NEW JERSEY COURT OF ERRORS AND APPEALS.

MAXIME BOUQUET, *Plaintiff-Appellant,* *vs.* HACKENSACK WATER COMPANY, *Defendant-Respondent.*	Appeal from Supreme Court.

BRIEF OF RESPONDENT.

Statement of Facts.

This case was tried before Judge Speer in the Hudson Circuit Court, and resulted in the direction of a verdict for nominal damages on motion of the defendant.

Plaintiff is the owner of a lot of land and the building erected thereon which fronts on River Road in North Hackensack, and which road separates the plaintiff's land from the Hackensack River. Plaintiff's residence is about one hundred fifty feet from the river; the plaintiff has no riparian right; the plaintiff demanded damages because of an alleged nuisance created by the defendant. The defendant is a water company incorporated under the laws of the State of New Jersey with the usual powers incident to such corporation, and in the exercise of its corporate powers, was, at the time of the alleged injury to the plaintiff, engaged in constructing a reservoir up-stream several miles from the lands of the plaintiff, and in the course of this construction work, it is claimed by the plaintiff that the de-

fendant stirred up the river bed and caused the water to become riled and discolored, and this discolored water descending down-stream past the property of the plaintiff, caused a sediment of mud to collect on the foreshore, and the discoloration of the water was such that boarders from the plaintiff's house would not use the same for swimming as they were wont, and they left the boarding house of plaintiff, who thereby lost their custom and the resulting revenue from their board. This loss is set up as the damage sustained by the plaintiff.

The direction of a verdict for six cents damages was assigned as the grounds of appeal before this Court.

POINT I.

The direction of the verdict was proper in this case, because the injury, if any, was of a public nature and the plaintiff failed to show any injury to him differing in kind and decree from the injury suffered by the public at large.

For the purpose of the motion made before the trial judge, the allegation that the defendant caused the discoloration of the water, and that the same was a nuisance, was taken as proven (page). It therefore left for consideration on the motion only the question of the damages sustained by the plaintiff.

POINT II.

The Passaic River is a navigable stream and is, therefore, a public highway. This was admitted as a fact (Case, page 65).

The plaintiff was not a riparian owner and the foreshore was the property of the State of New Jersey, therefore, any injury sustained by the plaintiff by reason of the alleged acts the defendant causing a deposit of mud on the foreshore would be a public nuisance and could be abated only by action on behalf of the public.

Referring to the tidal stream in *Stevens v. Paterson & Newark Railroad,* the Chief Justice said:

> "As a general rule, the public domain is subject altogether to the control of the legislature, and all incidental damages resulting to individuals from the exercise of such control, gives no legal claim to compensation."

The question of mud on the foreshore, however, was eliminated from the consideration of the trial judge, and was not claimed as an element of damage. The plaintiff bases his entire right to recover on the dirty water. (Case, page 64.)

POINT III.

Nature and decree of the injury sustained by the Plaintiff.

The only wrongful act of the defendant complained of is that it stirred up the bottom of the river by its construction work and caused the water to be dirty and riled.

This being so, the case narrows down to the single question of law as to the plaintiff's right to recover damages for the wrongful act committed in navigable river (a public highway). Nuisance, as a basis of an action of this kind, is a combination of two factors (1st) a wrongful act, and (2nd) resulting damages.

We will take up first the elements of damage as presented to the trial court.

Plaintiff kept a boarding house—had a few friends as boarders in 1911; in 1912 had an average of ten or twelve boarders a week from June 1st to October 1st (page 12) who paid $8 or $10 a week (page 13). In 1914 and 1915 he had no boarders. They would not stay. Plaintiff says:

"The attraction in my place is only the clear water. When the water was filled with mud, everybody went" (pages 9-10).

"Q. The reason the boarders objected to the riled water was because they didn't like it for swimming, and you say the water did not look clear? A. Not now, it is not clean.

"Q. And that is the reason you did not go swimming because the water in the river was not clear? A. It was too dirty.

"Q. That the only reason? A. That was the only reason."

JACQUES ARNE, a boarder, testified as follows:

"Q. Why did you go up there and board last summer and the summer before? A. As I told you before, we did not like the country up there.

"Q. Now is the time to tell it. Why didn't you do it? Tell us all about it? A. Because the water was muddy, you know. Ducks generally like muddy water, but I don't; and of course that was all. As I said, it spoiled the whole neighborhood there, the sight, the scenery, and I am a lover of scenery" (page 34).

"Q. And your artistic sense is shocked by the change in the color of the water? A. That's right" (page 35).

EUGENE HARTMAN, another boarder, testified that the main pleasure of the place was to swim.

"Q. Why didn't you stay at Mr. Bouquet's last summer? A. Because we did not like the place any more; we could not go in the river.

"Q. What was the matter with the river? A. It was all dirty—thick. My children did not want to go in the river any more; they

said, 'Papa, we can't go in that river to swim any more.'"

It therefore appears that the loss of the custom of the boarders was due to the fact that they did not like the color of the water, some because the scenic beauty was destroyed, others because they thought it not suitable for bathing.

The trial court, in the argument on the motion to direct a verdict, summed the evidence up as follows:

> "They all say they went there peculiarly and solely because of the swimming, and that the swimming was rendered undesirable because of the muddiness of the water" (page 47).

Counsel for the plaintiff in the same argument stated the proposition as follows:

> "It is the interference with the enjoyment of that place, the having of clean water in front of it, and the knowledge you can go in your house and doff your clothes and go into clean water. *There is no reaching over by the Hackensack Water Company into the yard and doing something there. It is the artistic feature of it*" (page 51).

Counsel further states:

> "It is very true that the damage that we are claiming is not from the dirty bank; it is just as your Honor very succinctly puts it—from the dirty water" (page 64).

This damage, it seems would be too far removed and consequential to be recovered in this action.

> "A city creating a public nuisance is not liable to an individual for loss of prospective customers, who might have come down a street, and who might have stopped at his shop had it not been for the nuisance; the damages being the same in kind as those sustained by all, though greater in degree."

Leermann v. City of Milwaukee, 113 N. W., 65; 13 L. R. A. (N. S.) 253; 132 Wis., 628:

"Not using a turnpike because of bad condition, too hypothetical does not constitute private damages."

Baxter v. Winooski Turnpike, 22 Vt., 114:

"Smoke, noise and bad odors, even when not injurious to health, may cause a discomfort amounting to nuisance; but the discomfort must be physical and not such as affects the taste or imagination merely."

Cleveland v. Citizens Gaslight Co., 20 N. J. Eq., 201.

POINT IV.

No common law right to bathe in a navigable stream.

The right to frequent the shore for sea bathing was made the subject of a legal question for the first time in the case of *Blundell v. Caterall,* 5 Barn. & Ald., 268 (1821), the defendant contending for a common law right of all the king's subjects to bathe on the seashore, and to pass over it for that purpose. It was decided by three learned judges against one, that no such general right in a subject to frequent the shore for the purpose of bathing, existed. This was the first case in which the public right to use the sea or seashore for bathing was ever judiciously claimed or opposed, as was remarked by Mr. Justice Bailey.

This case was fully argued and the judges gave their opinion at considerable length.

The Court did not confine themselves to the narrow ground of bathing in a place where private fishing with stake nets existed; on the contrary, they decided upon the broad ground that the general common law right did not exist at all, by ancient custom or usage of frequenting the seashores for bathing.

Irrespective of the question of damages, the plaintiff must first show a right violated. In the discussion in this case sub judice before the trial judge, the question arose as to whether swimming is a right in a public highway (navigable stream) that everybody has. The Court said:

"I do not find any case on it." (Page 76.)

The fundamental and primary rights in a stream are commerce and navigation.

"The right to bathe in a navigable stream will not occasion other or more beneficial uses to be put down as nuisances."

Baggot v. Orr, 2 Box. & Pul., 472.

"Navigable river is a great public highway in which people of the State have a paramount and controlling right consisting chiefly of right of property in the soil and a right to use the water flowing over it for purposes of transportation and commercial intercourse. Water highways are covered by the same general rules applicable to highways on land."

Joyce on Water Courses (p. 339).

"The public have a common right to use a navigable stream for navigation as a public highway."

29 Cyc., 304.

It seems that the construction of a reservoir for a public water supply is of sufficient importance to justify the temporary inconvenience caused to the plaintiff in his right to bathe. The construction of the reservoir would cause but a transient injury (page 49).

"An obstruction not materially injurying free navigation which is temporary and reasonable, not a nuisance."

29 Cyc., 307.

The law is well settled that, if the damages suf-

fered by an individual are of the same nature as those inflicted upon the public at large, they are not rendered special and peculiar, within the meaning of the rule, by the fact that they exceeded the latter in degree. In order to be included within the rule, they must differ from the latter in kind.

Sedgwick, §425 p. 616.

Cites:

George v. Peckman, (Neb. 1905) 103 N. W. 664.

2 Pomeroy Eq. Jr., §1349 and other cases.

Rule fully stated

Wesson v. Washburn, Iron Co., 13 Allen, Mass. 95.

"Failure of a town to maintain a bridge as part of a highway in the place of a ford, was not a nuisance for which a landowner could sue, because he used the road more frequently than others; his inconvenience, though greater in degree, being of the same sort as that of the general public."

Mangle v. Nescopeck, Township, 73A. 1021; 225 Pa. 68.

"The injury or damage resulting to one landowner from an unauthorized or illegal assertion by another landowner of a right to the exclusive possession of public lands in an injury suffered in common with all members of the public whose live stock graze in the vicinity of such public lands, and, if a nuisance, is a public nuisance which cannot be enjoined by the individual landowner, unless he shows some special injury peculiar to himself, differing in kind, and not merely in extent and degree from the general injury to the public."

Anthony Wilkinson Live Stock Co. v. McIlquain, 83 p. 364.

Code 1873 §3331, provides that whatever is

"an obstruction to the free use of property, so as essentially to interfere with the comfortable enjoyment of life or property, is a nuisance, and a civil action * * * may be brought thereon by any person injured thereby." Held, that one who has established on a navigable lake, after a railroad bridge had been built essentially interfering with navigation, the business of letting boats to pleasure parties, does not sustain such peculiar injury from the bridge, in distinction from the general public, as to entitle him to bring an action under the statute though his business is materially injured."

Innis v. Cedar Rapids, I. F. & N. W. Ry. Co., 76 Ia. 165; 40 N. Y. 701, 2 L. R. A. 282.

"Where an erection is made in a river without authority, no action will lie at the suit of an individual, though his injury might be greater than that of other owners along the river; the river at that place being a public highway."

Lansing v. Smith, 8 Con. 146 (N. Y.).

"Where a city discharges its garbage into Lake Michigan, so as to interfere with the fishing rights of a particular locality *but affects all alike who fish there,* it is a public, and not a private, nuisance; and no private individual can maintain an action to enjoin its continuance."

Kuehn v. City of Milwaukee, 83 Wis. 583; 18 L. R. A. 553.

An analysis of the cases cited by the plaintiff show the facts to be so dissimilar from the case at bar, as to be slight aid in determining the legal principal applicable.

They all deal with circumstances which prevent or interfere with access from a highway to or from the land of the plaintiff.

We do not argue that an obstruction or an ex-

cavation in the highway which prevents access to the adjacent land may not be a nuisance, but to be a basis for an action for damages, the damages must be proven.

It is very apparent in the case at bar that plaintiff's right of access is not interfered with.

In the case of *Ross v. Butler,* 19 N. J. Eq. 294, defendant manufactured pottery, and in the course of manufacture, burned large quantities of pine wood which emits large volumes of black smoke laden with cinders.

The court held that the above acts caused such injury, annoyance and discomfort, as would constitute a nuisance, and an injunction was granted.

Roessler v. Doyle, 73 L. 521.

Defendant operated a chemical factory; the complainant lived across the street and complained that he was injured by odors and bright lights flashing up, loud noises.

Defendant contended that was a public nuisance.

The court said:

> "A public nuisance may arise in two classes of cases, where the right invaded by the offender is a common and public right—one which belongs to every citizen, such for instance as the right to use a highway or park or navigable stream—the plaintiff must show that he had received an injury distinct in kind from that received by the rest of the public. The private injury in this class of cases is said to be merged in the common nuisance and injury to all citizens, and the right is to be vindicated and the wrong punished by public prosecution."

The verdict of the circuit court was sustained on the ground that the injury to plaintiff in the enjoyment of his property by noisome smells and disturbing noises was special damage.

The loss plaintiff sustains really sifts itself

down to the loss of boarders because he could not entertain them by bathing; in other words, he insists that the river be kept clean so that he may bring boarders there to bathe and board them at his boarding house. ~~Claiming a right in himself as an individual, he wants to commercialize his interest in the public right in the stream.~~

He is not claiming a right in himself as an individual—he couldn't show any damage to himself; he is injured because the boarders have lost their public right to bathe; he wants to commercialize their interest in the public right in the stream.

Speaking of the boarders the court below said:

> "Then why did they stay away in the light of that fact? They stayed away not because the foreshore was muddy, but because the water was dirty, and you have got to determine then whether the mere fact that the river was dirty was a damage special to you and different from that suffered by the public generally and which is subject to indictment (page 60)."

We maintain that the trial judge was right in his determination that no special damages were shown.

The plaintiff had given up all claim to damages because of mud on the shore and rested his case solely on the dirty water (p. 64).

All that is shown is that some boarders left because they could not swin. This is clearly not a special damage, because everybody who wanted to swim in that river would encounter the muddy water and would be injured in precisely the same way.

The plaintiff, residing near the water, would be an added convenience in the enjoyment of the use of the river, but would not change the nature of his damage so as to render it private and special.

"The Mayor and Aldermen of Jersey City

> merely as riparian owners upon a tidal stream has no right in the waters of the stream distinct from the rights of the general public therein. The adjacency of its property to the water merely affords convenience of the enjoyment of the common right."
>
> *Atty. Gen. v. Paterson,* 13 Dick., p. 4.

The plaintiff had no riparian right; the road was between his property and the river. He had no rights in the stream distinct from the rest of the public. He was simply a man who lived along the stream, and his right to have the color of the water changed was the same right as the public have. His adjacency to the water gave him no added right. If the act complained of was a nuisance, it should have been attacked as a public injury, by indictment or injunction.

The trial judge, speaking of deprivation of the right to swim in a navigable river said:

> "It may very well be that to deprive a person of that right is to deprive a person of something he is entitled to receive. Now, that may be a damage to his property, but it is no nuisance to him as distinct from the rest of the community—absolutely no nuisance different in kind or degree, because everyone who wanted to swim must encounter the roiled water."

then cited the case of *Whitmore v. Brown,* 65 Atl. Rep., 520.

In this case the plaintiff claimed damages because of her loss of boating privileges through the erection of a nuisance in a navigable cove, the court in that case said:

> "Though by reason of her land being on this cove, the plaintiff may have more need or occasion than other persons to make use of the public right to the unimpeded navigation of the cove, and her land may be more damaged by the violation of that right, *the right itself is still public and not private.*

> Her ownership of the land on the cove gives her no greater nor different right to navigate it. Every citizen has the same right in kind and degree. The plaintiff may have a greater interest than others in the right and a greater need of its enforcement, but that does not change the public right into a private right."

If the plaintiff recovered in this action, every land owner along the Hackensack River from New Milford to North Hackensack and perhaps farther down the river, would have a cause of action, because every one temporarily deprived of the use of the river for bathing sustained the same injury.

Blackstone speaking of the remedy for a nuisance says:

> "The law gives no private remedy for anything, but a private wrong. Therefore no action lies for a public or common nuisance, but an indictment only; because the damage being common to all the King's subjects, no one can assign his particular proportion of it; or if he could it would be extremely hard, if every subject in the Kingdom were allowed to harass the offender with separate actions."

The consideration of the motion to direct a verdict for nominal damages was continued over one day to allow an examination of the cases, and the thorough discussion of the question between court and counsel as printed in the case (p. 45 to 87) leaves but little to be said on the subject.

The court was of the opinion that the destruction of the scenic beauty of the water and the loss of the boarders of their pleasure of swimming was not a special damage for which the plaintiff could recover. We submit that the verdict below was right and should be affirmed.

Respectfully submitted,

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NEW JERSEY

Court of Errors and Appeals.

MAXIME BOUQUET, *Plaintiff-Appellant,* *vs.* HACKENSACK WATER COMPANY, *Defendant-Respondent.*	*Appeal from Supreme Court.*

Brief of Appellant.

THE FACTS.

Plaintiff (appellant) owns land abutting on the tide water of the Hackensack River. Upon the property is his dwelling house, where he resides with his family. In the years of 1912 and 1913 he sold off four or five parcels of the tract as building lots. He conducted a summer boarding house business in his dwelling, which was a large country house.

When the plaintiff took title to his land the river was clear and attractive, and the banks at low tide showed clean sand; and he, his family, friends and boarders boated on the river, and bathed and fished in it. The defendant, in the years 1914 and 1915, charged the river with mud so that fishing and bathing in the river and boating on it were practically prohibited to plaintiff and his boarders. The mud discolored the river, thereby spoiling its appearance, and the mud became deposited on the banks, spoiling the appearance of the banks, which had before been clean sand.

Plaintiff profited by his boarding house business

in the summers of 1912 and 1913. He solicited the same boarders and others for the summers of 1914 and 1915, but the boarders refused to come because of the mud in the river and the resultant prohibition of boating, fishing and bathing, as well as the resultant spoliation of the visual attractiveness of the plaintiff's property, and its immediate surroundings.

There was evidence of a loss of a sale of the property.

To summarize: the plaintiff, by defendant's acts in the public highway (conceded to be a nuisance—Case, p. 87) suffered a diminution in the value of his property; lost his boarding house business; was deprived of his personal and family use of the river; the one peculiar element making for the enjoyment and attractiveness of his property was taken away, and he lost a sale of the property.

The ground of appeal.

The Trial Court, on defendant's motion at the close of plaintiff's case, over plaintiff's objection, directed a verdict in favor of plaintiff for nominal damages only, on the ground that the foregoing facts did not constitute special damage to the plaintiff so as to give him a private action in respect of the public indictable nuisance.

The ground of appeal is that the evidence shows that plaintiff suffered, from the nuisance, injury differing in kind and degree from the injury suffered by the public at large, and thereby is entitled to his action for damages.

I.

Plaintiff suffered injury differing in kind and degree from that suffered by the public at large.

Appellant's case is summarized in the words of

Tindal, C. J., in *Wilkes vs. Hungerford*, 2 Bing. (N. S.), 281, where defendant obstructed the highway to the detriment of plaintiff's custom in his book-shop: "All who passed had the right of way; but all had not shops."

Wilkes vs. Hungerford was later limited in its application (See Ryerson vs. Morris Canal, 69 N. J. L., 505, 507), but the principle enunciated above was not changed.

A.

General argument.

This is a nuisance case; one where the gist of the action is the question of damages, one whose case-law authorities abound in the platitudes of "well-settled rules" and "difficulties of application." It seems proper, therefore, before examining the cases, to survey the facts from the intuitive, or, if you please, the "common-sense" view-point.

Was Mr. Bouquet's damage different, both in kind and degree, from the damage of the public at large? That it was different in degree is obvious. The members of this Court had a right to use the river, but they were not in the habit of doing so, nor have they their homes on it, so that their share of the public damage was infinitesimal compared with plaintiff's.

But, was not the kind of damage suffered by plaintiff the same as that suffered by the public? No, because the kind of damage suffered by the public was the deprivation of a clean stream, the loss of the fishing, the destruction of the aesthetic attractiveness. Plaintiff does not sue to recover for these—they are the components of his share of the public damage, and his dwelling on the river bank only makes his share greater in degree than the share of others—but plaintiff sues for his loss of

trade and the diminution in value of his land. And, loss of trade and depreciation of land value, are different kinds of injury from prohibition of boating, bathing and enjoyment of water views. They were injuries which he shared in no wise with the public —they were peculiar to him. The general public did not lose its boarding-house trade, nor suffer depreciation in its land value.

Other dwellers along the river may, or may not, have suffered this kind of damage. If there were boat livery men, restaurateurs, caterers to river or shore activities of any kind along the river, they may, or may not, have suffered this kind of damage; but such, if there were such, do not constitute the public at large, and the rule of law governing this case is that the damage shall be different from that suffered by the general public.

It should also be stated here, because the Trial Court seems at one point in the announcement of its views to have lapsed into error herein, that there is nowhere in the case a justification of defendant's acts under delegated legislative authority. The case is one of nuisance, with no attempt at a justification. The doctrine of delegated legislative authority, as set forth in either *Marcus Sayre vs. Newark*, 60 N. J. Eq., 361, or in *Beseman vs. P. R. R.*, 50 N. J. L., 235, 52 N. J. L., 221, is not involved in this case.

B.

New Jersey Cases.

The following are thought to be all the New Jersey cases, in chronological order, which shed any real light on what is "special damage" in public nuisance cases. As applied to the case at bar, they appear to be consistent from beginning to end, except as the *H. B. Anthony Shoe* case may be consid-

ered a departure from previous cases, of which mention will be made.

Zabriskie vs. Jersey City & Bergen, 13 N. J. Eq., 314 (1861).

Chancellor Green refused to enjoin an alleged unlawful laying of a track in front of complainant's premises, because complainant was neither presently damaged, nor likely to be, to any extent. But the Chancellor intimates that prevention of access to complainant's lot and preventing wagons from standing in front thereof to unload would be special damage.

Higbee vs. Camden & Amboy, 19 N. J. Eq., 276 (1868).

A public nuisance case, but Chancellor Zabriskie retained the injunction on the ground that erecting a *platform* opposite complainant's land in a street wherein complainant owned the fee, was a taking inconsistent with a public servitude and constituted special damage.

Hatfield vs. C. R. R., 33 N. J. L., 251 (1869).

The Supreme Court, by Chief Justice Beasley, refused damages to a land owner along whose property an unauthorized track was laid in the public highway, for the reiterated and all-sufficient reason that no damages were proved. In effect, plaintiff's verdict below was set aside and a new trial ordered for him to prove, if he could, diminution in his property values and ill effects to his lumber business.

Property value depreciation and loss of trade were proved in the case at bar.

Prudden vs. M. & E. R.R., 19 N.J. Eq., 386 (1869).

M. & E. R.R. vs. Prudden, 20 N.J. Eq., 530 (1869).

Chancellor Zabriskie, in the Court of Chancery, considered that the inconvenience to complainant from the laying of an unauthorized track in the street in front of his premises, whereby wagons could not stand to unload, was special injury. In the Court of Appeals (Justice Depue), this was not denied, but was specifically affirmed, although the Chancellor was reversed and his injunction vacated because of complainant's want of showing irreparable damage.

Stevens v. Paterson R. R., 34 N. J. L., 532 (1870).

We shall not, of course, repeat the facts of this leading case, but the Court should be reminded that Mr. Stevens had no riparian rights, by having wharfed out or by grant.

Chief Justice Beasley says, at p. 553:

> "But I think it is a nuisance which, according to the allegations on the record, inflicts a peculiar damage to the plaintiff, and if that be so, it is admitted this action is well brought. The plaintiff, until the State interferes and deprives him of the privilege, has the right to pass directly from his property on to the shore of this navigable river. He has been deprived of the right by the tort of defendants, and this is a damage which, apparently, is individual and peculiar to himself. If a ditch should

> be dug in a public highway, in front of a door of a dwelling house, so as to cut off access to and from such house, no one would doubt that the occupier of such house sustained a greater inconvenience from the public nuisance than the body of the community. The character of the present tort, as it respects the plaintiff, is precisely of this nature. I think the facts stated support the action."

Mr. Stevens was deprived of "free access from his lands to the river, for the purpose of washing, bathing, watering his cattle, and for fishing and navigation." Every other citizen of the State had the right to wash, bathe, and water his cattle, and fish and navigate in the river, and to pass over Mr. Stevens' ripa to do so. But Mr. Stevens was shut out from the ripa opposite his land in the exercise of these public rights. So was Mr. Bouquet, the appellant at bar. His ripa was covered with mud, which defendant at bar put there, just as the Paterson &c. R. R., put its structure on Mr. Stevens' ripa; and because of the mud on appellant's bank, Mr. Bouquet and his boarders could not bathe as they had been wont to do, and access to his property over the public bank was made dangerous and disagreeable.

Prudden vs. Lindsley, 28 N. J. Eq., 378 (1877).

Prudden vs. Lindsley, 29 N. J. Eq., 615 (1878).

Prudden vs. Lindsley, 31 N. J. Eq., 436 (1879).

In this injunction case, Chancellor Runyon dissolved the preliminary injunction because he could

not find that the alleged street was a public highway. He then added that putting a building in and upon a way which complainant had been using (which complainant claimed was a public way) directly against complainant's barn doors, was not such irreparable special injury as to move a court of equity to enjoin, where complainant could reach the barn over his own land from another highway. In this case, complainant claimed no fee in the way, nor any rights in the way as such beyond the public right. The Court of Appeals (Justice Dixon) reversed the Chancellor and remitted the case for further proceedings on the ground that the record virtually established the way as a public highway. The opinion of the Appellate Court does not advert to the point of "special damage;" but that point was definitely discussed in the Chancellor's opinion, and the remittitur would have been fruitless, if this Court had not considered that building in a public highway against complainant's barn was special damage. In 31 N. J. Eq., 436, the Chancellor made the injunction perpetual.

It is submitted that the use of the highway by Mr. Prudden in connection with his barn was no more a peculiar use, differing from the public use, than was the use of the Hackensack River by Mr. Bouquet, in connection with his boarding house and building lots business.

Mehrhof vs. D., L. & W. R. R., 51 N. J. L., 56 (1888).

This case, which was an action for damages, it is submitted, togother with the Ryerson case (*infra*), is abundant authority for appellant's contention in the case at bar.

Here were no questions of riparian rights, access rights, property rights, or aesthetic enjoyment.

Plaintiff's brick yard was on the tide waters of the Hackensack, and down the river, at a distance from their property, the defendant created a nuisance in the public highway. Every citizen in the State was, it is not unfair to say, affected by the nuisance, because every citizen who chose to navigate the river would have been interfered with, as were plaintiffs. Plaintiffs, in that respect, were injured only in greater degree than the rest of the public. But plaintiffs had a business on the river, and the public nuisance inflicted on them a different kind of damage from the above mentioned general damage. They were put to expense and lost trade and profit. Justice Garrison, for the Supreme Court, says:

> "In the case before us, the plaintiffs clearly bring themselves within this rule as to special damage, by the allegation of loss of use of their boats, which were shut off from the channels of trade, their expense in victualing them, and the loss of trade and profit."

Mr. Bouquet, in the case at bar, had a business on the river, and lost trade and profit by the defendant's nuisance.

And if there could be any question raised as to the damages being consequential and not direct, it is submitted that the Mehrhofs might very likely have shipped their bricks by rail, if not from Lodi, then from some other rail and water point above the Lackawanna bridge; but Mr. Bouquet could not supply his boarders with another river.

H. B Anthony Shoe Co. vs. West Jersey, 57 N. J. Eq., 607 (1898).

This was an injunction case. Complainant owned

on the west side of a street, and defendant was about to lay a second track in the street, west of an existing track. As stated by the Vice Chancellor, the suit was not to prevent the laying of the track, but to have it planked so that it would be driven over with vehicles. In the Court of Chancery, Vice Chancellor Pitney, in what has all the ear marks of an oral opinion (including a misquotation of the Higbee case), refuses the order because he does not consider the legal rights sufficiently clear to warrant the extraordinary equitable relief, although he states that the deprivation of access seems to him to constitute special damage.

In the Court of Appeals, Justice Van Syckle states that the bill sought to enjoin further appropriation of the highway, which is not inconsistent with the Vice Chancellor's statement that the relief prayed was to have the track planked. After dissenting from the Vice Chancellor's views as to the doubt about the existence of the legal rights involved, but without announcing the definite views of the Appellate Court thereon, the opinion shortly disposes of the case, by announcing that because complainant had no fee in the street, he was not injured differently from any other of the public.

It is submitted that this decision runs counter to a long established line of New Jersey cases; and that, on the question of what constitutes special damage in a public nuisance case, it is the less controlling because it was the pronouncement of the Court in refusing equitable relief, in denying the extraordinary remedy of injunctive process. The only authority cited is the Higbee case, wherein, however, Chancellor Zabriskie, at p. 279, clearly states:

"They are not deprived of access to their

lands, which would be an injury peculiar to them."

The Mehrhof case is neither mentioned nor distinguished.

In the Anthony case, the opinion states that if complainant owns the fee of the street, any erection on it is an injury to his individual rights. This, we submit with respect, is a truism, and yet is not wholly accurate, for the "erection" of a street railway track, not inconsistent with vehicular use, is not a legal injury to the owner of the fee in a public highway. This is just what the Chancellor pointed out in the Higbee case, dissolving the injunction as to the additional track, but retaining it as to the platform.

We submit, that the Anthony case is not authority for the proposition that an abutting land owner, who has no fee in the highway, is, for want of a fee, wholly precluded from proving that his injuries from a public nuisance in the highway are different in kind from that of the rest of the public.

If the Anthony case so shut out an abutting owner, all the clear and satisfying reasoning expressed by Justices Dixon and Depue in *Marcus Sayre vs. Newark*, 60 N. J. Eq., 361, would be aside the point. For, in the Marcus Sayre case, while the complainant had wharfed out and so secured riparian rights, the gravamen of his complaint was injury from poisonous and offensive odors arising, not from the deposit against his dock, but from the river at large. He had no property rights beyond low-water mark, but this Court most distinctly recognized his right to an action for a nuisance in the river beyond low water.

Ryerson vs. Morris Canal, 69 N. J. L., 505 (1903).

This was an action for damages. The Supreme Court (Justice Pitney) decided it on the authority of the Mehrhof case, and does not mention the Anthony case.

Plaintiff owned three farms, and at a point on the public highway between the farms, the defendant maintained a public nuisance. Every citizen who passed the defective bridge was damaged by the nuisance; but the Supreme Court says that because the plaintiff sustained actual pecuniary damage by passing between his farms by a roundabout route, his damage was different in kind from that of the public.

Mr. Ryerson sustained loss in his business because of the public nuisance. So did Mr. Bouquet in the case at bar.

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8 Atl. 319

C.

Foreign cases.

Liebermann vs. Milwaukee, 13 L. R. A., N. S., 253 (Wis., 1907).

Demurrer to an action for damages for highway obstruction was sustained, because complaint alleged only a prospective loss, and not an actual damage. The note in 13 L. R. A., N. S. cites a number of cases where injury to business from highway obstruction is considered special damage.

Callanan vs. Gilman, 107 N. Y., 360 (1888).

Injunction suit to restrain obstruction of sidewalk by adjoining owner. "There was some proof that some custom was turned from plaintiff's store on account of the obstruction and that pedestrians were turned off the north side of the street before reaching plaintiff's store. That the plaintiff suf-

fered some special damage not common to persons merely using the street for passage is too obvious for reasonable dispute."

Flynn vs. Taylor, 127 N. Y., 596 (1891).

Action for damages against adjacent land owner who obstructed sidewalk. "It is true no direct interference with the plaintiff's premises or business was shown. The pecuniary loss to him was caused by the indirect effect of the obstruction to the sidewalk upon the public. But when an unreasonable use of the public highway is shown, and it also appears that such unreasonable use causes special damages to an individual, he has a personal right of action to compel the abatement of the nuisance."

Cranford vs. Tyrrell, 128 N. Y., 341 (1891).

This was a bawdy-house injunction case, where the injunction was sustained. The case differs from the case at bar in having the element of noise in it. The reasoning of the case, however, it is submitted, makes it authority for the proposition, that even without the element of noise which disturbed plaintiff, the depreciation of his property value from the mere existence of the bawdy-house in the neighborhood, was special damage, sustaining a private action.

Seifert vs. Dillon, 19 L. R. A., N. S., 1018, Nebraska, 1909.

This was a bawdy-house injunction case. The opinion mentions the noise made by the frequenters of the place as an element of annoyance to plaintiff but the essential injury to plaintiff was the loss of customers in his business, because of the mere presence of the bawdy-house and its surrounding atmos-

phere. Plaintiff's loss of trade was held special damage giving him private action.

Smart vs. Aroostook, 68 Atl., 527 (Maine, 1907).

Plaintiff's summer camp was on a navigable public river. Defendant obstructed river with logs, whereby plaintiff was hindered in access to his camp. The river was the only public highway to the camp. Action for damages was sustained. The case cites and quotes Whitmore vs. Brown, 65 Atl., 516, which was the case upon which the Trial Judge in the case at bar placed so much reliance. The Smart case differs from the case at bar in that the river was the only method of approach to the camp, although the reasoning of the case supports this appellant's contention. It is cited here, however, mainly because it explains the Whitmore case.

As to the Whitmore case, it is to be further observed that the structure there complained against was erected wholly on private property. "The wharf extension, if erected, will, so far as appears, be wholly on flats owned by the defendants." (The facts are elucidated by the diagram printed in Whitmore vs. Brown, 61 Atl., 985, 987.) Plaintiff claimed that certain existing structures and a contemplated one (1) obstructed navigation generally and thereby reduced the value of her land (2) were unsightly and impeded and spoiled her view, thereby depreciating her land value, and (3) obstructed passage to her land, thereby depreciating it. The Court disposed of these claims as follows:

(1). "It may be that an individual actually obstructed by an unauthorized structure while in the actual exercise of the public right may maintain an action for

damages resulting as was held in Brown vs. Watson, 47 Me., 161, 74 Am. Dec., 482, but that is a different case from this, where the only complaint is of the unfavorable effect upon the enjoyment and value of her land." (2). No right of prospect over land of others is recognized, except by grant. (3). Not clear that proposed extension will materially impede access; hence no injunction.

In the Whitmore case no pecuniary damage was shown, and the Court denied injunctive relief because it was not clear that access would be obstructed, thereby leaving it to be inferred that interference with access would be special damage.

Green vs. Thresher, 83 Atl., 711 (Pa., 1912).

A sign erected by adjoining land owner, which constituted a public nuisance, caused crowds to gather in the highway, thereby plaintiff's window display was obscured and he lost trade. This was held to be special damage.

II.

A new trial should be ordered.

Respectfully submitted,
ARTHUR T. DEAR,
Attorney and Counsel of
Plaintiff-Appellant.

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NOTICE AND GROUNDS OF APPEAL.

(Filed May 27, 1916.)

NEW JERSEY SUPREME COURT.

MAXIME BOUQUET, *Plaintiff*, *vs.* HACKENSACK WATER COMPANY, *Defendant.*	*Action at Law. Notice and Grounds of Appeal.*

To Messrs. Edwards & Smith, Attorneys of Defendant:

Please take notice, that the plaintiff, Maxime Bouquet, appeals to the Court of Errors and Appeals from the judgment of the Supreme Court entered herein on March 4, 1916.

The grounds of said appeal are that the Trial Judge erred in directing a verdict in favor of plaintiff and against defendant for nominal damages only, on the ground that plaintiff had shown no special damage, whereas plaintiff had shown special damage.

Respectfully,
ARTHUR T. DEAR,
Attorney of Plaintiff.

SUMMONS AND COMPLAINT.

(Filed October 14, 1915.)

SUMMONS.

Out of Supreme Court, tested October 8, 1915, served October 11, 1915.

COMPLAINT.

Plaintiff residing at North Hackensack, Bergen County, says:

1. He is and for many years past has been the owner and occupant of land at North Hackensack abutting on the Hackensack River, where the tide ebbs and flows.

2. He purchased the land and established his residence there because of its proximity to the river, and has been accustomed to bathe in and boat upon the river, and to enjoy its beauty.

3. Defendant has charged the river with mud and other indissoluble matter, which has discolored and made noisome the water. Said matter has become deposited upon the bottom and banks of the river. The same causes the river to overflow beyond its accustomed wont upon plaintiff's land; and makes access to and from the river unpleasant, difficult and dangerous.

4. Plaintiff has thereby been deprived of his accustomed use of the river, his peace and comfort in his dwelling have been impaired, and his property damaged.

Second Count.

1. Plaintiff purchased and holds part of his land for sale as building lots.

2. By reason of the facts set forth in paragraph

three of first count, said land has been deprived of its desirability for building lots, and its market value decreased; whereby plaintiff has lost the sale of the same and the value thereof.

Third Count.

1. Plaintiff has heretofore conducted the business of entertaining for profit, boarders, who were attracted to plaintiff's house because of its proximity to the river and the opportunity of bathing therein, boating thereon, and enjoying the beauty of the same.

2. By reason of the facts set forth in paragraph three of first count, plaintiff has lost his business of entertaining boarders for profit.

Plaintiff demands as damages $10,000.

ARTHUR T. DEAR,
Attorney of Plaintiff.

ANSWER.

(Filed December 3, 1915.)

Defendant, Hackensack Water Company, a corporation of the State of New Jersey, answering the complaint herein, says that:

First Count.

1. It denies the first (1), second (2), third (3) and fourth (4) paragraphs of the first count.

Second Count.

1. It denies the first (1) and second (2) paragraphs of the second count.

Third Count.

1. It denies the first (1) and second (2) paragraphs of the third count.

First Defense.

Defendant will object that the complaint discloses no cause of action. It fails to show that the plaintiff has any special interest in the condition of the Hackensack River where the tide ebbs and flows.

Second Defense.

Defendant will object that the damages claimed in the complaint are too remote.

EDWARDS & SMITH,
Attorneys of Defendant.

New Jersey Supreme Court.

MAXIME BOUQUET,

vs.

HACKENSACK WATER CO.

Case tried February 9, 1916, before Speer, J., and a jury.

ARTHUR T. DEAR, for the plaintiff.

EDWARDS & SMITH, for the defendant.

MAXIME BOUQUET, sworn.

Direct examination by Mr. Dear.

Q. You are the plaintiff in this action and your home is at North Hackensack, just above the new bridge? A. Yes, sir.

Q. Along the Hackensack River? A. Yes, sir.

Q. And you have been on your place since about 1906 and got title to the land in 1910? A. Yes, sir.

Q. And this is your deed from Mr. Van Thun, is it? A. Yes.

Mr. DEAR—It is acknowledged. I offer it.

Marked Exhibit P 1.

Q. I show you a photograph and ask you what that is? A. That is my house.

Mr. DEAR—I offer that.

Mr. EDWARDS—I would like to have the date it was taken.

Q. Do you know when it was taken? A. Last year.

Mr. EDWARDS—Last year. All right.

Marked P 2.

Q. I show you a surveyor's layout or sketch and ask you whether that gives the location lines of your property? A. Right from the river front up to the corner at the bridge going up the Englewood road and turning around—

Mr. EDWARDS—Speak a little louder.

A. Fronting the Hackensack River, up to the corner of French Brook, going up east in the direction of Englewood, following the back line to the south again to such a corner and such a place—I forget the name of the place—and going down back again to the river.

Q. Well, that sketch is a sketch of your property? A. Yes; it is a sketch of my property.

Mr. DEAR—I will offer it.

Mr. EDWARDS—I object to that. It has not been proved. How many feet front has he on the road?

A. On the river front?

Mr. EDWARDS—On the river road.

A. On the river road, well, I should say five to six hundred.

Mr. EDWARDS—Six hundred feet?

A. Yes.

Mr. EDWARDS—And how deep is it? How far back does it run?

A. Over 200 feet deep—about 230 feet.

Mr. EDWARDS—230 feet deep?

A. Yes.

Q. Does your property run to the river?

Mr. EDWARDS—I object. The deed is the best evidence of that.

A. Yes, sir.

THE COURT—I will sustain the objection if you want.

Mr. DEAR—All right.

Q. What roads or passageways, if any, are near your property or go by your property? A. River Front.

Mr. EDWARDS—River Front?

A. River Front Road.

Q. There is a passageway or road along your property and along the river, is there? A. Yes, sir.

Q. And that road or passageway leads from the wagon road over to the bridge which is south of your property; the River Front Road that you have spoken of leads north along the river how far? How far does it go up? A. About quarter of a mile.

Q. How many houses are there up there that it leads to? A. Four.

Q. Is the road improved? A. No; just what work we do ourselves.

Q. How much of a road is it? A. It is a regular country road.

Q. Is there any curbing along it? A. A little bit.

Q. What kind of curbing is it? A. Oh, just follow the river.

Q. I said curbing—curbstones, such as divide a street from a sidewalk. Are there any curbs such as divide a street from a sidewalk along that road? A. No.

Q. You were speaking of curvings, weren't you? A. Yes, curve parallel with the river.

Q. Since you bought your property in 1910, have you sold off any of it? A. Yes, sir.

Q. To whom have you sold any property? A. Mr. Oriet, Mrs. Courvacier, Mr. Cruse and Mr. Bertram.

Q. Which was the first one you sold to? A. Mr. Cruse.

Q. When did you sell to him? A. In 1912.

Q. How much land did he get from you? A. 46 wide by 150.

Q. And where was that with relation to the river; where was Mr. Cruse's lot with relation to the river? A. Right in the river front.

Q. How much did Mr. Cruse pay you in 1912 for that? A. One thousand.

Mr. EDWARDS—I do not think that is competent testimony. I object to it.

THE COURT—What is the point of it?

Mr. DEAR—The point is two-fold ; to show that he has actually sold and to that extent been in the building lot business, and as some evidence of the value of the properties and what he might get for other lots if, according to the theory of our case, he were not prevented by the condition of affairs.

THE COURT—I think I will permit that.

Q. After you sold to Mr. Cruse, to whom did you sell next? A. Mr.—

Mr. EDWARDS—I object as irrelevant and immaterial, and as having no bearing on the measure of damages—any sale.

THE COURT—If you want to take the chance of this testimony as bearing solely upon the question of rental value, I will permit it, and they may have their objection entered on the record.

Mr. DEAR—I do want it.

Mr. EDWARDS—May this same objection apply to all this line?

THE COURT—This question is ruled on now, and it is admitted, and your objection is noted.

A. Mrs. Cuivassier.

Q. You sold to her in what year? A. 1913.

Q. How much did she get from you?

Objected to. Objection overruled.

Q. How much did she get from you, and what did she pay you for it? A. $1,600.

Q. For how much land? A. About one hundred by two hundred.

Q. On the river? A. On the river front.

Q. Did you next sell to Mr. Oriet? A. Yes, sir.

Q. And he got from you how much?

Mr. EDWARDS—I object.

THE COURT—Same ruling.

Objection noted.

Q. Mr. Oriet got how much land? A. 100 by, let me see—I think it is 200 or—I mean 100 river front by 200 deep.

Q. And what did he pay? A. $1,200.

Same objection. Same ruling.

A. $1,200.

Q. And that was in 1913? A. Yes.

Q. You next sold to Mr. Berton? A. Yes; 4 lots, river front, 100 by 100.

Q. And he paid—?

Same objection.

A. $1,600.

Q. What year? A. 1913.

Q. Can you tell us how much you paid for your place to Mr. Van Thun in 1910?

Mr. EDWARDS—I object as immaterial.

Mr. DEAR—I am asking him if he can tell us.

THE COURT—The objection is overruled, and the answer will be yes or no.

Q. Can you tell us how much? Yes or no. A. Yes; about eight thousand.

Mr. EDWARDS—No; no; no.

Q. No; I am asking you, are you able to tell us? Say yes or no. Are you able to tell us how much you paid? A. How much I paid? Yes.

Q. How much was it?

Objected to. Objection overruled.

A. $8,000.

Q. How much land have you left beyond a hundred feet on each side of your dwelling house that is available for building lots, and that you could sell if you found a purchaser—

Mr. EDWARDS—I object.

Q. How many lots have you left to sell?

Mr. EDWARDS—I object as immaterial.

THE COURT—I think if there is one material fact in the case this is probably it, because it shows how much land he has left that he is claiming for damage to.

Mr. EDWARDS—That is not what he is asked.

THE COURT—That is not the way you understood it. That is how I understood it. That is what I am admitting it on.

Mr. EDWARDS—He asked what property he had left for sale.

THE COURT—I understand. I suppose every man's property is for sale if he can get what he wants for it, and I suppose that is what the question involved.

Q. How many lots have you got for sale outside of your house lot? A. 36 lots.

Q. How many? A. $3,600 lots.

Q. And you call lots 25 by 100? A. Yes, sir.

Q. Have you ever built upon any of this land, except what Mr. Cruse and Mrs. Cuivassier and the others bought—have you ever built on some of these 36 lots you are speaking of? A. I was just starting to build a foundation to build up a connection to my building, to continue the business as a boarding place.

Mr. EDWARDS—What is that?

A. A summer boarding place. We saw—

Q. Speak loud and slowly. These gentleman

want to hear it. A. I was starting to build an extension—not an extension, but another building, to continue the building which I start for a boarding—a summer boarding house—a summer resort.

Q. And did you actually start to build? A. I start digging foundation in the beginning of the trouble with the water.

Q. Did you have plans drawn? A. I had plans drawn, yes.

Q. Are these they?

Mr. EDWARDS—I object on the ground that these plans were not carried out and it is absolutely immaterial what he started to do.

THE COURT—He might be entitled to recover for the plans if the interruption of it was brought about by your fault.

A. Yes, sir.

Mr. EDWARDS—I ask an objection.

THE COURT—All right.

Mr. DEAR—We offer the three sheets of plans.

Marked P 3, P 4 and P 5.

Q. Why did you not go ahead?

Mr. EDWARDS—I object as immaterial.

A. Well, I had some encouragement the year before to build, for a lot of my friends were coming in; they thought it was very pretty and very nice—

THE COURT—The answer will be stricken out.

Q. Just try and answer the question. Why didn't you go ahead with this building?

Mr. EDWARDS—Same objection.

THE COURT—Same ruling.

A. On account of the water—everybody enjoyed the clear water the year before and everybody went disgusted on the year I started to build.

Mr. EDWARDS—I ask that that be stricken out.

THE COURT—It is stricken out.

Mr. DEAR—Because it was not responsive—on account of the muddy water?

THE COURT—I struck out the entire answer because there was not any part of it that was responsive, and he did not say the water was muddy.

Q. When was it that you started this building? A. In the spring of 1913.

Q. Had you been conducting any business in your home in the big house the year before? A. Yes, sir.

Q. What business? A. Boarding—boarding summer boarders.

Q. If this house, the new one, was designed as an extension of that business why didn't you go ahead with it?

Objected to as immaterial. Objection overruled.

Q. Try to answer that question. Why didn't you go ahead with it? A. I have got to just tell you that the attraction of my place is only the clear

water. When the water was filled with mud everybody went disgusted.

Mr. EDWARDS—I ask that that last part be stricken out.

THE COURT—It will be—the part about the disgust.

A. On account of the mud.

Q. All right; that will do. Now, tell us about your place, Mr. Bouquet, as it was when you got title in 1910; what kind of a place was it, and what, if any, were the surroundings, and tell the jury; they want to know about that. A. Well, the water was so attractive that everybody went canoeing, fishing and swimming; that was the pleasure of the place.

Mr. EDWARDS—I object as a conclusion on his part.

THE COURT—The fact that it was attractive will be stricken out. The fact that they went fishing and swimming and canoeing will be allowed to stand. I will strike out the word "everybody," because manifestly everybody did not. You did not, and I did not.

Q. Did your family ever make any use of the river? A. All of us—me and my family.

Q. What did you and your family do? A. We went boating and swimming and fishing.

Q. Were you able to do that last summer, in 1915? A. No, sir.

Q. Were you able to do it the summer before—

Mr. EDWARDS—I object. That calls for a conclusion.

A. No, sir.

THE COURT—It manifestly does, but it is the kind of conclusion he can answer to, and I will permit him to answer it

Mr. EDWARDS—I ask an exception.

THE COURT—You may have it.

Q. And did you go swimming and boating, or whatever you said, the summer before that, in 1914? A. No, sir.

Q. Why not? A. Muddy river.

Q. How was the river in about 1910? A. Very clear—very attractive. You could see the fish swimming in the water.

Q. Can you see them now. A. No; not by any means.

Q. How did the river look back in October of last year when these suits were brought in Court; if you should drive over the new bridge past your place, what could you see about the water? A. Nothing but mud.

Q. What was the color of the water? A. Like mud—more than sandy—muddy—mud about six inches deep.

Q. When the tide flows out so the water is lower, can you tell us anything as to seeing the mud or the effects of the mud? A. It carried the mud up and down constantly.

Q. When the water is low, at ebb tide, can you see anything around the river connected with the mud's being there? A. We only see the mud carried up and down.

Q. How do the banks look? A. What is what?

Q. How do the banks of the river look? A. Well, they look about six inches of mud.

Q. What was the year, Mr. Bouquet, that you

had your boarding business, if it was only one year? A. 1912.

Q. Had you ever kept boarders before 1912? A. Well, a few; in 1911 we start, and there were a few—a few friends.

Q. In 1912 when did the first boarders come, and when did the last boarders go away, in 1912?

Mr. EDWARDS—I think the question of the boarders being there is utterly immaterial in fixing damages.

THE COURT—It is an attempt to show the rental value of the premises. A boarder is just as much a tenant as a person who rents a house, and if he lost tenants on account of the pollution of the water, and you were legally responsible for that pollution, why the measure of damage, being the amount of rental value, would be the amount of money that was lost from tenants because of this illegal act.

Q. When did the first boarders come, and when did they go away, in 1912? A. It averaged from the first of June to the first of October.

Q. That is four months, isn't it? A. Four months.

Q. How many boarders did you have in 1912?

Mr. EDWARDS—May I have an exception to all this line of testimony?

THE COURT—As to the boarders, yes.

Q. How many boarders did you have? A. An average of ten to twelve a week.

Q. What was the largest number of boarders you

had in 1912, would you say? A. Sometimes we had up to 16 and 18.

Q. Did you keep books at the boarding house business? A. No.

Q. And what did your boarders pay you? A. An average of $8 to $10.

Q. Who did the work of providing food and accommodations, and who took care of these boarders —what help did you have? A. Only one woman to wash the dishes.

Q. And what did you pay that woman to wash dishes? A. Six dollars a week.

Q. What expense were you under for the food that you gave the boarders? A. Well, we figured from $18 to $20 a week.

Mr. EDWARDS—$18 to $20 a week?

Q. Yes.

Q. For what? A. For the meat and grocery.

Q. For meat and groceries? (No answer.)

Q. Where did you get the meat and groceries? A. Market; New York market.

Q. Did you get any of your supplies elsewhere than in the market in New York. A. We have our own supply.

Q. Tell us about that. A. We have our own chickens, rabbit and pigeon, and garden. We get most everything on the place.

Q. What was the last word—garden? A. Garden.

Q. And what grows in the garden? A. Vegetable.

Q. How many boarders did you have the next year; that is 1914? A. Nobody.

Q. How many boarders did you have last year; that is in 1915? A. Nobody.

Q. After your season of boarders in 1913 did you

do anything about having them again in 1914? A. Yes, sir.

Q. What did you do? A. I put a couple of advertisements and I called my friends again; they came in the place and it was the only thing—they said—

MR. EDWARDS—I object to what they told him.

Q. Don't tell what they told you. And after your friends had come there did they stay? A. No—for a day.

Cross-examination by Mr. Edwards.

Q. How much frontage have you got on the river road now? A. Let me see; I have got to figure it. I have, I think, about 300.

Q. How much? A. 300 feet about. I did not measure since.

Q. About 300 feet on the river road? A. Yes.

Q. How large a plot does your house occupy? A. Well, it is occupying about 60—the house is about 60 feet deep and 40 feet wide.

Q. And is the house in the middle of this 300 foot plot? A. About.

Q. How much land is there between the road and the river? A. Well, it is right on the edge some places.

Q. How many feet is there there? A. Sometimes six feet, three feet, ten feet.

Q. How many? A. From three feet to ten feet—irregular.

Q. From three to seven feet?

Answer repeated.

Q. Three to ten feet. You haven't got the State

grant, have you—the riparian grant from the State? A. Well, I think they had it with the original.

Q. Have you got it? A. Not me, but the original people has it.

Q. But you did not acquire it from them? A. When I made the survey of the title company they start from the high mark of the water, of the land. They start from the high point—of high water.

THE COURT—Then he hasn't any riparian right. (To the witness) Is that what you mean to say?

Q. You haven't any riparian rights? A. I do not know.

MR. DEAR—He hasn't.

THE COURT—That is admitted then, that he hasn't any riparian rights.

Q. Have you this map of the property that is mentioned in your deed? A. Yes.

Q. Where is it? A. I gave it to my lawyer.

MR. EDWARDS—Have you got the map of Van Thun?

MR. DEAR (To the witness)—Do you mean the prin ed piece of paper you gave me yesterday?

THE WITNESS—Yes, sir.

MR. DEAR—It is not a survey; it is some old print showing what a beautiful property it is. I haven't it.

Q. Did you keep summer boarders in 1912? A. Yes, sir.

Q. And then you kept more boarders in 1913? A. No; less.

Q. And no boarders in 1914? A. No boarders.

Q. And you did not try to keep boarders in 1915? A. I tried, but they did not come.

Q. How did you try? A. I invite them. I put some advertisement in the paper.

Q. But you did not have any boarders? A. I did not have any; they would not stay.

Q. Did you keep any books of your boarding house? A. No, sir.

Q. So there is no way you can show your profit, is there? A. Oh, yes.

Q But you did not keep books? A. Oh, yes; I have some witness.

Q. What? A. I have a witness.

Q. But you cannot do it? A. Yes, sir.

Q. What have you done with your chickens—during 1914? A. We eat them up.

Q. You ate them up? A. Yes.

Q. And also the vegetables? A. Yes.

Q. All? A. No; we always keep some back.

Q. You could not drink the water when you went there, in the stream, could you? A. No.

Q. Salt, isn't it? A. No.

Q. Brackish? A. No.

Q. What kind of water is it, fresh water or salt water? A. Yes.

Q. Doesn't the tide ebb and flow there? A. No, sir; not to make it salty enough.

Q. But the tide flows up there? A. Yes.

Q. How much does the tide rise and fall in front of your house? A. Four feet tide.

Q. How deep is the river there at low tide? A. Well, it runs from two feet to five feet—sloping down.

Q. And this bridge, is that below your property? A. Yes, sir.

Q. And is there a draw in that bridge to allow

boats to go through? A. Well, I did not take notice of it.

Q. Don't they ever open that bridge? A. Yes.

Q. So as to let boats go up the river? A. Yes.

Q. How many bedrooms did you have in your house? A. We have about ten.

Q. Seven bedrooms? A. Ten.

Q. How many bedrooms did your family occupy? A. Two.

Q. What does your family consist of? A. My wife and two sons.

Q. Your wife and two children? A. Two sons.

Q. How old are your two sons? A. 21 and 23.

Q. They did not help with the boarders, did they? A. What is that?

Q. Did they help take care of the boarders? A. Sometimes, yes.

Q. What business were you in, Mr. Bouquet? A. I was in the jewelry business.

Q. Whereabouts? A. In New York.

Q. And went to business every day? A. No, not in the summer.

Q. What did you do in the summer time? A. Keeping boarders.

Q. Did not go to business at all in the summer? A. No.

Q. That was in the year 1913? A. Yes.

Q. You say you had eight to ten boarders for four months? A. Yes, sir.

Q. How many did you have for the whole four months? A. Average about eight dollars a piece—sometimes ten.

Q. How many boarders? A. From ten to twelve.

Q. How many did you have in a room? A. Two.

Q. At the beginning of the season you didn't have them, in June, did you? A. In June, yes.

Q. House filled up right at the beginning? A. Yes, sir.

Q. And kept filled until the end? A. Yes, sir.

Q. And in 1914 and 1915 you did not keep any borders? A. Nobody.

By the Court.

Q. You had no trouble getting to the river if you wanted to get there, did you? A. No.

Mr. EDWARDS—Cross the road; that is all he had to do.

A. We were bathing from my place to the river.

Q. Well, you could have bathed if the water had been clear, you think? A. Yes.

Q. And you could get to the bank of the river without any trouble at all? A. Yes.

Q. There was not anything to stop you? (Witness shakes his head).

Q. All the while. A. All the while.

Re-direct examination by Mr. Dear.

Q. You said you were in the jewelry business; whom do you work for? A. Well, for special trade and—

Q. Well, you work for yourself? A. Yes; by myself.

Q. You are a jewelry designer and do special jewelry work, don't you? A. Yes; special work; all the time for myself.

Q. Have you always been in the jewelry business? A. No; I have been in the hotel business in Paris.

Q. Do you know how to cook? A. I know how to cook; I am a chef.

Re-cross examination by Mr. Edwards.

Q. How long did you run that hotel in Paris? A. About thirty-five years ago.

Q. How old are you now? A. I am fif—going on sixty.

Q. You left Paris when you were quite young, then? A. Well, thirty-five years ago.

THE COURT—On this case that we are trying now, what is the theory upon which you think you are entitled to recover?

Mr. DEAR—On the invasion of their rights which rise or have their essence in the public right, which in this case is figured as special damage.

THE COURT—But I do not quite see that. As I understand the law in this State—I have not had a chance to give it careful consideration, because this is rather a novel case; but my impression is this: That if this is a stream in which the tide does not rise and fall then the riparian owners own to the middle of the the river; but if it is a case in which the tide does rise and fall, why, then they do not own to the middle of the river, but the river is a public highway, and the rights that the owner of ripa has in the stream are precisely the same rights that the public have to pass and repass upon it. And if, in this case, there is not anything more than a pollution of the river, or putting mud in it and making it roilly, where is there any injury arising to this man? He says that there was no interruption of his

ability to go to the river; nothing that interfered with him; that if the water had been clear, the boating could have been indulged in, and the bathing could have been indulged in, and everything would have been all right. The only thing he complains of is the fact of the roiling of the water by the mud.

Mr. DEAR—I did not hear Mr. Bouquet say that there was nothing to interfere with his passage (testimony repeated).

Mr. DEAR—I will produce evidence to show that that is not so, that the bank was slimy and there was a deposit of mud on the—may I get at one with your Honor on terminology? What is the ripa—above high water mark?

THE COURT—Above high water mark.

Mr. DEAR—What are we to call the land between high and low water mark?

THE COURT—My own impression of the term ripa where it is used in many of the cases is the point above high water mark. because many cases speak of a destruction of the ability to get to the stream by interfering in some way with the ripa—by which clearly in those cases is meant the land above the high water mark.

Mr. DEAR—Has your Honor recently run through the Stevens case?

THE COURT—I am looking at it now.

Mr. DEAR—All right. Above high water mark we will call the ripa. Between

high and low water mark we will call what?

Mr. EDWARDS—The foreshore they generally call that.

Mr. DEAR—I will produce evidence to show that the foreshore is made more dangerous for passage by the deposit of mud on it which makes it slippery.

THE COURT—What difference does it make as to this man?

Mr. DEAR—He owns up to that; and that was all that was owned in the Stevens case. In the Stevens case that was a case of trespass on the case, where the owner, who did not have foreshore rights by grant from the State or by having wharfed out but was only the same kind of an owner that Mr. Bouquet was, brought his action against the railroad company for running along the foreshore—brought his action in trespass on the case—and his action was sustained because after a long discussion showing that he had nothing in the way of title in this foreshore, any more than he had as one of the public, still the damage to him in climbing over the railroad tracks to get from his property to the highway itself was held to make it a case of special damage. Now, then, in this case Mr. Bouquet cannot so easily climb or walk from his land or property—his property—to the public highway below low water mark because if he tries to do that at low tide or half tide he will slip and

flounder in the mud which has been deposited on the foreshore.

THE COURT—Well, you do that in any navigable river.

Mr. DEAR—Not to the extent that it is done here. That is a matter of evidence, and notwithstanding what Mr. Bouquet testified to, I will not bother to have him corrected, I will simply show that that is not so; that there is a deposit of mud which makes the bank slippery and slimy: and if we get into the other case they will show they cannot go swimming on the sandy beaches, because of this deposit of slime, as they could before.

THE COURT—But the man who only owns to the high water mark hasn't any special privilege of swimming in a navigable river.

Mr. DEAR—No; but Mr. Stevens had no more right to get to the Passaic River than Mr. Bouquet had to get to the Hackensack River. I call your attention to the language of Chief Justice Beasley at page 553 in the Stevens case.

THE COURT—I do not see how that says that he has a right to have the foreshore rights kept clear for him for his use. The Stevens case does not hold that, and I do not know of any case that does. The foreshore does not belong to him.

Mr. DEAR—No.

THE COURT—What right has he on that foreshore then.

Mr. DEAR—As one of the public.

THE COURT—Where do you get that from?

Mr. DEAR—It is a public highway.

Mr. EDWARDS—For navigation.

Mr. DEAR—The Stevens case tells us we have as much right there as the Hackensack Water Company, and the Hackensack Water Company has as much right as we have there. It is public. That is what this foreshore, between high and low water mark, is; and Mr. Bouquet would get no further than that if the Stevens case did not say that notwithstanding that it is a public nuisance, where his remedy would be by indictment or something of that kind, still if he had difficulty in getting over this foreshore—

THE COURT—Well, I will let you go ahead and see where you getwith it.

ELIZABETH BOUQUET, sworn.

Direct examination by Mr. Dear.

Q In 1913 you were assisting your husband at home in the boarding house business? A. No; in 1912 we started boarders.

Q. And in 1913 you were assisting him there? A. Yes, assisting.

Q. What did you do? A. I did the cooking partly.

Q. How many boarders did you have in 1913? A. We had an average—

Mr. EDWARDS—Now, they are going into the boarder question, and I simply want to make the same objection to all of the

testimony on the question of boarders as being immaterial and having no relation to the measure of damages.

THE COURT—But of course they have got to go farther and show that these boarders were shunted away because of the sliminess of the foreshore or else there is absolutely nothing to it, because the inability to swim because the water was roiled, or the inability to canoe because it was not clear I do not think has any bearing on this case at all, except as it is now claimed—I am speaking now about this Bouquet case alone—except as the sliminess may have resulted from the roiled condition of the water and have been the proximate cause of the loss of the boarders; and that must be shown then to have been caused by your company by wrongful act.

Q. Now, just go ahead and tell us; in 1913, the year that you had the most boarders, how many did you have? A. Ten a week.

Q. You started your season about when? A. The first of June—the latter part of May or the first of June.

Q. How many boarders did you have to start with? A. Well, eight or ten for two weeks and then they would go away and we would have some more coming in—ten or twelve.

Q. Did you have more than eight boarders—did you have any more than eight in the house at once? A. Oh, yes.

Q. When would that be; over Sundays? A. In the middle of June, July.

Q. How many did you have at once? A. We have

had as high as twenty-four; we had boys mostly—young boys too—boys—we had three cots in a room.

Q. What is the least number you had during the season of 1913? A. Six.

Q. What is the condition of the river now? A. Very filthy.

Q. I know, but what kind of filth? A. Slime.

Q. Well, mud is it? A. Slime and clay.

Q. Well, muddy describes it.

Mr. EDWARDS—Don't lead her.

A. Mud and slime.

Q. And was it that way five years ago? A. No, not five years ago.

Q. Does the tide rise and fall beside your house? A. Yes.

Q. How much? A. Well, six feet—six or ten feet right in front of the house at high tide, and when the tide falls off it leaves all the slime on our bank.

Q. Can you see that? A. Mud—oh, yes; we have to walk in it. It leaves it right on the banks, right in front of the house, all the dirt.

Q. What about that five years ago? A. There was not anything like that five years ago.

Q. What kind of a bank did you have five years ago? A. Very clean.

Q. Your property, or your husband's property, runs to French Brook—one side of your property just beyond Mr. Bertron's is bounded by a brook that runs into the Hackensack River, isn't it? A. Yes.

Q. Does the tide rise and fall in that brook? A. Yes; it overflows; it flows right over on the place.

Q. How is that? A. It overflows right on the property.

Q. When the tide is low the water in that brook is low? A. Very low.

Q. And when the tide is high the water in that brook is very high? A. Yes.

Q. Now, tell me, when the tide is low what is the appearance of the banks of that brook—when the tide is low what is the appearance of the banks of that brook? A. Thick mud.

Q. How was it we will say five years ago? A. There was no mud then.

Q. Were you yourself accustomed to go bathing? A. Yes, I was; I learned to swim there.

Q. When have you last been swimming in the river at your place? A. For the last three years—we did not go in swimming for the last three years.

Q. Why not? A. Because the condition of the water.

Q. Where were you accustomed to bathe? A. Oh, in the house.

Q. I mean in what part of the river were you accustomed to bathe? A. Well, we did not go up the river to bathe at all. Right in our fr—

Q. When you went up the river to go swimming whereabouts in the river did you go swimming? A. These last three years?

Q. No; when you went in. A. Right in front of our house. The water is 10 feet high right in front of our house. We have a large float.

THE COURT—Well, when you went swimming you used to jump off the float, I suppose, and swim around and come back and get on the float again?

A. Yes.

Cross-examination by Mr. Edwavds.

Q. You have a float in front of your house? A. We have a large float in front of our house.

Q. And that is in the river? A. It is high; it is over the river.

Q. Oh! Above the river? A. Yes; it is above the river.

Q. How high above the river is it? A. I cannot say exactly how high. The water comes up to it when it is high tide.

Q. Then you would walk onto this— A. We would jump off.

Q. But you would walk onto it from the road? A. Yes, sir.

Q. Now, the reason why you jump off of it, you say the river is muddy? A. Yes.

Q. That is where the mud is? A. No; the mud is right on our banks, because otherwise—

Q. But when you go into the river you do not go from the bank; you go from this float. A. Not always. There is other parts of our property—

Q. But you have this float. A. We have other part. We don't always use the float.

Q. What? A. We do not always use the float.

Q. But your boarders use it? A. Not I, but the boys—

Q. And you have the float there. A. Yes; the float is there for the boats and the canoes.

Q. And also for the people to go swimming? A. And we have stairs to go down on the side of the float for those who want it that way, but the boys generally swim right off. We have stairs right down outside the float; they step into the river.

Q. Then you go right down the stairs into the river. A. Go down the stairs and walk right into the river.

Q. Is the float there yet? A. Yes, the float is there yet.

Q. And the stairs are there yet? A. The stairs are there yet—the stone stairs.

THE COURT—Where did you swim when it was low tide?

A. We never went in when it was low.

Q. Only on high tide? A. Only high tide.

Q. Yes. Well, when you went there first there was some mud on the banks of the river, wasn't there? A. Never noticed any mud five years ago.

Q. You think not. A. No.

Q. Did you look for it? A. Well, we could see it; we didn't have to look for it. Now, we can see it without looking for it.

Q. Did you look to see if it was there five years ago? A. We would not have gone in swimming if there had been mud.

Q. This mud was after you got in swimming? A. We never went in where there was mud in the river five years ago.

Q. You say the water does not look clear? A. Not now; it is not clean. It is muddy now, so we did not go in swimming in the river for three years.

Q. And that is the reason you did not go swimming, because the water in the river was not clear? A. It was too dirty.

Q. And that was the only reason? A. That was the only reason.

Re-direct examination by Mr. Dear.

Q. Do you know what causes the river to be muddy? A. Yes, from the water works. We have seen them dredging up there lots of times; we have been up there.

Mr. EDWARDS—I move to strike that out as a conclusion.

THE COURT—I will strike it out.

Mr. DEAR—Didn't she say she had seen it?

A. I saw it myself. I went up there lots of times.

THE COURT—She simply answered a question which resulted in a conclusion being stated, that it was from the water works. If you want to prove facts that she witnessed you can prove all the facts you want, but to let her draw the conclusion that it was from the water works is merely a conclusion.

Q. Have you been up the river? A. Yes.

Q. Up above New Milford? A. Yes; further up.

Q. And New Milford is about two miles above you? A. Yes, sir.

Q. What have you seen up there? A. A lot of dirt. All the way up the water was muddy, and up to Oradell is the waterworks—at New Milford is where they have the waterworks there. I did not visit inside the waterworks where they purify the water.

Q. Have you been up the river just above New Milford and seen anybody at all working there? A. Yes, sir.

Q. What have you seen there? A. Up at Oradell where they started it.

Q. What have you seen there? A. Big long pipes across the river, a big dredging machine. We saw it bring up all the mud and then throw it right on the banks again, and all that goes right on the river again.

Q. How does that compare in color with the color that goes past your place? A. Black and gray.

Q. Were the stone steps in front of your place going down the bank affected in any way by the condition of the river? A. Yes, it leaves all the mud and slime and makes it very dangerous—makes it very slippery.

Mr. EDWARDS—I move to strike out the conclusion that it is dangerous. I do not see how she can say that.

THE COURT—She might know it very easily.

A. You can break your leg very easily when you go down the stairs.

Q. Have you ever had any personal experience? A. I fell down and dislocated my knee.

Mr. EDWARDS—I move to strike the last out.

A. Slipping down the stairs.

Q. Wait a minute. These gentlemen would like to know about that knee. Now, tell them where it happened. A. I had a dislocated knee; I cannot tell you any more about it. It was very painful. I have been troubled with it now for the past month.

Q. How did you hurt your knee? A. By falling down on the step.

Q. What step? A. Going down into the river.

Q. You did not see the step? A. Oh, yes; I saw the step, but it was very slippery.

Q. From what? A. From the condition of the river—the slime and mud.

THE COURT—When was this?

A. This was last year.

By the Court.

Q. I thought you said you did not go in swimming? A. I did not go in swimming; I went down to the river to get some water—to put something in the river—something in the river I had in my hand.

Q. What was it? A. I tell you, it was a duck I had in my hand; I wanted him to swim. I wanted to see—we had some ducks; I had never had them in the river and I wanted to put him in there to see how he would like it, that was all.

By Mr. Edwards.

Q. You wanted to get this? A. I put the duck in the river.

Q. And the duck was struggling and wanted to get away? A. And I slipped down on the step.

Q. And you could not hold the duck? A. The duck fell in the river. I let him go; he came back —I slipped.

Q. He made a struggle and you slipped? A. I slipped on the steps.

Q. But the duck did make a struggle? A. It wasn't the duck, I suppose. The stairs was so slippery that I could not hold myself, that was all.

Q. With this duck in your hand? A. The duck was in the river then.

By the Court.

Q. Didn't you know the steps were slippery before you started? A. I did not think they were so slippery as that.

Q. You could see them, couldn't you? A. They

were muddy, but I thought I could go down anyhow. I took my own chances on doing it.

By Mr. Edwards.

Q. When it is high tide I suppose the lower steps are covered with water, aren't they? A. Yes.

Q. How many steps are they down? A. I think five. I never counted them.

Q. At high tide how many steps are covered with water? A. They are all covered.

JACQUES ARNE, sworn.

Direct examination by Mr. Dear.

Q. You live in New Jersey? A. I live in West Hoboken.

Q. And you have been at Mr. Bouquet's place at North Hackensack? A. Yes.

Q. In what capacity; what were you doing there? A. Since Mr. Bouquet bought the place we went up in the summer time there and my wife stayed there all the time, and of course I went up in the evening and sometimes during the day.

Q. Speak so that gentleman can hear you (indicating). A. Well, since Mr. Bouquet bought the place we went up there every summer, you know.

Q. You are old friends of Mr. Bouquet's? A. Yes; we know Mr. Bouquet for a long time.

Q. Were you ever up there as a boarder? A. Yes.

Q. When was that? A. Well, since Mr. Bouquet bought the place, because I liked it so much that I—

Q. What year were you there as a boarder? A. Well, I think it was in 1910 that Mr. Bouquet bought the place, and of course—

Q. You do not understand the question. What year was it you were there as a boarder and paying

money— A. Since Mr. Bouquet bought the place.

Q. Were you at Mr. Bouquet's place last year? A. No, sir.

Q. Were you there the year before that? A. No, sir; not since the Hackensack is muddy, because it spoiled the whole—

Mr. EDWARDS—I object.

Q. Just answer my question, please. How long is it since you were up there at Mr. Bouquet's place? A. Well, since—I go there occasionally, but I wasn't up there for one year—you know that means a day; I don't go up there boarding any more because my wife likes clear—

Q. When were you there? A. Well, 1910, '11 and '12—and, let me see now, '13. I have a bad memory about dates—

Q. Don't remember back; remember forwards. A. The only thing I can tell is since the Hackensack is in bad condition we don't go up there any more.

Mr. EDWARDS—I ask that that be stricken out.

Mr. DEAR—I ask that it be stricken out, too.

THE COURT—It is out by consent.

Q. You are married; Mrs. Arne has been up there with you? A. Yes.

Q. And at what rate did you pay Mr. Bouquet board, if you did pay him board?

Mr. EDWARDS—May I have the same objection to this line of testimony?

THE COURT—Yes; you may have it.

Q. How much did you pay him—what rate? A. $8.

Q. $8 for yourself and— A. For each, you know.

Q. Were there any other people there when you were there; were there any other boarders there when you were there as a boarder? A. Yes.

Q. About how many? A. Sometimes nine, ten, eleven. On Sundays, you know, sometimes thirty, because some would come up only for a day, you know, to have a little fun.

Q. What was the largest number you have ever seen Mr. Bouquet entertain at Sunday dinner? A. Thirty-six.

Q. What did you do with yourself when you were up there? A. Well, I amused myself.

Q. How did you pass your time? A. Bathing, fishing, crabbing, boating—canoeing—whatever went on there; the pleasure we had up there, that was about all. That was enough, of course.

Q. What were the other people, the other boarders and guests of Mr. Bouquet doing while you were there? A. Well, about the same.

Q. Why did you not go up there and board last summer or the summer before? A. As I told you before, we did not like the country up there.

Q. Now is the time to tell it. Why didn't you do it? Tell us all about it. A. Because the water was muddy, you know. Ducks generally like muddy water, but I don't; and of course that was all. As I said, it spoiled the whole neighborhood there, the sight, the scenery—and I am a lover of scenery.

Cross-examination by Mr. Edwards.

Q. You are a lover of scenery? A. Of sceneries if you want to make it any plainer.

Q. And it has changed the color of the water a

little? A. Now, they put the color in the water it seems to me to change the whole neighborhood there. It is an ugly sight. I never liked it since.

Q. What color was the water before? A. It was a greenish blue.

Q. Salt water? A. I never tested it.

Q. And your artistic sense is shocked by the change in the color of the water? A. That's right.

Q. That's all.

EUGENE HARTMAN, sworn.

Direct examination by Mr. Dear.

Q. You are living in Brooklyn now? A. No; in the Bronx.

Q. And you have been long a friend of Mr. Bouquet's? A. Oh, yes; for many years.

Q. You are connected with the jewelry trade too, are you not? A. No; I am a designer.

Q. Of what? A. Textile designer.

Q. Have you been at Mr. Bouquet's place at North Hackensack? A. Oh, yes.

Q. Were you there last year? A. We went there last year, my family, to see the place.

Q. Your family consists of Mrs. Hartman and two children, does it not? A. Yes.

Q. Have you and your family spent some time as boarders with Mr. Bouquet? A. We have.

Q. Do you remember how long ago that was? A. It was in 1912.

Q. And how much time did you spend with him then? A. Oh, about two months.

Q. Were you there every night? A. Yes; I commuted to the city.

Q. And Mrs. Hartman and the children stayed right there? A. Of course.

Q. What did you do; what did you see them do,

and what did you do in the way of passing your time? A. Our main pleasure was to swim, of course, and on the river; that is the main thing.

Q. Did you swim? A. Certainly; and my children, too.

Q. Now, tell us what you did, if anything, last spring, almost a year ago now, last spring, 1915, did you go up there? A. Went up there, yes, sir.

Q. What for? A. We were looking for a place to spend our vacation like every year. We go to the country for two months every year, my family and I, and we were looking for a place and Mr. Bouquet said, "Why don't you come to my house again this year?" I said, "All right, I'll come up and see you."

Mr. EDWARDS—Never mind what was said between you.

Q. You went there to look for a summer place to settle down for the summer? A. Yes.

Q. Did you settle there for the summer last summer; did you stay at Mr. Bouquet's place? A. No.

Q. Where did you go? A. Went to Whaley Lake.

Q. Is that in New York? A. Yes; above Poughkeepsie.

Q. Why didn't you stay at Mr. Bouquet's last summer? A. Because we did not like the place any more; we could not go in the river.

Q. What was the matter with the river? A. It was all dirty—thick. My children did not want to go in the river any more; they said, "Papa, we can't go in that river to swim any more."

Cross-examination by Mr. Edwards.

Q. Where did you see the river, from the bridge? A. From Mr. Bouquet's place, of course.

Q. And did you go down to the float? A. Why, we were standing on the river edge naturally to see the river.

Q. What say? A. We were standing on the river edge to see the river; the river was right at our feet of course.

Q. And the color of the water was changed. A. It was a thick yellow.

Q. That is what you did not like? A. Of course, nobody could swim in there.

Q. What? A. Nobody could swim in a thing like that.

Q. Well, did you try to? A. No, I could not try; of course not; thank you.

THE COURT—Were the children on the bank with you?

A. Yes.

THE COURT—They were all there with you?

A. Oh, yes, certainly.

LENA SCHREPPE, sworn.

Direct examination by Mr. Dear.

Q. You have spent some time as a boarder with Mr. Bouquet? A. I did.

Q. And with your children? A. One boy.

Q. And when was that? A. The boy was up there in 1910.

Q. Yes; and how about you? A. I was out there in 1912–1913.

Q. 1913 was it? A. Yes, sir.

Q. When the boy was there in 1910 were you there at all? A. Oh, no; I was not there. I just stopped and went off again. I went there every week.

Q. How long were you with Mr. Bouquet as a boarder in 1913? A. Two weeks.

Q. And what did you do while there? A. Walking—

Q. What is there to do at Mr. Bouquet's—

Mr. EDWARDS—What did she do?

A. Tried to go swimming.

Q. What? A. Swimming.

Q. Did you go in swimming in 1913 up there? A. I went in in August, of course, the last week in August.

Q. While you were there with Mr. Bouquet? A. I was there.

Q. I say, while you were there you went in swimming? A. Yes.

Q. Now were there any other people at Mr. Bouquet's house at that time? A. Yes, sir.

Q. About how many? A. About eight to ten; ten I think.

Q. And any difference, at any different times in the week; would there be any difference in the number of people? A. Yes; Sundays would be more than week days.

Q. Were there any more Sundays than at other times? A. Yes; Sundays, twenty to twenty-five.

Q. Have you been up there at any time since you left in 1913. A. Yes, sir.

Q. When were you up there since? A. Quite often Sundays.

Q. You are an old friend of the family, too? A. Yes, sir.

Q. What was the condition of the river last year and the year before? A. It was very muddy.

Q. Did you go up, off and on, during the sum-

mer of 1914 and the summer of 1915; did you run up to see your friends? A. Yes; I did.

Q. Did they have any boarders during 1914 and 1915? A. No; no boarder.

Cross-examination by Mr. Edwards.

Q. What brought you there on Sundays—the good dinner? A. Good dinner; that is right.

Q. Mr. Bouquet was a good cook? A. Mr. Bouquet was a good cook.

Q. People that went there liked good dinners? A. People that went there liked good dinners.

Q. What month, in 1912, were you there? A. The month of August.

Q. And 1913? A. No; in 1912 I wasn't—

Q. Weren't you there in 1913? A. Yes; there I stopped for two weeks—the last week in August and the beginning of September.

Q. How often did you go in swimming? A. Every day.

Q. From the float? A. From the float, yes.

Q. You have not been there—have not boarded there since? A. I have not boarded there since.

Q. Have not you gone in swimming since? A. No.

Q. The last time you went in swimming was 1912? A. 1913.

Q. It was all right then? A. It was all right; it was not extra nice, but it was all right yet.

Q. They had more boarders in 1913 than any other year, didn't they? A. They had boarders while I was there.

Q. I mean more than they had before, in 1912? A. Well, about that I could not say, because I was not there steady in 1912.

Q. But when you were there you did not see any change between 1912 and 1913? A. Of course, 1912, I only went there Sundays.

Q. In 1912, you went there Sundays? A. Only Sundays; I always found the house full of people.

Q. But in 1913, were they pretty full there. A. They had about ten or twelve people.

Q. How many? A. Ten to twelve.

Q. Did you have a room yourself? A. Yes, sir; with somebody else; with another lady.

Q. Now, you say the river was muddy; where did you see that—from the bridge? A. Last year?

Q. Yes; where did you see it? A. Right down at the water.

Q. You walked right down to the water? A. Yes; when you pass the bridge; before you get to the house.

Q. I see; that is where you saw it; on the bridge? A. On the bridge, and down to the house.

Q. When you got to the house, did you walk down to the water? A. Why, of course.

Q. Right down to the water; nothing to stop you? A. Well, there is a porch there what you can walk on.

Q. What? A. There is a piece of boardwalk you can walk on; yes.

Q. You walked on that? A. Yes.

Q. Just the same as ever? A. Walked on the board walk.

Q. Just as you did in 1913? A. Yes, sir.

Q. When you looked at it from the boardwalk— A. It was yellow.

Q. Wasn't it yellow in 1913? A. It was not as clear as in 1912.

Q. But in 1913 you were still swimming. A. I went swimming; yes.

Q. Had you grown more particular in 1913 than you were before? A. Did I grow more particular? No; because the water got dirtier.

OTTO SCHINDLER, sworn.

Direct examination by Mr. Dear.

Q. You are a real estate agent and insurance broker? A. Yes.

Q. With your office where? A. West Hoboken.

Q. Did you have Mr. Bouquet's place on your books, or in hand for sale in 1913? A. Yes.

Mr. EDWARDS—Are you going to prove by this gentleman values or anything of that kind?

Mr. DEAR—Yes, sir; I am going to offer testimony—

Mr. EDWARDS—I want to question him with respect to his qualifications if you are going to do that.

Mr. DEAR—No expert testimony.

THE COURT—He wants to show a loss of a sale.

Mr. EDWARDS—That is a different thing.

Mr. DEAR—If it is not hearsay testimony. That is what is bothering me. Object if it is. I guess the Senator will correct me.

Mr. EDWARDS—Don't answer too quickly.

Q. Who was that customer who was willing to pay what he was asking? A. George F. Little, of Jersey City.

Q. George F Little of E. N. Little Sons Company, jewelers and jewelers' supplies, 1 Broadway, New York; is that right? A. He lives in Webster avenue, Jersey City Heights.

Q. And he lives in Webster avenue, Jersey City Heights. What was Mr. Little willing to pay?

Mr. EDWARDS—I ask an exception to this—

THE COURT—Yes; a mere unaccepted offer is not evidence on the question of values, but if there was a contract which was broken or something of that sort that is another proposition.

Q. How about that, Mr. Schindler, was there a contract, a meeting of the minds—it does not have to be in writing— A. Yes, sir.

Mr. EDWARDS—In writing?

A. No; not in writing. I was working on it for six months to get them together, and Mr. Little knew this place in 1910; he used to go there every year, and in 1912 he commissioned me to get it as cheap as I could, so I had it at that point where Mr. Bouquet was willing to sell it for $9,000—

Mr. EDWARDS—One moment.

A. —and Mr. Little and I went up there and changed—when he saw the condition of the place he changed his mind and I lost the sale.

Mr. EDWARDS—I object because there was no binding contract.

THE COURT—I think I will have to strike it out.

Mr. DEAR—I am sorry it got in if it is not competent.

Q. Was Mr. Little willing to pay the price that you mentioned at any time? A. He commissioned me to pay that price for it.

Mr. EDWARDS—I understand the price is out.

Q. Did you succeed in getting Mr. Bouquet to agree to sell at the price mentioned between you and Mr. Little? A. Yes.

Q. Then why didn't Mr. Little go ahead with the proposition that he had commissioned you to negotiate? A. We went up there and saw the condition of the place.

Q. When was it you went up there? A. That was in August, 1913.

Q. What did you see?

Mr. EDWARDS—I object. Mr. Little is the only one that can tell us about that.

THE COURT—Yes; what Mr. Little said to him I do not think is of any consequence in the case. Mr. Little knows what he saw and what he said.

NO CROSS EXAMINATION.

Mr. DEAR—That substantially completes Mr. Bouquet's end of the case. I would like to put on—have the privilege now of putting on the witnesses, these young men who were at Mr. Natalo's place, and then have Mr. Natalo go on with his question of damages, etc.

THE COURT—Why not dispose of the Bouquet case now? Then we know where we stand.

Mr. EDWARDS—I do not think these cases hardly ought to be tried together, as they are developed.

THE COURT—Well, they are being tried together.

Mr. EDWARDS—But we ought to have all the testimony in the Bouquet case.

THE COURT—I understood you were practically through with the Bouquet case.

Mr. DEAR—There is some testimony to connect up the defendant with the muddy condition of the river. That I am prepared to do by witnesses who have really more to do with Mr. Natalo's case—unless your Honor will say to me—

THE COURT—Well, as the case seems to me now—I am only looking at it just for the sake of seeing if we can simplify the matter in trying the one case that you lay great store by where the party is a riparian owner—whether we cannot find some ground upon which the Bouquet case ought to be disposed of first and then try this other one. Now, it seems to me, and admitting merely for the sake of the argument in the Bouquet case that there is some evidence connecting up the Hackensack Water Company with the roiling of the river, I still fail to see that there is any damage outside of a mere nominal damage, if there is any at all, that is attributable to the roiling of this river with respect to Mr. Bouquet's property. The only evidence in the case from any of the witnesses is that from Mrs. Bouquet herself, who says that one of the steps or the steps were a bit muddy and that the people who did the swimming there usually jumped off the float. Now, it would be a most extraordinary thing if the steps that were constantly at high tide washed with the water would not be a bit slippery or a bit muddy.

Mr. DEAR—With all respect to your Honor, I am not sure that it is not absolutely a matter for discussion before the jury. Why should

clear water, particularly water that is somewhat brackish, as our friend the Senator has testified to —

THE COURT—There is no testimony that it is brackish.

Mr. DEAR—Well, we will admit it. It probably is. Why should that make the steps slippery, and why necessarily should there be a deposit of mud on there?—and that is what this lady slipped on—and we have the testimony that they had a most beautiful clear, crystalline stream there some years ago.

THE COURT—But there is not a solitary piece of evidence they lost a thing because of this mud that I know of except as the mud made the water undesirable for swimming. That is all I can find in the case from anybody. Those boarders there distinctly said—Mr. Arne states that he did not like the scenic quality of the situation, that the water was yellowish and it was not nice to look at, and he would not swim in it; and Mrs. Schreppe says she did not like it because it was yellow and she would not swim in it, and Mr. Bouquet and his wife say the water was muddy and you could not swim in it, and people who went in usually jumped from the float. Let us assume there was a little mud on the steps. There is not any evidence that there was any mud on the float, and there is not any evidence at all that a solitary person who stayed away from there and who thereby contributed by his absence to the loss of rental value would not have stayed away from there equally strongly if there had not been any mud on the steps at all—absolutely no evidence at all.

Mr. DEAR—It is true the boarders have not talked about the steps; they have talked about the foreshore.

THE COURT—No; they have talked about the river front up there. There has not a solitary one of them talked about the foreshore being undesirable, and those who have talked about the foreshore have testified that when they walked down there they walked down and stood there, and this designer even testified that he walked down and took his children there and they stood there and said "We don't like the water." That is the testimony from all the witnesses who have testified. Now, I do not see how you can link up any loss that Mr. Bouquet seeks to recover for with any injury to the foreshore.

Mr. DEAR—May I interrupt your Honor right there? Your Honor very correctly summarized the evidence except as to Mr. Hartman testifying to his children and himself standing there. It is my fault if the witnesses have not testified to the banks being muddy, and I am prepared to prove that fact.

THE COURT—But no one has said anything at all about their unwillingness to go there because of the muddiness of the foreshore.

Mr. DEAR—Your Honor has pointed out that I have not had them testify to that, and they would testify to that if I were to recall them.

THE COURT—Well, take the case as a proposition of law in the light of the admitted facts. Admit for the sake of the argument merely—let us assume there was a deposit of mud on the foreshore, still we are up against the proposition

that there is not anybody who says that he stayed away from that place by reason of the muddiness of the foreshore. They all say they went there peculiarly and solely because of the swimming, and that the swimming was rendered undesirable because of the muddiness of the water.

Mr. DEAR—How are they going to get to the swimming—

THE COURT—They are going to walk across the float, as everybody says. That is what your own client said. Mrs. Bouquet said that they all went over the float.

Mr. DEAR—All right, sir; that may have been so as a matter of practice, but they do not have to; they have a right to walk over the foreshore and slip into the water that way.

THE COURT—They had a right to do that, and if they had stayed away from there on account of the condition of the foreshore it may very well be that you would have an indubitable right to recover damages on that account, but nobody did that. The condition was awful, may be, but nobody stayed out of the water on that account. They all stayed out because the water was roiled and muddy. Now what difference would it make if the foreshore was covered with diamonds or with gold. What difference did it make what it was covered with if nobody wanted to go in anyway? They all said "We don't want to go in the water." Now, what difference does it make what condition the foreshore was in? I agree with you perfectly that the Stevens case lays down the rule that if a man be the owner only to high

water mark, and if there be something put in the foreshore that results in a distinct damage to him, that he is entitled to be compensated for the damage. For instance, if he owns the land bordering on a public highway—which one of these navigable streams is—and some one should come and dig a tremendous ditch there and thereby prevent him getting to the highway, which he has a right with the rest of the public to use, he is especially damaged in degree and kind different from anybody else in the community, and thereby he would be entitled to recover damages. But what I am saying is this: Assuming for the sake of the argument that there was some deposit of slime on the foreshore which would have in some way interfered possibly with some people who wanted to go into the water that way, still we are up against this proposition—see if this does not appeal to your own view of what you have worked out the law to be—you have got to show first that there was a wrongful act. Now, let us assume that this debris or mud on the foreshore is a wrongful act; in addition to that you have got to show, in order to recover substantial damages, substantial damages. If there is a mere wrongful act, why, the measure of damage would be nominal.

Mr. Dear—May I interrupt to say—the dominion they exercised over the thing that makes up this public highway—I do not think my evidence confines me only to the foreshore. I am trying to use my foreshore to get in under the Stevens case.

The Court—Whatever the act is which you consider to be wrongful—and just in passing I

might say with respect to your remark that they have exercised dominion over the public highway, it is a dominion they have exercised to the detriment of the public generally, and if this man seeks to recover damages he must show special injury and he can only recover individually to the extent that he has shown the special injury.

Mr. Dear—Yes.

The Court—That brings us to inquire whether or not if there is a wrongful act established there is any special damage established to have flowed from that wrongful act other than the mere nominal damage that arises from having exercised this so-called dominion which has resulted in cluttering up the foreshore and so on. Now, that brings us then to inquire what is the measure of the damage in a case like this. That is a very important thing to know, because if the measure of damage would be permanent injury to the freehold, manifestly you would be entitled to recover for the difference in the value of the land immediately before and immediately after. In such an event you could have the right to show the actual diminution in salable value of that land, and the evidence which you have produced bearing on its actual value now would be infinitely more to the point and infinitely more directly bear upon the case than it does now, because here admittedly, apparently, this is a transient injury, an injury which arises from a wrongful act done for a temporary purpose and which is shortly to cease. If that is the case then the measure of damage is quite a different thing, and if you will turn to any

book on damages I think you will find that the measure of damages in such a case is the diminution in the rental value of theproperty for the period of time from the infliction of the wrongful act to the date of the commencement of the action. If that is so, then we come down, still reasoning, as I think logically, to this proposition; that if it be the rule, which I think it is—which however may not be—that in determining such rental value you look at the kind of business that Mr. Bouquet was carrying on, to wit, that of a boarding house keeper, and find that he lost boarders by reason of this alleged condition, then we got to find out whether those boarders actually did depart from him and refuse to come back and refuse to patronize the place because of the wrongful act of this defendant company; now then, the wrongful act that inflicts a peculiar and special degree and kind of damage on the plaintiff in this case is the act of depositing this mud on the shore. The act, however, of which Mr. Bouquet and all his witnesses seem to complain is the wrongful act of roiling up the water of the river, which is an act which is wrongful as against all the public and is subject to indictment, and for which Mr. Bouquet suffers not in any way different in degree or kind from any other person in the whole general community. That seems to be the way the thing works out.

Mr. DEAR—The Rossler and Doyle case and that Massachusetts case of Wesler say that this doctrine that in the public right are merged all the little private rights has never been extended to where the peace and comfort of a man's dwelling have been invaded.

THE COURT—If you should prove anything of that kind, such as is laid down in the leading case of Ross v. Butler, 4 C. E. Green—there are any number of cases that have followed that case—there the doctrine as I understand it is that if the peace and comfort are diminished to such an extent as to interfere with the health or convenience or well-being of the family, there you have a nuisance which is actionable and enjoinable, but I do not understand that merely because of some mud, which is not disease-bearing—

Mr. DEAR—No claim of that kind.

THE COURT—And not in itself injurious and does not go upon and injure a man in the enjoyment of the ordinary comfort of his house—

Mr. DEAR—I am not at difference with your Honor on the principle. It is only a matter of application. It is the interference with the enjoyment of that place, the having of clean water in front of it, and the knowledge you can go in your house and doff your clothes and go into clean water. There is no reaching over by the Hackensack Water Company into the yard and doing something there. It is the artistic feature of it—and undoubtedly that is a very real component of the value of Mr. Bouquet's location there.

THE COURT—If a man discolors the water of a stream, a navigable stream, a public highway, by putting some mud in it, then I understand your doctrine to be that he is responsible to every person that has a dwelling house or a property adjacent to that river because his aesthetic sense is injured by reason of the change in color. I do not think that is possi-

ble, and I do not think, furthermore, where he is not the owner of the foreshore, that the discoloring of the water, which it is not claimed in any way is upon his property, is a nuisance to him. A nuisance I understand is something that is put upon another man's property and inflicts injury. I do not undesrtand that a mere discoloring of the water which does not come on his property at all is an injury to him.

Mr. DEAR—May I attempt to illustrate?

THE COURT—Yes.

Mr. DEAR—Suppose across the street from your Honor's residence there should be carried on indecent and offensive sights; does your Honor think that because there is not some physical reaching out across the street to your Honor's property that would not be a nuisance?

THE COURT—Well, I think probably it would.

Mr. DEAR—Because of that which makes up the value of this place—I think the sitting on the front porch or on the banks or anywhere you want and looking around at clear water, and the next year at muddy water, with the ordinary concomitants that go with it—this year I can go swimming, and next year I can't—affects the rental value of the place and is a nuisance. I imagine—because I have not any authority, and we have not any right to think without authorities—I think if the highway that your Honor had his summer place on were smeared all up with white dust of some kind so that the sun's rays instead of being absorbed in the oil, etc., that is ordinarily on our streets were to be reflected upward into your residence

and make it hot and glaring like a Mexican scene, I think there would be special damage, because the man who put it there. although he was very careful that none of that dust blew across your property, has changed the appearance of things. It is on this public highway in front of your place. It is such a close question—and there is no denying it—it is such a close question that I think the plaintiff is entitled to the benefit of the doubt in this court.

THE COURT—Well, I am not sure that there is any doubt when you come to look at the cases carefully. I have not had a chance to look at them. I have simply been reasoning with you. If you will look at the Attorney General vs. Paterson, 13 Dick., you will find some very interesting reading—58 Equity, page 1. There, on page 4, you will find this: "The Mayor and Aldermen of Jersey City merely as riparian owner upon a tidal stream has no right in the waters of the stream distinct from the rights of the general public therein. The adjacency of its property to the water merely affords convenience in the enjoyment of the common rights. The water and the land under it where the tide ebbs and flows is the property of the city subject to the right of navigation."

Mr. DEAR—That is a case where the Attorney General—well, it practically was an injunction case.

THE COURT—It was an injunction case.

Mr. DEAR—And there they are dealing on the one side with the State of New Jersey and

on the other side a municipal corporation. Chancellor McGill wrote the opinion and his mind was wholly directed to these questions of municipal rights. How, if what is there said can be brought over and applied to this case of both private parties, would it have been possible for the discussion to have gone to the length it did in the Marcus Sayre v. Newark case, where the Court spun along at a great length on the question of what right the Marcus Sayre Company may have had out in the public highway where—

THE COURT—My own impression about that thing is this: that first of all it being admitted that Mr. Bouquet only had the title to the high water mark he had not any right in that river at all distinct from the rest of the public, absolutely none; he was a mere member of the public. He hadn't any right individually to insist that the water should be green, blue or purple. He was simply a man who lived along the stream and if the color of the water was changed he did not have any right as an individual in an individual suit to insist that the color of the water should be different and that nobody should change it. He had a right as a member of the public to have the public remedy, which is a remedy by indictment. That is what he had a right to do.

Mr. DEAR—He certainly had a private right to stop the river from being changed from blue to green if the peace and comfort of his dwelling were impaired.

THE COURT—I do not think you can find any case which says that the changing of the

color of a stream is an interference with the peace and comfort of a man's home.

Mr. DEAR—I have not been able to find such.

THE COURT—I do not think the changing of the color of the river is a private nuisance in the case of anyone who hasn't any right in the river. It is a public highway.

Mr. DEAR—We have been talking about blue and green. It is not a question of changing the color; it is a question of there being mud there—disagreeable foreign substances in it.

THE COURT—I think, Mr. Dear, in the absence of any authority to the contrary—and after what may be on my part a vague recollection, but nevertheless rather an extensive one, for I have been through these nuisance cases many times—I cannot recall a solitary case where a party has been permitted to recover for an injury merely to an aesthetic sense where he had no right different in degree and kind in the highway which is alleged to have been obstructed or polluted than that of the rest of the public generally.

Mr. DEAR—May I say one word more? There is no use arguing forever, but I think I may still get your Honor on it. Have you had occasion to run through the Marcus Sayre case.

THE COURT—I have not gone through any of them. I have simply been arguing with you.

Mr. DEAR—This is what the Marcus Sayre case says—it denied injunctive relief to this

company against the city of Newark. The city wanted to run another sewer just above the Marcus Sayre Company's plant, and they said, "No; we cannot stop that. The city of Newark is under a duty to make sewers for its inhabitants and by custom has a right to run the sewerage into the Passaic River; but if the city should construct these sewer works negligently and if there should be some negligence in the work respecting which otherwise they were clothed with complete delegated legislative power, then the Marcus Sayre Company could recover even against the municipality." How could the Marcus Sayre Company recover against Newark unless it had some right that the corresponding wrong went with in the water? In other words, I think it is—

Mr. EDWARDS—They owned the ripa and they owned the riparian grant.

THE COURT—Let me ask you this, to make it perfectly plain: Suppose that you own a piece of property in which you and your family live, and I own the house next door, and when I move in my house is painted a sober and solemn gray, and suppose after a while I paint it a most disgusting yellow and I put some trimmings on that are out of entire harmony with the general scheme; have you any right to complain against me because I have used my property in such a way as to offend your aesthetic sense?

Mr. DEAR—No, sir.

THE COURT—Now, suppose that instead of painting my house this atrocious color I proceed to carry out some chemical experiments in my house, and I put a chemical retort in there and

get a lot of nasty smelling things and let the smoke and fumes and stuff of that sort run over and into your house to such an extent that it injures your family's health, you have a right there.

Mr. DEAR—Yes.

THE COURT—Why? Because in one case only your aesthetic sense was affected and the thing did not amount to a nuisance, and in the other case the comfort and convenience and use of your house was affected and in that way a right of action arose. To make it plainer still, suppose that on a public highway where there run they trolley cars a trolley company should see fit to paint its cars a color that disgusts everybody that looked at them, and you lived along the highway and the cars were passing there every few minutes—or a place on a river.

Mr. DEAR—Now, you are getting right down to it.

THE COURT—Suppose that thing occurred, and every time your wife looked out of the window she saw these things and she had to pull the shades down because it disgusted her, do you think that the offended aesthetic taste there would give right to an action even though a private party using this public highway offended this aesthetic sense? I do not think so.

Mr. DEAR—I do not suppose that a lone steamboat steaming up the river that shocked all our artistic temperaments would give rise to a right of recovery, but if they used glaring lights and blinded your eyes as they went

by, that would be a different thing. Is your Honor going to take it for granted at this stage, which I take it is practically a motion for non-suit, that they were justified in putting the mud in the river?

Mr. EDWARDS—There is no allegation of negligence.

THE COURT—I am not entirely convinced that this is a motion for non-suit. I am simply trying to determine whether or not this is a situation where anything more than normal damages should be allowed.

Mr. DEAR—You are right, sir. I did not quite follow you. Let's stick to this question of damages.

THE COURT—Yes. Let's assume for the sake of the argument that these things you contend here have been established, the connection of the Hackensack Water Co. with mud in the river, and assuming that you have established the loss of rental value as a natural and proximate result of the dumping of this mud into the river, have you established in any way that there was any loss of rental value to you through that?

Mr. DEAR—Yes; there is evidence from which the jury can infer that in a most clean-cut fashion, so far as it goes, that at the end of 1913 you or I or some one might have been found to rent that place for a boarding house business because it looked good, but at the end of 1914, would anyone have rented it from Mr. Bouquet for a boarding house business? No.

THE COURT—You simply, by that argument, have removed the difficulty one step, but you

have not discharged it. The question would be, You could not rent it. Why? Because the swimming was not good. Why wasn't the swimming good? Because the river was muddy. Then you are right up against the same proposition you were before, because you have not progressed any. In other words, you have to show something more than that the river was muddy. You have to show some special degree of damage different in kind from that that the public suffered, which was suffered by you, resulting in the loss of rental value, and all you have shown is that the the special kind of damage you suffered was that some of this mud filtered around and remained upon the foreshore between the ripa and the channel, or whatever it was; and you have shown furthermore that everybody who left left because he could not swim.

Mr. DEAR—Isn't that special damage if you run a boarding house?

THE COURT—No. That is the very point we have been arguing. I think not. I think that the river being muddy is a damage that you and everyone else who has a right to use that for fishing, boating, swimming and all that sort of thing suffered; that you do not suffer any damage different in kind and degree from that of the rest of the public. They have a right to go in the water. If they are prevented from going in it is because they do not like the color of the water. Now, let us go a step farther and draw one other distinction. Suppose that instead of the thing continuing along to this time it had lasted for a while, and that there had gotten considerable mud on the so-called

foreshore, and then suppose that the river had cleared up so that it was perfectly clear so that these lovely fishes could be seen and those things, and you could have jumped off the float just as you did before; would the people have come back?

Mr. DEAR—We will hope they would have.

THE COURT—Then why did they stay away, in the light of that fact? They stayed away not because the foreshore was muddy, but because the water was dirty, and you have got to determine then whether the mere fact that the river was dirty was a damage special to you and different from that suffered by the public generally, and which is subject to indictment.

Mr. DEAR—Will your Honor give me until to-morrow morning?

THE COURT—Yes. It is a new case, and I think that you arrive very much better at an accurate and proper legal conclusion if you thresh it out, and I am threshing it out with you, not because I am against you or for you, but because I am struggling about, just as you are, to find out what the law is; and I am perfectly willing to let it rest until to-morrow morning to hear you on that subject, because the proposition is new.

Adjourned to February 10, 1916.

THE COURT—Mr. Dear, you wanted to bring something to my attention, I understand.

Mr. DEAR—I think that there is no evidence here yet of odors, and I would like to have permission to put on a witness or two as to these odors.

THE COURT—If you have that in, then what?

Mr. DEAR—All right, if your Honor will assume that we have it.

THE COURT—No; I am only asking you offhand, because I do not think there is a solitary soul who has said anything about an odor creating any physical discomfort or annoyance.

Mr. DEAR—No; there is not.

THE COURT—Well, put them on. If you have anything of that kind I will hear it.

MAXIME BOUQUET, sworn.

Direct examination by Mr. Dear.

Q. Mr. Bouquet, in what way, if any, have you been sensible of this mud in the river, beyond seeing it? You have seen it. Now, has it come to your attention any other way? A. Yes.

Q. How? A. We—all the people of the town—

Q. No; how do you know about—when you are at home how do you know about this mud in the river? You have seen it, haven't you? A. We have seen it and we can touch it; we wade in and we can catch mud in our hands. There is six inches of mud on the edge.

Q. Yes; but when you are sitting up in the house, or on the front porch? A. Well, we see the mud on the river; the mud only.

Q. Well, do you sense it in any other way? A. Well, of course we smell it.

Q. All right. Now how much do you smell it? A. We smell that dirty, what do you call covered water from the top of a swamp?

Q. Tell us to what extent you smell it. How much? A. Well, you know, gentlemen, when you

leave water on a pail or on a tray outside like the rain, it brings an odor of like musty smell; and it is the same smell when you remove mud which mud has been laid down there for centuries.

Mr. EDWARDS—I move to strike out the last part.

THE COURT—It will be stricken out.

Q. Are you speaking of the smell that you have smelled at your house? A. Well, we can smell it all about the river, and my house is 150 feet from the river.

NO CROSS-EXAMINATION.

Mr. DEAR—Now, if the Court please, I would like to re-state the proposition in order to save time. I understand that we are discussing the existence—

Mr. MILLER—May I interrupt just to make this suggestion?

Mr. DEAR—Yes.

Mr. MILLER—It seems to me we may get nearer the appropriate method of proceeding with our trial if we put in all the evidence on this Bouquet case before we argue the Bouquet case.

THE COURT—I understand that the evidence is practically in of Mr. Bouquet.

Mr. DEAR—The facts are in now. I have nothing more than I know of or no intention of offering anything more on Mr. Bouquet's case.

MOTION FOR NON-SUIT

Mr. MILLER—Now, I think it is necessary for me to make this motion: I move for a non-suit upon the ground, first, assuming—

THE COURT—You move for a non-suit, do you?

Mr. MILLER—Yes, I move for a non-suit on the ground that assuming there has been shown a breach of some right that Bouquet has, it has not appeared that that breach has been caused approximately by the defendant, the Hackensack Water Company. On the second ground that it does not appear that he has suffered any special damages proximately resulting from any unlawful act on the part of the defendant the Hackensack Water Company. On the third ground it does not appear that he has suffered any special damages of any kind, assuming that there is a breach of some obligation on the part of the defendant; and on the next ground on the theory that all that appears—and the presumption is, in the absence of proof to the contrary, that what the Hackensack Water Company was doing it was doing lawfully, and in the absence of proof that what it was doing was being done negligently and that this result was produced not by the mere doing of the thing but by the doing of it negligently, we are entitled to a non-suit.

THE COURT—I deny the motion.

Mr. MILLER—May I take an objection to that ruling?

THE COURT—The objection is on record.

Mr. MILLER—I now move in behalf of the defendant, the Hackensack Water Company,

that your Honor direct a verdict in favor of the plaintiff in this case for six cents damages.

THE COURT—A motion to direct a verdict, I presume, must be considered as a waiver of your motion for a non-suit, and it must be considered as a closing of your case.

Mr. MILLER—On this branch of the case, yes.

THE COURT—I will hear the other side on that motion.

Mr. DEAR—After having the benefit of the discussion yesterday I think that the plaintiff's case is and should be rested on, if I may call it, the simon pure nuisance theory aside from any particular water rights doctrines. It being a water case, I was naturally turned to our water cases, and I conceived the idea that the Stevens case would be a good one to hook on to for the bank proposition; but it is very true that the damage that we are claiming is not from the dirty bank; it is just as your Honor very succintly puts it—from the dirty water. Now, then, all of our water cases except as Chancellor McGill delivered himself in 58 Equity, as he has reversed later, which I will call your Honor's attention to, all of our water cases talk about rights in the water property rights. For example: In the Sayre case in the Court of Appeals, in Justice Depue's opinion at page 371, he says: "By the law of this State a riparian owner has no property in the land by reason of his adjacency to tidal waters while it remains under water. The inchoate right which he has is not property," etc. And he cites State vs. Jersey City, 1 Dutcher, and Stewart vs. Boyn-

ton, 2 Vr. Now, the first of those cases was a tax case where there was an assessment for tax purposes of land under water—a certiorari proceeding—and the Supreme Court held that the riparian owners not having wharfed out had no title of any kind to the land under water and no property rights therein subject to tax assessment. In the second case a gentleman tried to bring a suit for use and occupation because some one had left his boat or raft, or something, out in the river over his land under water, and they said, no; he has no property in it to bring use and occupation. We do not claim, sir, as, of course, it is obvious, any right of Mr. Bouquet in the water. It is conceded all around this is a public highway. What we do claim is that there is a right in him as an owner of his own land to be immune from anything which amounts to a nuisance to his property. It occurs to me that I think something is to be learned from the doctrine of ancient lights and prospect.

THE COURT—That is not existent in this State.

Mr. DEAR—That is what I am getting at—or in this country; but to some extent that doctrine existed in England and was attempted to be brought over here. What happened? The American Courts finally uniformly said: "No; we will not recognize the doctrine;" and I think the philosophy of it was that in the growing country we could not recognize the right of one man over the land of the other; in other words they said a man can use his own property so that he does not injure that of his neighbor, and our Courts were more liberal

than the English Courts; the philosophy of our Courts was more liberal than that of the English Courts, and they said: "We won't recognize the intangible right."

THE COURT—This maxim that a man shall use his own property so as not to injure that of another is subject to—

Mr. DEAR—Special interpretation?

THE COURT—Yes.

Mr. DEAR—That is what I am coming to. I am only laying down a starting point, and the reason for it is that it has not been interpreted here in this country the way it was interpreted in England.

THE COURT—For instance, I can use my property so as to ruin another legally.

Mr. DEAR—Yes, that is what I am getting at. Now, then, you may use your property, but I do not think you can use the public property so as to ruin me without a cause of action in my favor.

THE COURT—Yes; I can. For instance, take the Hudson and Manhattan tubes. They have been so used as to very largely take away the value of property down in lower Jersey City.

Mr. DEAR—Exactly.

THE COURT—And that is a public use, and it is a public highway on which the public generally have a right to travel.

Mr. DEAR—Yes.

THE COURT—That is one way of using the public property to injure some one else without an action.

Mr. DEAR—Why? Because under delegated legislative authority.

THE COURT—That is exactly what these people are doing.

Mr. DEAR—There is no delegated legislative authority here; it is a private corporation.

THE COURT—But they are exercising a franchise.

Mr. MILLER—You have pleaded that we were a corporation.

Mr. DEAR—Of course, you are a corporation; I guess you are, yes; I have pleaded they are a corporation, but they are not exercising public franchises here at all. If your Honor has made that statement to me, I come back and say no, and I will ask you, with all due respect, why you say that.

THE COURT—If you look for an answer, I will say that the very fact of their being a public corporation is a franchise which they are using, and whatever right they have to furnish water to private consumers and to procure water in a watershed, they may even use the right of eminent domain for. Those are public charters that they are using.

Mr. DEAR—But there is not a bit of evidence here now of a public franchise, or to put it in other words, a delegated authority from the State to dirty the water.

THE COURT—Let's assume for the sake of the argument—because I do not think it makes any difference at all in the final disposition of this case—let's assume for the sake of the argument that they are running some dirty

water on this highway, then you still have the duty of showing that that is a private nuisance as to this plaintiff.

Mr. DEAR—All right.

THE COURT—Muddy water is not a private nuisance necessarily. For instance, I can dig a cellar on my ground if I see fit, and I can put water in there and let it stand there all summer and all winter; I can let stand there for the kiddies to play in and I can let it stay there in winter for skating, and you cannot stop me.

Mr. DEAR—Yes, and when you are sued you justify on this theory: We are living in a more or less compact state, and that it is necessary that we give and take, and you have a right to use your property to-day to a far greater extent so far as injury to me, your neighbor, is concerned that you did a hundred years ago in England where we had the ancient lights theory. It is your property.

THE COURT—Now, suppose instead of putting water in that open ground I put assafoetida; then you have a right of action because it is a nuisance.

Mr. DEAR—Yes.

THE COURT—It does you a peculiar, particular injury. And that is the same kind of an action you would have if this river was a nuisance that did some peculiar damage, different in degree and kind than that suffered by the public generally. Different in kind and degree—that is what the cases say. The mere fact that you—and this is what you were arguing yesterday—the mere fact that you suffered damage does not make this thing a nuisance.

The mere fact that you lose all your boarders does not make this thing a nuisance. It must be a violation of a legal right existent in you.

Mr. DEAR—In respect—

THE COURT—In respect to this particular thing.

Mr. DEAR—In respect to the property and not in respect to any rights in the water, because that is in the highway. Now, take the State vs. Erie Railroad, 84 Atlantic, 698—the smoke case down here.

Mr. MILLER—Is this the Court of Errors?

Mr. DEAR—No; this is the Supreme Court—Justice Minturn.

THE COURT—The Court of Errors Reversed that, didn't they?

Mr. MILLER—Reversed on the proposition of the charge.

Mr. DEAR—On the question as to what is a nuisance—on the question as to how far our courts will go on this subject: "As was said by the New York Court of Appeals in McCarty vs. Natural Carbonic Gas Co., 'No hard and fast rule controls the subject; for a use that is reasonable under one set of facts would be unreasonable under another. Whether the use of property to carry on a lawful business which creates smoke or noxious gases in excessive quantities amounts to a nuisance depends on the facts of each particular case.'" That ends the quotation from the New York case, and this is the statement of our Supreme Court: "And in all cases where the question has arisen whether the facts and circumstances are suffi-

cient to create a condition tantamount to a public or private nuisance, the solution of the inquiry, where there is evidence upon the subject, is invariably referred to the jury." Which simply goes back to what we might call the original a pronouncement in Ross v. Butler, where the Chancellor says each case may be judged according to its own facts.

THE COURT—That is true not only with repect to nuisances, but with respect to everything else in the law. That is nothing new.

Mr. MILLER—That is one of the points that the Court of Errors disagreed with. They decided that what was done under lawful authority could not be a nuisance.

THE COURT—You could not take a criminal case away from the jury on that proposition anyway, except in favor of the defendant.

Mr. DEAR—Of course, you could not. Let these defendants prove to your Honor and the jury that they are doing this under lawful authority and we are out of Court—that is the Beseman case.

THE COURT—But you are not in Court unless you prove that what they are doing, whether under lawful or unlawful authority, is a nuisance. That is the difficulty with it—nuisance as to them. Now, you lay very gracefully out of this case the notion of the water, but the difficulty with the situation is the water is a very important factor.

Mr. DEAR—I try to lay out of the case anything predicated on our property rights in the water.

The COURT—But you have got to leave in

the case the fact that this is a public highway.

Mr. DEAR—Oh, yes.

THE COURT—And that the injury is an injury which you do not suffer in any greater degree than anyone else or in any different kind.

Mr. DEAR—I hesitate to quote from this Roessler vs. Doyle case, because your Honor has been through it only yesterday, but in the Roessler and Doyle case, 73 N. J. Law, we find this: "A public nuisance may arise in two classes of cases. Where the right invaded by the offender is a common and public right—one which belongs to every citizen, such, for instance, as the right to use a highway or park or navigable waters—the plaintiff must show that he had received an injury distinct in kind from that received by the rest of the public." Then it cites the Wesson v. Washburn case.

THE COURT—Yes; I read that last night.

Mr. DEAR—But the principal underlying these cases has never been extended to cases where the alleged wrong has been done to private property, or the health of individuals is injured, or their peace and comfort in their dwellings is impaired by the carrying on of offensive trades which create noisome smells or disturbing noises, or causes other annoyances and injuries to persons and property, however numerous or extensive may be the other injuries. I cannot conceive, sir, that the property owner is remedyless if he comes into Court and shows that a third party has so been using a public highway that he is specially damaged, and I conceive it to be mat-

ter of defense as to what right the third party has to do that.

THE COURT—What is the damage in this case?

Mr. DEAR—The damage is the loss of his property, the loss of the usufruct of his property, the loss of the rental value of his property.

THE COURT—Why? He did not lose any use of his property from this so-called nuisance, as you call it, by reason of anything that he suffered in any different degree or kind than that that the public suffered. So far as I can see it, I do not see a solitary thing that he lost.

Mr. DEAR—Why doesn't your Honor's last remark apply to Roessler and Doyle? How is Roessler and Doyle any different from Mr. Bouquet's case? In Roessler and Doyle they were across the street from a factory and the noise—

THE COURT—Certainly; but in my judgment you seem to lose sight of this important distinction, that in every case such as Roessler and Doyle, Ross and Butler and all the other cases where an injury from noisome smells and all that sort of thing has resulted it has appreciably resulted in physical discomfort and annoyance. You put a case yesterday afternoon which for the moment seemed to be rather aside from the general rule; you put the case of somebody who carried on indecent performances across the street, and to my mind that seemed to be a case which was a nuisance, and while it did not seem to come within any special rule I frankly admitted that I thought it was a nuisance; and

according to my usual custom I thought I would look it up, and I did look it up, and found why it is a nuisance. It is the only case in which mental distress or mental perturbation will be considered as laying a basis of a nuisance—indecency; and that on the ground of public injury that would arise on that account. That is the only one you can cite.

Mr. DEAR—That is not the way it was reasoned out in an early Maryland case.

THE COURT—It is the way it is reasoned out in all the text books, notably Bigelow, which is one of the best books on torts in this country. But whatever the reason, the fact is that there is not another case that you can find in any text book where mere mental distress has been held to lay a basis for damages by way of an action of nuisance. There is not another one. The rest are all physical discomfort and annoyance—smoke, gases, fumes, actual trespass.

Mr. DEAR—I do not believe that the law nor your Honor's administration of it nisi prius is made up of following blindly exceptions to general rules. Of course, these ~~boarding~~ bawdy house cases have not come up until somewhat recent years—

THE COURT—I do not think the ~~boarding~~ bawdy house makes any difference at all. I do not care whether it is a ~~boarding~~ bawdy house or a hotel or a livery stable or a private house. That is an accidental fact and has nothing whatever to do with it except as furnishing a condition to which the law is to be applied. It does not change the law at all. The rule of law is precisely the same no matter what the fact is.

Mr. DEAR—That is what I am saying.

THE COURT—That is what I am saying. So we won't argue that. I agree with you.

Mr. DEAR—And the rule of law was not departed from or varied in these indecency cases.

THE COURT—Manifestly it was, because the fundamental rule of the law was a general rule that a nuisance would result from any act which resulted in physical discomfort or annoyance. That was the general ground upon which the doctrine was placed. Of course, it goes on to say that it renders the habitation less desirable and comfortable and convenient and so on.

Mr. DEAR—Well, of course, the facts in Roessler and Doyle were physical, so what was said outside is mere dicta; but I just call your Honor's attention in passing to the fact that they do not use that phrase physical discomfort exclusively in their discussion in Roessler and Doyle as to what constitutes a nuisance. They speak of any congeries of facts that go to make up an appreciable diminution in the value or an attack on the enjoyment of the use of the property.

THE COURT—But the difficulty with the situation is that I think you are now wandering away from the point that we are arguing. The point we are arguing is not. Is this an uisance? because the very motion made by the other side assumes it to be a nuisance. The point we are arguing is whether there is any damage. That is the only point in the case, and we simply fruitlessly talk when we talk as to whether this is a nuisance or not. We will assume for

the sake of the argument that it is. Now, a most interesting case on this subject is Hatfield vs. Central R. R. Co., 4 Vroom, 251. In that case a railroad company had the temerity to build, without license of law, on an actual public highway in front of a man's lumber yard where he was actually carrying on his business, a railroad track, and large damages were allowed because of inconvenience and so on to his business, and the Court set aside the verdict on the ground that so far as they could see from the facts in the case there was not any evidence at all to establish any damage although the fact of the nuisance was perfectly patent and open; and if you will look at the text books—take Hale on damages, page 252, you will find the rule laid down that a nuisance consists of a violation of a legal right and of damages, and that the gist of the action is damages. That is the general rule. Now, in this case what have you shown? You have simply shown that this man has a place there upon which there may be for one reason or another a nuisance. You have shown that he ran a hotel there, or a boarding house, and that from this boarding house a lot of people either went away or refused to come to it, and that the reason why every one of then went away or refused to come was because the swimming had been spoiled by the muddiness of the water. Now, I think that that is not a special damage to him which he is entitled to recover damages for in a case of this kind, because everybody who wanted to swim in that river was injured in precisely the same way that he was and not any more. Of course, it may very well be that it is questionable whether swim-

ming is a right in a public highway that everyone has. I do not find any cases on it; but I assume offhand that a man has a right to take a walk for pleasure on a public highway which is a street, and I assume therefore that a man has a right to take a swim in a navigable river by way of pleasure; and it may very well be that to deprive a person of that right is to deprive the person of something that he is entitled to receive. Now, that may be a damage to his property but it is no nuisance to him as distinct from the rest of the community—absolutely no nuisance different in kind or degree, because everyone who wants to swim must encounter the roiled water. That is how the thing appeals to me. I do not know whether you gentlemen have found—I assume you have not, because somebody would have cited it by this time—a very interesting case on this subject. I will read to you a lot from it, because it deals with about every question in this case. It is not in this State, however, but it is the decision of Lucilius Emery, who was at one time the Chief Justice of the Supreme Court of Maine, and who was a very eminent jurist, and who sat in a State where water rights are constantly mooted, and consequently is supposed to have been reasonably well informed with respect to it. This is the case of Whitmore vs. Brown, 65 Atlantic Reporter, commencing at the second paragraph in the second column on page 520. Chief Justice Emery says this—and I may say in order to make this intelligible that what happened was that a man who owned property next door to a riparian owner whose property went to the edge

of the bank, built certain floats and other things there which interfered with navigation, just as your claim is that this mud interferes with swimming, which is another method of using the public highway—nothing at all different. This man wanted to use his boats and get out of there, just precisely as your people wanted to use their bodies and swim in the water. This is what the Court says about that: "The present structures and the proposed extension are forbidden by statute, and to that extent are, and will be, illegal. Do they or will they infringe any legal right of the plaintiff? There is no evidence nor complaint that they do or threaten any injury to the plaintiff or her land by vitiating the air or water by unhealthy or offensive odors, by disturbing noises, or by obstructing the passage of light or air or by otherwise unfavorably affecting her health or comfort. The plaintiff practically advances but three propositions, viz "—now see how closely these propositions are assimilated to yours—"(1) That the structures are, in law and in fact, an obstruction to the navigation of the cove, and thereby reduce the value of her land in the cove; (2) that the structures are unsightly and also obstruct the view of the scenery from her land, and thus lessen the enjoyment and value of her estate; and (3) that the structures materially impede the passage by water to and from her land, and thus lessen its value. As to the first proposition, whatever the damage to the plaintiff or her land, the right infringed, that of the unimpeded navigation of the cove, is a public right common to all the people of the State, and not a right peculiar to owners and occupants of land bor-

dering on the cove. It is the settled law of this State that structures which only infringe public rights can be dealt with only by the public; that is, by proceedings in the name of the State or some authorized persons in behalf of the public. An individual affected has no separate right of action in his own name. To enforce the public right for his benefit he must set the public agencies in motion. It is only when the structures inflict upon him some special legal injury different in kind as well as degree from that suffered by others, that he has an individual right of action against them." Citing cases. "The plaintiff contends, however, that boating privileges in and about the c ove are attached to her lot"—just as you claim that summer boarders are attached to yours—"that these are a large and peculiar element in its market value, and constitute a legal right appurtenant thereto apart from the public, which has no right to make use of it to facilitate their use of their public right, and that the structures restrict and abridge these privileges. There may be appurtenant to her lot a right of passage by boats, etc., to and from it, but that is only the right of access to, and departure from, her land by water. Any other use of the water for boating or other navigation would be under the public right alone."—Which is precisely the claim that you make with respect to going over this mand for the purpose of swimming, and having that swimming interfered with by the roiled condition of the water. Now, here is a very important paragraph, because this answers an argument which you made last night absolutely: "But the plaintiff further urges that, conceding the right violated

to be a public right only, yet the violation of that public right has damaged the value of her land, and that this damage is individual and peculiar, one not suffered by the public at large. The question, however, is not whether the plaintiff's land has been damaged, but whether any of her legal rights have been infringed. The landowner has no legal right that the market value of the land shall not be disturbed." Abandoned habitation is one way of stripping value away; the passing of transportation lines through a community is a way of lessening values; factories in residential communities is another method of destroying absolutely the value of land, but neither one of those is a legal wrong; for the reason they have no legal right to prevent these things going into the community.

Mr. DEAR—I would like to say—

THE COURT—I just want to read you this: "Though, by reason of her land being on this cove, the plaintiff may have more need or occasion than other persons to make use of the public right to the unimpeded navigation of the cove, and her land may be more damaged by the violation of that right, the right itself is still public and not private. Her ownership of land on the cove gives her no greater nor different right to navigate it. Every other citizen has the same right in kind and degree. The plaintiff may have a greater interest than others in the right, and a greater need of its enforcement, but that does not change the public right into a private right"—citing cases. "It may be that an individual actually obstructed by an unauthorized structure while in the act-

ual exercise of the public right may maintain an action for damages resulting, as was held in Brown v. Watson, 47 Me., but that is a different case from this, where the only complaint is of the unfavorable effect upon the enjoyment and value of the land. The plaintiff further urges the hardship of her being left to the action of public officials to enforce the public right and relieve her from the damage done her by these unlicensed structures. She suggests that the officials, influenced by local, political or other immaterial considerations, may improperly neglect, and even refuse, to act upon application, and thus leave her helpless. Even if this apprehension be well founded, the Court cannot afford relief in this suit. Her remedy against recalcitrant public officers is in some other procedure. To the second proposition there are two answers. The law of this State does not recognize any legal right to an unobstructed view of scenery over and across the lands, even the flats, of others unless acquired by grant, nor does the law recognize as a cause of action the annoyance caused by the proximity or ugliness of otherwise harmless structures upon the land of another. The pleasure of an unobstructed view and of a prospect free from unsightly objects may be great, but, in the present state of the law, it is too refined for legal cognizance. Again, the annoyance complained of and the consequent loss in value of land, were not caused by the fact that the structures are or will be erected and maintained without the required statutory license." In other words, that they are a nuisance. And then follows this important statement, which is the crux of the argument we have been hav-

ing right along: "The plaintiff must prove that her damage was caused by the particular element in the character or use of the structure which renders it a nuisance." You cannot claim that it is a nuisance for one thing and get damages generally, but there must be a linking up of the particular cause or element with the resulting damage. Otherwise you can get no damages on account of it. If you have first the muddy condition of the bank and secondly the roiled condition of the water, on both of those this principal is applicable: First, there is no evidence in the case that the muddy condition of what you yesterday chose to designate as the foreshore has prevented anybody from enjoying that river or caused any annoyance or inconvenience to these parties on its account, and at any rate what is there is upon the land of the State or of a third party and not on the land of this plaintiff; and therefore unless some peculiar damage resulting from that is shown in the case there can be no recovery on it. Then with respect to the other element, the roiled condition of the water, even though that is unsightly, even if it is a nuisance because it is being done without legal authority at all, no matter what it may be, if it is not a thing which causes a damage resulting in physical discomfort or annoyance there could be no recovery. Now, in this case if you claim special damage you must prove it, and I am trying to evince by what I say here the utter lack of casual connection between the injury that all the witnesses have complained of and the resultant damage—when I say resultant damage it is a sort of a bull; but what I mean is the damage

alleged to result in your complaint—because the injury complained of is that you cannot swim any more because the water won't permit it, and the result is that you cannot swim any more there, and the result of not being able to swim any more is that he lost all his boarders. Now, then, swimming is the common and ordinary use of that river which he has not any greater right to enjoy than the rest of the public has, and in which he has no peculiar or individual or special interest any more than anyone else has, and therefore, it being a common nuisance, only the common remedy through the public authorities can be sought. That is the point I want to make, and I think now I have succeeded in stating it clearly.

To illustrate the point I have just made, the Court says: "The hurt to the plaintiff must come from the structure qua nuisance"—that is as a nuisance—"to give her a cause of action for maintaining it." Now, assuming for the sake of the argument that this roiled condition of the water constitutes a nuisance—assuming that—it is a public nuisance, and being a public nuisance unless you can show some special and peculiar damage different in kind and degree from that suffered by the public at large, this plaintiff has no right to maintain his individual action for damages on account of it.

Mr. Dear—There is no question about that to my mind.

The Court—Now, that is my notion of the case. It is a difficult case, for this reason—not that the rules of law that govern it are difficult, but it is difficult because the combinations of fact to which the rules of law are applicable are

so unusual and extraordinary, and when we once come across the rules that are settled by the wisdom of the ages on the subject we find that they are so absolutely settled that there can be no doubt about it. For instance, the first rule of law that we would be obliged to deal with would be the rule of law with respect to what is a nuisance.

Now, nobody disputes what the nature of a uuisance is, and nobody disputes that in order to recover damages for a nuisance after you have established that the nuisance exists, you have to link up the gist of the action, which is the damage, with it, and to show that the whole thing you complain of as a nuisance is a nuisance and that it resulted in the particular damage for which the claim is made, and that I think is the one part of this case where the proof is conspicuously lacking. As I said a moment ago in calling your attention to these various cases, and especially to this case of Hatfield, there, at least by implication, Chief Justice Beasley reading the opinion lays down the rule so absolutely clearly that it seems to me it admits either on the side of reason or authority of no dispute, because there was a case where there was a nuisance and there could be no doubt about it being a nnisance. It was an unauthorized trick in a public highway. It was right in front of this man's property and was calculated to interfere with his carting out his lumber into that highway, and the Chief Justice said, "Why, you may have established a nuisance. This is a nuisance; we say that; but you have got to have proof and show that the business was depreciated because of this nuis-

ance, this particular thing." In this case there is nothing like that whatever.

Mr. DEAR—People would not come back because they could not go swimming.

THE COURT—Certainly; and the interference with the swimming was the public nuisance. That is the case.

Mr. DEAR—Damage differing in kind and degree.

THE COURT—Let me read to you again, so there will be no question about that. "The plaintiff contends, however, that boating privileges"—swimming privileges, supply that, for it the same thing precisely.

(Mr. Dear shakes his head).

THE COURT—Now, why do you do that, as though that is not so? This is a public highway. "Plaintiff contends that boating privileges in and about the cove are attached to her lot"—just as you contend that the right to swim is attached to this lot—"that these are a large and peculiar element in its market value."

Mr. DEAR—They are, pertaining to our place.

THE COURT—"And constitute a legal right appurtenant thereto, apart from the public, which has no right to make use of it to facilitate their use of their public right, and that the structures restrict and abridge these privileges;" and he goes on to state: "There may be appurtenant to her lot a right of passage of boats, etc., to and from it, but that is only the right of access to and departure from her land

by water. Any other use of the water for boating or other navigation"—which would include swimming—"would be under the public right alone." Now, if that case is law this case is ended.

That, I think, disposes of the motion; but I will agree with you this: that if you had shown that the nature and kind of the stench, if there was a stench that arose from this river, was of such a character and to such a degree that it interfered with the physical comfort and convenience of the people in this house and inflicted a damage because of such physical discomfort and inconvenience, I would say you ought to go to the jury and have your damages fixed, and if these people had suffered physical discomfort and inconvenience I would say that you were not obliged to go on and show to what extent, because, as Justice Field said in this Fifth Avenue Bank case in 110 U.S.;—he says, "Physical discomfort and inconvenience, like a blow in the face, cannot be mathematically ascertained, but must be ascertained by the jury in their best judgment." If that case were here then I think Ross vs. Butler and all the other cases would become immediately applicable and I think I would be obliged to submit the question to the jury as to whether or not there was damage to this property by reason of that peculiar situation of affairs, but here there is nothing more than a slight smell, which I suppose, putting the best phase on Mr. Bouquet's testimony—

Mr. DEAR—I have got some smell in the case. I just wanted to get it on the record. There is a smell.

THE COURT—It is exactly the same smell that you smell in your house and I smell in my house from the Hackensack meadows, and it is nothing more or less, from the description given; and if I am correctly informed as to that muddy smell, far from being an unhealthful thing it is a healthful thing. That is my understanding of it. A mere smell never gives any man a disease; but if it becomes a stench and interferes perceptibly with the enjoyment of his household, then you have a claim for damages.

Now, in dealing with this case thus far I have assumed for the sake of the argument—and I want it on the record, so that if I am wrong about it and you care to review it the assumption may be taken as something which will give you all the benefit you are entitled to from my decision—I have assumed for the sake of the argument that there is a direct established connection in the evidence between the act of the Hackensack Water Company and the presence in this river of that mud, and I have assumed, for the sake of the argument that the presence in the river of this mud is negligence, because I think that negligence is a necessary element in a case of this kind. I think that the rule is laid down in the Beseman case and in all the cases in this State that deal with this situation—when I say negligence I am talking about a situation where they have established that they have certain rights to do certain things and that they are doing those things, and that the damage that results is merely that unavoidable and necessary that comes from the exercise of a public franchise.

CERTIFICATE SUPPLEMENTING PRINTED RECORD.

Filed March 3, 1917.

NEW JERSEY COURT OF ERRORS AND APPEALS.

MAXIME BOUQUET, *Plaintiff-Appellant,* *vs.* HACKENSACK WATER COMPANY, *Defendant-Respondent.*	*Certificate of Trial Judge.*

To the Honorable the Judges of the Court of Errors and Appeals:

The stenographic record of the proceedings at the trial before me, of the above entitled cause, reads as follows from the point to which the same has heretofore been printed by plaintiff-appellant at page 87 of the printed case:

(Mr. MILLER continuing)—But it is not conceded in the other case.

THE COURT—No.

Mr. MILLER—I want the jury to understand that.

THE COURT—I understand.

Mr. DEAR—If the Court please, in the Natalo case I do not see, under your Honor's present view of the law, that it makes much difference whether a man is a riparian owner or not.

THE COURT—Mr. Dear, as the case appeals

to me, nobody could have presented your case any better than you did. All the evidence is in, and if I am wrong it is manifest on the record that I am wrong and if I am not wrong of course there is no right of recovery in the Bouquet case. Now, in my judgment, as I am looking at it at present, there is not any distinction between the case of the riparian owner and the case of the man who owns merely to the ordinary high water mark. It seems to me the cases are governed by the same rule. But these parties are entitled to have the best run they can get, and I do not want to see them thrown out unless they ought to be properly; and I would suggest to you that it may be a wise plan to have one of the jurors in this second case withdrawn and give you an opportunity to look further if you desire to into the Bouquet case, and if you desire to, take an appeal on it to have that thing determined. Then this case will still be here and ready to be disposed of when you have reached a final determination or when the Court of Appeal has eventually passed upon the Bouquet case. Either there is a right or there is not. Either I am right or wrong. If there is a right you ought to have it vindicated. If I am right there is not any right in that case. Now, why not just let the second case here stand over by withdrawing a juror? Then you can take such move as you see fit on the Bouquet case.

Frankly, Mr. Dear, I would like to see a way by which these parties could recover something. That is my own inclination about it; and if you can find a way along the line of the law I would almost stretch a point to see that they did. But I don't see it. I have

looked into the case with great care, but I do not see any. But that does not prove that there isn't any, because we are all human and all have our limitations. I have decided on what I think is right. Now, may be that is not right. If it is not right, why some further research on your part, and possibly if you see fit to go further with the case the judgment of the Court above will determine that matter. And there is this additional advantage, and that is this: that if his case depends upon your ultimate decision with respect to the Bouquet case all further expenses are stopped until that decision is reached, and you do not incur any additional expense in discovering that he is wrong, too. So that I think that would be the better course if you see fit to follow it. Of course, I am here to do whatever you gentlemen desire to have done in the effort to get justice in the case.

Mr. EDWARDS—We are perfectly willing to follow your Honor's suggestion and Mr. Dear's wishes, because he has worked up the case so wonderfully that he ought to have a chance to prove it.

The twelfth juror having failed to answer upon a call of the roll in the Natalo case, the Court declared a mistrial.

WILLIAM H. SPEER,
Judge.

Mr. DEAR—They have not established that yet.

THE COURT—No. I am assuming that there has been evidence on that point and I am placing my decision in this case upon the ground that is mentioned in this case of Whitmore and on the discussion that I have given heretofore in regard to the matter. So this results, I think, in my saying that I must direct a verdict in favor of the plaintiff and against the defendant in the case of Bouquet and assess the plaintiff's damages at the nominal sum of six cents, because a nuisance may be said to have been established, but no damage of a special kind is shown to have resulted from the fact of existence of the nuisance.

Mr. MILLER—The existence of the nuisance is conceded for the purpose of the motion in this case.

POSTEA.

(Filed March 2, 1916.)

This case was tried before Judge William H. Speer with a jury at the Hudson Circuit on February 9 and 10, 1916. Upon defendant's motion to direct a verdict in favor of plaintiff for nominal damages made at the close of plaintiff's case, the Judge so directed the jury and the jury returned a verdict against the defendant and in favor of the plaintiff for six cents ($.06).

WILLIAM H. SPEER,
Judge.

JUDGMENT.

(Entered March 4, 1916).

Six cents damages against defendant in favor of plaintiff, with no costs.

EXHIBIT P I.

DEED—Dated August 17, 1910, between John H. Van Thun and Annie M. Van Thun, his wife, grantors, to Max Bouquet, grantee.

Conveys the fee simple of—

"All those lots, tracts or parcels of land and premises, hereinafter particularly de-described, situate, lying and being in the Township of Palisade, in the County of Bergen and State of New Jersey, and known and designated on map filed in Bergen County Clerk's Office entitled 'Map of property of John H. Van Thun, situate at New Bridge, Bergen County, New Jersey' as 'The whole of Block 'A' on said Map, excepting lot number 1 in said Block. The whole of Block 'B' on said map. The whole of Block 'E' on said Map. The whole of Blocks 'I', 'J', 'K', 'L', 'N', 'O' and 'P' on said Map. Lots numbers 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 12, 14, 17, 18, 19, 20, 21, 22, 23, 24, 25 and 26 in Block 'M' on said Map, also lots numbered 19, 21, 23 and 25 of Block F.'"

(Subject to restrictions against erection of certain kinds of buildings.)

"*Together with all right, title and interest of the party of the first part in and to the land lying between high water mark of the Hackensack River and the middle of Riverside Avenue, as shown on said map, lying directly opposite or in front of such of the property above described as has a frontage on said Riverside Avenue.*"

Habendum in fee.

Full covenants and warranty.

Acknowledged by grantor and wife before a Commissioner of Deeds and recorded in Bergen County Clerk's office, August 17, 1910, in Book 764 of Deeds, at page 125.