannot say that there is any measure of damage that this jury may apply to the theory of any reasonable use. In other words, the owner here alleges that it has the right to anticipate that if the City of East Orange puts down its wells on the tract in question, it will necessarily divert the subterraneous water from the use of the land of the Country Club and among other things cause the well now there on the property to go dry. I am inclined to the view that that is in the speculative realm, as it were, and that there is no proof in advance of the actual use of the land by the City of East Orange which would justify the Court in sending that question to the jury; and I shall leave it therefore to the remedy indicated in the case of Meeker against East Orange, and if it should appear after the operation by the City of its water works on the land in question, if they do use it, that there is the consequence which is claimed here, then of course, the Country Club would have a right of action against the City of East Orange and the question as to reasonable use by the City would be the issue in such an action. My theory therefore is that the present claim of damages is purely specula-

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tive. That there is no evidence which would justify submitting that question to the present jury, and therefore the only question involved will be the market value of the land that is sought to be taken by the City for the uses indicated.

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Mr. Seufert: In what way will the action appear on record?

The Court: I shall decline to submit to the jury the question of damage to the adjoining land on the ground the property owner as alleged, namely—

Mr. Seufert: Understand the reason; understand that this suit is brought because of the fact that in this case the City of East Orange having been permitted to extract or abstract from the lands intended to be taken or condemned two million gallons of water per day; that in this case the possible damages, not only of the present, but in the future, are to be taken care of and an award made by the jury. I am referring first to the fact that we are entitled to assume that the use to be made will be the most injurious or possible under the terms of their grant and that injury will accrue to the remaining lands of the Braidburn Realty Corporation by reason of the abstraction of this water. That that injury will be to their pumping plant and to their water supply; further that such testimony so offered indicated the reasonable probability of such an occurrence and establishing the cost of a substantial supply and fixing the amount of damage that would accrue to Braidburn Realty Cor-

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10 poration when such a damage would happen. That we are compelled to bring that claim for damages in this case under the case of *Van Schoick v. The Delaware & Raritan Canal Company*, 20 New Jersey Law, page 249, and various opinions in cases citing this case with approval, which we regard as the existing law today which, while there may be a cause of action in the future, nevertheless in this case we are barred from bringing any action against the City of East Orange for any subsequent injuring accruing to the lands or the user of the lands in question, except such as may arise through negligent operation of the plant on this land.

20 The Court: Perhaps I should add to what I have already said, there is rather an interesting situation that arises here, owing to the state of the law at the time this proceeding was instituted. In other words the City of East Orange was apparently obliged to apply to the State Board of Conservation for a permit and in the petition and in the grant from the State Board there are indications that the State Board has the charge and the jurisdiction and the control of subterranean waters in the state by reason of legislative enactment. In other words, the act creating that Board appears to give it jurisdiction and control, which I assume is to conserve largely all these subterranean waters throughout the state. So the Legislature made it necessary that any municipality desiring to take land for water supply purposes must first obtain the permission of the State Board. Apparently the

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State Board is given some sort of control as to the quantity of water that may be taken in such circumstances by the municipality granted the permit and it is under the constant supervision and control of that Board. Then this case to which I have referred, namely, Meeker against the City of East Orange, sets up the criterion of reasonable use, not that they have no right at all to use; that the property owner has no right to use water under his land, under the surface, but that he is limited to the reasonable use. Now, surely this jury could not pass upon this question here because there is no evidence. In other words, the Court of Appeals holds that the landowner has the right to use the water of subterranean sources, but it is confined to reasonable use. Now, since it has such right, apparently, then how can it be said that the Country Club is damaged until it actually occurs? How can we anticipate to what extent the Country Club is going to be damaged in the use of these wells, for example, because the City of East Orange would be entitled to reasonable use and apparently that is controlled by the State Board of Conservation, as I see it, under the statute creating it. So it would seem to me peculiarly a question for inquiry when the condition that is feared actually arises; and that being so, surely this jury cannot pass upon the damage which is merely anticipated and then say that they will assess damages in favor of the owner as against the taking party, namely, the City. I do not see that there is any evidence here

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10 that can be controlling as the source of an intelligible fact or at least an inference of fact for the jury. That arises in the future. When that situation does arise, then undoubtedly they have the right to go to the proper forum and there ask for an injunction or the recovery of damages directly due to the ascertained injury. That is my theory about it. Whether I am correct about it, I don't know. However, it goes here, and you may have an exception.

Mr. Seufert: We pray and ask for an exception.

20 The Court: The sole question to be submitted to this jury will be the value of the land sought to be taken; I will allow that.

Mr. Seufert: What about any injury to the remaining land?

The Court: Well, is there any evidence? You are setting up here injury to the remaining land. In the first place, while your deed covers the entire tract, there's a roadway running between it. Is the land sought to be taken still a part of the entire tract?

30 Mr. Seufert: The part to be taken is part now of the whole tract. The road merely separates a section. It's the golf club and it's a part of the entire property and it was the purpose of the owner to use the entire property and this is a special element that was considered in connection with any separation of the tract.

40 The Court: Doesn't that involve the market value of the tract sought to be taken, having in mind its available use?

Mr. Seufert: It is a proposition that I am

Rosswell M. Roper, direct.

inclined to believe is always troublesome to figure it out.

The Court: I am going to let the jury determine the market value of this land and the ascertainment of its available use. If it was available for golf club purposes the market value is increased in that respect, the jury will so consider it.

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Mr. Seufert: I guess the easiest way will be to have it go that way and take an exception.

The Court: Yes, proceed.
(Exception allowed.)

ROSSWELL M. ROPER, sworn on behalf of the respondents, testifies as follows:

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Direct examination by Mr. Ellis:

Q. Mr. Roper, where do you live? A. East Orange.

Q. Have you any official connection with the City of East Orange? A. Yes, I am engineer and general manager of the water department.

Q. Speak up, will you, Mr. Roper, so the jury will all hear. And you have been for how long a time? A. About ten years.

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Q. And how much of your time during that ten years has been spent in the vicinity of the Passaic River, and directing your attention especially with reference to the Braidburn property? A. My work has taken me up there on an average of at least once a week. Sometimes more frequently and I have run surveys over that ground—

The Court: I had intended to incorporate in my observation on the disposition

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Rosswell M. Roper, direct.

10 of the question of damage what is laid down
in the case of Meeker against East Orange,
and I think I will do it now. In this case the
Court held that the defendant, the municipal
corporation, for the purpose of supplying
this municipality with water, acquired a
tract of land and sunk a number of artesian
wells and that the land owner would have
the right to bring suit, and without percolat-
ing any amount of water a certain amount
of damage to crops was held actionable.
Here the Court holds that the landowner's
remedy in this case is not to have his dam-
ages settled here but when the situation
arises that he may be entitled and it may be
20 desirable to prove as a fact the actual dam-
age when the occasion arises.

Mr. Seufert: I except to that.

The Court: I will deny it.

Q. Mr. Roper, during your experience in the vi-
cinity of this Passaic River, have you made any
study of the conduct and characteristics of the
Passaic River? A. I have for a number of years,
about eighteen or twenty years.

30 Q. Now, will you tell us something about it?
What happens in rainy seasons in the Passaic ba-
sin and particularly with reference to the Braid-
burn property? A. The action is this: the water
coming down in the tributaries of the Passaic
above Chatham and mill streams coming in flows
through the natural river channel until it gets
down between Chatham and Northfield. At that
point it empties into a holding basin, which is
caused by the inability of the water to get away
40 at Little Falls. The flow of the Passaic River—let
me change that, the water flowing in the Passaic

Rosswell M. Roper, direct.

may rise very quickly at Chatham. It may continue over a time of ten hours to run in and the water in this whole area running all the way to Little Falls rises very, very slowly in proportion, because as the river gets out of its bank it seeps through the ground. The higher the water gets the wider the area that it would cover. So that while the water might be uniform in the Passaic River near Chatham, you might get a rise of water which will flow down on the property, out over this area, and you will get a condition where the water at Chatham has gone down because of flood conditions and passed there to the flooded area and has kept steadily rising and getting higher within this big basin, but your river may have gone back to normal again at Chatham. This is a very unusual condition and one that others have studied for quite a long time.

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Q. And is, therefore, the condition of the river at Chatham where some readings were made as to the height a true criterion of the lands at the Braidburn property during flood conditions? A. Absolutely not except in this way, that the high average of water at Chatham would indicate the probability of a flood if it continued long enough to fill up the basin.

30

Q. Now, are any of these flood conditions caused by the Whippany and Rockaway Rivers backing up? A. I spoke of these tributaries. I did not say above Chatham, but the tributaries coming in above Little Falls affects it.

Q. How big an area would be covered in flood tides? A. It depends entirely on the height of the flood, the larger floods will cover anywhere from between twenty and twenty-eight thousand acres.

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Rosswell M. Roper, direct.

Q. Now, from your experience and your knowledge of the Passaic, how often do these floods occur? What periods of the year?

10 Mr. Seufert: I object to this as not being the best method and best proof.

The Court: I think if the witness is familiar with the land in question sufficiently to state when it would flood he may explain by directing his attention to that. And it will shorten it. You may ask him the conditions there he knows of.

Q. How often, Mr. Roper, from your ten years' experience of the Passaic, do these floods occur and what periods of the year?

20 The Court: The same question; do you know this land?

The Witness: Very well.

The Court: How long have you known it?

The Witness: Eighteen or twenty years.

Q. And are you familiar with the flood conditions there? A. Very much so.

30 The Court: Suppose you interrogate him about that.

Mr. Seufert: Just one minute. Have they got any records that their plant there right opposite to us similar to the ones or similar to the ones we took at Chatham, I would be glad to have them go in. The jury wants to know the length of time this land has been flooded in a year or the past ten years. That's what I have been trying to show. Have they got any records, if so, I will be glad to admit them.

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Rosswell M. Roper, direct.

The Witness: Have we any records there of the condition; we have not.

The Court: However, you have personal knowledge of the flood conditions?

The Witness: Absolutely.

The Court: For the past ten years? 10

The Witness: Yes, past eighteen or twenty years.

The Court: You may interrogate him along that line.

Q. How often in your experience do these floods rise?

Mr. Seufert: I object to that question as not being a proper question to ask.

Mr. Ellis: We are asking about his experience in connection with it. If he knows, he can tell us how often he knows it rises. 20

The Court: This particular property.

Q. All right, I will reconstruct the question. Mr. Roper, how frequently are these floods to the extent that they affect the Braidburn property under condemnation?

Mr. Seufert: I object to that as not being proper evidence. 30

The Court: I can't tell yet. It may prove to be competent. I will allow that question. He may answer.

Mr. Seufert: Exception.

A. The property may be flooded twice in a year or may be flooded ten times in a year. The flood may come up and lay on the ground for as long as ten or twelve weeks.

The Court: Have you seen it? 40

The Witness: I have.

Rosswell M. Roper, direct.

The Court: Taken photographs of it?

10 The Witness: The whole thing, as based on this. This is a matter given to me to study, to ascertain if after one rain it will not flood these meadows. It is my recollection from the first rain it has not been flooded, that is a short rain but after a heavy rain, after we got the flood conditions on the meadows, what we call the maximum flood, that's at least thirty-six hours after the rain started—in other words, it takes that long for this water to come down indicating that it is a long period of rising and corresponding long period of falling. It's not quick acting.

20 The Court: How many times have you seen this flooded, these meadows flooded, in the last eighteen years?

The Witness: I can't tell you the exact number of times, but I have seen it at least—

The Court: Each year, how often?

The Witness: On an average I have seen it four or five times a year.

30 The Court: And to what extent; indicate on the map?

The Witness: I have seen the water way around from starting in here (indicating) and it backs up to here (indicating)—no, I may correct that; it comes way in through here (indicating). I have seen the water way up along this sewer tank which is up back in the woods, when the river has been in here and went on over and shoots back here and so on out here (indicating). I have been all over—I went down all over it quite a number of times.

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Rosswell M. Roper, direct.

Mr. Seufert: Where you just pointed is the low land?

The Witness: No, up in here, it's 171 and 172, which is higher than any place down there.

The Court: Has it ever flooded right to the road? 10

The Witness: I have never seen it to the road. I have seen it up to between half way from the woods to the edge of the road.

Q. How many days would the water remain on this land after one of these flood conditions?

Mr. Seufert: If he knows.

A. I have seen it on the land for a period of ten to twelve weeks. 20

Q. Now, take for instance this year, 1929, do you know what the condition of this land was with respect to—strike that out. In the year 1929, from February 1st, we will say, until about May 1st, what was the condition of this land? A. The land was flooded during February and March and during April but not during May except in little places.

Q. And what percentage of the land under condemnation would you say was then submerged? 30

A. At least ninety per cent.

Q. Now, you refer to some testimony yesterday with respect to a particular date, February 8th, 1929, at which I recall it was testified that at elevation 169 the land in that spot was fifteen inches above the water. Were you at elevation 169, marked No. 5 on this map, and which has been identified as B-5, on February 8th? A. I was.

Q. I show you— A. I went over that particular point in a boat, rowed over it. 40

Rosswell M. Roper, direct.

Q. I show you nine photographs and ask you if you have seen them before and what you know about them? A. Yes, I know these photographs; I took them myself and signed my name to them.

Q. What date?

10

The Court: What are the dates?

The Witness: February 8th, 1929.

The Court: All the same date?

The Witness: I believe they are. I was there the 5th and 8th. I think I can check it up—about the same date.

Q. These photographs were taken by you? A. Taken by me.

20

Q. And are any of these photographs the spot marked "5" on this map? A. Yes, sir.

Mr. Ellis: Any objection?

The Court: You better indicate on the map the view of the portion of the tract shown in the photograph.

By Mr. Seufert:

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Q. These were taken with a small camera? A. These were taken with a camera 3¼ by 5½, postal size picture.

Q. And enlarged into this proportion. Why did you enlarge them? A. So they can be seen more easily.

Mr. Seufert: I object as being an enlargement and not a proper photograph.

The Court: Do they correctly reproduce the actual physical conditions existing at the time?

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The Witness: Yes.

The Court: At the time you were there?

Rosswell M. Roper, direct,

The Witness: Absolutely. I can tell—

The Court: Why did you enlarge that?

The Witness: For this reason, so that could be more easily seen: I took the film out of this camera into the development room and I was present with the man when he developed the present film and made the enlargements. 10

The Court: However, he says they reproduce the physical conditions as they were.

Mr. Seufert: No objection if the jury will remember they are increased in size.

The Court: Mark them.

(Marked Exhibits P-2 to 10 inclusive.)

Mr. Seufert: They were taken February 1st? 20

The Witness: Yes.

Mr. Seufert: The same time?

The Witness: Yes.

Further direct examination by Mr. Ellis:

Q. Were you at elevation 169, marked "5" on this map February 8th? A. I was.

Q. What was the condition at that one spot? 30

Mr. Seufert: One minute. When did you see this map for the first time?

The Witness: When it was put on the board.

Mr. Seufert: You didn't know anything about elevation or anything about it before when?

The Witness: Why, I have taken elevations over there. I know that particular place. I know the elevation there, while I don't agree with your engineer, we carried 40

Rosswell M. Roper, direct.

ours up from the government posts, we checked the levels.

Mr. Seufert: Then you recognize that ground level to be a certain figure?

The Witness: Yes, the same one.

10 Q. Was that land under water at that time? A. It was.

Q. About how deep was that? A. I would say fifteen to eighteen inches.

Q. How much of that area did you row around in a boat on that day? A. Why, I went over, I would imagine, about fifty per cent. of it.

Q. Mr. Roper, do you know where the Sewer Disposal plant is of the Braidburn? A. I do.

20 Q. Can you indicate on the map where the 400 foot strip will come across?

Mr. Seufert: How is that material?

Mr. Ellis: I think the jury ought to know.

The Court: Of course there is a reservation there of that right of way for the Sewer Disposal.

30 Mr. Seufert: There's an exception and it was put in there to counterbalance any possible damage by reason of the taking of this land and taking some of the—

The Court: I assume that's so. However, I think the jury would like to know where it is. (To witness.) Where is it?

(Witness marks map.) A strip 400 feet wide in here. This strip 400 feet wide runs from 225 feet from the road, running down to the river.

40 Q. You are familiar with the petition in this case? A. Yes.

Q. And we understand then that this 400 foot

Rosswell M. Roper, direct.

strip is taken subject to the right of Braidburn maintaining their Sewer Disposal drains? A. Right.

Q. Mr. Roper, I show you a map, rather large, and ask you what you know about this map and under whose direction it was prepared? A. It was prepared under my direction. 10

Q. Made under your direction? A. Yes.

Q. What does it show? A. It shows the property owned by the City of East Orange, their acreage, date purchased and also shows that part of the Braidburn land that is now in question under condemnation.

Q. Is it drawn to scale? A. 300 feet to the inch.

Q. Does it correctly portray the holdings of the City of East Orange in Millburn Township and Livingston Township and land under condemnation in this case? A. To the best of my knowledge. 20

Q. Made under your direction? A. Yes.

Mr. Ellis: I offer it in evidence.

Mr. Seufert: I object as not being material and includes a lot of land not affected by this condemnation.

The Court: Why do you show so much land? 30

Mr. Ellis: I want to show this to show what we paid for abutting land.

The Court: At private sales?

The Ellis: At private sale.

The Court: It should be helpful in this case. I will allow it.

Mr. Seufert: Exception. Most of this land are lands that testimony, if it's the same, as in the Commission, before the Commissioners, are on the other side of the river. 40

Rosswell M. Roper, direct.

The Court: Of course, if that's so, it can't hurt you any. There must be a similarity, of course.

(Map marked Exhibit P-11.)

10 The Court: We will adjourn at this time until five minutes of one.

(Thereupon the Court adjourned until 12:55 in the afternoon.)

AFTER RECESS.

ROSSWELL M. ROPER, recalled:

Further direct examination by Mr. Ellis:

20 Q. Mr. Roper, on February 8th, when these photographs were taken, will you tell us what the depth of the water was on this Braidburn tract?

A. It was filled from—well, you say the Braidburn tract?

Q. I refer to the forty-three acres shown on this map? A. Well, it's filled from a few inches to as much as three to three and a half feet in some places, depending upon the contours of the ground.

30 Q. Now, referring to this other map here, rather, which I think is P-11; I point out to you two portions on the map, one marked August W. Fund and one Annabelle Dickerson, and ask you if you know when these pieces were acquired by the City of East Orange? A. I do.

Q. When? A. I have that entered on the map, showing the date acquired and who they were purchased from.

40 Q. From the persons whose names are entered on the map? A. In one case August Fund and the other Annabelle Dickerson.

Rosswell M. Roper, cross.

Cross examination by Mr. Price:

Q. For how many years have you been engineer for the City of East Orange? A. About ten years.

Q. Professionally employed by them during that period and particularly in the inquisition of their water supply? A. The inquisition, operation and so forth.

10

Q. Of their water supply? A. Right.

Q. East Orange water supply sources are mainly located where? A. In what are known as the Dickerson field, the Stanford, the Slowick field and the Canoe Brook.

Q. The Dickerson field is shown on the map marked "D" by hand Norman and Edna Dickerson? A. Yes.

20

Q. How many wells there? A. Three.

Q. The Slowick section is where, in between here? A. No.

Q. Where is it? A. It lays in here (indicating).

Q. In the property which is designated what? On the map as Frank Mead (?)? A. Yes, sir.

Q. Where is the Canoe Brook section of your water supply? A. It lays in here (indicating).

Q. Indicating the section along the place marked Canoe Brook in the vicinity marked George W. Reeve and Samuel B. Parcell? A. You are correct.

30

Q. How many wells have you in the Canoe Brook section? A. About ten.

Q. How many in the Slowick section? A. Three.

Q. These wells furnish the water supply for East Orange, is that correct? A. It is.

Q. Have you been connected with the City of East Orange in the acquiring of this land shown on this map called East Orange Water Department? A. Parts of it.

40

Rosswell M. Roper, cross.

Q. Well, was some of it acquired prior to your connection with the City? A. It was.

Q. And parts of it since? A. Right.

10 Q. Does the City of East Orange now own all the lands shown on this map? A. No, only those parts which are indicated as having been purchased through deeds of record. These are places shown which are not owned by the City of East Orange.

Q. I notice a great many tracts that have designations on them with names, acreage and dates acquired. That's right now, all these that have designations on them of acreage represent the acquirements by the City of East Orange of the property? A. I believe that's it.

20 Q. The black line shown on this map is shown to be East Orange? A. Yes.

Q. And at least a substantial part of it you have been the person in the engineering department at the time of these acquirements? A. No, I would not say that.

Q. The bulk of it was purchased before you were connected with the department? A. And by the City.

30 Q. And the purchases which have been made by the City during the period of the ten years you have been connected have been largely to the west side of this map, approaching the Braidburn property? A. Yes, they have.

Q. Now, you made a statement to this jury that you have observed the flood conditions of the Passaic River? A. I have.

40 Q. And I understood you to say you have made that observation with reference to your professional connection with the City, is that correct? A. Yes, and also as hydraulic engineer, I have been

Rosswell M. Roper, cross.

very much interested in it and checked that with Mr. VanNule, the engineer—

Q. Leaving aside Mr. VanNule, I ask you whether your interest in this proposition is from one or two sources, from either your connection with the City or your interest abstractly as a hydraulic engineer? A. Both.

10

Q. Now, with your connection with the City, you made an inspection of this problem, what was the purpose you had in mind in inspecting the flood waters of the Passaic River? A. One thing was—well, it is to give them as part of the data that anyone in the engineering department, the engineer's department to know the physical condition surrounding the plant.

20

The Court: In other words, to properly inform yourself?

The Witness: Yes.

Q. In other words, the City wanted to drill wells and it's important to know the flow of the river if you are drilling wells near the river? A. Only from a construction standpoint, to know whether it would interfere with your operations during construction and you investigate every problem before you start.

30

Q. What I want to know is, you observed the flow and flood conditions of the Passaic. Now, from your connection with the City you must have had some purpose in doing that? A. Yes.

Q. What was the purpose? A. General engineering information which will be of value to the City which I represented.

Q. And you kept track of that situation with reference to the construction of such wells as have been constructed during your period of connec-

40

Rosswell M. Roper, cross.

tion with the City, is that so? A. Just state that again?

10 Q. You have kept in touch with the rise and fall of the Passaic in connection with such wells as have been driven under your supervision as engineer of the City? A. In connection with the rise and fall of the river for drilling wells?

Q. Well, to tell where to locate them? A. Oh, no.

Q. Now, you are engineer under which the water plant, the Dickerson wells located here? Prior to that location did you have any reason to inspect the flood conditions of the Passaic? A. Surely.

20 Q. What was that; that's what I want to find out? A. General engineering information of the conditions all along the edge of the property, what might happen if we had a jam by the Canoe Brook and water back up toward our pumping station as it had done on the Commonwealth one time. We had to help them out. In other words, it's looking into conditions.

Q. What I am trying to bring out, it's an important feature of your investigation? A. Yes.

30 Q. Now, with that in mind, don't you keep records? A. You mean of the—

Q. Don't you keep records of the rise and fall of the Passaic River? A. We do not.

Q. Do you carry them in your head? A. I carry the reports that are built up from time to time in my head as to certain landmarks. I have certain sets of investigations to show comparison between one flood and one that's present.

Q. You say you retain that mentally? A. I do.

Q. You don't keep any record of that? A. No.

40 Q. In the event of your death, sir, or in the event of your removal as engineer or retainer by

Rosswell M. Roper, cross.

East Orange, what record would East Orange have of your investigations?

Mr. Ellis: I don't think that's material.

The Court: He says there are no records so far as he knows.

Mr. Price: I would like to have it stated on the record as to the Dickerson wells.

10

The Court: If you should retire from the present position, what records would the City have?

The Witness: The same information I had, which I have transferred to the Commissioner under whom I act.

The Court: Well, that would indicate that you handed down reports to someone of the City of East Orange.

20

The Witness: That's the way they are handed up.

The Court: The Commissioner to whom you say you made these oral reports for the City of East Orange are members of the Governing Body of the City?

Mr. Ellis: We have a Council and Mayor for the Governing Body of the City.

The Court: Who else has it?

30

The Witness: The Board of Water Commissioners.

Q. Is that the Mayor? A. The Mayor and Council is the head of that.

Q. And by Commissioners you refer to the Water Commissioners? A. Yes.

Q. Did they change from time to time? A. Yes.

Q. But despite that situation, there has been no actual records kept by you or in your department of the rise and fall of that river? A. No.

40

Rosswell M. Roper, cross.

Q. You spoke of land named Fund, is that correct? A. Right.

Q. And the deed there is April 5th, 1928, is that correct? A. Yes, you just read it.

10 Q. Is this the last piece of property that was acquired prior to the present condemnation matter? A. I would have to look it up.

Q. Did you see any of them? A. I see one right below it.

Q. Edna Dickerson, came through also in August? A. Yes.

Q. That is the acquirement of property that you have on that map by way of deed? A. Yes, I think it is.

20 Q. And all these deeds—I withdraw that and I will put it this way— A. There's another place here (indicating).

Q. You mean where it may be acquired? A. Yes, maybe.

Q. Are all of the lands up to the present situated on the easterly side of the Passaic River? A. You mean ownership.

Q. All lands East Orange acquired on the easterly side of the Passaic River? A. Yes, Essex County side.

30 Q. This is the first the municipality ever has acquired lands on the westerly side or Morris County side? A. As far as I know.

Q. Well, you know? A. No.

Q. You don't know? A. No.

Q. You have worked on it, the acquirement of this land? A. I did.

Mr. Ellis: Mr. Roper has answered the question.

40 A. (Continued.) The question came up several

Rosswell M. Roper, cross.

years ago, and one of the Commissioners investigated the section considerably west of the river there, but I can't answer your question to answer correctly, I have to say I don't know, but at that time he tried to acquire land west of the river.

Q. He was on this property of Braidburn, 42.97 acres? A. That's right. 10

Q. And you have to take from it 7.13 as St. Elizabeth's tract? A. It is.

Q. It's this 42.97 that's comparatively the total part sought to be taken. It does include the land to the center of the river? A. The property includes the land to the center of the river and adjoins our property there on the other side.

Q. There are three farms in part of the 42.97 acres? A. No, that's different ownership. 20

Q. Now, you haven't shown on this map the location of the remaining Braidburn property? A. No.

Q. That Braidburn land runs on down south of the place where you have shown that boundary line at that end of the map?

Mr. Ellis: If you know, Mr. Roper.

A. I know in a general way that side but don't know exactly where they go.

Q. Did you make a survey of this map? A. This was made by Kuntz, Summit engineer. He was in the employ of Braidburn as well as ourselves. 30

Q. Did you or did he draw the map? A. I didn't draw the map.

Q. What did you have to do with it? A. Why, it was done under my direction by an employee of the department, an engineer named Hand.

Q. Do you know the location of the Braidburn 42.97 is correct? A. Yes. 40

Q. But you made no field inspection of the remaining land? A. I have not been down over the

Rosswell M. Roper, cross.

remaining land. I have driven through. I have been through next to that land and knew that land.

10 Q. The Braidburn property also extends north of the 42.97 tract, doesn't it? A. Yes, very little though.

Q. And also comes up across here (indicating)? A. You mean west of the road? I don't know from my personal observation, I haven't been all over their land. I have a map of it and know where the lines are.

20 Q. Mr. Ellis asked you on direct examination with reference to the present method of sewer disposal by the Braidburn people. And you spoke about—

Mr. Ellis: I didn't ask him about method. I asked him about general location. I asked him where the 400 foot strip was that you reserve.

Q. Mr. Ellis asked you about the general location of the sewer disposal, is that right? A. Right.

30 Q. You described it as being in here, did you not (indicating)? A. The sewer disposal tank is up on the property to be retained by Braidburn. The tank is way up in the woods.

Q. Don't you know in the stipulation in this case there isn't a question of retaining ownership of land but merely the right to use that for disposal purposes?

Mr. Ellis: That's part of the record. It's mere argument.

40 Mr. Price: The difficulty is we did have a statement with Mr. Ellis which is in writing.

The Court: I am going to be guided by

Rosswell M. Roper, cross.

the order as signed by Justice Parker, plus the argument I made yesterday.

Mr. Price: Do you regard the questions asked of this witness as being competent in this case?

The Court: Don't you stop until I tell you. 10

Q. Don't you understand in the stipulation in this deed that the only right reserved in reference to that strip is a right of way for sewer purposes?

A. Yes, to allow the sewers from Braidburn to come down—

The Court: He says yes.

Q. Now, you are sinking your wells on this tract, aren't you? A. We are not. 20

Q. You are not going to? A. I don't know. That depends on the water commission.

Q. I mean you are acquiring this land for the purpose of putting wells down? A. If in their judgment they want to go ahead and do it.

Q. Answer the question. The purpose of East Orange in seeking this land is to sink wells in this property, isn't it? A. If they so desire.

Q. Well, they so desire by this condemnation suit, don't they? A. That would indicate it, yes. 30
But there are other questions that may come up, that case of the big merger that Judge Ellis said in his opening of this matter with all the municipalities in the nothern part of the State or whether the State Board is going to apportion this water, we don't know. They may say Newark has got to give water to Summit or vice versa.

The Court: Is it your understanding the State Board has that authority? 40

The Witness: Oh, yes. As I understand

Rosswell M. Roper, cross.

they have the right if there is shortage in any part of the Metropolitan district they connect from one to the other.

10 The Court: In other words, that Board is given authority and control over the survey of potable waters for the municipalities of New Jersey; and they are subject to their ruling and discretion how it should be supplied.

The Witness: And this Board has always passed—

The Court: I am not asking you that. The result is that a permit for increase is subject to the control of the State Board.

20 Q. Did you make a record on the back of these photographs as to the date that you took them immediately upon their enlargement? A. Yes, and signed my name for identification.

Q. Now, that date, I understand, was the 8th of February?

The Court: That right? Look at them?

A. That's right.

30 Q. That means that the 8th of February was the day that you took—

The Court: That reminds me of the caution of a lawyer. A lawyer is always cautious and if he is asked whether the weather is fine or not, he will walk to the window and say yes, it's fair.

Mr. Price: Apparently engineers do the same.

40 The Witness: When they feel they are trying to be tripped.

Rosswell M. Roper, cross.

Q. I am not trying to trip you. Well, I apologize to you. I am asking you a fair question as to whether the 8th of February was the date you took these pictures? A. To the best of my recollection, it is.

Q. What purpose did you have in taking these? 10
A. To illustrate the fact there was water on these lands at the time. I have also taken pictures of our own lands showing water, I think maybe forty or fifty of them.

Q. Did you tell us, if I overlook this, you will let me know, did you tell us where that view was on the big map here? A. What view?

Q. The view shown in these pictures? A. Several of them taken different places.

Q. You identify them as all taken the same day? 20
A. Yes, but from different parts of the property.

Q. And are they a criterion of the property in various places? A. Yes.

Q. Now, will you look at our Exhibit B-9, which is a graph map prepared and based on the bench marks at the Chatham plant and by comparison of that and looking under date of February 8th, I ask you doesn't that graph also clearly show the fact that there was flood on that day? 30

Mr. Ellis: I object to that.

Mr. Price: Do you want to object to this question?

Mr. Ellis: Yes, I do.

The Court: Now, what is your objection?

Mr. Ellis: Mr. Roper doesn't pretend to know anything about this graph.

The Court: He may say so. You don't have to tell him. 40

Q. To generally adopt that suggestion, do you

Rosswell M. Roper, cross.

know anything about a graph? A. This is the first time I have seen this.

10 The Court: Are you able to answer that question? You are asked to look at the graph and whether or not on February 8th a flood is shown thereon. If you are not able to answer, say so. In other words, the same day you took the photographs.

A. This graph indicates apparently that on that date that there was a height above the Chatham bench mark of some 32 inches.

20 Q. Yes, and shows the 5th, the other day you mentioned that it was apparently not flooded? A. No, the 5th comes right up in there and up here (indicating). You notice the lower points on the 5th?

Q. In other words on that particular page, doesn't that graph illustrate properly, allowing for the difference in elevation between the Chatham mark and this, doesn't that illustrate properly the condition on that particular day at that property?
A. Absolutely not.

Q. It does not? A. No.

30 Q. Doesn't it show the condition of some flooding? A. It shows that on that particular day, the 8th, based on the Chatham bench mark there were 32 inches of water upon this outlet pipe apparently.

Q. That's what I am asking you, do you deny that allowing for the difference, that that shows the condition the same to you or different on February 8th? A. I absolutely deny it and I can prove it to you very simply if you wish.

40 Q. All right, sir. Your denial is based upon evidence you gave yesterday to the fact you claim the Chatham bench mark is not an accurate basis, is

Rosswell M. Roper, cross.

that what you say? A. My denial of that is based on the fact that the action of the Passaic River at that affluent pipe is not commensurate in the rise and fall with the action of the water in the Passaic flooded area. In other words, you may have a flood down in there covering all of the lower East Orange reserve through to Braidburn and at the same time up there at the affluent pipe there may be very little water running.

10

Q. By East Orange you mean the Dickerson property? A. I mean parts of our property.

Q. And namely the Dickerson property? A. Mr. Dickerson and Fund and Norman and Brum, Lavatche and Horton Reneu.

Q. Mr. Engineer, before you retire from the stand, will you make two crosses where the Braidburn shore property is, mark either point, north and south of the present site of the condemned portion?

20

Mr. Ellis: If you know.

A. You want me to do what?

Q. I want you to mark a cross indicating the shore lines of the Braidburn Company north and south of the 42.97 acres.

30

Mr. Ellis: Now, if you know.

A. I know, in which direction—

Mr. Seufert: Now, have you got any map which shows that land?

The Court: If he is able to do it I will let him do it.

A. They have holdings to the west and south west.

Mr. Price: That is all.

40

(Witness Excused.)

Albert Warren Tillinghast, direct.

ALBERT WARREN TILLINGHAST, sworn on behalf of the respondents, testifies as follows:

Direct examination by Mr. Ellis:

10 Q. Mr. Tillinghast, where do you live? A. Live in Englewood, New Jersey.

Q. And what's your business? A. I am a golf architect.

Q. How long have you been in that business?

Mr. Seufert: We admit his qualifications.

Mr. Ellis: I want to show them.

Q. How long have you been in that business? A. Twenty-five years.

20 Q. How many golf courses have you constructed? A. I can't tell you exactly, several hundred easily.

Q. Tell us some of the big courses in this vicinity you have constructed? A. This particular vicinity, I have Bernardsville, Somerset Hills, Country Club at Bernardsville, at Essex County, West Orange. Baltusrol—

30 Q. Where is that? A. That's there at Short Hills. Stachel Manor, I have just finished a course at Ridgewood, New Jersey, twenty-seven holes there and a new course for Aldecress Corporation at Alpine, New Jersey.

Q. Did you construct the famous Shawnee course? A. Yes. Another course very close here, Lake Balhada. I think that is correct. Boonton, Montville.

Q. Are you familiar with the lands shown on the map there own by the Braidburn Country Club east of Brooklake Road? A. Yes.

40 Q. Have you made an examination of the lands? A. Yes, sir.

Albert Warren Tillinghast, direct.

Q. When? A. In February last.

Q. How did you come to make that? A. I was called to make an examination of the property for the City of East Orange.

Q. What else? A. For what purpose, I do not know. 10

Q. Are those lands adapted for the construction of a golf course? A. No.

Q. Why not? A. From my observation, first, they are entirely too low, and was inundated at times by the adjoining river.

Q. When you examined the lands, did you have their engineer with you? A. Yes.

Q. Did you follow the levels and elevations of the land? A. Yes, generally.

Q. What would have to be done to the land to put it in condition for golf links? 20

Mr. Seufert: I think first we should follow the rule—

The Court: I think you can go directly to the point. (to witness.) You say they are not adaptable or available for use for a golf course or be incorporated in a golf course. Why, Mr. Witness?

The Witness: Because they are too low and would be inundated. 30

The Court: That is to say in the condition the land now is?

The Witness: Yes.

The Court: I think you may ask that for the purpose of informing the jury. (To witness.) What would you have to do to make it available?

The Witness: Why, you would have to raise the land itself so as to keep the water back and so that the land itself would drain. 40

Albert Warren Tillinghast, cross.

The Court: Would that mean banking and digging?

The Witness: Yes.

Q. Would you dig and make fill? A. Yes.

10 Q. Do you engineer many—

Mr. Seufert: I object.

The Court: Let the engineer speak for himself.

Q. In any event, you say from your— A. There would have to be considerable fill.

Q. Mr. Tillinghast, has this land any value in your opinion for golf playing purposes? A. No.

Q. None whatever? A. No.

20 The Court: Can't you put nine holes on there?

The Witness: You could put nine holes anywhere, but I wouldn't want to.

Q. Mr. Tillinghast, do you know what the date was you were there? A. Exact date?

Q. Yes? A. I do not.

Q. You know it was February, 1929? A. Yes.

Cross examination by Mr. Seufert:

30 Q. The condition was flood at that time, wasn't it?

The Court: When you were there?

A. I should say the condition was about normal. It wasn't flooded.

Q. Could you get on it? A. You could walk over it.

Q. Did you go on the land? A. Yes, to some slight extent.

40

Albert Warren Tillinghast, cross.

Q. When was it you went on the land? A. On the date of my visit.

Q. And you recognize the map and land there? A. Yes.

Q. Can you go to the map and show us what parts of the land you examined? A. Out here (indicating). 10

The Court: Through the woods?

The Witness: No, then it must have been up in here (indicating).

Q. And where did you go; how far in on the land did you go? A. As far as I wanted to.

Q. Well, how far was that? A. About a hundred feet.

Q. In from the road? A. Yes. 20

Q. And so that all of this land that you saw was from that point about a hundred feet in from the road? A. That was as much as I wanted to see.

The Court: How long did you stay?

The Witness: I was on the property about two hours, I presume.

Q. And you were at this one point, standing there two hours? A. No, not that one point.

Q. Well, what other point did you go to to examine the land? A. Various points, the east side of the river. 30

Q. Well, that's what I asked you. You said only one point before. Where were you there or where is the other point besides the point a hundred feet from the roadway? A. Why, I can indicate in a general way where I walked and looked over the property.

Q. How many times were you on that property? A. Once. 40

Albert Warren Tillinghast, cross.

Q. And did you go to the river? A. Yes.

Q. Whereabouts? A. About in here, I think it was (indicating).

10 Q. And was the land there above or below—how was the bank there above the river? A. Oh, it was very close, probably a foot.

Q. And did you examine any of the rest of the river bank? A. No.

Q. And who was with you? A. My engineer, Mr. Wainsboro.

Q. Was he there with you all the time? A. Yes.

Q. Did Mr. Wainsboro examine the property at any other time besides the time you were there? A. I think not.

20 Q. So the entire examination upon which you base your opinion was made of this ground at the time that you state you made this one observation of it? A. Yes.

Q. And was limited to how long a stay? A. Oh, possibly an hour, possibly longer, possibly not that much.

Q. How much of the entire forty-two acres did you cover? A. Well, I didn't go in the river.

Q. Naturally. A. Part of the forty-two acres was

30 Q. I say, what part of the forty-two acres did you cover of the land? A. Oh, all we could scout by the road.

Q. Just by the road, Brooklake Road? A. Yes.

Q. And you examined this entire tract from the roadway? A. Yes.

Q. And that's all? A. That's all.

Q. And you got your levels and the character of the land from the roadway? A. Oh, no.

40 Q. How did you get them? A. For the purpose

Albert Warren Tillinghast, cross.

of calculating the amount of fill which would be necessary that was—

Q. I didn't ask you that. I asked how you got your level? A. I am trying to tell you. On consultation with my engineer afterwards.

Q. Where did you secure the levels? A. From the East Orange Water Company. 10

Q. You didn't take your own levels? A. No.

Q. From the levels furnished you by the East Orange Water Company, you have made up your opinion? A. Yes.

Q. Do you know anything of the character or nature of the soil? A. From an analysis.

The Court: No, yourself.

Q. From observation? A. No. 20

Q. You didn't have enough interest in it to find out what kind of soil they had there? A. It was not a question of interest. I was there for a definite examination that I came for.

Q. But you made no examination? A. Yes.

The Court: Made no test of the soil?

The Witness: No.

Q. Now, you could build nine holes of golf on this course, couldn't you? A. No. 30

Q. You couldn't? A. No.

Q. That is you would not? A. I wouldn't, no.

Q. Why? A. Because I don't think a sane man could.

Q. Have you built courses on lands that were in worse condition than this? A. I have never been called upon to try to put a course on land like that.

Q. You write articles? A. Sometimes. 40

Q. Golf articles? A. Naturally.

Q. You write articles for a magazine called

Albert Warren Tillinghast, cross.

"Golf Illustrated"? You have written outlines? A. Yes, sir.

Q. And what kind of a communication is this?

A. I also differ with others. It always pays me.

10 Q. This is one of your articles in September, 1928?

The Court: Is it not?

Q. Is it not? A. Yes, sir.

Q. What's the title of it? A. Force construction.

Q. What do you mean by force construction?

A. I mean that frequently we have to plan golf courses where we are not encroached by any of the natural conditions.

20 Q. Well, this is one of the propositions where you would use what you call a force construction, isn't it? A. It would be very forced.

Q. It would; not impossible? Be fair with the situation? A. Would you like me to go at length in this thing?

Q. Answer the question put you?

The Court: Does this article you have written in any way have any bearing upon this condition?

The Witness: None whatever.

30 The Court: Why?

The Witness: Because this land was in New Jersey where I could have the links. It wasn't in anywheres near like this. Entirely dissimilar.

The Court: Force construction doesn't relate to low land, sometimes inundated as this?

The Witness: No.

40 Q. Well, doesn't force construction mean in the way you have used it extraordinary construction? A. Very.

Albert Warren Tillinghast, cross.

Q. And haven't you been compelled at different times in the construction of these courses you testified about to use extraordinary construction in connection with water conditions? A. At times.

Q. So force construction is useful or necessary in water conditions? A. It is, yes. 10

Q. Now, I ask you whether or not you are the Tillinghast set forth as author of this article referred to in "Golf Illustrated" of June, 1928? A. Yes.

Q. These are your pictures in there? A. They are.

Q. That's a water problem, wasn't it? A. A problem, but entirely different.

Q. But that's a water problem? A. Yes; would you like me to go in detail about this thing at all? 20

Q. And you took pride in the statement that you have overcome this problem. The one indicated in here? A. Yes.

Q. And that as a matter of fact then was a problem more severe than this problem? A. That was a problem down in that part of the United States.

Q. Well, golf work doesn't differ in different parts of the United States? A. Doesn't it? 30

Q. You can perform the same jobs if you have the same conditions here as this one? A. I haven't got the same conditions here.

Q. I said if you had the same water conditions here in Jersey, you could perform the same job? A. If I was forced to do it.

Q. Are there any golf courses in the Bay Section of Louisiana? A. There are.

Mr. Seufert: I offer this article in evidence. 40

Mr. Ellis: I object.

Albert Warren Tillinghast, cross.

The Court: Of course, it has a tendency—

Mr. Seufert: It's a question of credibility.

The Court: I will allow it. He recognized that. I will let them both be marked.

10 Mr. Ellis: My objection is that this is entirely a collateral matter, not binding upon the City of East Orange.

The Court: No, it's elementary. It appears at some other time and on some other occasion that he undertook to engage in this work he now indicates. Whether that's a conclusion, is for the jury to say.

(Marked as Exhibits B-33 and B-34.)

The Court: Anything that will affect the weight and credibility of the witness—

20 Mr. Ellis: It is understood I will have a chance to explain this.

The Court: Oh, certainly.

Q. I find in this statement as follows: "The majority of the tract of land secured for golf courses throughout America today presents natural advantages, and so forth, reading from Exhibit P-34. Is there any reason to change your sentiments you wrote at that time? A. I have—

30 The Court: No, answer the question. You still maintain these sentiments?

The Witness: Yes.

Q. Now, along this point, as a matter of fact there has been an elementary and profile factor in every golf course? A. Not necessarily.

Q. That's a feature? A. Admittedly.

Q. A desirable feature? A. Very.

40 Mr. Seufert: That's all.

Albert Warren Tillinghast, redirect.

Redirect examination by Mr. Ellis:

Q. Mr. Tillinghast, by force construction, I suppose you mean you could build a golf course in the Atlantic Ocean if somebody paid you enough money? A. No, I don't think the ocean, but I could in the Sahara Desert.

10

Q. Will you explain this force construction? A. Sometimes courses are built where there happens to be very heavy land. Golf clubs want golf courses built in a particular spot irrespective of what that cost may be. My purpose is to advise them how to spend their money.

Mr. Seufert: Are we getting a lecture?

The Court: What about this force construction?

20

A. With this force construction, the article I have mentioned there it was in connection with that section of Florida where they were full of swamps from Tampa Bay. There was no land there. It was all reclaimed land. It was a very, very excessive proposition. In other words, after the ground had been filled and contoured sometimes an elevation must be fifteen feet higher—

The Court: James B. Duke's Hill in Somerville?

30

The Witness: Exactly. In that particular instance though if you go to Savannah it was eight to ten miles away to bring in sufficient top soil to cover some forty or fifty acres of fill. We are forced sometimes to do that. There's a piece of golf work in New Jersey that was built by Mr. Lamont and some of his friends, and they were very wealthy men and I would advise no one to

40

Albert Warren Tillinghast, redirect.

10 build golf courses where they did. My estimate of this property in question, I have no conception of the fact that there was undoubtedly a very wealthy man who wanted to build a golf course there. As a matter of fact my conception of the property, my entire conception was wrong because I thought I was being called in by the City of East Orange to pass on property suitable for a golf course.

The Court: Well, the question here is the available use and whether that land in the condition it now is is available for golf purposes?

20 The Witness: That particular piece of land may be available as a Country Club course but I would not attempt a miniature golf course under any consideration.

Q. Mr. Tillinghast, I don't know if you know where Brooklake Road is. A. That's the road I think we drove along there with Wainsboro.

Q. You said you came in up here (indicating). Do you know—did you enter from Brooklake Road any point south of that? A. No.

30 Q. Where did you come in toward, did you walk when you came down? A. There's a road came in here (indicating).

Q. That's the way you came in? A. Yes, along a cabin there. We walked in there. It was quite a woods but we didn't go in far.

Q. Did you walk down to the river? A. No, not at that point. We walked down to the river from this side here (indicating).

40 Q. And were you on the other side of the river with anyone of the City of East Orange looking at the land from that side at any time? A. Not of

Albert Warren Tillinghast, recross.

East Orange, I would say, this side of the Passaic, East Orange side is the east side.

Q. Were you over there? A. Here (indicating). We went in this side (indicating).

Recross examination by Mr. Seufert:

Q. These lands up here are the Braidburn Club property, aren't they? A. Yes, I recall that. 10

Q. Are you acquainted with the Braidburn course at all? A. No, never been up.

Q. Do you know that the Braidburn people have a nine hole course right in here adjoining the road? A. No, I knew there was a course, I didn't know whose course it was.

Q. Now, if they were to extend that nine hole course across the road into this tract here and make a new eighteen hole course out of the old nine hole course and to extend it here the nine holes on the forty-two acre tract, or tract east of the Brooklake Road, would that alter your opinion as to the advisability? A. I never express an opinion of that kind unless I have a chance to study the ground. The whole layout there would not impress me because I have here an encroachment of the same property which is entirely foreign to this tract in question. 20 30

Q. You have been up against these encroachments before, haven't you, in your various courses or these inundations? A. Naturally.

Q. You would go right around them? A. Not unless they have to go around.

Q. But you do go around them? A. I go around them if I can, if there's a way to get around them.

The Court: There are plenty of loop holes? 40

The Witness: Yes, plenty of them.

Isaiah S. Mackie, direct.

Q. You spoke of this as not being available for a miniature course. Is it available as nine holes of a standard eighteen hole course, using nine holes on the other side? A. I will say no.

10 Q. Why not? A. Because of the very restricted area there would make it necessary to assemble very short holes and no golf course of any section can have holes which are a very short length; they must have a desirable distance.

Q. Did you examine the distance there? A. I am examining now. I am giving an opinion now.

Q. No, from the time you formed your opinion? A. No, I am giving you these grades.

20 Q. Did you go through the fifty-seven acres in the tract east of the road available for tract purposes or were you limited to the forty-two acres? A. I was limited to the forty-two acres less five down in the middle of the river.

Mr. Seufert: That is all.

(Witness Excused.)

ISAIAH S. MACKIE, sworn on behalf of the Respondents, testifies as follows:

30 *Direct examination by Mr. Ellis:*

Q. Where do you live? A. Whitestone, Long Island.

Q. What is your business? A. Constructor, in fact golf engineer altogether.

Q. You lived around here, in this vicinity? A. Ten years.

Q. Where were you located here? A. Summit, New Jersey.

40 Q. You were at the Canoe Brook Country Club? A. Ten years.

Isaiah S. Mackie, direct.

Q. What courses have you constructed around here? A. East Orange Golf Club. The Park course, South Orange, that's the nearest golf courses to this property. And quite a number of others.

Q. Did you lay out the new eighteen holes at Canoe Brook? A. Yes, and I played the other eighteen. 10

Q. Are you constructing golf courses now? A. Yes.

Q. You say you lived around here how long a time? A. Ten years.

Q. Are you familiar with the terrane and character of land around the Braidburn Club? A. I was.

Q. Have you made any special examination of the land of that club, the forty-three acres? A. Yes, I have been over it. 20

Q. Is it adaptable for the construction of a golf course? A. It's impossible.

Q. Would anybody erect a golf course on there? A. Well, they couldn't use it, they could erect it but never play it.

Q. Why do you say that?

The Court: Why do you put that interpretation on there? 30

The Witness: It depends on the weather.

Q. Now, why do you say it's not adaptable for a golf course? A. The flood conditions and drainage conditions.

Q. Are you familiar with the flood conditions of the basin on that place? A. Yes, I have seen it and very familiar from Canoe Brook to East Orange. 40

Q. When did you examine this land last? A. August this year.

Isaiah S. Mackie, cross.

Q. When before that? A. February of this year.

Q. Now, how much of an examination did you make? A. Well, one time I was on it about five hours, another time about two hours.

10 Q. Did you examine the character of the soil?
A. I did, yes.

Q. What is it? A. One place silt and other places humus.

Q. Mr. Mackie, would you say whether or not this land has any value for the purpose of constructing a golf course on it?

Mr. Seufert: I object.

The Court: In its present condition.

20 Mr. Seufert: I object, he has not been qualified for the purpose of value in dollars and cents.

The Court: Not monetary, but usability.

A. Will you repeat that question, please?

Q. Will you say whether or not this land has any value for the purpose of constructing a golf course? A. None whatever.

Cross examination by Mr. Seufert:

30 Q. You say you were with the Canoe Brook for some length of time? A. Yes, ten years.

Q. The Canoe Brook is located where on this map? A. Well, it's directly south, I would say, of the Braidburn Country Club. I can see the tower from Canoe Brook.

Q. Canoe Brook is the name of the club? A. And there's a brook there, too.

Q. You have water troubles at Canoe Brook?
A. Well, no.

40 Q. No? A. No.

Isaiah S. Mackie, cross.

Q. Why do you say no; didn't you have any water trouble? A. We had drainage trouble, if you call that trouble.

Q. What is the difference between drainage trouble and water trouble? A. Well, this is a flood condition.

10

Q. I didn't ask you that now. Just limit yourself to—

The Court: No, he going to tell you.

Mr. Seufert: Maybe so, but I will get to that in a little while.

Q. Drainage conditions are water conditions? A. Yes.

Q. And you had drainage conditions to counteract at Canoe Brook? A. Yes.

20

Q. And this drainage condition you call water trouble? A. The other was flood and this was a drainage problem, to drain the property.

Q. They were water troubles? A. Yes.

Q. And the course was flooded? A. Never.

Q. What was the condition of the course? A. What do you mean?

Q. When you had the water troubles? A. The drain was backed up by spring water, surface water.

30

Q. Is that all? A. That's all.

Q. None of it flooded in the course at any time? A. Surface flooded for maybe a couple of hours or so.

Q. Would that spread over the land? A. Very little of it.

Q. But it did? A. Yes.

Q. And you had to change it? A. I changed it.

Q. Did you change it? A. I changed it.

Q. And constructed the course or put in a drain-

40

Isaiah S. Mackie, cross.

age system? A. Well, in the new course we put in a drainage system, the flood condition was only on the old course.

Q. And who put that system in? A. I did.

10 Q. Who put that in? A. I put that in as far as I was agreeable there. I didn't finish the job on the new course.

Q. And you left the job? A. No, I was fired.

Q. Fired, all right. A. By Jersey people.

Q. But somebody else has finished the job? A. It is semi-completed.

Q. And reconstructed the work you have done? A. Not that I know of.

Q. You don't know? A. I don't know.

20 Q. But you started the job and you were fired and somebody else came in and finished it? A. The golf course was in a completed condition. There's two golf courses on Canoe Brook.

Q. From which one are you fired? A. There are two courses, I was fired from the Club.

Q. You were fired from the work? A. I was not.

Q. You were fired after you started work? A. No, sir.

30 The Court: Were you told you were employed?

The Witness: No.

Q. You constructed the East Orange course? A. Yes.

Q. Where is East Orange located? A. I think it is south of that. It's on the Passaic River, no, it is close to it.

Q. That course can only play according to the weather, too? A. Oh, no.

40 Q. Why not? A. It's above the flood condition.

Q. But it gets wet? A. It gets wet but it don't flood.

Isaiah S. Mackie, cross.

Q. Doesn't any water overflow it? A. Rain water.

Q. Settles there? A. No.

Q. What becomes of it? A. It's drained back.

Q. How long does it take to get it off? A. That depends on the rain fall. 10

Q. But if the rain stays, how many days would it take to get it off? A. That depends on the rain, the rain fall at that time.

Q. Any normal storm? A. Depends on the place.

Q. Is there water conditions or water trouble there? A. Very, very little.

Q. And did you have to convert that? A. Yes, we had to drain.

Q. And you are up against water troubles in almost any course? A. Along the Passaic River, yes. 20

Q. And you can construct so as to avoid that? A. To the best of my ability, yes.

Q. Now, what is the reason here in your mind that you have when you say this tract is not available for golf purposes? A. In the first place, you got the river along, opposite the property that's got other surface water coming up around there which will always make flood conditions. 30

Q. Now, on every course you have drainage conditions; you take care of the water that falls on the course, don't you? A. Yes.

Q. No trouble to take care of that at all? A. Not the rain, but you have got to have drainage.

Q. There is no drainage to this property here taking the rain off that would fall on it, but it would go uncurbed? A. Yes.

Q. Why? A. Because there's no fall for your drainage. 40

Frank H. Taylor, direct.

Q. Have you found golf clubs where there is no fall? A. Yes, I have.

The Court: Anything more?

Mr. Seufert: That's all.

10

(Witness Excused.)

FRANK H. TAYLOR, sworn on behalf of the respondents, testifies as follows:

Direct examination by Mr. Ellis:

Q. Mr. Taylor, where do you live? A. I live in East Orange, New Jersey.

20 Q. What's your business? A. Real estate agent, broker and appraiser.

Q. You are president of Frank H. Taylor & Sons, Inc., "note first name"? A. I am, yes, sir.

Q. And how long have you been in the real estate business? A. Over forty-four years.

Q. Where do you operate? A. I operate principally in East Orange, occasionally in Morris County, occasionally in Union County.

Q. Have you any official connection with the City of East Orange? A. I have.

30 Q. What is it? A. I am president of the East Orange Water Commission.

Q. Are you familiar with the land of the Braidburn Realty Corporation as shown on this map? A. I am, yes, sir.

Q. Have you ever purchased any land of similar character in the vicinity of that land within a recent period of time? A. I have, yes, sir.

40 Q. Now, will you tell us where and at what time? A. I purchased from August Friend on April 6th, 1926, approximately fourteen acres, 14.89 acres ad-

Frank H. Taylor, direct.

joining the Passaic River and right opposite a portion of this parcel that is now under condemnation. 1928.

Q. Does it touch the land in question? A. The river separates the two.

Q. How much did you pay per acre? 10

Mr. Price: I object. As I understand, the question of acquirement by lease should be a very—

The Court: At private sale.

Mr. Price: I haven't quite finished. That the question of private sale would preclude this situation for the reason there's all kinds of conditions that can obtain when a municipality sets out to acquire land. For instance, East Orange has been acquiring property by private sale and condemnation from here up to the Northfield road. (Further argument.) 20

The Court: I will overrule the objection.

Mr. Price: Exception.

Q. What was the price paid per acre? A. One hundred dollars per acre.

Q. Mr. Taylor, have you ever purchased any other land within recent time? A. Yes, a half interest in Annabelle Dickerson's in Essex County, right opposite the parcel that's being condemned in the condemnation, of 18.86 acres on April 5th, 1928. 30

Q. How much did you pay for this land? A. Fifty dollars per acre.

Q. Were they both at private sale from a willing seller?

Mr. Price: I object, it's a conclusion. How can this party say a person is willing to sell? 40

Frank H. Taylor, direct.

The Court: Objection overruled.

Mr. Price: Exception.

The Court: Same ruling as heretofore.

Mr. Price: He is asking if he was a willing seller.

10 The Court: You argue to the jury on that.

Mr. Price: Exception.

By the Court:

Q. You negotiated it? A. Yes.

Q. Owner was willing to sell? A. Yes.

Q. No obligation about it? A. Absolutely not, we were not compelled to buy.

20 *By Mr. Ellis:*

Q. Mr. Taylor, have you purchased any other land of similar character in the vicinity of this Braidburn property within a recent period of time? A. June 16th, 1924, I purchased 92.43 from the Bran estate—

Mr. Price: This was a matter of five years ago.

30 The Court: That may be remote. Of course, it may be remote as to values, five years ago.

Mr. Ellis: There was testimony on the other side of property longer ago, eight years. That was a question of mileage.

The Court: I was going to say I don't remember it.

Q. Now, Mr. Taylor—

40 The Court: Is there any other purchases comparatively around here?

The Witness: No.

Frank H. Taylor, direct.

Q. Now, Mr. Taylor, both these parcels you speak of were abutting the Braidburn property?

A. Yes.

Q. Were they similar in character? A. Exactly the same in character.

Q. And similar, both pieces of property? A. 10
Flooded sometimes and dry in dry weather.

Q. Now, Mr. Taylor, from your general experience and your experience in this case, what in your opinion is the value of the Braidburn land per acre?

Mr. Price: For the purpose of perfecting my record I want to enter an objection to all the above testimony.

The Court: Yes, that's as far as sales to 20
Essex County this gentleman specialized in the purchase of this land. Have you had any general experience as a real estate agent?

The Witness: I have sold land in Millburn the last forty-four years.

The Court: What's your business?

The Witness: Real estate business, buying and selling all the time.

The Court: What is the nearest land to 30
the forty-two acres you have either negotiated as purchaser or to sell?

The Witness: Well, on the part of the Water Department last spring I sold property in Livingston. I used to have some property for sale all around there as a real estate agent. I sold some property in West Orange, that is land similar to this.

The Court: How far away?

The Witness: Well, I think it must be 40
probably about five or six miles.

Frank H. Taylor, direct.

The Court: Rather remote. Let's keep in the immediate vicinity.

(Discussion off the record.)

10 The Court: I won't allow this Livingston sale to go in. It's too far away. I will allow you to ask him what in his opinion the value of this land was.

Q. In your opinion, what was the value of this Braidburn land?

Mr. Price: I object on the ground that the only evidence to qualify this gentleman—

20 The Court: He may answer it. Now, let's see. (To witness): Are you able to answer that question, as to the value of this land?

The Witness: Yes.

The Court: How?

The Witness: Based on what I have purchased and based on investigations I have made there throughout Morris County and Essex County of properties of different types.

30 The Court: And land in this vicinity other than the forty-two acres?

The Witness: Yes. I have been in the business throughout this section all my life as a real estate man and I have had a good deal of property for sale in Morris County. I have six hundred acres near to Chatham and Madison and am frequently up here in consultation with property owners.

40 The Court: You have made a study of this proposition?

The Witness: Yes, of lands similar to the lands under inquiry here.

Frank H. Taylor, cross.

The Court: Lands similar.

The Witness: Yes.

The Court: I am inclined to think this witness may answer. Objection overruled.

Mr. Price: Exception.

The Court: The question is what in your opinion is the value of the land in question. 10

The Witness: One hundred dollars per acre.

Cross examination by Mr. Price:

Q. Any portion of this property that you have purchased and sold been adjoining any other holding that the owner then had. I am speaking particularly of the Friend tract? A. No, sir.

Q. These were their sole holdings? A. Yes. 20

Q. I indicate that properly on the map, do I? A. Yes, sir.

Q. What was the other tract with reference to the location on this map that you had purchased when you said a half interest was purchased? A. The tract is between it and the Dickerson property.

Q. The one up there, Friend, is that correct? A. Yes.

Q. In other words, the two tracts you referred to, one where half interest was purchased and one where the whole interest was purchased was then Friend's tract? A. Yes. 30

Q. Was there any other you bought for the City of East Orange? A. The Judge ruled it was too far back.

Q. I mean with reference to the period we have been limited to? A. There's no other property except in Livingston. 40

Frank H. Taylor, cross.

Q. How long have you been Water Commissioner? A. I think approximately eight years.

Q. Chairman of the Water Commission? A. Its president for the past two years.

10 Q. And a member of it prior to that time? A. Yes.

Q. You have been the officer in charge of that during the purchase of some of this property? A. Yes, I was chairman of that committee, real estate advisor to them.

Q. Are you the gentleman who had the negotiation for the Public Service for land? A. Yes.

20 Q. Where was that tract of land involved? A. In the Dickerson well property and ran to the right to the Braidburn property and right through here, over the Dickerson well field.

Q. Dickerson well field is marked here? A. Yes.

Q. Where does the right of way go? A. Goes to Hibernia, I believe.

Q. Where does it go across this property to East Orange? A. Goes across the Dickerson well field.

Q. Across this way that I am indicating? A. Yes. approximately from South Orange Avenue.

30 The Court: Do I understand that East Orange owns all of the land shown on that map?

Mr. Price: Owns all that is marked with names. Approximately 2,300 or 2,400 acres in Millburn and Livingston.

Q. When was the negotiation you had with the Public Service for the right of way across the East Orange lands?

40 Mr. Ellis: I object. Nothing to do with this.

Frank H. Taylor, cross.

The Court: I can't tell.

Q. When was it? A. The negotiation, I believe, was approximately two years and a half or a year and a half ago.

Q. When were you negotiating? A. About a year and a half ago. 10

Q. And the strip of land the Public Service wants for their high tension purpose? A. Yes.

Q. How wide a strip of ground did they take across your property? A. I think it was 250 feet.

Q. In width? A. Yes, sir, 250 feet in width, I think.

Q. And how long in distance across your property? A. I can't tell you from memory.

Q. Approximately? A. It was a year and a half or so ago and I can't tell from memory how long it was. 20

Q. Can't you give me approximately? A. I think it covered approximately about 24 acres, or more, I don't know.

Q. The strip 250 feet wide was of enough length to make 24 acres? A. That's my recollection, but I did not anticipate the question and I didn't look it up, and I don't know.

Q. That land that was involved in that right of way ground, is of the same general character as this, isn't it? A. It runs across the Dickerson field. A portion of it is, yes, all low ground. 30

Q. What was the consideration the City of East Orange received for that ground of 250 foot strip across your own land from the Public Service Corporation?

The Court: That was a private sale?

The Witness: That was a leasehold, we didn't sell it. 40

Frank H. Taylor, cross.

10 Mr. Price: It is important that we know what the price was the City of East Orange is receiving from the Public Service for the mere lease of 250 foot strip through the Dickerson property, we can get at the value of their property.

The Court: I don't know, that was a high tension line, is the condition the same?

Mr. Price: The condition is exactly the same as to damages.

The Court: Were there damages?

The Witness: That's the way it was computed.

20 The Court: Now, wait a minute. I will allow you to state, Mr. Taylor, the conditions there and what was purchased.

The Witness: It was a right of way. It was leased for one year.

The Court: Only one year?

The Witness: One year.

The Court: With renewal privilege?

The Witness: It must have been. My recollection is the leaseholds were given by Council of a year's unit.

30 The Court: Now, as a matter of fact, there was no title sold at all?

The Witness: No title at all. Just the right of way for overhead easements. That's what I conclude.

Q. The negotiation included the damage to your property? A. Absolutely, damage to the remaining property by reason of—

40 The Court: Anything in the soil?

The Witness: Nothing in the soil at all.

The Court: No fee?

Frank H. Taylor, cross.

The Witness: No fee at all.

Mr. Price: The lease in this case for the specific period of damages is proof of the situation. If this lease shows that the property was worth only one hundred dollars an acre, it's some indication that we might have from which to get the value of the land. 10

The Court: I don't know. A right of way that was being sought by a company for high tension wire, does that have any relation to the value of the land at all? They were incorporating a section of land 250 feet wide and so much in length. Now, how has that any relation?

(Discussion off of record.)

The Court: Mr. Taylor can settle this himself. Did that transaction involve the purchase of any land at all by the Public Service? 20

The Witness: No, sir, it did not.

Mr. Price: I have served the other side with a notice to produce this lease which contains this clause in it which takes care of the damage. It's a question of the mere leasing of a 250 foot strip across this property and it may base its worth at only \$100.00 an acre, your Honor might say it is important. 30

(Discussion off of record.)

Mr. Ellis: It is not evidential.

Mr. Price: May I have it produced?

The Court: It will be produced and marked.

(Lease marked B-35 for Identification.)

Mr. Price: For the purpose of continuing my examination I now offer in evidence the 40

Frank H. Taylor, cross.

10 original to the lease dated March 12th, 1928,
between the City of East Orange and the
Public Service Electric and Gas Company
covering a tract of land across East Orange
ownership in and near the vicinity of the
Braidburn property.

Mr. Ellis: I object to that admission on
the ground that it is irrelevant and incom-
petent.

The Court: Moreover this is in the Town-
ship of Livingston.

Mr. Ellis: Yes.

The Court: How far from the Braidburn
property?

20 Mr. Ellis: Fifty or sixty feet. The river
just divides the two parcels of land; the oil
field known as the Dickerson well field and
the part opposite this, the Braidburn tract.

The Court: I am inclined to the view this
is not material and has nothing to do with
the matter at present and the objection to
this introduction should be sustained.

Mr. Price: Exception.

30 Q. The closest piece of property that you have
sold or purchased outside of your purchase for
the City of East Orange, the nearest piece of prop-
erty to Braidburn is in the Village of Livingston?
A. Yes, outside of East Orange.

Q. Which was five miles away? A. Approxi-
mately five, yes.

Mr. Price: That's all.

(Witness Excused.)

Edna Dickerson, direct.

EDNA DICKERSON, sworn on behalf of the Respondents, testifies as follows:

Direct examination by Mr. Ellis:

Q. Miss Dickerson, where do you live? A. I live in the Township of Livingston. 10

Q. Where with respect to this Braidburn land?
A. Our land is divided by the river.

The Court: How wide is the river at that point?

The Witness: Twenty-five or thirty feet.

Q. What's your business? A. Real estate.

Q. Where do you operate? A. In Chatham.

Q. Have you had any experience in the purchase or sale of land along the Passaic River in the vicinity of this Braidburn tract? A. I have. 20

Q. When? A. First, I would like to say that I have been ill for the last three years and I haven't been attending to business at the office. But last January I sold a piece of property in Florham Park directly in line with this property about a half a mile distance.

Q. Was it similar in character? A. Part of it was.

Q. And what did that consist of? A. There was a house and an acre and a third on one side of the road. On the other side of the road there was a five acre field which adjoined the river. 30

Q. Were they sold in one or separate parcels?
A. No, I sold the property to a man in Summit. Had \$500.00 to bind the bargain and then we found that the owner reserved the five acre field adjoining the river and because the purchaser couldn't get that at the original figure for the other, I returned the \$500.00 deposit. Of course that isn't a 40

Edna Dickerson, direct.

sale. Then about three months after that time they got together again, the purchaser and the seller and they paid—

Mr. Price: I object to that.

10 The Court: You can't do it that way.

Q. Anyway, was the property then sold? A. Yes.

Q. How many acres? A. Five acres one side of the road and an acre and a third on the other.

Q. Where was that with reference to Braidburn?

A. Oh, about a half a mile directly across over the hill in the direction to Florham Park.

Q. Was it low land? A. Yes.

20 Q. What did that sell for per acre? A. Thirty dollars per acre.

Mr. Price: She has already said there was a house on this property. That property is located at least a half a mile away.

The Court: Generally similar excepting there was a house on it. How much an acre?

30 The Witness: The five acres I have reference to was divided by the road from the property that the house was on.

The Court: The house wasn't on the five acres?

The Witness: No, sir.

The Court: You mean the five acres sold for thirty dollars per acre?

The Witness: Yes, sir.

The Court: Lately, was that?

The Witness: We closed the deal the 19th of last January.

40 Q. Now, what other sales do you know of along

Edna Dickerson, direct.

the Passaic in the vicinity of this Braidburn land within a recent period? A. Well, I know Annabelle Dickerson and Friend.

Q. Where was that land? A. Well, that's just at the rear of our property.

Q. And was it similar in character to the Braidburn land? A. Yes. 10

Mr. Price: Is that the same property Mr. Taylor testified about?

The Witness: Yes.

Mr. Price: Did you have charge of that?

The Witness: No.

Q. Have you knowledge of the purchase price of this land? A. Mrs. Dickerson is my cousin.

Q. You visit back and forth? A. She spoke to me before the sale was contracted. 20

Q. Mrs. Dickerson, your cousin, conversed with you about the sale before the sale? A. Yes.

Q. You knew at the time the sale was in progress? A. Yes.

Q. Have you knowledge of the consideration? A. No.

Q. But you had knowledge of the sale? A. Yes.

Mr. Price: May I put my objection on record and ask for an exception? 30

Q. What were they sold for? A. Fifty dollars an acre.

Q. That's for a half interest? A. Yes.

Q. Do you know what the Friend property sold for? A. No, I do not.

Q. Do you know of any sales right around your place or toward Chatham? A. I know of the Brown place, but the Judge would not permit that— 40

Q. That was the one excluded? A. Yes.

Edna Dickerson, direct.

Q. How many years have you been in the real estate business?

The Court: To whom was that sold for fifty dollars an acre?

10

Mr. Price: That's East Orange.

The Court: This the tract Mr. Taylor also testified to?

Mr. Ellis: Yes, for the corporation.

Q. How many years have you been in the business, had your office in Chatham? A. About twenty years.

Q. And your office is in Chatham? A. Yes.

20

Q. Now, Miss Dickerson, I ask what in your opinion the value of the Braidburn land per acre as set forth on this map?

Mr. Price: The cases hold that a person is not permitted to qualify as an expert unless he says he has knowledge of land in the vicinity and one sale does not qualify it. She has testified to one sale in fact.

The Court: Do you feel qualified to answer that question?

30

Mr. Price: I most respectfully object to the next question.

The Witness: I have served as an expert in a great many cases.

Q. Have you studied the real estate business there? A. Yes, I have been through there on my work.

Q. You were ill for a time? A. Yes.

Q. But you have nevertheless studied the condition? A. Yes.

40

Q. Know the place? A. I have been over the ground for the last forty years.

Edna Dickerson, cross.

Q. You will admit forty years searching? A. Yes, I am not afraid to divulge my age.

Q. And you knew of sales in the neighborhood, your cousin? A. Yes.

Q. And other sales which were recorded? A. That I sold.

10

The Court: I will allow her to answer.

Mr. Price: Exception.

Q. In your opinion, Miss Dickerson, what is the value per acre of this Braidburn land? A. Fifty dollars an acre.

Q. Now, will you tell us what the nature or character of the Braidburn land is; that is with respect to flood conditions? A. Well, I know it's exactly the same as our property, immediately adjoining the river. When we have any freshets the ground is practically all under water. We have our freshets usually during the fall and spring and in wet seasons sometimes the entire summer in the shade.

20

Q. And was there shade over some of this land? A. Yes.

Q. Are you familiar with the territory all along the Passaic there? A. Yes.

Q. And does that same condition exist practically on all the property on the Passaic? A. Yes.

30

Q. Is there any real estate the other side of the Braidburn land, for example? A. No.

Q. Not used for any purpose at all? A. No.

Cross examination by Mr. Price:

Q. Do you know any development at Hanover? A. No.

Q. Along the Passaic River? A. No.

Q. Have you been down in that section? A. No, I have not.

40

Edna Dickerson, cross.

Q. Then your lack of knowledge is due to your own visitation of the place? A. I haven't been over there at all.

Q. Just to clear up a matter in my mind. This half interest sale was adjoining this tract, was it?

10 A. Yes.

Q. And the one making a half interest by way of Friend? A. Yes.

Q. And the other half? A. He bought it, a party by the name of Ohln, I think, somewhere in one of the western states, he owns the other half.

Q. And the other half was your cousin's? A. Yes.

Q. And at the sale which was made that time, they bought the whole ownership that time, was the whole three lots bought? A. No.

20

Q. This sale down in Florham Park, which way with reference to the Passaic River, which direction on this map, east? A. It's the I. Halsey Budd property.

Q. A half a mile east of this property? A. Yes.

Q. Now, the purchase of this house and some ground, a half an acre on the other side of the road took place long before the subsequent sale, you say they were sold separately? A. We sold the place.

30

Q. How much did you get for that? A. That is this five acre field or—

Q. How much did you sell the ground and the house for? A. \$12,750.00 and \$180.00 for—well, it made a total of \$12,750.00.

Q. You sold the house for how much? A. \$12,750.00.

Q. The ownership of the five acres belonged to the same grantor? A. Yes.

40

Q. And for the purpose of putting that sale

Charles G. Zahn, direct.

through they took a mortgage you had and made it part of the same conveyance, is that correct?

A. Yes.

Mr. Price: That is all.

Redirect examination by Mr. Ellis:

10

Q. I don't know if you understood that question. Was the house across the way sold first? A. Why, it was sold and then we found this five acre field was not included and they refused to take the property.

The Court: Until they included it.

The Witness: Subsequently they took the five acres.

20

Q. And subsequently what price was agreed upon— A. Thirty dollars an acre.

Q. That was sold for thirty dollars an acre? A. Yes.

Q. And that five acres across the road belonged to the same party.

(Hereupon the Court took a recess to attend Judge Mills' funeral.)

30

CHARLES G. ZAHN, sworn on behalf of the respondents, testifies as follows:

Direct examination by Mr. Ellis:

Q. Mr. Zahn, where do you live? A. Livingston.

Q. What's your business? A. Real estate.

Q. Where do you operate? A. Livingston mostly.

Q. Operate any in Morris County? A. Some in Morris County.

40

Charles G. Zahn, cross.

Q. How long have you been in the real estate business? A. In that vicinity about six years.

Q. Are you familiar with the land on the Morris side and Essex side of the Passaic River along Florham Park and Livingston? A. Yes.

10 Q. Have you bought and sold land in that area? A. I have on the Essex County side.

Q. Are you familiar with the Braidburn land described on the map up here? A. Yes, sir.

Q. How long have you known it? A. About three or four years.

Q. Have you sold within a recent period of time similar lands in the vicinity of this Braidburn land? A. I sold a piece on the Essex County side.

20 Q. How far away from the Braidburn land? A. Right across the river.

Q. Was it similar in character? A. Yes, just the same.

Q. And does your real estate business take you generally through that part of Essex and Morris Counties? A. Yes, sir.

Cross examination by Mr. Price:

30 Q. You testified before the Commission in this matter, did you not? A. Yes.

Q. I find here that you were asked the question to qualify, and you said, "I have not sold any property on the Morris County side."

The Court: He says that now.

Q. At the Commission, Mr. Ellis himself asked you whether you were acquainted with places on the Morris County side. You said yes? A. By that I told him I had Morris County real estate. I have.

40 Q. You did? A. Yes, I have property listed in

Charles G. Zahn, cross.

both counties. Every real estate man has property listed in various parts.

Q. Have you had any experience in the purchase and sale of property in Morris County? A. I haven't right around Florham Park.

Q. Have you had any experience in the sale of real estate in Morris County? A. I sold some property in Hanover Township, but that doesn't matter. Other than here I haven't sold any on the Morris County side. I had given him the sale in Florham Park. 10

Q. You mean by Morris County in Florham Park section? A. Yes.

Q. Outside of this piece across the river, what's the nearest piece of property you have sold in Morris County, nearest the Braidburn property? A. On Mount Pleasant Avenue, Hanover. 20

Q. How far is that from the Braidburn place? A. Four or five miles.

Q. How long ago was that? A. About '27.

Q. Four or five miles away? A. Yes.

Q. Was that farm land? A. Yes, sir.

Q. This piece of land you said you sold on the Essex County side, to whom did you sell and when? A. As near as I recall about 1925 or '26. 30

Q. And to whom? A. It was from Dukes to Burnett.

Q. Where was it located? A. Almost across the river from the Braidburn place.

Q. Well, the property across the river according to this map is the Dickerson property and the Friend property. I see the property in here you are talking about; the place where there's no name? A. That's right.

Q. Was there buildings on the property? A. No buildings. 40

Charles G. Zahn, direct.

Q. That was in 1927? A. No, about '25 or '26.

Q. How many acres in that piece? A. Seven acres.

Q. And was that the whole ownership of the seller or did he own other land? A. No, that's all he owned there.

Q. Then he sold the piece he owned? A. Yes.

Q. That's in Essex County? A. Yes, sir.

Q. That's that property there in red that you sold here from Dukes to Burnett? A. No, they have a right of way in there.

Q. From where? A. South Orange Avenue.

Q. Is that shown on the map up here? A. Yes.

Q. In other words they have a right of way back in here? A. Yes.

Q. On the property itself— A. There is no opening.

Q. Burnett still own that? A. Yes, sir.

Further direct examination by Mr. Ellis:

Q. Were the lands similar in character to the Braidburn land? A. Yes, sir.

Q. And do they abut the Braidburn land in the center of the river? A. I can't answer that. I don't know.

Q. Well, does it run up to the river? A. This was about fifty feet from the river. Didn't go right to the river bank.

Q. What was that sold for per acre?

Mr. Price: I make my objection to that on the ground the witness is not qualified.

The Court: Objection overruled. He may answer. It appears he is familiar with the property across the river.

Mr. Price: I wonder if I may state my objection.

Charles G. Zahn, direct.

The Court: Yes.

Mr. Price: On the lack to qualify on the ground that the experience of one sale does not qualify him.

The Court: His experience is confined to one sale respecting the same side of the river as the Braidburn property, but he is familiar, it appears, the lands are similarly situated on the opposite side of the river which is between twenty-five or thirty feet wide. 10

Mr. Price: He said the only other sale nearest to the property was five miles away.

The Court: He says he is familiar with the sale of land on the other side of the river. Wasn't that your answer? 20

The Witness: Yes.

By Mr. Price:

Q. What sales of land are you familiar with?

A. The sale just referred to.

Q. I mean personal knowledge? A. There was a sale just made several weeks ago.

Q. How far away is the property? A. Probably a thousand feet.

Q. In Essex County or Morris? A. Essex County. I have been in through all this land. It faces South Orange Avenue. 30

Q. That's not one you had personal charge of? A. No.

Mr. Price: I press my objection.

The Court: Objection overruled.

Mr. Price: Exception.

Further direct examination by Mr. Ellis:

Q. How much did the property to Burnett sell for per acre? A. Fifty dollars an acre. 40

Charles G. Zahn, cross.

Q. Now, Mr. Zahn, from your experience in buying and selling real estate in the vicinity of the Braidburn property, what do you consider the Braidburn land worth per acre?

10 Mr. Price: I object to that on the same ground.

The Court: The same ruling.

A. I say about a hundred dollars an acre.

Further cross examination by Mr. Price:

Q. Well, Burnett lives in Summit? A. No.

Q. Where does he live? A. He lives over on Northfield Avenue. He's in the dairy business.

20 Q. Bought this tract for business purposes? A. To cut hay off it for cows.

Q. And this particular tract of land, was that the only thing that particular seller sold? A. Yes.

Q. Sold in its entirety to this gentleman? A. Yes, sir.

Q. Wasn't it a part of this other strip of land at all? A. No, sir.

The Court: Where did you say that sale was?

30 The Witness: South Orange Avenue.

The Court: How far away is that from this land?

The Witness: I would say roughly about a thousand feet.

The Court: Private sale?

The Witness: Yes.

40 The Court: Qualification is very largely in the discretion of the trial judge. Of course all such testimony is for the value of the jury. It may or may not assist them but they have produced such testimony as

Albert Diecks, direct.

they have at the trial and I think there is a familiarity as the result of study or experience or sale.

Mr. Price: That's right, but where this man has been across on the East Orange property and has ridden across the Brown estate. That is owned by East Orange now, isn't it? 10

The Witness: Yes, I believe so. East Orange recently bought it.

Mr. Price: Is the nearest road to this property outside of Passaic Avenue indicated here?

The Witness: Yes.

Mr. Price: Just for the record, there's no railroad station over here? 20

The Witness: No.

Mr. Price: Which way to Madison is it?

The Witness: This way.

Mr. Price: Indicating to the south?

The Witness: Yes.

Mr. Price: May I ask your age?

The Witness: Thirty-one.

Mr. Price: That is all.

(Witness Excused.) 30

ALBERT DIECKS, sworn on behalf of the Respondents, testifies as follows:

Direct examination by Mr. Ellis:

Q. Mr. Diecks, how old are you? A. Now, that's not hardly fair.

The Court: Well, over fifty? 40

The Witness: I was born in 1864.

Albert Diecks, direct.

Q. Where do you live? A. West Orange.

Q. What is your business? A. Real estate business.

Q. You specialize in— A. Specialize in unimproved property.

10 Q. Where do you operate? A. All over Essex and Morris County.

Q. How long have you operated in that area?
A. In Essex and Morris divisions twenty-seven to twenty-eight years.

Q. Are you familiar with the Braidburn property described on this map? A. Yes, sir.

Q. How long have you known that? A. I have known that piece in there, I judge, forty years. Long before Mr. Ward bought it.

20 Q. Just state briefly what you know about the flood conditions? A. Very uncertain. Sometimes it floods in the spring and than again June, July and August, uncertain, according to the streams.

Q. How long as an average does the water remain there? A. Sometimes it will lay there for three or four or six weeks. It all depends on the storm.

30 Q. Mr. Diecks, have you bought or sold any land similar to the Braidburn in the vicinity of the Braidburn land within a recent period? A. I have. Not just the lands there, but I have had a contract of my own for Hanover Neck. I have seven or eight courses there.

Q. Was that similar to the Braidburn land? A. Yes, about the same type.

Q. Have you sold any land along the Passaic?
A. Yes, I should judge I sold there probably thirty or forty-five different plots.

40 Q. Did you sell any land abutting the East Orange property? A. Yes, C. B. Bassets along the

Albert Diecks, cross.

Passaic bank seven or eight different parcels there.

Q. That's along the Passaic River? A. Yes, and through Passaic Avenue.

Q. How far from the Braidburn would you say?

A. I should judge as the crow flies, probably a mile. 10

Q. Have you sold much land to the City of East Orange? A. I have, and have negotiated a sale.

Q. For a period of how many years? A. Oh, from four to probably fifteen.

Q. Now, what did you get for the Hanover Neck lot?

Mr. Price: I object until I cross examine.

Cross examination by Mr. Price:

20

Q. How far is Hanover Neck? A. I should judge as the crow flies two and a half to three miles.

Q. Is that Hanover or Hanover Neck? A. The other gentleman said five.

Q. It isn't as far as that? A. No.

Q. That was sold with your own property? A. Yes.

Q. How long ago was that? A. About two and a half years ago.

Q. What kind of land was that? A. Low land like this. It faces the Whippany River. 30

Q. The Whippany River that passes through Hanover Neck? A. Yes.

Q. How much of the portion of the piece of property did you then own? A. The whole tract.

Q. That was the original tract? A. I guess that was probably ten years. Never could sell it and I finally let it go on a very small margin.

Q. This piece of land is there? A. No, it's the main farm right in Hanover. 40

Albert Diecks, cross.

Q. You spoke about another sale to the City of East Orange. Is that in connection with this map?
A. I don't know anything about that map. It was on Passaic Avenue on toward the Little Short Hills Road.

10 Q. What I am getting at, you have taken part in the negotiation or purchase by East Orange Water Department? A. I purchased that but I have also had private individuals that purchased, too.

Q. A purchase that was contemplated by East Orange Water Department? A. Yes.

Q. And paid by them? A. I don't understand.

Q. And paid by them? A. I get my percentage to sell to anybody else.

20 Q. You were acting on their behalf in negotiating these sales? A. I went to them. They know of me.

Q. Yes, but in making your negotiations with them you were acting on their behalf? A. Not personally, no. For any property they had I acted—I went to see them about it.

Q. In other words, if you thought about a piece of property you went to East Orange? A. Just as much as I go to anybody else, I went to East Orange.

30 Q. And you were acting in your capacity for individual property owners? A. Yes.

Q. Now, the property which was negotiated in these sales, that includes the property acquired by the City of East Orange for water purposes? A. Yes.

Q. How long ago was the most recent of these sales that you went on this property? A. Oh, I was interested, in charge of the property by the Brown estate.

40 Q. I am not speaking about that. I am speak-

Albert Diecks, cross.

ing what you sold yourself. The sale you yourself made. What is the closest in point of time and distance? A. About a mile down the road at the Passaic Avenue bridge.

Q. And you negotiated it yourself? A. Every one I looked over finally.

10

Q. And how long ago was that? A. I said that was—let me see—what was the last one made there—seven or eight years, I guess.

Q. Which one, the Basset one? A. No, sir, a man named of—

Q. Was one Jackson? A. No, Jackson is on the other side.

Q. On Passaic Avenue? A. Right along Passaic Avenue to the bridge and Budd.

Q. So the nearest one in point of time was seven or eight years ago? A. Yes.

20

Q. Now, the Commonwealth purchase, when was the last one made of that? A. The Commonwealth, I suppose the last, a little later than that.

Q. About how long? A. Six or seven years.

Q. That property is how far away from this property? A. That would adjoin the East Orange Water property.

Q. How near Braidburn? A. About the same, a mile, that is down there (indicating).

30

Q. That was about six years ago?

The Court: Of course, they are too remote.

Mr. Ellis: This sale he made in Hanover Neck—

The Court: Too far away, I think. Probably two and a half to three miles, was similar property, I know, but I think it is too far away, and that was two and a half to three years.

40

Albert Diecks, cross.

Mr. Price: That's this witness's own property.

Mr. Ellis: I would like to examine him further.

The Court: All right, go on.

10 Q. Are you familiar with prices that are being gotten along the Passaic River for land? A. Yes, sir.

Q. Do you keep in touch with sales? A. Yes.

Q. And do you make appraisals for people of land? A. Yes. I did for an Orange owner, Judge Davis' office—

The Court: In this immediate vicinity?

The Witness: Anywheres—

20 The Court: Along the Passaic River?

The Witness: Yes.

The Court: And land similar to this?

The Witness: Yes.

Mr. Price: I object.

By Mr. Price:

Q. Has there been any appraisals made of the land by you over here? A. No, sir.

30 The Court: What's the last one?

The Witness: Approximately about three years ago. You see there's been very little demand for any of this property.

The Court: But you have kept in touch with the market condition?

The Witness: Yes, clean through Hunterdon County. For instance, I own a farm up in Morris County in Mount Freedom.

40 The Court: You keep in touch in an individual way of the times?

The Witness: Yes.

Abraham Mendelsohn, direct.

The Court: I will allow it.

Mr. Price: Exception.

Further direct examination by Mr. Ellis:

Q. How much did you get per acre for your land? A. Twenty-five.

10

Q. Similar to the Braidburn land? A. Yes.

Q. What in your opinion is the value per acre of the Braidburn land?

Mr. Price: I object.

The Court: Overruled.

A. Seventy-five dollars.

Mr. Ellis: Cross examine.

Cross examination by Mr. Ellis:

20

Q. Do you know where the Burnhan property is located? A. No, sir, I do not. I just simply heard of it.

Q. You do not know of the location of that tract of land? A. No.

Q. All you know about it, you heard it testified to in Court on our side? A. No.

Mr. Price: That is all.

30

(Witness Excused.)

ABRAHAM MENDELSON, sworn on behalf of the Respondents, testifies as follows:

Direct examination by Mr. Ellis:

Q. Where do you live? A. Chatham.

Q. How long have you lived there? A. Nineteen years.

40

Abraham Mendelsohn, direct.

Q. What's your business? A. Real estate at the present time.

Q. How long? A. Six years.

Q. Where do you operate? A. Around this vicinity.

10 Q. Are you familiar with values of land around Florham Park and especially along the Passaic River? A. Yes, sir.

Q. Do you know of any sales of land along the Passaic in the vicinity of these Braidburn lands?

A. Well, I have made sales on Passaic Avenue, Chatham. That is, Florham Park.

Q. When was that made? A. In 1925.

20 Q. And how far is that from these Braidburn lands? A. Well, I should judge in the area of about a mile.

Q. Were these lands similar in character to these Braidburn lands? A. Yes, sir.

Q. And have you sold any other farm lands around this vicinity? A. Yes, sir.

Q. Around that vicinity, rather? A. Yes.

Q. Do you keep in touch with the sales made from time to time so you have personal knowledge of them?

30 Mr. Price: Rather leading.

The Court: It has that tendency. Reframe it.

Q. Have you any knowledge of the sales that are made along the Passaic River between, we will say, Florham Park and Chatham? A. Yes, some of them.

40 Q. And how big a piece was this land you say was near Passaic Avenue? A. Fronting on Passaic Avenue was nine acres.

Q. What other pieces have you sold around

Abraham Mendelsohn, cross.

there? A. Well, I have sold a farm adjoining the river, thirty-five or thirty-six acres.

Q. When was that sold? A. I sold that last year, 1928.

Q. And what other sales, if any? A. Then I had a sale on Brooklake Road, 1925, 27 $\frac{3}{4}$ acres for developing purposes. In fact some of the land adjoins the Madison Township. 10

Cross examination by Mr. Price:

Q. And how long have you been in the real estate business? A. Six years.

Q. What was your occupation before that? A. I was in the drygoods business.

Q. Here in this vicinity? A. In Chatham.

Q. Your business is in Chatham now? A. Yes, sir. 20

Q. And you commenced your real estate operations about six years ago? A. Yes, about six years ago.

Q. This Passaic Avenue situation of which you speak. Is it Passaic Avenue that lays to the east of this tract? A. Well, the property backs up toward the river.

Q. Through Passaic Avenue going along there? A. The river goes along there. 30

Q. That sale was on Passaic Avenue? A. Yes, from the rear of that (referring to the map).

Q. And that was back in what? A. 1925.

Q. And the only other piece that was near here you sold in 1928 along the Passaic River? A. Some of it was.

Q. How far from this land is that sale, how far from Braidburn? A. That practically adjoins the road to the river. 40

Q. Not adjoins the river, how far from the Braidburn property?

Abraham Mendelsohn, cross.

The Court: You know this Braidburn property?

The Witness: Yes.

The Court: The golf club?

The Witness: Yes.

10 The Court: You know the particular part that runs down to the river?

The Witness: Well, I might say a half a mile there.

Q. Who was the seller and who was the purchaser? A. The Budds owned it and a man by the name of Reynolds bought it.

Q. Relatives? A. Well, yes, they are.

20 Q. Do you know the relationship? A. Well, they are merely fourth or fifth cousins. They were not on very good terms and I talked to them about it.

Q. You brought them together? A. Yes.

Q. You negotiated the sale for the seller or purchaser? A. The seller came in the office and he asked me to sell it for him.

Q. Did that property have a building on it? A. At the time, it did, yes.

Q. Any dwelling house? A. No.

30 Q. How much was bought of the tract of land that the seller owned or was it the whole tract? A. He owned the whole tract.

Q. I mean it wasn't part of a main tract? A. No, he owned the whole tract.

Q. So that and the other property along Passaic Avenue back in 1925 is the only near portions you sold? A. Yes, outside the property I sold on Brooklake Road for developing purposes.

40 Q. That isn't the same sort of property as this? A. No.

Q. And that was back in 1925? A. Yes.

Abraham Mendelsohn, direct.

Mr. Price: I object to the qualifications.

The Court: Have you kept in touch with the situation since then?

The Witness: Yes.

The Court: And made a study of it?

The Witness: Yes. 10

The Court: Obtain information wherever you could of land values?

The Witness: Yes.

Mr. Price: May I register my objection to this question and exception?

The Court: Certainly.

The Court: And you have familiarized yourself with land values in that section?

The Witness: Yes.

The Court: In other words, that's your business? 20

The Witness: Yes.

The Court: And that's the territory in which you operate?

The Witness: Yes.

The Court: You have done that down to the present time.

The Witness: Yes.

The Court: I will allow it.

Mr. Price: Exception. 30

Further direct examination by Mr. Ellis:

Q. These nine acres on Passaic Avenue, what were they sold for? A. \$600.00.

Q. From your experience, Mr. Mendelsohn, in the sale of land in that area—

Mr. Price: This is the one in 1925?

The Witness: Yes.

The Court: That's too long ago. 40

Abraham Mendelsohn, cross.

Q. Are you familiar with the character of this Braidburn land? A. Yes.

Q. How long have you known it? A. I have known it for the last nineteen years.

10 Q. What do you say the market value per acre of this Braidburn land is?

Mr. Price: I would like to object to that.

The Court: Yes. Objection overruled.

Mr. Price: Exception.

A. About \$60.00 an acre.

The Court: Upon what do you base that, Mr. Mendelsohn?

20 The Witness: Yes. First of all the reason I base it that way, it has no road front. No road frontage, and then it's got a sewer system on it.

The Court: And what else?

The Witness: And covered with water about three months out of the year.

Cross examination by Mr. Price:

30 Q. You see the right of way along there from this property being taken by the City of East Orange over to Brooklake Road? A. Yes, this road is way over, what do you say?

Q. I don't know, I ask you do you see it on the map there? A. Yes.

The Court: Did you know that was a right of way?

The Witness: No.

Q. When did you inspect this property? A. The 29th of the month?

40 Q. Of this month? A. Last month.

Q. Were you here for the purpose of inspecting

Abraham Mendelsohn, redirect.

it for the purpose of testifying in this case? A. I was asked to go over there and see the property along there and come to Court.

Q. And you inspected it to prepare yourself for testimony? A. Yes.

Q. Had you been on that property before? A. 10
Yes, many times.

Q. Do you know where the Bushauer property was? A. Yes.

Q. How near? A. Well, that's about 1,200 feet away.

Q. This property runs up to Mrs. Bushauer's on Brooklake Road? A. Yes.

Mr. Price: That is all.

Redirect examination by Mr. Ellis: 20

Q. Mr. Mendelsohn, can you see the Braidburn property from the Bushauer property? A. Yes.

Q. Is that similar in character to this Braidburn? A. In a measure, the rear may be.

Mr. Price: It adjoins Braidburn?

The Witness: In the rear, I guess it does.

Mr. Price: By adjoin, you know I mean the property lines touch?

The Witness: Yes. 30

Mr. Price: Did you say your office is in Chatham, New Jersey?

The Witness: Yes.

Mr. Price: That is all.

(Witness Excused.)

Aaron D. Thompson, direct.

AARON D. THOMPSON, sworn on behalf of the Respondents, testifies as follows:

Direct examination by Mr. Ellis:

10 Q. Mr. Thompson, where do you live? A. Plainfield, New Jersey.

Q. Have you an office around here? A. My main office is 39 Branford Place, Newark.

Q. Have you any office in Morris County? A. No.

Q. Have you ever lived in Morris County? A. Yes.

Q. Where? A. Madison.

Q. How long ago? A. About three and a half to four years, I should judge.

20 Q. What's your business? A. Real estate developer.

Q. How long have you been in that business? A. I should say about twenty years.

Q. Have you been doing any developing in Morris County near the Passaic River? A. I have near the Passaic River, I have developed at Florham Park, Brooklake Road.

30 Q. How far is that from the Braidburn property? A. I should judge the rear part of their land in question, I should judge about 2,000 feet.

Q. Has that been your business for twenty years, developing property? A. Yes.

Q. Are you familiar with the Braidburn property? A. I am.

Q. Well, you see the Braidburn property shown on that map, has that any value for developing purposes? A. I can't see any value in it.

The Court: Why?

40 The Witness: Impossible to dig a sewer;

Aaron D. Thompson, cross.

impossible to put in a water plant, water main. Impossible, I should say to dig a cellar.

Q. And why do you say that? A. By inspection; because of the inspection I made.

10

The Court: Could you build bungalows on it?

The Witness: Up in the air.

Q. Do you mean on stilts? A. On stilts, like Singac.

Q. Are you familiar with the flood conditions of the Passaic in that place? A. I have seen the land flooded.

The Court: To what extent?

20

The Witness: I should say about one-third; how deep, I don't know.

Cross examination by Mr. Price:

Q. Your Brooklake property is located about 2000 feet? A. A frontage.

Q. A frontage of 2000 feet? A. Yes.

Q. This type of bungalow like Singac, that's where the park is at Singac along the river there? A. Yes, there they are built on stilts.

30

Q. That's a summer colony where people come and use these bungalows along that river? A. Yes.

Q. What is that river? A. Passaic River, I should think.

Mr. Price: That is all.

(Witness Excused.)

40

Philip A. Ross, direct.

PHILIP A. ROSS, sworn on behalf of the respondents, testifies as follows:

Direct examination by Mr. Ellis:

10 Q. Mr. Ross, where do you live? A. White Oak Ridge, Millburn.

Q. How long have you lived there? A. Off and on for thirty-seven to thirty-eight years.

Q. How far do you live from this Braidburn property? A. I should say about four miles.

Q. And what is your business? A. I work at the East Orange Water Department.

Q. Where? A. Well fields.

The Court: At the Dickerson wells?

20 The Witness: Dickerson and Slough Brook.

Q. How often are you at the Dickerson wells? A. About six or seven hours a day.

Q. How far is the nearest Dickerson well to the Braidburn property? A. About 100 feet, the closest tank, I should judge.

Q. Can you see the Braidburn property from the well? A. I can.

30 Q. Now, how long have you known that condition? First, are you familiar with the river conditions there at the Braidburn property? A. I am.

Q. How long have you been familiar with them? A. Going on seven years. Well, ever since I was a youngster. The seven years I worked for East Orange I have been right there.

Q. Now, how often would you say the Braidburn lands are subject to floods?

Mr. Price: I object to that.

40 The Court: Are you familiar with the flooding of the land?

Philip A. Ross, direct.

The Witness: Yes.

The Court: And how?

The Witness: By seeing it every day.

The Court: During what period of time?

The Witness: The last, I would judge,
the last seven years. 10

The Court: And you have actually seen
that in flood?

The Witness: Yes.

The Court: And seen the flood recede?

The Witness: Yes.

The Court: He may answer.

Mr. Price: Exception.

Q. Will you tell us how often that was flooded
and how long at a time? A. Some years it's six to
nine months out of the year. Some years three
months. We generally have the high water in the
spring. One in the fall and one in the middle of
the summer, about August. If there is a heavy
shower or a rain fall it will rise. Will not come
as high as the spring flood or the fall flood. 20

The Court: Do you know this tract of
land we are talking about?

The Witness: Yes. 30

The Court: To what extent would it be
flooded during the period we are speaking
about?

The Witness: I have seen it flooded very
near to Brooklake Road.

The Court: Up in the woods?

The Witness: Yes.

The Court: Other times?

The Witness: Other times it would be
flooded down to the center, which is lower
than the river. 40

Philip A. Ross, direct.

Q. Is there a low spot in the interior land? A. There are three very bad spots right down in the center.

Q. Were you with Mr. Roper on February 8th, 1929, when photographs were taken there? A. Yes.

10 Q. I call your attention to point marked "5" on this map. Are you familiar with that point? A. I am.

Q. Can you tell us what was on that spot on February 8th, 1929? A. I should judge about two feet of water.

Q. And how did you get about that land that day? A. Row boat.

20 Q. How deep was the water in places there on the Braidburn land? A. In places I should say from two feet to six feet.

The Court: Where was it six feet; can you indicate?

The Witness: Down the center, I have been out there many times.

The Court: Indicate on the map.

30 The Witness: There's one very low spot right in here; and there's another one I should judge on this property here (indicating); which I believe does not belong to it.

The Court: St. Elizabeth's.

The Witness: There's another low spot approximately down in here somewhere (indicating).

Q. Now, how deep was the water—what would you say the average depth of the water around there was?

40 Mr. Price: When?

Q. On February 8th? A. I can't give the aver-

Philip A. Ross, cross.

age depth because I didn't go all over the property.

Q. What kind of boots did you have on? A. High hip boots.

Q. How far did the water come up on your boots? A. As far as we could let it come up without getting wet. 10

Cross examination by Mr. Price:

Q. This place you point to here as being a low spot is in the property of the College of St. Elizabeth? A. I believe that's one of the low spots.

Q. I understood that was one of the spots; that's in the St. Elizabeth property? A. It may be.

Q. You don't know? A. No.

Q. This place No. 5, as being where you were, is a low spot near the Passaic River, isn't it? A. There is a low spot right in by the edge of the river. 20

Q. And that is the place where you say you were? A. No, I was further in here away from the river.

Q. You just heard Counsel ask if you were up in here? A. I was in the vicinity.

Q. So that place indicated on the map by Counsel was somewhere else, wasn't it? A. No, we just went over the property. 30

Q. You say you are still in the employ of the City of East Orange? A. Yes.

Q. You have been in their employ six or seven years? A. Yes.

Q. Who is your main supervisor? A. Mr. Roper.

Q. The engineer who testified? A. Yes.

Q. And you are in the water department? A. I am. 40

Philip A. Ross, redirect.

Q. Were you there on that day when the photographs were made? A. I was.

Q. Were you present— A. Just a moment please—

Q. The photographs were made February 8th?

10 A. Yes. I wasn't there when they were developed.

Q. You were there when they were taken? A. When some photographs were taken.

Q. Was Mr. Roper the man who took them? A. Yes.

Q. And he was the man who was with you on that day? A. Yes, sir.

Q. Was he with you when you made the measurements? A. No, sir.

20 Q. Who was with you then? A. I was alone. I made measurements several times.

Q. I am speaking about February 8th? A. I don't remember making measurements that day.

Q. Oh, you didn't make measurements that day? A. I don't remember making measurements with a rod on that day. I wasn't the only one that was there.

30 Q. Then these photographs you are speaking of has particular reference to February 8th? A. I don't know whether he made them before that or after. It was on my own hook I made them.

Redirect examination by Mr. Ellis:

Q. But this was a picture that was taken? A. It is.

Q. Who was the other fellow? A. Mr. Ross.

Mr. Ellis: That is all.

(Witness Excused.)

Charles C. Ross, direct.

CHARLES C. ROSS, sworn on behalf of the Respondents, testifies as follows:

Direct examination by Mr. Ellis:

Q. Mr. Ross, where do you live? A. White Oak Ridge, Millburn Township. 10

Q. What's your business? A. Superintendent of the East Orange Water Reservation.

Q. How long have you lived in the vicinity of the Passaic River? A. Forty years.

Q. How often do you see it? A. I seen it ever since I was a boy.

The Court: He's forty years old and it seems to me he has been there every day.

Q. Was it every day? A. Yes, I lived around that section. 20

Q. Are you familiar with the conduct and characteristics of the Passaic? A. Yes.

Q. Near the Braidburn property? A. Yes.

Q. Do you know this Braidburn property? A. Yes.

Q. Will you tell us what you know about the flood conditions there, if you know anything about them? A. The water rises in the spring and fall and if there is a storm in the summer it rises and covers over this property along the Passaic. 30

Q. And when these floods occur that way, for how long a period of time have you seen that property covered with water? A. It all depends on how large the flood is. This year it was from around February 1st to the latter part of April.

Q. How much of that time was there water on it? A. Probably covered for one month or five weeks. 40

The Court: What was the depth?

George Wade, direct.

The Witness: Anywhere from a half a foot to three or four feet.

The Court: And how much of the land?

The Witness: I should say two-thirds of it.

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Cross examination by Mr. Price:

Q. It covered it five weeks and then would the flow have gone? A. It would recede.

Q. You are in the employ of the East Orange Water Department? A. I am.

Q. For how many years have you been in the employ of that department? A. About eight.

Q. Who is your superintendent here? A. Water engineer, Mr. Roper.

20

Mr. Price: That's all.

(Witness Excused.)

GEORGE WADE, sworn on behalf of the Respondents, testifies as follows:

Direct examination by Mr. Ellis:

30

Q. Mr. Wade, where do you live? A. Livingston Township on the Dickerson Estate.

Q. What is your business? A. Trapper.

The Court: Muskrats?

The Witness: Muskrats principally.

Q. Where do you do your trapping? A. All along the river.

The Court: Morris County side?

The Witness: Yes, all over.

40

The Court: Day times?

The Witness: Day times, of course.

George Wade, cross.

Q. For how long a period of time have you known the Passaic River in that vicinity? A. Well, say about two or three months in the fall of the year.

Q. How long have you lived there? A. I have lived there for about ten years on the Dickerson estate. 10

Q. Do you know anything about the Passaic River? A. Yes.

Q. How long have you known anything of the condition of the Passaic River? A. Ten years.

Q. Do you know where these Braidburn lands are? A. Yes.

Q. How long have you known them? A. Ten years.

Q. Now, will you tell us what you know about the flood conditions of the Passaic and especially with reference to this Braidburn property? A. Well, about three or four months out of the year it's flooded over all through that section, that strip of land there. 20

Q. And how do you get about? A. With a canoe, flat bottom canoe.

Q. You don't work for the City of East Orange? A. No, sir. 30

Cross examination by Mr. Price:

Q. This Dickerson property is the property that belongs now to East Orange, part of it.

Q. You live in the house on that property? A. Shack.

Q. Near the river? A. Right near the river, 75 yards from the river.

Q. There is a call mortgage on the ownership of the land where you now live to East Orange? A. No. 40

Samuel P. Schackleton, direct.

Q. Who owns it? A. Miss Edna Dickerson, who already testified is the one who owns the place where I am at now.

Q. And the time, the total period out of the year you said was approximately three or four months? A. Yes.

Mr. Price: That is all.

(Witness Excused.)

Mr. Ellis: The City rests.

IN REBUTTAL.

20 SAMUEL P. SCHACKLETON, sworn in rebuttal on behalf of the Appellant, testifies as follows:

Direct examination by Mr. Seufert:

Q. Mr. Schackleton, are you a member of the Braidburn Club? A. I am.

Q. You know the land in question in this suit? A. Yes.

Q. Have you been all over them? A. Yes.

Q. As a matter of fact, I think you assisted in taking photographs? A. I did.

30 Q. Do you know Mrs. Bushauer? A. I do.

Q. Do you know the land that she owned? A. Yes, sir.

Q. Can you locate that on this map here? A. Approximately.

Q. Point out on the map just about where her property is? A. I will have to first locate our own land. I think Mr. Roper fixed that approximately. Our own land follows an irregular course from along the road back to a point—

40 Q. Draw it right in on there. Now, will you run

Samuel P. Schackleton, direct.

in the Bushauer line. Have you been on the Bushauer land? A. Yes.

Q. Will you mark their location on this map?
A. The Bushauer tract comes back 1000 feet from the Braidburn property in the rear but not in the front. It's separated in the front by a piece belonging to Mr. McMoney.

10

Q. How wide in width? A. Roughly about two or three hundred feet.

Q. It adjoins the Braidburn in the rear? A. Yes, sir.

Q. And will you mark it on there where it is?
A. (Witness marks map.)

Q. Now, did you take any photographs of this property, the Bushauer property? A. Yes, sir.

Q. I show you two photographs and ask you if you can recognize them? A. Yes, sir.

20

Q. These photographs were taken by you? A. Yes.

Q. Or under your jurisdiction? A. Yes, sir.

Mr. Ellis: I object if any other man was employed to take them.

The Court: What is the purpose?

Mr. Seufert: The purpose is to show the jury the exact similarity of the Bushauer piece to the lands in question.

30

The Court: I will allow it. It is for the jury to pass on. (To witness): They represent correctly the back portion on the same day that some of the other pictures were taken?

Mr. Ellis: I think it's very unfair to pick out one spot in the Bushauer property and then offer the photograph to the jury as being similar to Braidburn.

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The Court: Well, does this photograph show the similarity of the land?

Samuel P. Schackleton, direct.

The Witness: Yes.

The Court: How?

The Witness: It shows the water conditions and condition of the ground.

10 The Court: The Braidburn property is the same low land?

The Witness: The same low land.

The Court: And the Bushauer?

The Witness: Yes.

The Court: And it shows also your tract, that is the Braidburn tract?

The Witness: Yes.

Mr. Ellis: One spot. How deep is the Bushauer property?

20 The Witness: 1200 feet.

Mr. Ellis: He picked out one spot of a property 1200 feet deep and picked out one spot to show it to the jury.

The Court: Which one shows the flooding there?

The Witness: That one shows the flood (indicating).

30 Mr. Ellis: I object to the picture. It is a photograph of a very small portion of a lot 1200 feet deep. I say it's very unfair to show a very small part and only a part that is advantageous to my adversary.

The Court: Now, the members of the jury will understand these photographs are subject to the qualification that they do not represent the entire tract of land which they purport, namely, the Bushauer tract, and that the greater portion of it is high land. They may be marked with that qualification.

40 (Marked Exhibits B-36 and B-37.)

Samuel P. Schackleton, cross.

Mr. Seufert: The property owner rests.

Mr. Ellis: One minute.

Cross examination by Mr. Ellis:

Q. Mr. Schackleton, where did you get your information about the land which you have drawn on this map? A. From our own survey and from the tax maps at Florham Park. 10

Q. You say the land goes down here in this section to the river? A. I haven't tried to make this portion of the map accurate.

Q. Well, why didn't you try to make it accurate if you are giving information to the jury? A. If I want an accurate map, I will use my own.

Q. Doesn't the land come down to this point? A. I will be glad to show it on our own map. 20

Q. Now, Mr. Schackleton, will you use this map and see if you are not in error about the place you have drawn that land. Isn't this the land here instead of this down here (indicating)?

Mr. Seufert: Why don't you put that map in?

Mr. Ellis: No, I don't want to put it in. I want to show it's wrong.

The Court: Now, have you looked at it; what have you to say. Are you willing to stand corrected or not? 30

The Witness: What's the question?

The Court: The question is whether you correctly indicate that land on the map?

The Witness: I haven't attempted to indicate correctly our boundary line. It's a very rough line.

Q. Well, you have not attempted to represent it incorrectly? A. No. 40

Q. Is this the correct place where the line should

Samuel P. Schackleton, cross.

be or should it be up there? A. It should not be there.

Q. Well show us then where it should be?

10 Mr. Price: The Bushauer property is the only thing of importance and he's located that property.

The Court: You better leave Schackleton alone. Let him give—

Mr. Ellis: I just asked him one question.

The Court: Then if you want to put Mr. Roper in rebuttal to show the correct line—

Mr. Ellis: That's not the correct plot?

The Witness: I don't claim it's correct.

20 The Court: Is the Bushauer property located correctly on this map?

The Witness: As nearly as I could by the map of the Township.

The Court: And that's adjacent to the Braidburn property?

The Witness: Yes, sir.

(Witness Excused.)

Mr. Seufert: We rest.

The Court: We will adjourn until twenty minutes of ten tomorrow morning.

30 (Thereupon the Court adjourned until December 5th, 1929 at 9:40 A. M.)

Morristown, N. J., December 5th, 1929.

TRIAL RESUMED.

Thereupon Mr. Ellis summed up to the jury in behalf of the Respondents.

40 Thereupon Mr. Seufert summed up to the jury in behalf of the Property Owner.

Thereupon the Court charged the jury as follows:

The Court's Charge.

LAWRENCE, J.: Members of the Jury, this proceeding arises by reason of the filing of a petition by the City of East Orange to acquire for a municipal purpose, namely, an addition to its water supply or source of public potable water supply, a tract of land belonging to one of the appellants referred to as the Braidburn Coporation and described generally as containing approximately forty-two acres, located as indicated upon the maps that have been offered and the site either in or contiguous to the Borough of Florham Park in Morris County. Of course, you will understand that the procedure is based entirely upon the permissive authority of the law, and it is true that the City of East Orange is under no compulsion to take the land, nor is it restrained from any desire to take it, because of the attitude of the owner. In other words, under the power of eminent domain, as we refer to it, a public body, such as the City in this case, has the right to take private land for any authorized, or as we may say legitimate public use, and I may say that historically there was a time when a state or municipality could step in and take private land without compensation at all. That is not true, however, in New Jersey for the reason that the fundamental law of the State, namely the constitution, provides that private property cannot be taken for public use without just compensation, and just compensation has been defined by our Courts, applying it concretely to this particular proceeding, to market value plus any damage that may be proven to be suffered by the landowner to the remainder of the tract out of which the part sought is being taken. Now, just compensation is sometimes difficult to apply in a

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The Court's Charge.

given case. It is not easy to determine. The Courts realize that and so we are obliged in our procedure to leave it to the sound judgment of the jury to ascertain as a fact, under the evidence that is offered, plus the jury's own view of the land sought to be taken.

10 Now, while you have been listening for two or three days here to these various witnesses that have been produced by what may be termed one side or the other, you are not to leave out of consideration your own view of the property; you were there; you saw it and you are able to say, therefore, whether these witnesses are correctly describing the physical situation or whether they are not with reference to that view which you had, qualifying it, of course, with the varying conditions that may arise by reason of the flooding of the Passaic, to which reference has been made, and which is more or less pictured in the photographs that have been offered, as I recall now, by both the owner and the City. But the Appellate Courts lay down for the guidance of the Court and jury in ascertaining just compensation in this inquiry, or question shall I say, the following, and they call it the test: namely, what is the market value of the land condemned for any commercial value of its own in the immediate present or in reasonable anticipation in the near future. I may say, generally, that the academic rules applicable to eminent domain may be given you in this fashion; when a parcel of land is taken by eminent domain, the measure of compensation to be awarded the owner is the price which would be agreed upon at a voluntary sale between an owner willing to sell, but not obliged to sell, and a purchaser willing to buy, but not obliged or com-

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The Court's Charge.

pelled to do so. Market value at the time of the institution of the condemnation proceedings, which I should say in this case is February 1st, 1929, is usually the inquiry. And therefore, the productive value of the property, the productive value of the land, or the value of the land to its owner, based on the income such owner is able to derive from his use of it, is not the measure of compensation and is not material except so far as it throws light on the market value. Sentimental value to the owner, or his unwillingness to part with the property can have no consideration in determining market value. It is argued here, for example, that the owner has no desire to sell, and whether you regard that as unfortunate or otherwise, the City has the right under the power of taking property for public use, through what we know as eminent domain, to take the land, controlled, of course, by the constitutional mandate that it can take it only by paying the owner just compensation. Therefore, it is wholly immaterial whether the owner here wants to sell or does not want to sell. The City has the right to take under the law, but make a just compensation. Now, you are to determine, therefore, as judges of the fact, what just compensation will be. And, as I have indicated, market value is the test, which perhaps I should repeat: "market value of the land condemned for any commercial value of its own in the immediate present or in reasonable anticipation in the near future." Therefore, to determine the value of the land taken by eminent domain, it is not limited to the value of the land for the purpose for which it is actually used, but the jury may consider all uses to which it is adapted and may be put and will

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The Court's Charge.

award compensation upon the basis of its most advantageous and valuable use. The uses which may be considered must be so reasonably probable, however, as to have effect on the present market value of the land. A purely imaginative or speculative value cannot be considered; for
10 example, where a tract taken by eminent domain is used as a farm, the owner is entitled to have its present value for building purposes considered, but the jury is not to determine how it could best be divided in building lots nor conjecture how fast they could be sold nor at what price per lot. Therefore, we find our own courts saying this: that while the rule is that a landowner is entitled to receive the fair price for any use
20 for which it has a commercial value of its own in the immediate present or in reasonable anticipation in the near future, yet that concerns the present market value, having the reasonably anticipated use in view; quite a different matter from laying out the property in lots upon a map, estimating the cost of putting upon it the improvements contemplated and calculating what the value would be if such improvements were
30 actually made. You cannot approach the problem which you have to deal with, namely, in ascertaining the market value, upon the theory that if improvements were made on the land sought to be taken here, it would enhance the value and therefore we will give that value in advance of any such improvements having been made to the owner. That is not the law and you would not be permitted to approach the question from that angle. Available use, of course, you have the
40 right to consider that, but bearing in mind the condition of the land in which it now is. If it

The Court's Charge.

is available or fit for the purpose of a golf course, for example, and its value is enhanced in its present condition by reason of such available use, either in the present or to be reasonably anticipated in the near future, you have a right to consider such available use as either increasing the value of the land or tending to enable you to ascertain its present market value. Therefore, it is said that the details of a possible improvement upon the land, its cost, its probable rental value or money value afterward are not admissible as independent facts, nor are the prospects which would arise, or the increased value of the land to be considered if the property were devoted to a particular use. Rental value, however, may be taken into consideration as a bearing upon the market value. Therefore, in condemnation proceedings, testimony on behalf of the landowner to show such possible uses of the land in question is available, and I may say it has been offered here, but the value of a speculative nature, which may be thought to arise after extensive improvements involving necessarily large expenditures of money is not to be considered by the jury and in fact is not admissible.

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Now, it frequently happens that the difficulty of ascertaining market value is due to the lack of sale of lands of a similar nature and character in the immediate vicinity of the property sought to be taken, and therefore it is said that it sometimes becomes necessary to depend upon the judgment of experts, so-called. In other words, while market value is always the ultimate test, it occasionally happens that the property taken is of a class not commonly bought or sold, or some situation may be discovered which would indicate that there was

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The Court's Charge.

no actual value. In such cases, as market value presupposes a willing buyer, the usual test breaks down and hence it is said sometimes the property has no market value. In one sense that is true, but that does not mean it can be taken for nothing.

10 Therefore, from necessity, of course, the value must be arrived at from opinions of well-informed persons based on the purpose for which the property is suitable. This is not taking the value to the owner; it is done to merely take into consideration the purpose for which the property is suited and what a reasonable purchaser would be willing to give for it, which in a general sense may be said to be the market value. So that you have

20 in this case witnesses who are more or less engaged in the business of buying and selling real estate; some of them wholly so, and they have come here and expressed their opinions as to the value of this tract of land that is sought to be taken. As is not unusual in such cases, the opinions of such witnesses vary. Indeed, there is testimony to the effect that this land is only worth thirty dollars an acre. Then there is other testimony to the effect that it is worth a thousand dollars an acre; and still again that it is worth two or three dollars

30 an acre. Of course, your duty will be to analyze that testimony. It is not an arbitrary thing to be taken at par. The weight and credence you will give to it is peculiarly a matter for you, because you are going to determine the market value of the land, as laid down in the rule that I have given you; "for any commercial value of its own in the immediate present or in reasonable anticipation in the near future."

40 Now, therefore, when you find these witnesses testifying to sales of land in the immediate vicin-

The Court's Charge.

ity, take for example the Bushauer situation, or rather the sale; there it appears that Mrs. Bushauer sold for three thousand dollars in cash three acres. Now, your analysis of that sale, however, must necessarily depend whether you ascertain that the land involved is similar in nature to the tract sought to be taken here by the City. Whether similarity between properties in fact does or does not exist in order to permit a comparison of the value, the rights of way and easements through the property or of the fee of the property, is usually a preliminary question to be decided by the Court, and therefore with reference to that testimony regarding the sale by Mrs. Bushauer, I have allowed that to come to you because it may be of some evidential value in that respect. You will recall that it was described as largely high land, adjoining as I now recall, or bounding upon the highway or country road that runs through this tract. It appears that it extends from the highway to the shore of the Passaic River and at the shore end may have some similarity to the tract that is here involved, but, of course, you will understand that whether the criterion of a thousand dollars an acre for that land is a fair one to adopt must depend upon the finding of a similarity in the land. Now, here the forty-two acre tract is said to be in part low land. It is unnecessary for the Court to go in detail. You have had enough of that for the past three days and, moreover, you have seen the land and know more about it than I do and whether there is, therefore, any justification in the claim that is now made that that sale of the Bushauer property indicates the market value of land of a similar nature and character of that sought to be taken depends upon the proof of the similarity.

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The Court's Charge.

As a matter of law, I have allowed that question to come to you, because on the shore end the Bushauer property may have some semblance or similarity to the land in question. Now, bear in mind, your inquiry must always be directed to the market value. That is the test always for the guidance of the jury. The market value of the land condemned for any commercial value of its own in the immediate present or in reasonable anticipation in the near future. Therefore, I reiterate, that while the rule is that the landowner is entitled to receive the fair price for any use for which it has a commercial value of its own, that is to say, of the land in question, yet that concerns the present market value having the reasonably anticipated use in view and laying out of consideration the value if the property is improved, which would involve a speculative value with which the jury would have nothing to do. In order to permit a comparison of values, the rule is the property must be substantially similar in condition. That is the test.

Now, ordinarily, where a part of a tract of land is sought to be taken, the question arises as to whether the balance of the tract remaining and not taken, is damaged; for example, as a general proposition of law it is said, when a portion of a parcel of land is taken for a public use, the owner is entitled to recover for the injury to the remainder of that parcel only, and cannot recover for injury to separate and independent parcels of land in the same neighborhood which he might happen to own. In determining what constitutes a separate and independent parcel of land when the property is actually used and occupied, the unity of use is the principal test and if a tract of land, no

The Court's Charge.

part of which is taken in connection with some farm, for example, or some manufacturing establishment or some enterprise of any character, as a tract, part of which was taken, it is not considered a separate and independent parcel merely because it was bought at a different time. When, however, the tracts are separated by a highway, they are not to be considered as a single tract. And even if two tracts are contiguous and owned by the same owner and used for the same purpose, if they are not used in connection with each other, they must be considered as separate tracts, as a block of houses in a city street. That has no application here, however. I am reading this as I find it. Vacant and unoccupied land is considered to be separated by a public street, whatever the intention of the owner with regard to the future use may be, and a mere plotting into blocks or lots has been held sufficient in cases of vacant land to show prima facie intimation of an independent parcel. I don't know that the test I have just read to you is particularly applicable here, because it does appear that the Braidburn Company purchased the entire tract in one conveyance, as I now recall. At least, the deeds are here. And it appears that the land described, which is now sought to be taken, was included, and I am rather inclined to the view that the land was conveyed as an entire tract, indeed the land in the highway being included, subject to an easement or right of the public to travel over the highway, but whether you award any damage in addition to the market value which you find under a fair preponderance of the proof here of the land to be taken, that is to say, any damages to the remainder of the property of the Braidburn Company, depends entirely upon whether you find any evidence in the case.

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The Court's Charge.

Now, I have ruled out of the case, and therefore you are not to consider what apparently was originally predicated by the owner as an anticipated source of damage to its property as a whole; for example, those water rights, and you will recall that Counsel in opening to you laid particular stress upon the anticipated injury that the golf club, as it were, or golf property, would experience in the event that the City of East Orange actually took the land in question, and sank its wells as contemplated by the permit, which was obtained from the State Board of Conservation and Development. It was there stated that the City intended to utilize the land sought for the purpose of driving wells and taking out two millions of gallons of water per day. However, as the Court considered the matter, it discovered that not only it but the jury as well were precluded from considering that phase of the claim of the landowner entirely for this reason: the Braidburn Company is not without remedy independently of this proceeding, and therefore if it should appear in the future that the City of East Orange upon driving its wells and attaching its pumps and extracting water did in fact cause the well referred to on the golf property to run dry, the state of the law is such that the Braidburn Company has the right upon proving the fact to be that the well goes dry or runs dry because of the operation of the wells and use of the wells and the withdrawal of water therefrom by the City of East Orange, I say the Braidburn Company has a perfect remedy either to sue the City because of its unreasonable use of that water supply or for any injury or damage that the Braidburn Company may necessarily and reasonably experience or any expense it may be put

The Court's Charge.

to in providing a water supply other than that from the well now upon the premises, because the Court of Appeals in this State has laid down this rule: "Percolating underground waters may not be withdrawn for distribution or sale if it therefrom result that the owner of adjacent or neighboring land is interfered with in his right to the reasonable use of sub-surface water, or if his wells, springs, or streams are thereby materially diminished in flow, or his land rendered so arid as to be less valuable for agriculture, pasturage or other legitimate uses, such as golf playing," and that is a legitimate use, I might say. Therefore a landowner has not an absolute and unqualified right in all water that may be found percolating in his soil, to do what he pleases with it, as with the sand and rock which forms part of the soil. His rights to use such water is only a reasonable right and to a reasonable extent for his own benefit, as in agriculture, irrigation, manufacturing, domestic consumption and the like, and without undue interference with the rights of other landowners to the like use and enjoyment of waters percolating beneath their land, or of water courses fed therefrom. Now, there is rather an interesting situation developed here with which I confess I was not familiar. Examination, however, shows that the State Legislature has now lodged in a State Board, called the Department of Conservation and Development, the authority and control of any underground water area which may be productive of potable water; that is, water for public use for drinking purposes, and that Board, apparently, is given authority and power over all land in the State, that is to say, where there is subterranean sources of a potable

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The Court's Charge.

water supply, and it regulates the reasonable use that any city, for example, such as East Orange, may attempt to exercise, having acquired the right under a permit from the Department in question. So you are to observe that if it should appear as a fact in the future, in the event that the City undertakes to drive its wells and operate them on this land, that it is injuring the water supply or limiting the water supply, or indeed, taking it away entirely from this golf club property, the owner thereof has a remedy, either by an appeal to the State Department in question or to resort to the Courts to recover compensation for any damage it may suffer in that regard, and indeed, it may apply for an injunctive relief in the Court of Chancery of the State to restrain an unreasonable use by the City of such water supply. Therefore, the rule of reason has been adopted, apparently, by the Appellate Court, the highest Court in the State, and that becomes the rule of law for our guidance here. You are therefore instructed to disregard entirely the suggested damage or claim thereto on the part of the Braidburn Company with regard to the water supply, or the possible drying up of its well, as originally claimed. Whether or not there is any damage to the remainder of the tract upon which there is now a golf course or courses of the Braidburn Country Club is not entirely withdrawn from your consideration, for this reason: if there is any evidence in the case showing damage to that remaining land you would, of course, have a right to consider it, but I may say rather candidly I am not aware of any such evidence, and then if you find that is so, then in accordance with the request that I have here from the representative

The Court's Charge.

of the City of East Orange, the damage assessable would be nominal. I am not so sure that you will have any difficulty in passing on that question of damages even though it be in the nominal phase, for the reason that the real question here is, what is the market value of the tract of land sought to be taken, or what was it on February 1st, 1929, when the petition was filed, having in mind the market value of this tract sought to be taken for any commercial value of its own in the immediate present or in reasonable anticipation in the near future. Now, you see that relates to market value and that is the question of damages which I have rather briefly referred to, and as I say, it would seem to have very little consideration because the water question has been taken out entirely and you are directed to disregard it. After all, the real question here is what sum is to be awarded the owner of this land in compensation, just compensation, bearing in mind in view of its taking by the City of East Orange. Therefore, it would seem to me that the sole question, and I am inclined to think that the Counsel for the owner agrees with me, that the damage involved is not susceptible of any ascertainment in fact, but after all that question really relates to the ascertainment of the market value of the land and the sum to be awarded within the definition I have given you. I do not think I should say anything more to you. The question is not a difficult one and I have laid down the rules, and while you may or may not be able to digest them, it seems to me quite necessary that I give them to you.

Therefore I leave the case to you with the injunction that you ascertain the just compensation

Exceptions.

to be awarded the landowner here for the taking of the land that is sought by the City of East Orange. Swear an officer.

Thereupon the jury retired.

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EXCEPTIONS.

Mr. Price: I ask an exception to your Honor's refusal to charge our several requests to charge in the language as presented.

The Court: You take exception to the Court's failure to charge requests as presented in behalf of the Braidburn Corporation.

20 Mr. Price: Also desire to take exception to that part of your Honor's charge wherein, in making reference to the future use to which the property may be put, you advised the jurors that they could not consider any value of a speculative nature; on the ground that there was no evidence in this case proffered or offered by the property owners which covered anything of a speculative nature, and therefore the comment of the Court to the jury from that standpoint would of necessity create an erroneous impression in the jury's mind as to
30 the evidence offered by the property owner as to the available use of the property naturally for golfing purposes.

Also desire to take an exception to that portion of your Honor's charge wherein you made reference to evidence offered by the property owner of the Bushauser sale, which was a sale of property adjoining the Braidburn property and in which you said, in effect; I refer to the Bushauser property; and told the jury that their analysis must
40 depend upon whether they find the land involved

Exceptions.

is of a similar nature, and you then used the language to which I desire exception: "You will recall that it was described as largely high land bounded on the highway or country road running through this tract; it appears that it extends from the highway to the shore of the Passaic River and at the shore may have some similarity to the tract here involved"; on the ground, it is our contention that there was no evidence which said that the property was largely high land, or at least, the evidence on that point was the subject of dispute, and that the language used by the Court in charging the jury in that regard stated as a fact something which at least was a matter of dispute for the jury.

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Also a further exception to your Honor's charge with reference to your further charge in the Bush-auser matter wherein you said that the only land of a like nature may be some land along the river front; on the ground that we insist that was contrary to the evidence and that the question should have been left to the jury and not a statement of fact made by the Court. And on the further ground that in your latter comment as to explaining the purpose of permitting the matter to go to the jury wherein you say: I have allowed this matter to go to the jury, you having only referred to the fact that there may be some low land along the shore which is similar to the ground in question; or words to that effect; which in our opinion states a statement of fact that was at least disputed before the jury.

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Also desire to take exception to that part of your Honor's charge wherein you made reference to the fact of a sale where a public highway goes through the Braidburn property; in which you said

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Exceptions.

10 in effect: if where the tracts of land are separated by a highway, they should not be considered as a single piece or the same tract; on the ground it's our contention, referring to the Lehigh Valley case, they are to be considered as an entirety of ownership in the same tract, the presence of a public highway does not create a severance of the consideration of the singleness of the tracts.

20 Also desire to take exception to that portion of your Honor's charge wherein you said that the Court withdrew from the consideration of the jury the question of the probable or possible damage to the remaining land by reason of the withdrawal of subterranean waters upon the erection of wells on the property under condemnation; on the ground that the owner at some future time would be authorized and permitted by law to seek remedy in the Courts or before the Bureau of Conservation and Development for any violation, or what may be then determined to be a violation of these water rights and the unreasonable use of the water rights; for the reason that is our contention that under the law we were obliged to seek our relief by way of damages in the present proceeding by proof before the jury to that effect. And that 30 under the law we should not be forced to the expenditure of prosecuting these rights in a subsequent proceeding. And to clarify that situation, it is further our contention that the condemnation matter when completed is conclusive as to the rights of the property owner under the law as to the damage then existing or which will probably follow from the taking of the land.

40 Also desire to take exception to that portion of your Honor's charge where you said in effect; there was no proof of damage to the remaining

Exceptions.

land of the Braidburn Country Club, where you made the following comment; whether or not there was any damage to the remainder of the tract upon which there is now a golf course or courses of the Braidburn Country Club is not entirely withdrawn from your consideration if there is any evidence in the case showing damage to that remaining land, you would have the right to consider it, but I may say candidly I know of no such evidence, and if you find that—

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The Court: That is in accordance with the requests of Counsel when you said you would be entitled to real damages.

Mr. Price: —on the ground that we feel that there is evidence in this case of damage to the remaining land, at least having in mind the fact that the property left along Brooklake Road is of such a small depth that its value to the Country Club is less; and on the further ground that the erection of the wells on the property site here by condemnation would affect the value of the land on the other side of the road also for any present use or for any available development use to which the Braidburn Club might choose to put it.

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Also exception to your Honor's specific instruction on the question of the water supply, to which you referred again at the end of your charge and to which you referred during the progress of the case. Take exception to your charge directly instructing the jury to disregard the damage to the water supply of the Braidburn Club for the reasons stated above and for the reason that we feel under the present status of the law these damages should be comprehended in the present proceeding.

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The Court: You may have them.

Property Owner's Requests to Charge.

(Exceptions allowed and sealed.)

Mr. Weeks: I have no exceptions. Your Honor has covered our requests to charge and said the value is as you find it exists.

10 PROPERTY OWNER'S REQUESTS TO CHARGE.

The attorney for the appellant property owner respectfully requests the Court to charge the jury as follows:

1. It is the province of the jury to find facts. That is, the fact that you must find is: What is the market value of the property that has been taken, plus the consequential damages, if any, to the remaining lands of the owner?

20 2. The Constitution of the State of New Jersey provides that private property shall not be taken for public use without just compensation. The statute passed, the Eminent Domain Act of 1900, providing for means of condemnation for public purpose, requires the determination of the just compensation referred to in the Constitution in cases on appeal, by jury, who shall assess the value of the land or other property and the damages sustained. Your verdict in this case must be in a
30 single lump sum, which sum shall be made up as follows:

1. The value of the land taken;

2. Damages to the remaining lands belonging to the property owner, if any, by reason of the taking away of the property condemned from the entire tract;

40 3. Damages, if any, sustained by the remaining tract, arising in the future by reason of the use to which the property con-

Property Owner's Requests to Charge.

demned is to be put by the City of East Orange as set forth in the pleadings in this case.

3. The amount of compensation should be made upon the basis that the condemning parties make the most injurious use to the owner that can lawfully be made within the right taken by them as disclosed in their petitions. 10

4. In estimating the value of the property taken from the owners, the jury should consider all the capabilities of the property, and all the uses to which it may be applied or for which it is adapted.

5. That the jury should take into consideration and determine under the evidence in the case the best use to which the property taken is adapted, and award to the owners such sum as in their judgment will afford the owners just compensation for the lands taken in view of such use. 20

6. If, from the situation and surroundings of the property of the landowner, you feel that there resulted to the land taken a special value growing naturally out of the best use to which, from its situation, it was presently adapted, then the owner is entitled to secure for the land that compensation in which these elements will be accounted for. 30

7. That when the jury have determined all the capabilities of the property and all the uses to which it may be applied and for which it may be adapted they are to estimate its value in relation to such capabilities, uses and applicability, and not merely in relation to the condition it was on February 9, 1929, and the use to which it was then applied by the owner. 40

8. The ultimate question for you to determine

Property Owner's Requests to Charge.

is: What is the property worth in the market viewed not merely with reference to the uses to which it was applied at the time this condemnation proceeding was commenced, February 9, 1929, but with reference to the uses to which it was then
10 plainly adapted. That is to say, the question is: What was the property worth on that date from its availability for valuable uses? The property is not to be deemed worthless because the owner lets it go to waste, or to be regarded as valueless because the owner has not put it to any use. The capability of being made thus available gives it a market value which can be estimated by you.

20 9. The special value of land due to its adaptability for golf purposes is an element which the owner is entitled to have considered in determining the amount to be paid as the just compensation upon a taking by eminent domain.

30 10. In weighing the testimony of experts on real estate value, you may consider the reasons given by them for the opinions which they have expressed on the witness stand. Consider their testimony as to the properties which they referred to as being comparable to the lands taken, and the sales price of such comparable property which were particularly described to you by the various real estate experts.

40 11. In the foregoing statements in regard to the amount of compensation to which the owner is entitled, the Court has referred only to the value of the property taken. You are to understand, however, that the owner is also entitled to be compensated for any damage which the taking does to its contiguous lands which are not taken. You are not to bring in a special verdict for the amount of

Property Owner's Requests to Charge.

this damage, but if you find that the taking does any damage to lands not taken, you are to add the amount of such damage to the amount of damage you find for the lands to be taken.

12. It would be contrary to economic law and repellent to common justice to permit the fact that the lands are selected by the City of East Orange because of their availability for Water Supply purposes, to strip them of any element which, independently of the City of East Orange and prior to its taking, they possessed. The owner is to be given by way of compensation for his land not only its fair price for any use for which it is adaptable at the time of the taking or in reasonable anticipation in the near future, but, in addition, he shall be compensated for any consequential damages to the remainder by reason of the taking.

13. If you believe from the evidence submitted that the land in question is adaptable for golf lands, and that the 42 acres in question, in conjunction with the other lands of the owner immediately adjacent thereto, are the only available lands in the tract of the owner on which the present nine-hole course can be revamped to make a regulation 18-hole course, then your verdict should include such a sum of money as in your opinion will properly compensate the owner for the loss sustained, by preventing this extension of the golf course.

14. Pleadings in this case show that the City of East Orange intends and is permitted by law to erect water works on the land condemned and to be taken, by and through which they may abstract water to the amount of 2,000,000 gallons per day, and the property owner, the Braidburn

Property Owner's Requests to Charge.

10 Realty Corporation, is entitled to receive an award of damages at your hands to be included in the general award for any injury resulting in the future to the use of their remaining lands adjacent to the lands condemned, arising out of the use of the condemned lands by the City of East Orange, in the manner set forth in the pleadings.

20 15. Pleadings in this case show that the City of East Orange intends and is permitted by law to erect water works on the land condemned and to be taken, by and through which they may abstract water to the amount of 2,000,000 gallons per day. If you find from the evidence that the abstraction of 2,000,000 gallons per day from the premises taken will injuriously affect the water supply of the Braidburn Realty Corporation now in operation on the remaining lands of that company and located adjacent to the lands condemned, you have a right to include in your award for damages such amount as in your judgment will compensate the Braidburn Realty Corporation for injury arising out of a depleted water supply.

30 16. In cases of this kind, no amount can be mathematically fixed as to the amount of your verdict. You must, therefore, trust somewhat to your own judgment in arriving at this definite amount, and one of the objects and purposes of the view which you have made is to enable you to use your own senses and judgment by obtaining such information as an eye witness can gain of the general quality and condition of the land, the uses to which it has been put, or to which it is applicable, and better to understand and apply
40 the evidence of the witnesses who have testified

Property Owner's Requests to Charge.

before you. If, in your judgment, the evidence is conflicting as to the value of the property taken and the injury to the balance, you should resort to the knowledge gained upon your view as bearing upon the weight to be given to the various and conflicting statements and estimates.

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17. Under the statute by which proceedings are governed the City of East Orange has the right, if it desires, to abandon these proceedings at any time within twenty days after the rendering of your verdict, upon payment to the owners of their reasonable costs, expenses and counsel fees to be determined by a Justice of the Supreme Court, and upon filing a discharge of lien of notice of *lis pendens*. On the other hand, the owner cannot in any manner prevent the City of East Orange from condemning and taking the property if it desires to do so. His only right is to make claim to the compensation to which the law entitles him.

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18. All compensation for the taking under these proceedings must now be allowed to the owner of the property taken once for all, including all damages that the owner may ever hereafter sustain due to such taking, inasmuch as any damages that the owner may hereafter sustain for all times to come on account of the taking under these proceedings cannot be hereafter recovered.

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19. If the land condemned and taken has an available use within the meaning of the law when used in connection with adjacent and contiguous property and notwithstanding it may be limited solely to a joint use with such adjacent property,

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Petitioner's Requests to Charge.

the owner is to be allowed the value to it of the land taken with such available use.

Respectfully submitted,

(Signed) SEUFERT & ELMORE.

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PETITIONER'S REQUESTS TO CHARGE.

1. The land in question is to be valued in the condition in which it was on the date of filing the Petition and Order fixing the time and place for the Condemnation Proceedings, which was on February 9, 1929. (2 Comp. Stat., p. 2184.)

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2. In considering the amount of damages to be paid the owner for the land taken, the test for the jury is what is the market value of the land condemned for any commercial value of its own in the immediate present or in reasonable anticipation in the near future. (Ringwood Co. v. North Jersey District Water Supply Commission, 143 A. 369.)

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3. By the market value of property is meant what the property would bring at a sale between an owner willing to sell and a purchaser desiring to buy.

4. In order that testimony of the price paid for land in the neighborhood of that being condemned may be evidential, the land must be shown to be substantially similar. (Ross v. Commissioners Palisades Interstate Park, 90 N. J. L., p. 461.)

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5. The jury may disregard the testimony of any witness in this case as to the market value of other lands if they find that said lands are not similar in

Petitioner's Requests to Charge.

character to the lands being condemned in these proceedings.

6. In fixing the value of the lands taken the jury is limited to the proof of the present conditions of the land and uses to which it is naturally adapted, but must exclude speculative and possible uses to which the land might be put if improvements and changes were made. Matters that are collateral involving calculation of costs and profits are too remote and must not be considered by the jury. (Ringwood Co. v. North Jersey District Water Supply Commission, 143 A. 369.)

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7. The burden of proof is on the land owner to show by legal evidence the amount of damages, if any, to the remaining lands from which the premises in question are taken, and if the owner has failed to do this, then the jury should award only a nominal sum as damages to the remaining lands.

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8. I charge you that in this case the owner has submitted no competent evidence of the amount of damages to any remaining lands, and you are, therefore, instructed to allow only nominal damages for the severance.

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(Signed) WALTER C. ELLIS,
Attorney for Petitioner.

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*Exhibits.***Exhibit B-1.**

[\$1.00 in U. S. Int.
Rev. Stamps,
Cancelled.]

10 Brooklake Club, Inc. THIS INDENTURE,
 To made the 20th day of
Braidburn Realty Corp'n. April, in the year of
 our Lord One Thou-
 sand Nine Hundred and Twenty-three, between
BROOKLAKE CLUB, INC., a corporation of New Jer-
sey located at the Borough of Florham Park, in
the County of Morris and State of New Jersey,
party of the first part; and BRAIDBURN REALTY COR-
PORATION, a corporation of New Jersey, located at
20 the Borough of Florham Park, in the County of
Morris and State of New Jersey, party of the sec-
ond part:

 WITNESSETH, that the said party of the first part,
for and in consideration of the sum of One Dollar,
lawful money of the United States of America, to
it in hand well and truly paid by the said party of
the second part, at or before the sealing and de-
livery of these presents, the receipt whereof is
hereby acknowledged, and the further considera-
30 tion of the delivery to the party of the first part
by the party of the second part of Four Hundred
Ninety-seven (497) shares of the capital stock of
the party of the second part, without nominal or
par value, the receipt of certificates for which,
full-paid and non-assessable, is hereby acknowl-
edged by the said party of the first part, and the
said party of the first part being therewith fully
satisfied, contented and paid, has given, granted,
bargained, sold, aliened, released, enfeoffed, con-
40 veyed and confirmed, and by these presents does

Exhibits.

give, grant, bargain, sell, alien, release, enfeoff, convey and confirm unto the said party of the second part, its successors and assigns forever, all that tract or parcel of land and premises, hereinafter particularly described, situate, lying and being in the Borough of Florham Park, in the County of Morris and State of New Jersey, and bounded as follows:— BEGINNING in the center line of East Madison Avenue at the Southerly corner therein of the land conveyed by Howard Cole & Co., Inc., to William Bley Co. by deed bearing date March 6, 1920, and recorded in Book W 25 of Deeds, pages 549 &c.; thence (1) along the same South sixty-two degrees five minutes East three hundred and ninety-two feet and forty-one hundredths of a foot to a turn therein; thence (2) still along the same South forty-seven degrees and forty-two minutes East one hundred and forty-eight feet to the center of the bridge over Spring Garden Brook; thence (3) still in the center of the Avenue South thirty-six degrees ten minutes East two hundred and sixty-one feet to the southwesterly corner of lands of Lillie R. Steffens; thence (4) along the Westerly line of the Steffens' land North fifty-three degrees and thirty-four minutes East four hundred and fifty-four feet and ten hundredths of a foot; thence (5) still along the Steffens' land South forty-one degrees fifty-two minutes East nine feet and fifty hundredths of a foot; thence (6) still along the said land North fifty-five degrees and twelve minutes East one hundred and thirty-four feet and three hundredths of a foot to the Northwesterly corner thereof; thence (7) along the Northeasterly line thereof South thirty-five degrees and forty and one-half minutes East ten hundred and fifty feet and sixty-six hundredths of a foot to

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Exhibits.

- a monument stake; thence (8) still along the Stef-
fens' land South fifty-seven degrees and eleven
minutes West five hundred and twenty-five feet
and fourteen hundredths of a foot to the center of
said Avenue; thence (9) still along the same South
10 thirty-one degrees fifty-two minutes East nineteen
feet to the center of Brooklake Road; thence (10)
along the center line of said road South fifty-six
degrees and eleven minutes West five hundred and
forty-nine feet and twenty hundredths of a foot
to the northerly corner of land now or formerly
of Henry O. Young; thence (11) along the said
Young land South forty-eight degrees and three
minutes East seven hundred and seventy-four feet
and eighty-four hundredths of a foot to another
20 corner thereof; thence (12) still along the Young
land South seven degrees and seven minutes West
three hundred and seven feet and fifty-six hun-
dredths of a foot to another corner thereof; thence
(13) still along the same South thirty-three de-
grees and fifty-two minutes East seven hundred
and eleven feet and forty-eight hundredths of a
foot to another corner thereof; thence (14) still
along said Young land North fifty-six degrees
20 twenty minutes East two hundred and twenty feet
and forty-five hundredths of a foot to another cor-
ner thereof; thence (15) still along the same and
along the middle of a ditch South thirty-one de-
grees and thirty-one minutes East eleven hundred
and nine feet and seventy-five hundredths of a
foot to a point in the center of Black Brook; thence
(16) along the center of said Brook South eighty-
four degrees and fifty-nine minutes East seventy-
seven feet and fifty hundredths of a foot; thence
30 (17) along the Easterly line of land now or lately
of J. L. Snook through the middle of a ditch South
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Exhibits.

fourteen degrees and nine minutes East four hundred and five feet and fifty-seven hundredths of a foot to a corner of the Snook land; thence (18) still along the Snook land South thirty-seven degrees and eight minutes West six hundred and fifty-six feet and eighty-one hundredths of a foot to the middle of another ditch; thence (19) along the middle of the said last mentioned ditch South fifty-two degrees ten minutes East two hundred and fifty-six feet and fifty-two hundredths of a foot; thence (20) along the middle of another ditch North forty-one degrees and ten minutes East four hundred and three feet and fifty-seven hundredths of a foot; thence (21) still along the middle of said ditch North fifty-nine degrees and five minutes East one hundred feet and fifty-eight hundredths of a foot; thence (22) still along the middle of said ditch North forty-seven degrees and nine minutes East four hundred and thirty-eight feet and one hundredth of a foot; thence (23) still along the middle of said ditch North twelve degrees and one minute West two hundred and ninety-four feet and fifty-two hundredths of a foot; thence (24) still along the middle of the said ditch North three degrees and nine minutes East four hundred and eight feet and twenty-five hundredths of a foot to a point in the middle of Black Brook; thence (25) along the middle of Black Brook North thirty-nine degrees and forty-six minutes East four hundred and five feet and thirty-seven hundredths of a foot, more or less, to a point in the middle of Passaic River; thence (26) in a general Northwesterly, Northerly and Northeasterly direction along the various courses of the said River and through the middle thereof three thousand nine hundred and

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Exhibits.

- twenty-four feet more or less to the Southerly line
 of land now or formerly of the Sisters of Charity
 of St. Elizabeth; thence (27) along the line of their
 land North thirty-seven degrees seventeen minutes
 West nine hundred and five feet and twenty-eight
 10 hundredths of a foot more or less; thence (28) still
 along their land North thirty-three degrees twenty-
 nine minutes East three hundred and ninety-four
 feet and six hundredths of a foot; thence (29) still
 along their land South thirty degrees and forty-five
 minutes East ten hundred and twenty feet and
 twenty-seven hundredths of a foot more or less to
 a point in the middle of Passaic River; thence (30)
 in a general Northwesterly and Northerly direc-
 tion and along the middle of said river two thou-
 20 sand and seventy-four feet more or less to the
 Southerly line of land formerly of George Gold-
 berg, now deceased; thence (31) along the South-
 westerly line of the Goldberg land North fifty-four
 degrees and fifty-five minutes West eight hundred
 and ninety-seven feet and twenty-six hundredths
 of a foot to a corner of land of Lyman Fish; thence
 (32) along the Southerly line of the Fish land
 North seventy-one degrees forty-six minutes West
 seven hundred and seven feet and twenty-eight
 30 hundredths of a foot; thence (33) still along the
 Fish land North twenty-seven degrees and seven-
 teen and one-half minutes East one hundred and
 seventy-six feet and seventy hundredths of a foot;
 thence (34) still along the Fish land North seventy-
 four degrees and thirty minutes West two hundred
 and nine feet to the center of Brooklake Road;
 thence (35) along Brooklake Road South fifteen
 degrees sixteen minutes West one hundred and
 two feet and six hundredths of a foot; thence (36)
 40 South two degrees twenty-eight minutes West one
 hundred and fourteen feet and fifty hundredths of

Exhibits.

a foot; thence (37) south thirty-four degrees forty-six minutes West two hundred and twenty-four feet and seventy-five hundredths of a foot; thence (38) North eighty-five degrees thirty-nine minutes West one hundred and three feet and seventy-one hundredths of a foot; thence (39) North twenty-six degrees thirty-two minutes West one hundred and thirty-eight feet and ninety-two hundredths of a foot; thence (40) North eleven degrees ten minutes West two hundred and fifty-two feet and ninety hundredths of a foot; thence (41) North thirty-five degrees ten minutes East fifty-two feet and forty-four hundredths of a foot; thence (42) North forty-four degrees twenty-eight minutes East one hundred and eighty-three feet and eleven hundredths of a foot; thence (43) North thirty-seven degrees nine minutes East sixty-six feet and nine hundredths of a foot to lands of Lyman Fish; thence (44) along the line of lands of said Fish North sixty-seven degrees forty-three minutes West two hundred feet and fifteen hundredths of a foot; thence (45) still along lands of said Fish North thirty-one degrees thirty-seven minutes West two hundred and twenty-four feet and thirty-four hundredths of a foot; thence (46) still along lands of said Fish South fifty-six degrees fifty minutes West four hundred and twenty-seven feet and thirty hundredths of a foot; thence (47) still along lands of said Fish South twenty degrees forty-three minutes West two hundred and twenty-six feet and thirteen hundredths of a foot; thence (48) still along lands of said Fish North thirty-nine degrees forty-one minutes West seven hundred and sixty-seven feet and thirty-three hundredths of a foot to a corner of lands of said Fish; thence (49) North seventy-five degrees twenty-six minutes West four

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Exhibits.

hundred and ninety feet; thence (50) South nine degrees and thirty-four minutes West three hundred and thirty feet and forty-eight hundredths of a foot to the center line of Cole Boulevard; thence (51) along said Boulevard North eighty-six degrees and eleven minutes West one hundred and fifty feet and sixty-five hundredths of a foot; thence (52) still along the same North eighty-seven degrees, and forty-nine minutes West three hundred and sixty feet and ninety-one hundredths of a foot; thence (53) still along the same North sixty-seven degrees and thirty-five minutes West one hundred and twenty-four feet and twenty-six hundredths of a foot; thence (54) along the center line of a proposed roadway sixty feet in width presently known as Lake Shore Drive South forty-three degrees and twenty-one minutes West three hundred and eighty-six feet and sixty-four hundredths of a foot; thence (55) still along the center of Lake Shore Drive South fifty-one degrees and thirty-nine minutes West one hundred and seventy-eight feet and forty-four hundredths of a foot to a point in the center of a proposed roadway sixty feet in width presently known as South Drive; thence (56) still in the center of said Lake Shore Drive South sixty degrees and forty minutes West one hundred and fifteen feet and one-tenth of a foot; thence (57) still in the center of said Drive South fifty-three degrees and fifty-nine minutes West two hundred and sixty-four feet and three-tenths of a foot; thence (58) along the center of a proposed road-way sixty feet in width presently known as Park View Drive North fifty-one degrees and nineteen minutes West one hundred and sixty feet; thence (59) South thirty-eight degrees and forty-one minutes West three hun-

Exhibits.

dred and seventy feet to the line of lands of M. M. Simonson; thence (60) along the line of lands of said Simonson South seventy-seven degrees and fifty-four minutes East two hundred and ten feet to the Northeast corner of lands of said Simonson; thence (61) still along lands of said Simonson South fifteen degrees thirty-two minutes West one hundred feet to the Northerly line of lands conveyed as aforesaid by Howard Cole & Co., Inc., to William Bley Co. by deed recorded in Book W-25 of Deeds, pages 549 etc., thence (62) along the line of said Bley land South seventy-four degrees twenty-eight minutes East two hundred feet; thence (63) still along the line of said Bley land South fifty-five degrees thirty-five minutes East three hundred and ninety-three feet and twenty hundredths of a foot; thence (64) still along the line of said Bley land South thirty-two degrees thirty-three minutes West four hundred and twenty-five feet and eight hundredths of a foot to the point or place of beginning. Excepting, however, thereout and therefrom that portion of the foregoing premises conveyed by Brooklake Club, Inc., the party hereto of the first part, to Howard Cole & Co., Inc., by deed bearing date the 23rd day of January, 1923, and recorded in Book G-28 of Deeds of Morris County on pages 542 etc. Being the same premises conveyed to the party of the first part by deed from Howard Cole & Co., Inc., dated December 11, 1922, and of record in said Morris County Clerk's Office in Book I-28 of Deeds, page 150, confirmed by a deed between the same parties dated April 19, 1923, given for the purpose of correcting the description of the lands conveyed. TOGETHER with all and singular the tenements, hereditaments and appurte-

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Exhibits.

nances thereunto belonging or in any wise appertaining; and the reversion and reversions, remainder and remainders, rents, issues and profits thereof; and also all the estate, right, title, and interest, property, possession, claim and demand
10 whatsoever, as well in law as in equity, of the said party of the first part of, in and to the above described premises and every part and parcel thereof, with the appurtenances. TOGETHER with the right unto the party of the second part, its successors and assigns, to cross the adjoining lands of the said Howard Cole & Co., Inc., by means of the roads or drives, or the proposed roads or drives, known as Cole Boulevard, Cathedral Drive and East Lake Shore Drive, either on
20 foot, on horse or by any vehicle. Together also with the easement relating to Spring Garden Brook as set forth in a deed from Eliza A. Sanderson et als, to Leslie D. Ward, dated January 8, 1894, and recorded in Morris County in Book K-24 of Deeds, pages 212 &c. To HAVE AND TO HOLD all and singular the above mentioned and described premises with the easements, appurtenances and rights aforesaid, unto the said party
30 of the second part, its successors and assigns, to its and their own proper use, benefit and behoof forever. But this conveyance is made expressly subject to a certain mortgage indenture executed by said Brooklake Club, Inc., to Howard Cole & Co., to secure the payment of Three Hundred Thousand (\$300,000) dollars, dated December 11, 1922, and of record in said Morris County Clerk's Office, upon which mortgage there is due the sum of Two Hundred Ninety Thousand (\$290,000) dol-
40 lars, also subject to the easements and rights reserved in the aforesaid deed of December 11, 1922,

Exhibits.

from Howard Cole & Co., Inc., to Brooklake Club, Inc. And the said party of the first part, for itself, and its successors and assigns, does covenant, grant and agree to and with the said party of the second part, its successors and assigns, that it is lawfully seized in its own right of a good, absolute and indefeasible estate of inheritance in fee simple of and in all and singular the above granted, bargained and described premises, with the appurtenances, and has good, right, full power, and lawful authority to grant, bargain, sell and convey the same in the manner and form aforesaid. And the said party of the second part, its successors and assigns, shall and may at all times hereafter, peaceably and quietly have, hold, use, occupy, possess and enjoy the above granted premises, and every part and parcel thereof, with the appurtenances, without any let, suit, trouble, molestation, eviction or disturbance of the said party of the first part, its successors or assigns, or of any other person or persons lawfully claiming or to claim the same. And that the same are now free, clear, discharged and unencumbered of and from all former and other grants, titles, charges, estates, judgments, taxes, assessments and incumbrances of what nature and kind soever, except as aforesaid. And also, that the said party of the first part, and its successors or assigns, and all and every other person or persons whosoever, lawfully or equitably deriving any estate, right, title, or interest, of, in or to the hereinbefore granted premises, by, from, under or in trust for it or them, shall and will at any time or times hereafter, upon the reasonable request, and at the proper costs and charges in the law, of the said party of the second part, its successors and assigns, make, do and execute, or cause

Exhibits.

10 or procure to be made, done or executed, all and every such further and other lawful and reasonable acts, conveyances and assurances in the law for the better and more effectually vesting and confirming the premises hereby intended to be granted, in and to the said party of the second part, its successors and assigns forever, as by the said party of the second part, its successors or assigns, or its or their counsel learned in the law, shall be reasonably advised or required. And the said party of the first part, its successors or assigns, the above described and hereby granted and released, premises, and every part and parcel thereof, with the appurtenances, unto the said party of the second part, its successors and assigns, 20 against the said party of the first part, and its successors or assigns, and against all and every person or persons whomsoever, lawfully claiming or to claim the same, shall and will warrant and by these presents forever defend except as aforesaid.

30 IN WITNESS WHEREOF, the said party of the first part has caused its corporate seal to be hereto affixed by its President, and attested by its Secretary, and these presents to be signed by its President the day and year first above written.

BROOKLAKE CLUB, INC.,
By NORMAN MERRIMAN
President.

{ CORPORATE }
{ SEAL }

Attest:

S. M. SAUNDERS
Secretary.

40 Signed, sealed and delivered
in the presence of:

HARRIETT J. BELLAH

Exhibits.

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

BE IT REMEMBERED, That on this 24th day of September, in the year of our Lord One Thousand Nine Hundred and Twenty-three, before me, the subscriber, a Notary Public, personally appeared Shelby M. Saunders, who, being by me duly sworn on his oath, says that he is the Secretary of Brooklake Club, Inc., the grantor named in the within deed; that Norman Merriman is the President of said corporation; that deponent well knows the corporate seal of said corporation; and that the seal affixed to said deed is such corporate seal and was thereto affixed, and said instrument signed and delivered by said President, as and for his voluntary act and deed and for the voluntary act and deed of said corporation, and in the presence of deponent, who thereupon subscribed his name thereto as witness.

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SHELBY M. SAUNDERS

Subscribed and sworn to before me this }
 24th day of September A. D. One Thou- }
 sand Nine Hundred and Twenty-three. }

30

HARRIETTE J. BELLAH

{ NOTARIAL }
 { SEAL } Notary Public
 for New Jersey

Received and Recorded September 25, 1923 at
 2:38 o'clock P. M.

E. BERTRAM MOTT, Clerk. No. 17698.

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Exhibits.

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

10 I, E. BERTRAM MOTT, Clerk of the County of Morris, do hereby Certify that the foregoing is a true copy of the record of a Deed given by Brooklake Club, Inc. To Braidburn Realty Corp'n. as fully and entirely as the same remains of record in my office in Book U-28 of Deeds for said County, on pages 190, etc.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said County, at Morristown, this 3rd day of December, [SEAL] A. D. nineteen hundred and twenty-nine.

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E. BERTRAM MOTT,
 Clerk.

By EDWIN W. ORR,
 Deputy Clerk.

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*Exhibits.***Exhibit B-2.**

Howard Cole & Wf. THIS DEED, made
 To the Sixth day of Au-
 Braidburn Realty Corpn. gust, in the year of
 Our Lord One Thou- 10
 sand Nine Hundred and Twenty-seven BETWEEN
 HOWARD COLE and FAITH BAIRD COLE his wife, both
 of the City of New York, in the County of New
 York, and State of New York and formerly of the
 Borough of Florham Park in the County of Morris,
 and State of New Jersey Parties of the First Part;
 and BRAIDBURN REALTY CORPORATION, a corporation
 organized and existing under the Laws of the
 State of New Jersey, and having its principal office
 in the Borough of Florham Park in the County 20
 of Morris, and State of New Jersey, Party of the
 Second Part WITNESSETH, That the said Parties
 of the First Part, in consideration of the sum of
 ONE (\$1.00) dollar lawful money of the United
 States of America, to them in hand paid, by the
 said Party of the Second Part, at or before the
 sealing and delivery of these presents, the receipt
 whereof is hereby acknowledged, have granted,
 bargained, and sold, and by these presents do 30
 grant, bargain, sell, and convey, unto the said
 Party of the Second Part, and to its successors
 and assigns forever, All that tract or parcel of
 land and premises, hereinafter particularly de-
 scribed, situate, lying and being in the Borough
 of Florham Park in the County of Morris and
 State of New Jersey. BEGINNING at a point three
 hundred and thirty-one feet and five-tenths of a
 foot from the northerly corner of lands belonging
 to Steffens along a line south thirty-five degrees, 40
 forty minutes, thirty seconds, east (said corner

Exhibits.

being the junction of Courses 6 and 7 and said line being Course 7 as described in deed from Howard Cole and Company Incorporated to Brooklake Club Incorporated dated April 19, 1923 and filed in Book U-28, Page 186 of the recorded deeds of Morris County) thence (1) along Steffens land south fifty-three degrees thirty-nine minutes west one hundred and thirty feet and fifty-six hundredths of a foot, thence (2) still along the Steffens land south thirty-five degrees forty minutes thirty seconds, east seven hundred and eighteen feet and forty hundredths of a foot to a stone monument in the fence line being the beginning of Course 8 in above mentioned deed; thence (3) continuing along the same line but being across land belonging to said party of the second Part forty-eight feet and two-tenths of a foot to a stone wall, thence (4) along stone wall north fifty-three degrees three minutes east (said line being along Course 8 of a deed from Brooklake Club Incorporated to Howard Cole and Company Incorporated dated January 23, 1923 and recorded in Book G-28, Page 542 of the recorded deeds of Morris County) one hundred and thirty-one feet more or less, thence (5) north thirty-five degrees, forty minutes, thirty seconds west along the line first above written seven hundred and seventy-one feet more or less to the place of beginning. TOGETHER with all and singular, the tenements, hereditaments and appurtenances thereunto belonging, or in anywise appertaining; And also, all the estate, right, title, interest, property, claim and demand whatsoever, as well in law as in equity, of the said Parties of the First Part, of, in or to the above described premises, and every part and parcel thereof, with the appurtenances. To HAVE

Exhibits.

AND TO HOLD, all and singular the above mentioned and described premises, together with the appurtenances, unto the said party of the Second Part, its successors and assigns, to the only proper use, benefit and behoof of the said Party of the Second Part, its successors and assigns forever. The premises above described were intended to have been conveyed by a deed from Howard Cole and Company Incorporated to Brooklake Club Incorporated bearing date of December 11, 1922 and recorded in the Book I-28, Page 150 etc. of the recorded deeds of Morris County and also in a deed from and to the same parties bearing date of April 19, 1923 and recorded in Book U-28, Page 186 etc of the recorded deeds of Morris County, and in turn conveyed by deed from Brooklake Club Incorporated to Braidburn Realty Corporation, bearing date of September 24, 1923 and recorded in Book U-28 Pages 190 etc. of the recorded deeds of Morris County.

IN WITNESS WHEREOF, the said Parties of the First Part have hereunto set their hands and seals the day and year first above written.

HOWARD COLE 30
 FAITH B. COLE.....

Signed, Sealed and Delivered
 in the presence of
 F. E. HENDERSON
 GEORGE FARRELL

Exhibits.

State of New York }
 County of New York } ss.:

10 BE IT REMEMBERED, That on this Sixth day of August, in the year of Our Lord Nineteen Hundred and Twenty-seven before me personally appeared, Howard Cole and Faith B. Cole who, I am satisfied, are the grantors mentioned in the within Deed; and I having first made known to them the contents thereof, they thereupon acknowledged that they signed, sealed and delivered the same as their voluntary act and deed, for the uses and purposes therein expressed.

20 (Teresa Keating)
 (Notary)
 (Public)
 (New York County)
 (N. Y.)

Teresa Keating
 Notary Public, New York County
 New York County Clerk's No. 614
 New York County Register's No. 8435
 Commission Expires March 30, 1928

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Exhibits.

State of New York }
 County of New York } ss.:

No. 59426 Series B I, WILLIAM T. COLLINS, Clerk of the County of New York, and also Clerk of the Supreme Court for the said County, the same being a Court of Record, having a seal, Do HEREBY CERTIFY, That Teresa Keating whose name is subscribed to the deposition or certificate of the proof or acknowledgment of the annexed instrument, and thereon written, was, at the time of taking such deposition, or proof and acknowledgment, a Notary Public in and for such County, duly commissioned and sworn and authorized by the laws of said State, to take depositions and to administer oaths to be used in any Court of said State and for general purposes; and also to take acknowledgments and proofs of deeds, of conveyances for land, tenements or hereditaments in said State of New York. And further, that I am well acquainted with the handwriting of such Notary Public, and verily believe that the signature to said deposition or certificate of proof or acknowledgment is genuine.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of the said Court and County the 12 day of Aug. 1927.

(New York Seal) WILLIAM T. COLLINS, Clerk

Received and Recorded August 25, 1927, at 1:20 o'clock P.M.

E. BERTRAM MOTT, Clerk. No. 19263.

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Exhibits.

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

10 I, E. BERTRAM MOTT, Clerk of the County of Morris, do hereby Certify that the foregoing is a true copy of the record of a Deed given by Howard Cole & Wf. To Braidburn Realty Corpn. as fully and entirely as the same remains of record in my office in Book S-30 of Deeds for said County, on pages 292, etc.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said County, at Morristown, this 3rd day of December, A. D. nineteen hundred and twenty-nine.

20 E. BERTRAM MOTT,
 Clerk.

By EDWIN W. ORR,
 Deputy Clerk.

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Contour lines and figures show elevation in feet above mean sea level.
 Contour Interval in level country 10 feet, in hilly country 20 feet.

A
 BRAIDBURN
 Condemned

B
 EAST ORANGE
 WATER RESERVE

C
 Remainder
 of
 Braidburn
 Lands

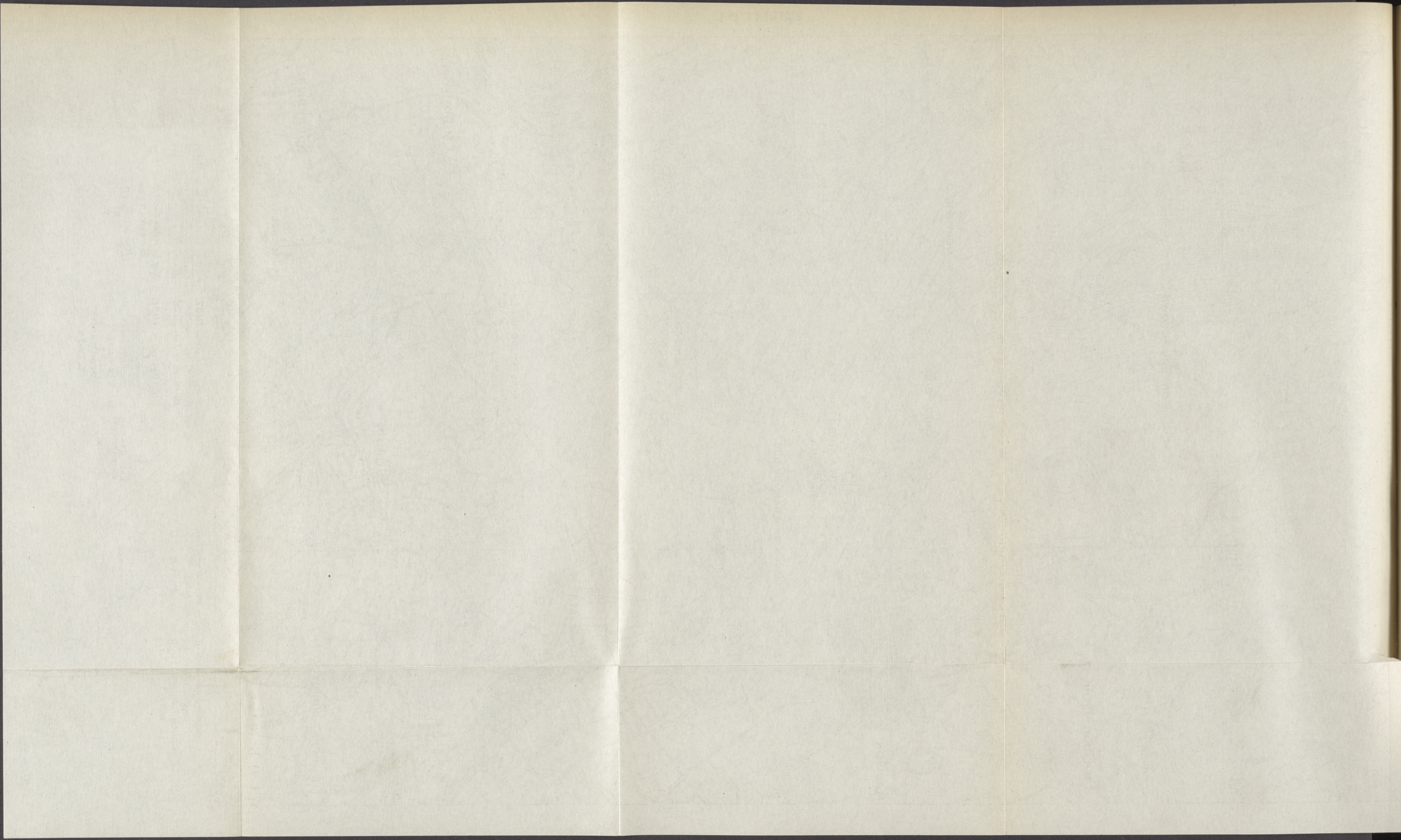
Surveyed in... 1887.
 by C. C. Vermeule, Topographer.
 Resurveyed in 1926.
 by L. P. Plummer, Topographic Eng.

Edition of... 1926.

BOONTON	PATERSON	HACKENSACK
MORRISTOWN	NEWARK	JERSEY CITY
PLAINFIELD	ELIZABETH	NEW YORK BAY

Key to adjoining Sheets
 Scale 2000' = 1"
 Mid section
 of
 P-1

EXHIBIT P-1



Stipulation.NEW JERSEY COURT OF ERRORS AND
APPEALS.

In the matter of the application of the City of East Orange for the appointment of three commissioners to fix the compensation to be paid for certain lands of the Braidburn Realty Corporation, a New Jersey Corporation, situate in the Borough of Florham Park, in the County of Morris, to be taken and condemned for public use. 10

BRAIDBURN REALTY CORPORATION
and BRAIDBURN COUNTRY CLUB,
Appellants,

v.

CITY OF EAST ORANGE,
Respondent.

} On Appeal. 20

It is hereby stipulated by and between Seufert & Elmore, attorneys for Braidburn Realty Corporation, and Braidburn Country Club, and Walter C. Ellis, attorney for the City of East Orange, that the foregoing shall constitute the judgment record. 30

It is further stipulated and agreed by and between the attorneys hereto that all provisions of the Condemnation Act and rules of the Court have been complied with.

WALTER C. ELLIS,
Attorney for Respondent.

SEUFERT & ELMORE,
Attorneys for Appellants.

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Stipulation.NEW JERSEY COURT OF ERRORS AND
APPEALS.

10 In the matter of the application of the City of East Orange for the appointment of three commissioners to fix the compensation to be paid for certain lands of the Braidburn Realty Corporation, a New Jersey Corporation, situate in the Borough of Florham Park, in the County of Morris, to be taken and condemned for public use.

20	BRAIDBURN REALTY CORPORATION and BRAIDBURN COUNTRY CLUB, <i>Appellants,</i>	}	On Appeal.
	<i>v.</i>		
	THE CITY OF EAST ORANGE, <i>Respondent.</i>		

30 It is stipulated by and between the attorneys for the respective parties hereto, that, notwithstanding the reasons set forth in the appellants' notice of appeal and grounds of appeal, the attorneys for the appellant will argue to the Appellate Court only the question of the withdrawal by the trial court from the jury, of the testimony given by the appellants' witnesses relating to damages to the remainder of the Braidburn lands, resulting from the use to which the condemned lands may be put by the withdrawal of subterranean waters. The appellants will argue only such portions of the grounds of appeal as relate to the rulings and charge of the trial court on the subject of damages

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Stipulation.

to the remainder of the appellants' lands by diversion of waters through subterranean channels. All other grounds of appeal are to be abandoned.

SEUFERT & ELMORE,
Attorneys for Appellants. 10

WALTER C. ELLIS,
Attorney for Respondent-Appellee.

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CHAPTER III

The first part of the book is devoted to a general survey of the subject. It is divided into three sections: the first deals with the history of the subject, the second with its present state, and the third with its future prospects. The author's aim is to provide a comprehensive and up-to-date account of the subject, and to show how it has developed over the years. He also discusses the various methods used in the study of the subject, and the results of these methods. The book is written in a clear and concise style, and is suitable for both students and researchers.

New Jersey Court of Errors and Appeals

BRAIDBURN REALTY CORPORATION and BRAIDBURN COUNTRY CLUB, <i>Appellants,</i>	} On Appeal.	10
<i>v.</i>		
CITY OF EAST ORANGE, <i>Respondent.</i>		

BRIEF OF APPELLANTS.

Facts. 20

This case arises out of the eminent domain proceedings brought by the respondent to acquire from the appellants approximately forty-three (43) acres of land on the Passaic River, situate in Morris County, for the purpose of securing two million gallons of water per day for the use of the City of East Orange, under a permit granted by the State Board of Conservation and Development.

The parcel under condemnation constitutes a part of a tract of land of approximately four hundred and three (403) acres, belonging to the Braidburn Realty Corporation, which is a holding corporation, and leased by the Braidburn Country Club. The club has two golf courses, a large clubhouse, water system, sewerage system and buildings appurtenant to a high class country club. 30

The land is situated in the Borough of Florham Park, adjacent to the Passaic River. The Country Club occupies the entire tract for golf club purposes. There is a country road running across the 40

easterly end of the property in the vicinity of the clubhouse. About fifty (50) acres of the tract lie between this road and the Passaic River, and forty-two (42) acres of this tract is the condemned land. The City of East Orange did not take the entire tract, but left a narrow strip of land between the condemned lands and the road. This road does not affect the property in any degree or separate the tracts so that one is not useable with the other. As a matter of fact, the tract east of the road is in daily use as a part of the plant, because the sewerage system, consisting of a septic tank and other apparatus and disposal beds operated for the benefit of the club-house building and grounds on the westerly side of the road, is located east of the road and the proceedings recognize this situation because there is an express reservation in the pleadings permitting the maintenance and operation and use of the disposal plant and the reservation of the right of way for the maintenance and operation across the condemned lands of some four hundred (400) feet in width for use in connection with the drains and beds of the disposal plant, and, therefore, appurtenant to the tract on the west side of the road. The evidence, likewise, indicates that the tract east of the road was useable in extending the golf courses now in operation on the tract west of the road and it is an evident fact and customary in most golf courses that public roads do not hinder the operation of or separate golf property.

Furthermore, the deed conveying the property to the Braidburn Corporation includes the property on both sides of the road (S. C., pp. 340 and 355) and the Court, during the hearing, ruled that the entire holdings of the Braidburn Corporation were, under the facts disclosed in the testimony, one tract (S. C., p. 323).

There is, therefore, no separation of the tracts lying east and west of the road which would, under the law, limit damages to the tract east of the road.

At the trial of the appeal from the award of the commissioners, the appellant contended that in addition to the value of the land, the appellant (the landowner) was entitled to show and submit to the jury, damages to the remainder of the property which would be suffered by the landowner by reason of the taking of the said land and damages to the remaining land arising from the use to which the condemned land is to be put, *i. e.*, from the diversion of underground water from the lands to the extent of two million gallons per day.

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The Court, during the course of the trial and again in its charge to the jury, withdrew from the consideration of the jury the question as to whether the appellant (the landowner) could recover under the condemnation proceedings, any damage to its water supply which would accrue by reason of the diversion of two million gallons per day by the respondent (S. C., pp. 212 to 221, and 324) and stated in its opinion, delivered during the trial, that any damages from the diversion of the water suffered by the landowner could be recovered from the respondent in a subsequent and distinct proceeding when, and only when, such damage had actually accrued.

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Proper exceptions were taken to the ruling of the trial judge (S. C., pp. 219 and 220) and his charge to the jury (S. C., pp. 328-331) on this phase of the case, and form the basis of this appeal.

All other questions in the case, except the rulings of the trial court in withdrawing from the consideration of the jury any question of damage to the remaining land, arising from the withdrawal of two million gallons of water per day, the use

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to which the condemned property is to be put, has been, by stipulation and consent, eliminated.

10 The question to be determined on this appeal, therefore, resolves itself into the question: Did the Court err in withdrawing from the jury the question of any damage which might accrue to the appellants by reason of injury to the remaining land arising from the use to which the condemned land is to be put and resulting in injury to its water system by the diversion of two million gallons of water per day by the respondent?

POINT I.

20 **The Court erred in withdrawing from the jury the question of damage to the remainder of the property of the appellants, by reason of the use to which the condemned property is to be put and resulting in injury to the water system of appellants by reason of the withdrawal, by the respondent, ^{of} ~~or~~ two million gallons of water per day from the land under condemnation in this proceeding.**

30 The rulings of the trial judge have placed the appellants in a precarious condition and as a matter of fact, have forced this appeal in order that the appellants' interest may be properly protected, and the law on the subject definitely established. The trial court, in eliminating from the consideration of the jury any question of damage to the appellants by reason of the injury which the appellants may suffer, was harmful to the appellants for the reason that such damage constituted a major portion of the appellants' claim. The testimony submitted shows that the pumping-plant now
40 in operation on the remaining lands of the appel-

lants, and which is operated to supply the clubhouse and various buildings, the grounds and golf-course, cost approximately twenty-six thousand dollars (\$26,000.00) to install and has a capacity of sixty thousand (60,000) gallons per day. The trial court limited the damages in this case to the value of the land taken and specifically ruled that any damage that the appellants might suffer by reason of the diminution or destruction of the water supply of the appellants could be recovered in the future Court proceedings when, and if, such diminution or destruction of the water supply occurs.

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While, as a matter of fact, the appellants would much prefer to wait to prosecute their claim for damages when they actually occur, nevertheless, in view of the rulings of the Supreme Court in the case of *Van Schoick v. The Delaware and Raritan Canal Company* (20 N. J. L. 249), the appellant is in the position of having to submit any and all question of damage to the trial court and if the rulings of the trial court are adverse to the appellant's contention, then, under the *Van Schoick* case, he is compelled to appeal the decision of this Court in order to properly protect his interest.

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The Court, in its ruling, made during the course of the trial, said (S. C., p. 212):

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"I have concluded that the question of damage to the remainder of the tract which is now the golf club proper of the Braidburn Company will be taken from the consideration of the jury. In other words, I shall not submit to the jury the question of damage to which the testimony yesterday related with regard to the diversion of water through subterranean channels, for the reason that I am of the opinion that that question is controlled by Meeker against the City of East Orange as

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found in 77 Law, at page 623, and in which the opinion was written by Chancellor PITNEY.

* * *

and after discussing the *Meeker* case, the Court continued (S. C., p. 216) :

10 “* * * The owner here alleges that it has
the right to anticipate that if the City of East
Orange puts down its wells on the tract in
question, it will necessarily divert the sub-
terranean water from the use of the land of
the Country Club and among other things
cause the well now there on the property to
go dry. I am inclined to the view that that
is in the speculative realm, as it were, and that
there is no proof in advance of the actual use
of the land by the City of East Orange which
would justify the Court in sending that ques-
20 tion to the jury; and I shall leave it therefore
to the remedy indicated in the case of *Meeker*
against East Orange, and if it should appear
after the operation by the City of its water
works on the land in question, if they do use
it, that there is the consequence which is
claimed here, then of course, the Country Club
would have a right of action against the City
of East Orange and the question as to reason-
able use by the City would be the issue in
such an action. My theory, therefore, is that
the present claim of damages is purely specu-
30 lative. * * *”

and again in its charge to the jury the Court said
(S. C., p. 324) :

40 “Now, I have ruled out of the case, and
therefore you are not to consider what ap-
parently was originally predicated by the
owner as an anticipated source of damage to
its property as a whole; for example, those
water rights, and you will recall that Counsel
in opening to you laid particular stress upon
the anticipated injury that the golf club, as it
were, or golf property, would experience in
the event that the City of East Orange actually

took the land in question, and sank its wells as contemplated by the permit, which was obtained from the State Board of Conservation and Development. It was there stated that the City intended to utilize the land sought for the purpose of driving wells and taking out two millions of gallons of water per day. However, as the Court considered the matter, it discovered that not only it but the jury as well were precluded from considering that phase of the claim of the landowner entirely for this reason: the Braidburn Company is not without remedy independently of this proceeding, and therefore if it should appear in the future that the City of East Orange upon driving its wells and attaching its pumps and extracting water did in fact cause the well referred to on the golf property to run dry, the state of the law is such that the Braidburn Company has the right upon proving the fact to be that the well goes dry or runs dry because of the operation of the wells and use of the wells and the withdrawal of water therefrom by the City of East Orange, I say the Braidburn Company has a perfect remedy either to sue the City because of its unreasonable use of that water supply or for any injury or damage that the Braidburn Company may necessarily and reasonably experience or any expense it may be put to in providing a water supply other than that from the well now upon the premises, because the Court of Appeals in this State has laid down this rule: 'Percolating underground waters may not be withdrawn for distribution or sale if it therefrom result that the owner of adjacent or neighboring land is interfered with in his right to the reasonable use of sub-surface water, or if his wells, springs, or streams are thereby materially diminished in flow, or his land rendered so arid as to be less valuable for agriculture, pasturage or other legitimate uses, such as golf playing,' and that is a legitimate use, I might say. Therefore a landowner has not an absolute and unqualified right in all water that

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may be found percolating in his soil, to do what he pleases with it, as with the sand and rock which forms part of the soil. His rights to use such water is only a reasonable right and to a reasonable extent for his own benefit, as in agriculture, irrigation, manufacturing, domestic consumption and the like, and without undue interference with the rights of other landowners to the like use and enjoyment of waters percolating beneath their land, or of water courses fed therefrom. Now, there is rather an interesting situation developed here with which I confess I was not familiar. Examination, however, shows that the State Legislature has now lodged in a State Board, called the Department of Conservation and Development, the authority and control of any underground water area which may be productive of potable water; that is, water for public use for drinking purposes, and that Board, apparently, is given authority and power over all land in the State, that is to say, where there is subterranean sources of a potable water supply, and it regulates the reasonable use that any city, for example, such as East Orange, may attempt to exercise, having acquired the right under a permit from the Department in question. So you are to observe that if it should appear as a fact in the future, in the event that the City undertakes to drive its wells and operate them on this land, that it is injuring the water supply or limiting the water supply, or indeed, taking it entirely from this golf club property, the owner thereof has a remedy, either by an appeal to the State Department in question or to resort to the Courts to recover compensation for any damage it may suffer in that regard, and indeed, it may apply for an injunctive relief in the Court of Chancery of the State to restrain an unreasonable use by the City of such water supply. Therefore, the rule of reason has been adopted, apparently, by the Appellate Court, the highest Court in the State, and that becomes the rule of law for our guid-

ance here. You are therefore instructed to disregard entirely the suggested damage or claim thereto on the part of the Braidburn Company with regard to the water supply or the possible drying up of its well, as originally claimed."

The Court in its ruling and in its charge to the jury, withdrew from the jury's consideration the question as to damages to the remainder of the property of the appellants, which will be suffered as a result of the respondent withdrawing two million gallons of water per day. This ruling and the charge of the jury, is directly contrary to the law of this State as laid down in the case of *Van Schoick v. The Delaware and Raritan Canal Company* (20 N. J. L., p. 249), which was decided in 1843 and which has been consistently followed and cited ever since.

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The *Van Schoick* case is absolutely dispositive of the issue in the case at bar.

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In the *Van Schoick* case The Delaware and Raritan Canal Company, had condemned a portion of the lands of the plaintiff. At the trial on the appeal from the award of the commissioners at the Burlington Circuit, the trial judge ruled that the jury was not to consider injuries which had not yet been done, but, which the jury might have supposed would thereafter arise as a result of the erection of the canal. After the canal was complete the plaintiff's remaining lands were damaged by water leaking through the embankments of the canal and destroying the crops and rendering the land useless, and he brought an action to recover his damages. The defense of the Canal Company to this subsequent action, was that the land had been taken by condemnation proceeding, by the Canal Company against the plaintiff in the *Van Schoick* case and contended that the damages

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claimed in this case had already been awarded by the former jury as they were, or ought to have been embraced in that issue.

10 The plaintiff answered that in point of fact, they were not so included, but by the express direction of the Court, the jury were instructed that they could not assess damages for the injury arising from washing away the plaintiff's soil or for the deterioration of his grass and crops occasioned by the leakage from the canal. In its opinion the Court said (*Van Schoick v. The Delaware and Raritan Canal Company*, 20 N. J. L. 249, at p. 253):

20 "To determine the first of these questions, we are to inquire into the true construction of the act, and what the legislature meant by the phrase, 'damages sustained by the owner.' They certainly did not mean damages done to the land actually taken and occupied or to be taken and occupied by the company, for the owner is to receive the price or value of such lands and the company are to take and hold them. And notwithstanding the legislature used the word *sustained*, in the past tense, it is equally clear, from an examination of the whole act, that they did not intend to limit the assessment to such damages as the owner has sustained at the time of the assessment, for the act does not contemplate that any

30 damages have accrued to him at the time it contemplates the assessment to be made, for the company have no right to the possession of the land, or to construct their canal upon it, or in any wise to affect the owner's interest or property 'till the same has been valued and the damages assessed; and consequently the law will not presume, that the company have committed any damages or the owner sustained any. The act clearly intends such prospective damages as may arise from the construction and use of the canal. It may be

40 asked then, if the legislature did not mean to limit the term damages to the land actually

taken by the company, or to damages already sustained by the owner, what damages did they mean? This question can only be answered in general terms, for it would be impossible to enumerate every species of injury to which the owner of land might be subjected by the construction of a canal across it. These must depend upon the peculiar circumstances and situation of the land taken, and its relative position to other lands, property or rights of the owner. I concur in that part of the charge above recited, where the judge says, that the damages intended are such as are necessarily occasioned by the construction of the canal, or necessarily result from its existence, and use, to the property or rights of the owner, whose lands are taken. But in construing the act, I would not limit them as the learned judge did in a subsequent part of his charge, to such only as would be distinctly foreseen and for which a present price could be fixed. I believe that the legislature intended *all* damages accruing to the owner of lands from any and every physical effect produced by the construction and use of the canal; whether the same were clearly to be seen and easily estimated before the construction of the canal, or whether they were uncertain and doubtful results from such construction. I believe that the legislature intended that the commissioners should assess all damages sustained by the owner, or likely to be sustained by him from the construction and use of the canal, whether they arise from the alteration or destruction of a public or private way, the exclusion or the overflowing of waters, the alteration or change in the current of streams or in no, the destruction of crops, the deterioration of adjacent lands by leakage, or whatever other damages may result from the natural and physical effects produced by the canal, provided always that the canal shall be constructed according to the provisions of the act and with proper care and skill. I believe that the legislature in-

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10 tended that the award of the commissioners, or in case that should be set aside, the verdict of the jury followed by the judgment of the court, should be final and conclusive between the parties, both as to the value of the land and the damages sustained. And I do not believe that they ever designed that after such proceedings the company should be subjected, from time to time, during the whole period of its existence, to an action at law by every landholder on the line of the canal, to recover damages for some injury which he may allege was not foreseen and for which consequently he was not compensated. Such a construction would have been a most effectual bar to the enterprise of erecting a canal; for no man would have embarked his capital in a work, the cost of which could never be ascertained 'till the charter expired. * * *

20 (and at page 255):

30 “* * * This brings me to the second question, whether having omitted to do so, or having been prevented by the court from doing so, he can now maintain this action. Believing that the statute provided a remedy for the injuries complained of in this action, I consider the plaintiff as confined to that mode of relief and debarred from an action at common law. It is no answer to say that he was deprived of his remedy under the statute, by the act of the court, if the court committed an error, the plaintiff should have sought to have it corrected by a motion for a new trial.”

40 In so far as the question raised by this appeal is concerned, the *Van Schoick* case and the case at bar are identical in theory. In the *Van Schoick* case the landowner was prohibited by the Court from offering any testimony as to damages which might be sustained to the remaining land by reason of the leakage of the canal; and in the case at bar, the landowner submitted evidence not only

that wells in the vicinity of the present water reserve of the City of East Orange, had been injured when the City of East Orange started to pump water from its present reserve, and in one or two instances wells had absolutely gone dry; and further, since the pumping of the East Orange wells, in addition to the water supply used by the several municipalities in the immediate vicinity, that the well on the appellants' remaining property had been reduced in height.

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The condemnation is based upon the right of the City of East Orange to take water.

The pleadings show in detail the action of the various Boards and Departments of the City of East Orange, the application of the City of East Orange to the State Board of Conservation and Development, the determination of the State Board of Conservation and Development, and its consent to permit the withdrawal of two million gallons of water per day from the lands of the appellants, under condemnation, and the determination of the City of East Orange to abstract water from the land being condemned, to the extent of its permit.

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The evidence submitted, and it is not now a question at issue on this evidence under the ruling of the Court, shows that in the opinion of the expert, Mr. Clyde Potts (S. C., pp. 134-160), who is now Mayor of Morristown and who is intimately acquainted with the lands in question, the source of the underground water supply in the immediate vicinity, and the operation of the water plant of the City of East Orange, based on his experience and many years' study of all available records and data, shows that the source of water supply of the appellants will be materially affected and probably ultimately destroyed by the pumping and abstraction, by the City of East Orange, of two million gallons of water per day, within approxi-

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10 mately one thousand (1,000) feet from the present water supply system of the appellants. There is also the testimony of Mr. Helm (S. C., pp. 165-170) and Mr. Fish (S. C., pp. 172-180) showing the effect upon the wells and springs in the immediate vicinity of the lands of the appellants and on its own lands, arising from the present pumping by the City of East Orange from its wells immediately across the Passaic River from the property in question.

20 The test as to the damages to which the landowner (the appellant) is entitled, as laid down in the *Van Schoick* case, and followed for almost ninety (90) years, is that the verdict of the jury in assessing the value of the land and damages sustained is conclusive as to all damages sustained by the landowner, except those caused by the negligent construction or operation of this plant. Therefore, the ruling of the trial court in this case, in withdrawing from the consideration of the jury, was harmful error in that it deprived the landowner from having the jury consider one of the elements of damages likely to accrue to the remaining land, and the one that will most seriously injure the landowner.

30 *Corpus Juris* on the question of *Conclusiveness and Effect of Judgment or Award* (20 C. J., p. 1067), says:

40 "The parties and their privies are concluded as to all matters which were put in issue, or might have been put in issue, in the condemnation proceedings, such as * * * the amount and items of compensation. The owner must recover in one proceeding all the damages which have resulted, or are reasonably liable to result in the future, from a proper construction and operation of the improvement, and no subsequent action will lie to recover items which were or might have been considered in

the original proceeding, the presumption being that all proper damages were considered in such proceeding."

They cite numerous cases from almost every State in the Union, including New Jersey—*Van Riper v. Essex Public Road Bd.*, 38 N. J. L. 23; *Van Schoick v. Delaware, etc., Canal Co.*, 20 N. J. L. 249.

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We desire to submit a short résumé showing the cases in which courts of this State have followed the theory of the *Van Schoick* case, that is, that the judgment of the jury in this case is final and conclusive between the parties. In *Trenton Water Power Company v. Robert Chambers*, 13 N. J. Eq., page 199, decided 1860, the Court said:

"The Master reports that he has estimated the value of the lands taken, and the damages sustained by reason of such taking, at the time of the taking. But the damages appraised are not to be limited to the time of the taking. It is well settled that the appraisement includes prospective damages, resulting naturally and directly from the work of the complainants, for all time. *Ten Eyck v. The Del. and Rar. Canal Co.*, 3 Harr. 200; *Van Schoick v. The Del. and Rar. Canal Co.*, Spencer 249; *Del and Rar. Canal Co. v. Lee*, 2 Zab. 243."

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In 1862, this Court, in the case of *Hoagland v. Veghte*, 30 N. J. L., page 516, said:

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"The case of *Van Schoick v. The Delaware and Raritan Canal Company*, Spencer 249, is relied on as in point. * * * The judge who delivered the opinion of the court considered the words 'damages sustained' as used in the law, although in the past tense, and therefore properly meaning such damages as had at the time accrued, to have a different meaning, because the company had no right to take the land or construct the canal, or in any wise affect the owner's interest or property, till the same had been valued, and the damages as-

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sessed. The law, he said, clearly contemplated such prospective damages as might arise."

In 1880, this Court, in the case of *Bright v. Platt*, 32 N. J. Eq., page 362, said:

10 "Their simple duty is to ascertain what sum of money is an equivalent for the rights which the railroad company seeks to acquire, and the injuries it is to inflict by the construction and operation of its road."

In 1905, the Supreme Court, in the case of *Perrine v. Pennsylvania Railroad Co.*, 72 N. J. L., page 398, said:

20 "Next it is insisted that the release embodied in the Keough deed discharges the damages in question. The charter already referred to, besides authorizing the construction and operation of the railroad, provides in the usual terms that if the company cannot agree with the owner of the required lands for the use or purchase thereof, commissioners are to be appointed 'to appraise the said lands and to assess the damages,' and it is made their duty 'to make a just and equitable assessment or appraisement of the value of the same (lands) and assessment of damages aforesaid.' And appeal is provided for, in which case it is made the duty of a jury 'to assess the value of the said land and damages sustained.' Man-
30 ifestly the award was to include not merely the value of the strip of land occupied by the railroad, but all incidental damages to the adjacent lands which might result in the future from the construction and operation of the railroad according to the provisions of the charter, and with proper care and skill. *Van Schoick v. Delaware and Raritan Canal Co.*, Spenc. 249; *Trenton Water Power Co. v. Chambers*, 2 Beas. 199."

40 In 1908, the Supreme Court, in the case of *Zimmerman v. Hudson and Manhattan Railroad Company*, 76 N. J. L., page 251, said:

“* * * The method of procedure to be followed by the commissioners appointed under this section of the General Railroad law was the subject of decision by this court in the case of *Pennsylvania Railroad Co. v. National Docks Railroad Co.*, 28 Vroom 86, and it was there declared that the duty of the commissioners was simply to ascertain what sum of money is an equivalent for the whole right which the condemning company is to acquire, and the whole injury which it is to inflict, leaving to other tribunals the distribution of the fund among the claimants of particular estates and interests. In so holding we followed the decision of the Court of Errors and Appeals in *Bright v. Platt*, 5 Stew. Eq. 362, where the same view was expressed as to the effect to be given to a provision almost identical in its language, contained in the charter of the New Egypt and Farmingdale Railroad Company. The latter decision is binding upon this court.”

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In 1912, this Court, in the case of *Herr v. The Board of Education of Newark* (82 N. J. L., p. 610, Court of Errors and Appeals), cited with approval the case of *Bright v. Platt*, 5 Stew. Eq. 362, said (referring to the commissioners' duties):

“* * * Their simple duty is to ascertain what sum of money is an equivalent for the rights which the railroad company seeks to acquire, and the injuries it is to inflict by the construction and operation of its road.’ This decision has been constantly followed.”

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On March 25, 1930, in the case of *James Bowen v. State Highway Commission* (8 Misc. Reports, p. 252), which was a case in which the landowner had claimed additional compensation after a portion of his property had been taken for highway purposes, the Supreme Court said:

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“Now we think that the relator should not be permitted to stand by and see the issue

framed which did not include all his alleged damages and then after the trial of such issue and the payment of the compensation awarded him in such action, come again into court and demand further damages which might have been included in the original proceeding."

10 The decisions set forth, established beyond any peradventure that the amount awarded by the commissioners, or on appeal by the jury, is conclusive as to all prospective damages that may be suffered by the landowner subsequent to the condemnation proceedings, and that the decision of the commissioners and the verdict of the jury is conclusive as between the parties; and that, therefore, the withdrawal from the consideration of the jury of any question of damages which the appellants may suffer by reason of the diminution or drying up of their present water supply, is harmful error and prevents the landowner from ever obtaining redress which it will undoubtedly suffer.

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In its ruling withdrawing this question from the jury the trial court misinterpreted the substance and rules laid down in the *Meeker* case (*Meeker v. City of East Orange*, 77 N. J. L., at p. 623) in that the Court failed to distinguish between the rights of the parties to the condemnation proceedings and the rights of the adjacent property owners, not included in the condemnation proceedings.

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The *Meeker* case was an action for damages by the owner of the property adjoining the property of the City of East Orange because of the diminution of his water supply, caused by the withdrawal of water by the City of East Orange from the adjoining lands, and the Court laid down the doctrine of reasonable use. But, this case is not in point, for two reasons: the first is that the question of reasonable use does not apply in a condemnation case and, secondly, no part of *Meeker's*

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land had been condemned by the City of East Orange.

It is admitted that each and every adjoining property owner to the Braidburn and East Orange reservation, except the appellants, will have a right of action if the withdrawal of two million gallons of water per day affect the supply of any of said property owners, but, the same is not true in the case of the appellants. Again referring to the *Van Schoick* case, the verdict of the jury is conclusive as between the parties, and the appellants in this case can have no action for the recovery of any damages they may sustain by reason of the withdrawal of two million gallons of water per day by the City of East Orange.

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The Court further stated that the question of damages was within the realm of speculation, and it is submitted that here again it misinterpreted the meaning of the word "speculation" as laid down in the decisions. The testimony submitted, both as to past occurrence and as to the probability of the drying up of the Braidburn well was not in the realm of speculation, but rather and actually the best possible testimony obtainable as to the prospective damages that will be suffered by the appellants.

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It is, therefore, respectfully submitted that the rulings of the trial court should be reversed to the end that a new trial may be granted, either *de novo*, or as to the prospective damages to the water supply system that will result from the taking of the land in question and the withdrawal therefrom of two million gallons of water per day by the City of East Orange.

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Respectfully submitted,

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New Jersey Court of Errors and Appeals

BRAIDBURN REALTY CORPORATION
and BRAIDBURN COUNTRY
CLUB,

Appellants,

vs.

THE CITY OF EAST ORANGE,

Respondent.

On Appeal.

BRIEF OF RESPONDENT.

Facts.

The appeal in this case brings before the Court a condemnation case tried in the Morris County Circuit Court. The respondent proceeded under the Eminent Domain Act (Revision 1900 as supplemented and amended) C. S. 2181. Prior to the filing of its petition the respondent, as required by the statutes regulating the Board of Conservation and Development, obtained from said Board consent to condemn the lands involved herein and to abstract water therefrom, in case water may be found therein, to an extent not exceeding an average of two million gallons per day. No permission was sought and none granted the respondent to condemn the right to draw water from any other lands of the appellant or other abutting owners. The City of East Orange at the present time has a holding of about 2,200 acres in Livingston and Millburn Townships, Essex County, a considerable portion of which abuts the Borough of Florham Park in Morris County, and from which holdings the City obtains its entire underground water supply. The lands condemned herein are contiguous to

other lands of the respondent and are located in the Borough of Florham Park immediately across the Passaic River from the Dickinson well field of the City of East Orange, where three wells have been for many years in operation within a few hundred feet of the Passaic River. To meet the demands of its rapidly increasing population, the City is enlarging its water reserve, and the lands involved herein consist of forty-three (43) acres, five acres of which are permanently in the bed of the Passaic River. The remaining (38) thirty-eight acres are low, marsh and swamp lands, are under water for a considerable portion of the year, and after every heavy rain remain under water sometimes for weeks at a time.

The appellants are the owners of another tract of land in Florham Park, on a portion of which is located a golf course. The last mentioned tract lies northwesterly and is separated by a public highway known as Brooklake Road, from the tract out of which the lands condemned are taken. The respondent has not condemned all of the last mentioned tract, but is taking only that portion lying southeasterly of a line running parallel with and two hundred and twenty-five (225) feet from the southeasterly side of Brooklake Road. In other words, the respondent has left with the appellants a frontage on Brooklake Road two hundred and twenty-five (225) feet in depth lying east of Brooklake Road, and has taken the remaining portion of the said tract to the Passaic River. Until test wells are sunk, the respondent has no way of ascertaining whether there is water in the lands condemned, and whether or not it will be profitable to develop them. The most that can be said is that the City hopes to find water there. The City has not condemned any water rights or other rights in any other lands of the appellants.

At the trial the appellants called one witness who offered testimony as to an anticipated damage to a well located on other lands of the appellants at a remote point, if and when the respondent should sink wells and commence pumping. The trial court, at the conclusion of appellants' case, withdrew the testimony of this witness from the jury for the reason that in advance of actual use of the lands by the respondent, such testimony was irrelevant. Also because the owners would have redress against the City for some subsequent and unlawful act, and further, "that the proofs of the landowner are of such a nebulous and uncertain character at the present time that we cannot say that there is any measure of damage that this jury may apply to the theory of any reasonable use." And for the reason: "that the present claim of damages is purely speculative. That there is no evidence which would justify submitting that question to the present jury" (see pp. 216 & 217, State of Case).

It is stipulated between the attorneys for the parties that all provisions of the condemnation act and rules of the Court have been complied with and that the only question to be submitted to this Court is the rulings and charge of the trial court on the subject of damages to the remainder of the appellants' lands by diversion of waters through subterranean channels. All other grounds of appeal are abandoned (see pp. 360 & 361, State of Case).

LAW.

Before answering Point 1, and the only point argued in the appellants' brief, it is interesting to refer to the State of the Case and review the character of the testimony offered by the appel-

lants' witness in reference to the question of damage to remaining lands which might result from future operations of the City's water department. The testimony of Mr. Clyde Potts (State of Case, p. 134) is the testimony the Court withdrew from the jury's consideration and is now the subject of appellants' appeal. Mr. Potts, after testifying as to his experience, stated that he thought a well owned by the appellants and located about 1,200 feet away from the Passaic River would be effected if the respondent should sink wells and abstract from the lands condemned water to the extent of two million gallons per day. Thereafter he was asked by the appellants what the damage would be to the remainder of appellants' lands, and over the objections of respondent, was permitted to testify that if the appellants desired to purchase water from the Borough of Florham Park it would cost a certain amount to lay mains to a particular point, and that if they purchased a quantity of 60,000 gallons per day from the Borough of Florham Park it would cost \$3,000 per year. The witness then attempted to capitalize this sum and the appellants offered this testimony as the only measure of damages to the remainder of the appellants' lands by reason of any possible diversion of waters. The testimony on this point (State of Case, pp. 147-148) is as follows:

"A If you have to buy water of Florham Park, there would have to be a six inch pipe laid from the present pumping station to the nearest point of the Florham Park main. And in my calculation I allow a sum of money for connection and I allow nothing for the obsolescence of the present pumping station. My judgment was if you laid a new main from the present pumping station of Florham Park and brought water from

Florham Park, that would be in lieu of the present pumping station and let the present pumping station be counted as junk. The well would have no further use of it and the pump as a matter of fact very little value.

Q Did you allow a sum for this 125-foot connection from Braidburn Club to Florham Park main? A I assume you use three thousand dollars and that would cover the item. The average use of 60,000 gallons a day.

Q That would be the cost per year? A Yes.

Q We don't know whether to capitalize that cost? A Yes, that's a customary practice in engineering where you have to substitute something, you take the upkeep and capitalize it. I figure up so much money laid aside, the interest of which would be for substitution in years; that would be in this case.

Q What's your figure?

Mr. Ellis: Object, I don't think that's a measure of damage in this case at all.

The Court: I will allow him to answer. You may have an exception. I will define the measure of damages, if any.

A Well, I took the cost of three thousand dollars a year and arrived at the capital for the year. It would be fifty thousand dollars at six per cent. In other words fifty thousand dollars laid aside drawing interest. If you take four and a half per cent., your principal income for the next few years would have to be pretty close to seventy thousand dollars, in other words, the sum that would buy water from Florham Park in case they make this connection, six thousand one hundred and twenty-five dollars."

On cross examination (State of Case, pp. 158-160):

"Q Mayor, in computing, you gave some figures a while ago about three thousand

dollars a year's cost to Braidburn Company if they did take water from the Borough of Florham Park. Have you deducted from that figure the present expense of operating the well of the Braidburn Country Club? A I have, yes, sir, that's in the cost. The gross cost is larger.

Q Is that three thousand dollars made up on the consumption of 60,000 gallons a day?

A Yes.

Q For every day in the year? A Yes.

Q Don't you think that's an unfair figure?

A Well, they may have to buy 60,000 gallons a day, and if they do—

The Court: No—

A (Continued.) I don't think it's unfair.

The Court: They don't pump 60,000 gallons a day a year now.

The Witness: No, sir.

Q Well, why do you compute the cost of supplying water to Braidburn at 60,000 gallons a day when you know they don't use that much water? A That was the maximum figure given me by them and it was a question which Judge Seufert asked me. He asked what was the cost to secure 60,000 gallons; he didn't ask me my judgment whether that was a proper figure or not.

Q Now, how much water does the whole Borough of Florham Park use per day? A Not much over 60. They was not using 50 when I started the plant.

The Court: What's the population of Florham Park?

The Witness: 1,200, I think about that. I think about 200 houses took water.

Q You know that country clubs are not open for golf-playing purposes during the winter months? A Yes, in this climate I know they are not.

Mr. Ellis: That is all."

Mr. Potts had not qualified as a real estate expert or as any other expert competent to testify as to damages to remaining lands, nor did the appellants offer the testimony of any real estate expert to show what respondent claims would be the proper measure of damages, if any, in such a case, namely, the difference in the market value of remaining lands of the appellants before and after any subterranean water is abstracted from any such remaining lands.

Respondent respectfully maintains that the aforesaid testimony was properly taken from the consideration of the jury as a measure of damages, and that in as much as no other measure of damages was offered by the appellants, there was no testimony to support appellants' claim for any possible damage to remaining lands resulting from a diversion of water in the future.

An award in condemnation should include only such damages to the remainder of the tract, from which a part is taken, as have been proven will naturally and necessarily result from the lawful use of the premises, and should not include damages for any act that could only arise from the unlawful use of the lands acquired.

Appellants now maintains that, although at the trial they offered no testimony to support such a claim, except as previously indicated herein, they were entitled to damages to some remote remaining lands of appellants which might result in the future from a diversion of waters resulting from future operations of the respondent. They cite as their authority for such a claim the case of *Van Schoick v. The Delaware and Raritan Canal Company*, 20 N. J. L. 249. It should be borne in mind that the respondent in condemning the forty-three (43) acres in question acquired

only such water rights as the law gives as incident to such ownership. It thereby acquired no water rights or any other rights in other lands of the appellants. The City may, of course, make any lawful use of the lands it has condemned, but if in its use, *by some wrongful or unlawful act*, it interferes, in the future, with property rights incident to adjoining lands, by whomsoever owned, it is liable to damages for such infringement. As a matter of fact, neither the appellants nor the respondent knows at the present time whether there is any subterranean water in the lands condemned, or if so whether or not it would be in such a quantity as to warrant development. Nor is there evidence at this time from what source or direction the water flows, if same may be found therein. Nor does anyone know whether or not it would affect the appellants' well at a remote point. This question remains one of the secrets of the underground, and may only be determined by future operations.

Respondent claims the Van Schoick case above referred to has no particular relevancy to the present situation. The statute there under consideration was an act to incorporate the Delaware and Raritan Canal Company passed in 1830. The suit was an action on the case and the plaintiff in his declaration alleged damages to his crops and lands resulting from a leakage of waters from the canal and from the embankment of the canal flooding his lands and preventing the flow off of surface waters. The appellate court held that the plaintiff should have recovered such damages in the condemnation suit and could not maintain subsequent actions for damages arising from the causes set forth in his declaration. The opinion of the Justice states: "I concur in that

part of the charge above recited where the judge says that the damages intended are such as are necessarily occasioned by the construction of the canal or necessarily result from its existence and use to the property or lands of the owner whose lands are taken." He then proceeded to state that the statute under consideration required to be included "all damages arising to the owners of lands from any and every physical effect produced by the construction and use of the canal, if constructed according to the provisions of the act, and with proper care and skill; whether they were damages to be clearly seen and easily estimated, or were uncertain and doubtful results of the construction." The Court found that there was no evidence that the canal was constructed carelessly or with any want of due and ordinary skill. Respondent maintains that the above decision is not at all analogous to the present situation. It requires no stretch of the imagination to understand that leakage from an artificial canal is one which naturally and necessarily results from its existence, and furthermore, that its embankments naturally and necessarily prevent the flow off of surface waters from contiguous lands. Obviously, such physical effect would result from the construction and use of the canal when constructed according to the provisions of the act and with proper care and skill. Damages for such should, of course, have been properly proven in the condemnation proceedings. *But the above case did not hold that an owner would be barred from an action against the canal company for some subsequent unauthorized or unlawful act of the company effecting other lands of the owner.* This point is stressed in the case of *Delaware and Raritan Canal Company v. Lee*, 22 N. J. L. 243, in which the then Chief

Justice commented on and explained the aforesaid rule. The Court had this to say, pages 248-250:

“It is said that the damages of which the plaintiff complains result directly from the construction of the canal, and that, a mode of compensation for these damages being provided by the charter, no action will lie; and in support of this position, the decision of this court in *Van Schoick v. the Del. and Rar. Canal Co.*, Spenc. 249, is relied upon. Justice Nevius, by whom the opinion of the court in that case was pronounced said: ‘I believe that the legislature intended all damages accruing to the owner of lands from any and every physical effect produced by the construction and use of the canal, whether the same were clearly to be seen and easily estimated before the construction of the canal, or whether they were uncertain and doubtful results from such construction. I believe that the legislature intended that the commissioners should assess all damages sustained by the owner, or likely to be sustained by him, from the construction and use of the canal, whether they arise from the alteration or destruction of a public or private way, the exclusion or the overflowing of waters, the alteration or change in the current of streams or in the destruction of crops, the deterioration of adjacent lands by leakage, or whatever other damage may result from the natural and physical effects produced by the canal; *provided always*, that the canal shall be constructed according to the provisions of the act and with proper care and skill.’ This language is certainly very comprehensive, and its terms may include the damages now sought to be recovered. It is, however, a well settled rule, that the language of a judicial opinion is always to be construed in reference to the case under consideration. As applied to the facts of that case, this language may be taken as strictly proper and as sufficiently guarded. In that case the plaintiff had brought his action for

damages, resulting in part or in whole from the construction and use of the canal across the lands of the plaintiff, for leakage from the canal and injuries to the soil, by shutting out the direct flow of the freshet of the river, and changing the currents of the water. But the learned judge, I apprehend, never intended to say that the damages awarded by the commissioners to the landholder for the construction of the canal included damages arising from the construction of a work at a remote point in no wise dependent upon or connected with the construction of the canal across the plaintiff's land. The damages complained of by the plaintiff in the present case do not result from the construction and use of the canal across his land. They have not the remotest connection with, or dependence upon that act, but result from the act of the company in obstructing a stream at a point remote from his premises. These are not, in the language of the judge, uncertain and doubtful results from the construction of the canal, much less such as were to be clearly seen and easily estimated. Such damages could by no possibility have been foreseen or estimated by the commissioners, nor do I apprehend that they could have been within the contemplation of the legislature. It never could have been the design of the act, that if the company remunerated the landholder for damages sustained in the construction of the canal across his farm, they were authorized, at a remote point in its course, to divert a water course from a valuable mill seat, or to submerge his meadows by penning back the water from below. I am confirmed in the opinion, that no such inferences were designed to be drawn from the language of the court in the case of *Van Schoick v. The Del. & Rar. Canal Co.*, because the same learned judge who delivered the opinion in that case, on another occasion held this language in regard to the charter of company: 'The whole scope of their charter indicates clearly that the legis-

lature did not mean to interfere with private and vested rights without providing a recompense to be paid by the company, and not by the state. And if injury or damage has accrued to the private property or rights of others, which could not be foreseen or anticipated, and therefore not provided for in the charter of the company, this constitutes no reason why the party thus injured should not be compensated. (*Ten Eyck v. The Del. and Rar. Canal Co.*, 3 Harr. 200.)” (Italics mine.)

The rule thus established, that a right of action will lie for subsequent injuries to the owners remaining lands from some unlawful or unauthorized act, is recited in an opinion of the Court of Errors and Appeals in *Delaware and Raritan Canal Company v. Salmon*, 39 N. J. L. 299, in which case the following was held:

“Nor will the fact that the company acquired the right of way for its railroad of the adjacent owner, by grant or condemnation, create a servitude of this nature. A conveyance of lands to a railroad company for railroad purposes, or their condemnation for that purpose only, bars the recovery of such damages as naturally and necessarily arise from the use of the premises for the authorized purpose. It will not exclude the recovery of damages for injuries resulting from the unskillful or improper construction of the road, or negligence in operating it. *If the subsequent injury results from negligence, or the want of skill in executing the work, or from doing some wrongful or unauthorized act, or omitting what the law requires to be done in operating the railroad, the remedy by action remains, notwithstanding the conveyance or condemnation.*” (Italics mine.)

The rule thus laid down that in a condemnation suit damages should be found only for such injuries as naturally and necessarily arise from

the use of the premises for the authorized purpose and should not include damages for some subsequent, wrongful and unauthorized act is directly applicable to the present case. It indicates that in condemnation proceedings the rule of damages is the same as in other actions of law, and merely imaginative, speculative or fanciful injuries cannot be considered. In the present case the respondent will, if water is found therein, have the right to take *from the lands condemned* a reasonable supply of water, but if it proceeds to take an unreasonable supply of water so that it effects the lands of the appellant or any other owner, such operation would constitute a wrongful and unauthorized act in the language of the above cited case. In other words, the doctrine of "reasonable user" as established in the case of *Meeker v. East Orange*, 77 N. J. L. 623, would apply. In the last mentioned case this court decided that the abstraction of percolating underground water for distribution or sale to the inhabitants of East Orange to such an extent that it interfered with the wells and springs of adjoining owners was a wrongful and unauthorized act. The doctrine of the Meeker case may be briefly stated by quoting paragraphs 2 and 4 of the syllabus as follows:

"2. A landowner has not an absolute and unqualified property in all water that may be found percolating in his soil, to do what he pleases with it, as with the sand and rock that form part of the soil; his right is to use such waters only in a reasonable manner and to a reasonable extent for his own benefit, as in agriculture, irrigation, manufacturing, domestic consumption, and the like, and without undue interference with the rights of other landowners to the like use and enjoyment of waters percolating beneath their land, or of water-courses fed therefrom."

“4. Percolating underground waters may not be withdrawn for distribution or sale if it therefrom result that the owner of adjacent or neighboring land is interfered with in his right to the reasonable user of subsurface water, or if his wells, springs or streams are thereby materially diminished in flow, or his land rendered so arid as to be less valuable for agriculture, pasturage or other legitimate uses.”

Respondent, therefore, respectfully contends that the judgment of the Morris County Circuit Court should be sustained and the appeal dismissed for the reasons argued aforesaid, namely:

That the trial court properly excluded from the jury's consideration the testimony of appellants' witness relating to possible damages which might result to appellants' remaining lands from some subsequent, wrongful and unauthorized use by the respondent of the lands condemned, and for the further reason that the measure of damages given by the appellants' witness was an improper measure of damages and could not have been submitted as such to the jury. No other testimony to measure damages by diversion was offered.

Respectfully submitted,

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of Respondent.

