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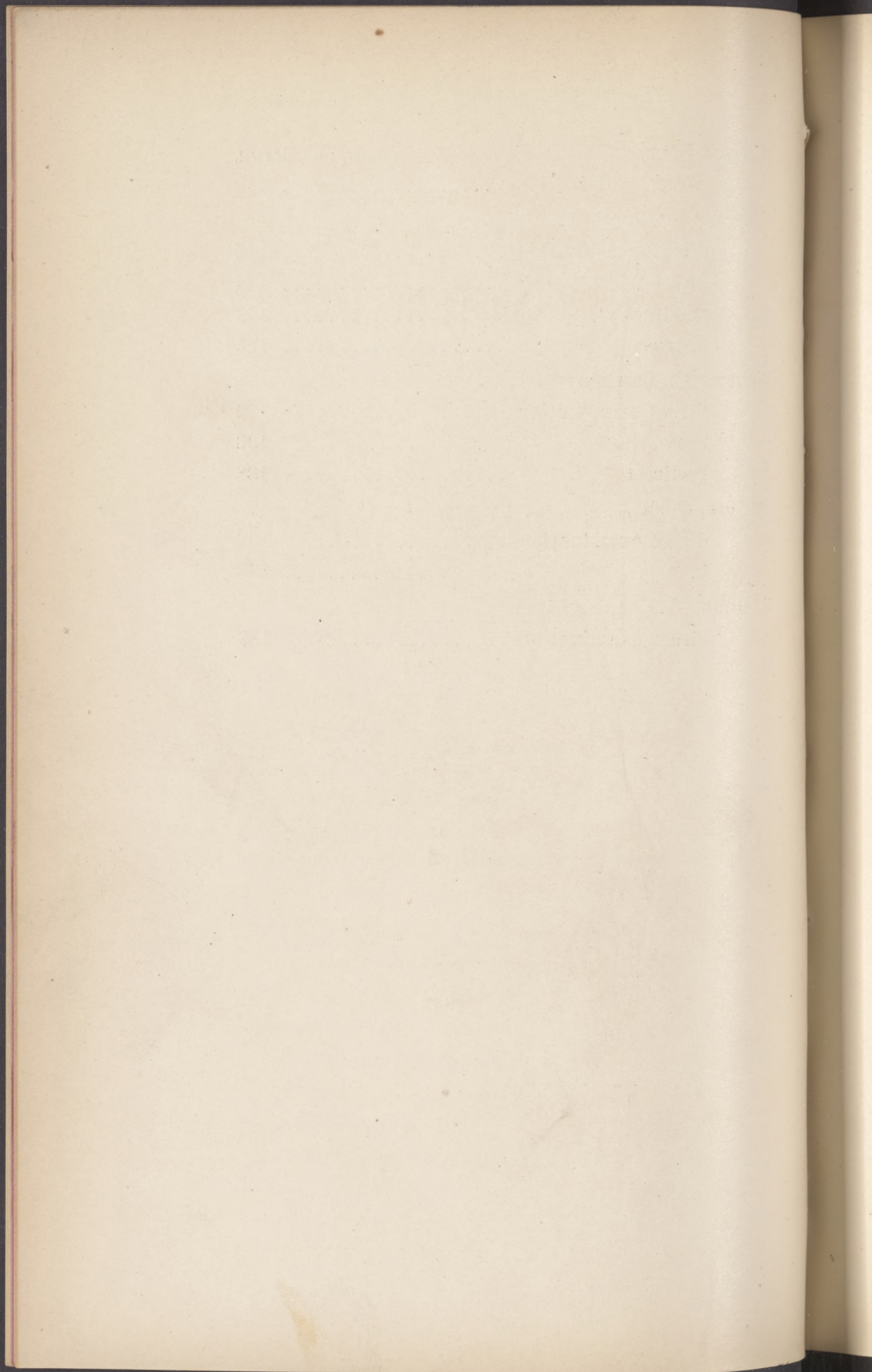
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**Notice of Appeal.**

Filed January 7, 1914.

New Jersey Supreme Court.

ESSEX COUNTY.

10

ROCCO CORBO,

*Plaintiff,*

*vs.*

EAST ORANGE AND AMPERE LAND  
COMPANY, incorporated,

*Defendant.*

*Action  
at Law.  
On Appeal.*

20

To MESSRS. PEIRCE & HOOVER,

*Attorneys for Plaintiff.*

Take notice that the defendant appeals to the Court of Errors and Appeals from the whole of the judgment entered in this cause.

Dated December 24th, 1913.

30

WM. THEO. VON DER LIPPE,

*Attorney for Defendant.*

40

*Grounds of Appeal.*

**Grounds of Appeal.**

Filed February 14, 1914.

**New Jersey Court of Errors and Appeals**

10	<p>ROCCO CORBO, <i>Plaintiff-Appellee,</i></p> <p style="text-align: center;"><i>vs.</i></p> <p>EAST ORANGE AND AMPERE LAND COMPANY, a corporation, <i>Defendant-Appellant.</i></p>	<p>} <i>Action</i> } <i>at Law.</i> } <i>On Appeal.</i></p>
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20 To MESSRS. PEIRCE & HOOVER,  
*Attorneys of Plaintiff.*

Take notice that the following are the grounds of appeal which the defendant hereby assigns and upon which it will rely at the hearing:

1. Because the court denied defendant's motion for a non-suit.

2. Because the court overruled the following questions propounded by defendant to the witnesses examined and excluded the following evidence offered:

30 (a) On cross examination of Jeraldo Maioran, sworn on behalf of plaintiff:

Q Mr. Corbo bought from you, did he not?

A Yes.

Q And you gave him a warranty deed, did you not?

A Yes.

Q And you didn't take any exception out of that warranty deed for—

40 *Mr. Hoover.* I object to it as immaterial and incompetent.

*Grounds of Appeal.*

*The Court.* I will sustain the objection.

Defendant's objection noted as ground of appeal.

(b) On cross examination of Alfonso Corbo, sworn on behalf of plaintiff:

Q So when these men went down to dig this ditch they were accompanied by policemen, were they not? 10

A I did not see the policeman myself.

Q There was no trouble down there, had no row?

*Mr. Hoover.* I object to that as immaterial.

*The Court.* I sustain the objection.

Defendant's objection noted as ground of appeal.

(c) On direct examination of Edward S. Rankin, sworn on behalf of defendant:

Q Now, assuming—or, not assuming, because you say you know—would the improvements that were erected on the Silver Lake district tend in any way prevent the natural seepage of water from the high lands down through this Silver Lake district? 20

*Mr. Hoover.* That is objected to; they cannot charge us with the improvement of the locality.

*The Court.* I think that is not competent.

Defendant's objection noted as ground of appeal. 30

(d) On direct examination of Wilmer C. Van Dyne, sworn on behalf of defendant:

Q Did you observe the Corbo property immediately after any storms, before the cleaning of the ditch?

A I did.

Q Can you tell us whether, in the storms, you observed what the flow of water was? 40

*Grounds of Appeal.*

A Well, I tell you every time when there was a storm—

*Mr. Hoover.* Is that a competent question?

*The Court.* I don't quite understand that. I will sustain the objection.

10 Defendant's objection noted as ground of appeal.

(e) On direct examination of William T. Von der Lippe, sworn on behalf of defendant:

Q Now, you conducted the sale of property out there, didn't you, on your own land?

A I conducted an auction there on our land in May, 1912.

Q And how many lots did you sell?

*Mr. Hoover.* I don't think that is material, especially in 1912.

20 *Mr. Duffield.* I offer to show by the witness that at a widely advertised sale of property in the immediate vicinity of the lots in question, or the land owned by the plaintiff, was sold at auction at a price which would not justify the appraisal made of the lots of the plaintiff.

*Mr. Hoover.* I object to the offer.

30 *The Court.* And when do you say the sale was?

*Mr. Duffield.* 1912, approximately at the time of the commencement of this suit.

*Mr. Hoover.* I do not think it is a proper test of the value; it is an auction sale; it is not a test of the value of the property in any sense of the word.

40 *The Court.* Other sales in the immediate neighborhood, or sales of similar property near the time in question, may afford some guide as to the value of the property in ques-

*Grounds of Appeal.*

tion, but I have never understood that auction sales constitute a proper guide. I think I should exclude the offer.

Defendant's objection noted as ground of appeal.

3. Because the court admitted the following evidence over defendant's objection and refused to strike it out on defendant's motion:

10

On direct examination of Alfonso Corbo, sworn on behalf of plaintiff:

Q Did you notice anything on the sides of this thing they had dug there?

A Not at that time but I notice lately that they have different places where the water runs in to drain off their land; different ditches and things where they can drain off their lots right into ours.

*Mr. Duffield.* I object to that; there is nothing charges us with putting in tributaries. 20

*The Court.* I overrule the objection. I suppose it is a motion to strike out.

*Mr. Duffield.* Yes, sir.

*The Court.* I decline to strike it out.

4. Because the court charged the jury as follows:

(A) "In such a case the measure of damage, if the plaintiff is entitled to recover, would be the difference between the value of his lots, immediately before and immediately after the damage was done."

30

(B) "Mr. Ackerman, a witness on behalf of the plaintiff, testified that he fixed the depreciation in value of this land at \$416. He tells you how he fixes it. He says there were 1,200 square feet of surface taken, exclusive of the original ditch, which, at the value of land in that location, 19 cents per square foot, amounted to \$228. He

40

*Grounds of Appeal.*

says that he took ten per cent. depreciation from the three southerly lots amounting to \$128.25, and twenty per cent. depreciation from the most northerly lot, which he says could not be used for building because of this narrowing, and that amounted to \$59.85; amounting altogether to \$416.10."

10 (C) "You have a right to consider Mr. Ackerman's knowledge, or his lack of knowledge, of conditions and values there at that time."

(D) "After considering all the evidence in this case which may bear upon value, if you find that the plaintiff is entitled to recover, then remember that the measure of damage would be the depreciation, or the difference in value, of these lots immediately before and immediately after the wrong was done."

20 (E) "When he did this, when he made this change, although he had the right, it was his duty to make that ditch of sufficient width and sufficient depth to accommodate the waters which before had naturally flowed through that stream, through the natural bed of the stream, unobstructed. It is insisted in this case that that is what he did; and if this ditch five feet wide and five feet deep was sufficient to carry the waters which would naturally have flowed through the natural bed of the stream, then he did no more than he had a right to do, and all the defendants in this case under those conditions would have had a right to do would have been to remove obstructions from that ditch, and not to have deepened, or widened it."

30 (F) "But if the ditch as dug by the plaintiff, or his predecessor in title—when I speak of the plaintiff I mean his predecessor in title—was not of sufficient size to accommodate the water

40

*Grounds of Appeal.*

which would naturally flow through the stream in its natural condition, unobstructed, and by that reason the water backed up on the defendant's land, and it was thereby injured, then it had the right, not only to remove obstructions from that ditch, but to widen it and deepen it so as to accommodate that natural flow of water. But they had no right to widen and deepen one foot or one inch beyond what would be necessary to accommodate that natural flow as mentioned." 10

WILLIAM T. VON DER LIPPE,  
*Attorney for Defendant-Appellant.*

20

30

40

*Complaint.*

**Judgment Record.**

NEW JERSEY SUPREME COURT.

10	ROCCO CORBO, <div style="text-align: right; padding-right: 20px;"><i>Plaintiff,</i></div> <div style="text-align: center; padding: 5px 0;"><i>vs.</i></div> EAST ORANGE AND AMPERE LAND COMPANY, incorporated, <div style="text-align: right; padding-right: 20px;"><i>Defendant.</i></div>
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**Complaint.**

Filed November 1, 1912.

20 East Orange and Ampere Land Company, incorporated, the defendant in this cause, was summoned to answer unto Rocco Corbo, the plaintiff therein, in an action at law, upon the following complaint:

The plaintiff, Rocco Corbo, of the City of Newark, County of Essex and State of New Jersey, says that:

*First Count.*

30 1. He is the owner of those certain tracts of lands and premises, situate, lying and being in the City or Township of Newark or Belleville, in the County of Essex and State of New Jersey, more particularly described as follows:

40 Beginning at the corner formed by the intersection of the westerly line of North Eleventh street and the southerly line of Togo Place; thence running southerly along the said line westerly on the North Eleventh street fifty (50) feet; thence westerly and parallel with Togo Place one hundred (100) feet; thence northerly and parallel with North Eleventh street fifty (50) feet; thence easterly along the said

*Complaint.*

southerly line of Togo Place one hundred (100) feet to the said westerly line of North Eleventh street and the point or place of beginning. Being known as lots numbers 20 and 21 North Eleventh street, block R, in the map of Concetta S. Maioran of Silver Lake.

Second Tract: Beginning at the corner formed by the intersection of the westerly line of North Eleventh street and the northerly line of Togo Place; thence running northerly along the westerly line of North Eleventh street fifty (50) feet; thence westerly and parallel with the said northerly line of Togo Place one hundred feet; thence southerly and parallel with the said line of North Eleventh street fifty feet; thence easterly along the said line of Togo Place one hundred feet to the said westerly line of North Eleventh street and the point or place of beginning.

Known as lots number 30 and 31 on North Eleventh street, block R, in the said map of Concetta S. Maioran.

2. That the defendant is the owner of lands and premises above and to the westward of the plaintiff's lands as above described.

3. That prior to the first day of July, 1911, a small natural stream of water ran through the lands of both the plaintiff and defendant, originating on the land of the defendant and running from thence in a natural bed over and through the lands of the plaintiff on the extreme rear and along the northeasterly side of the plaintiff's aforesaid lots.

4. That on or about the first day of July, 1911, aforesaid, the said defendant enlarged the ditch or the bed of the aforementioned stream on the defendant's land, thus causing an increased amount of water to accumulate in the said ditch and stream.

5. The defendant thereupon without the knowledge or consent of the plaintiff came upon the lands of the plaintiff aforesaid, and through its agents,

*Complaint.*

servants or representatives dug out and enlarged the ditch or bed of the aforementioned stream on the lands of the said plaintiff throughout its entire length on said lands of plaintiff, to the extent of from two to three and four times the original width and depth of the aforesaid stream. Thus causing damage to the lands of the plaintiff and increasing the volume of the flow of water thereover. All without the knowledge or consent of the plaintiff.

6. This increased flow of water over the lands of the plaintiff, caused by the defendant aforesaid, commenced on or about the first day of July, 1911, and has continued from thence hitherto. All without the consent and against the protest of the plaintiff.

7. Plaintiff's land has been much damaged thereby.

20 *Second Count.*

1. The plaintiff being the owner of the lands and premises above set out and described and in the manner above set out and described, the defendant, through its agents, servants or representatives, on or about the first day of July, 1911, and at divers other days and times from thence hitherto without the consent of the plaintiff, broke and entered the aforesaid lands and premises of the said plaintiff and then and there dug out a large quantity of the land of the said plaintiff of great value, to wit the value of the sum of one thousand dollars, and took and carried away the same and converted and disposed thereof to its own use.

2. Plaintiff's land has been much damaged thereby.

*Third Count.*

1. The plaintiff being the owner of the lands and premises above set out and described and in the manner above set out and described, the defendant,

*Complaint.*

through its agents, servants or representatives, on or about the first day of July, 1911, and at divers other days and times from thence hitherto without the consent of the plaintiff, broke and entered the lands and premises of the said plaintiff and with feet in walking trod down, trampled upon, consumed and spoiled the grass, shrubbage and land of the said plaintiff of great value, to wit of the value of one thousand dollars. 10

2. Plaintiff's land has been much damaged thereby.

Plaintiff demands, as such damages, the sum of one thousand dollars (\$1,000.00).

PEIRCE & HOOVER,  
*Attorneys of Plaintiff,*  
763 Broad St., Newark, N. J.

20

30

40

*Answer.*

**Answer.**

Filed December 17, 1912.

10 Defendant, East Orange and Ampere Land Company, a corporation of the State of New Jersey, with principal office at No. 671 Broad street, in the City of Newark, Essex County, New Jersey, says that:

*First Defense to First Count.*

- (1) It admits paragraph one of the first count.
- (2) It admits paragraph two of the first count.
- (3) It admits the third paragraph of this count except so far as denied in the following statement:

20 Defendant says that said stream is a large natural watercourse originating to the west of, and beyond the lands of this defendant, and that some time prior to July 1st, 1911, the said stream in its natural channel and condition ran over and across the lands described in the first count of the complaint about half way between, and almost parallel with, the front and rear lines thereof.

- (4) It denies paragraph 4 of the first count.
- (5) It denies paragraph 5 of the first count.
- (6) It denies paragraph 6 of the first count.
- (7) It denies paragraph 7 of the first count.

30 *Second Defense to the First Count.*

(1) Defendant says that the said stream is a natural watercourse which by its natural channel ran over and across the middle of the lands now owned by said plaintiff as in paragraph three of the first defense to the first count is alleged.

40 (2) That at some time prior to July 1st, 1911, the owner of said premises or their servants or agents changed and diverted or permitted to be changed and diverted the said stream from its natural channel to

*Answer.*

the rear line or both the first and second tracts and down the northeasterly side of said premises in the second tract described in said first count of the complaint.

(3) That said owners or their servants or agents in so changing and diverting the said stream or in permitting the same to be done restricted and obstructed its steady, easy and natural flow thereby causing the waters thereof to back up and wrongfully flood the lands of this defendant. 10

(4) That after the said stream was changed and diverted from its natural channel said owners of said premises described in the first count of the complaint, or said plaintiff or their agents or servants wantonly, wrongfully and willfully filled in the bed of said stream, as the same had been changed and diverted, with earth and refuse or suffered the same to be done, thereby narrowing the confines thereof and obstructing and restricting its natural flow thereby causing the same to become pent up; to back up and wrongfully flood the lands of this defendant as an upper proprietor therein. 20

(5) That the said premises as set out in paragraph one of the first count are subject to the proprietary rights of this defendant to have the said stream flow over and across the same freely, unrestricted, unobstructed and naturally. 30

(6) That this defendant on or about the first day of July, 1911, went down the said stream and broke down and destroyed the dams, or obstructions so wrongfully erected and maintained by the owners of said premises, or said plaintiff, and cleaned out the bed and channel of the said stream, without breach of the peace, and sufficient only for the said waters to flow freely and naturally down the same. 40

*Answer.*

10 (7) That this defendant avers it had a legal right to cross the boundary line of its own lands and enter upon the lands of the said plaintiff or any other person for the purpose of opening up and cleansing out the channel of said stream and removing any and all obstructions therefrom in order to restore said stream to its natural condition so that the same might flow naturally and freely down the channel thereof; so far as the same was necessary to relieve the lands of this defendant from the waters of said stream flooded thereon by reason of the same being wrongfully dammed, restricted and obstructed.

*Third defense to the first count.*

20 (1) The said plaintiff in having and mainting the said dams or obstructions and thereby causing a flooding of the lands of this defendant by the restriction of the waters of said stream was maintaining, a nuisance as to this defendant.

(2) That this defendant in removing the dams and clearing out the obstructions in said stream did so without a breach of the peace and did no unnecessary damage to the lands of the said plaintiff.

30 (3) This defendant avers that it had a legal right for the purpose of abating the said nuisance to enter the lands of the plaintiff without his consent, and that it had a legal right to abate such nuisance without committing a breach of the peace and doing no unnecessary damage without being answerable to the said plaintiff in damages.

*First defense to second count.*

(1) It denies the first paragraph of this count.

(2) It denies paragraph two of the second count.

*First defense to third count.*

(1) It denies paragraph one of this count.

*Answer.*

(2) It denies paragraph two of this count.

*Second defense to third count.*

(1) As a further defense to this count this defendant pleads the second defense to the first count as if the same were here repeated at length.

*Third defense to third count.*

(1) As a further defense to this count this defendant pleads the third defense to the first count as if the same were here repeated at length. 10

W. THEO. VON DER LIPPE,  
*Attorney for Defendant.*

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30

40

*Reply.*

**Reply.**

Filed December 5, 1913.

The plaintiff, Rocco Corbo, replying to the answer filed herein on behalf of the defendant, East Orange and Ampere Land Company, a corporation, says:

10 Plaintiff admits the third paragraph of the first defense to the first count filed herein.

Plaintiff admits the first paragraph of the second defense to the first count filed herein.

Plaintiff admits the second paragraph of the second defense to the first count filed herein.

Plaintiff denies the third paragraph of the second defense to the first count filed herein.

Plaintiff denies the fourth paragraph of the second defense to the first count filed herein.

20 Plaintiff denies the fifth paragraph of the second defense to the first count filed herein.

As to the sixth paragraph of the second defense to the first count filed herein, plaintiff in reply says that plaintiff denies that there were any dams or obstructions erected and maintained by the owners of the premises or by the plaintiffs, as alleged in said paragraph, and avers that the defendant dug out and enlarged the channel without authority therefor.

Plaintiff denies the seventh paragraph of the second defense to the first count filed herein.

30 Plaintiff denies the first paragraph of the third defense to the first count filed herein.

Plaintiff denies the second paragraph of the third defense to the first count filed herein.

Plaintiff denies the third paragraph of the third defense to the first count filed herein.

As to the second defense to the third count filed herein, plaintiff makes same reply as made to the second defense to the first count herein.

40 As to the third defense to the third count, plaintiff makes same reply as to the third defense to the first count filed herein.

PEIRCE & HOOVER,  
*Attorneys for Plaintiff.*

*Postea.***Postea.**

Filed December 12, 1913.

This case was tried before Judge Nelson Y. Dungan, with a jury, at the Essex Circuit, on December the fifth, nineteen hundred and thirteen.

The jury rendered a general verdict against the defendant and in favor of the plaintiff for the sum of three hundred and twenty-nine dollars and forty cents (\$329.40). 10

**Judgment.**

Entered December 12, 1913.

	Whereupon it is adjudged that the plaintiff recover of the defendant the sum of three	20
\$329.40	hundred and twenty-nine dollars and forty	
46.18	cents and his costs, which are taxed at the	
—	sum of forty-six dollars and eighteen cents,	
\$375.58	making in the whole the sum of three hundred and seventy-five dollars and fifty-eight cents.	

WM. S. GUMMERE,  
*C. J.*

I, William C. Gebhardt, Clerk of the Supreme Court of the State of New Jersey, do certify that the foregoing is a true copy of the judgment entered in the above stated cause as the same remains of record in my office. 30

(SEAL) In testimony whereof I have set my hand and the seal of said court, at Trenton, this sixteenth day of February, A. D., nineteen hundred and fourteen.

WM. C. GEBHARDT,  
*Clerk.* 40

*Stipulation.*

NEW JERSEY SUPREME COURT.

10	<p>ROCCO CORBO,  <i>vs.</i>          EAST ORANGE AND AMPERE LAND          COMPANY.</p>
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Transcript of shorthand notes of testimony taken in the above stated cause, upon the trial thereof at the Court House, Newark, N. J., December 4, 1913.

Before Hon. Nelson Y. Dungan, Judge, and a Jury. Peirce & Hoover for plaintiff.

Willian T. von der Lippe and Edward D. Duffield  
 20 for defendant.

Mr. Hoover opened for the plaintiff.

Mr. von der Lippe opened for defendant.

The following stipulation is offered in evidence and marked Ex. P. 1.

It is hereby stipulated and agreed by and between the attorneys for the plaintiff and defendant that the following facts shall be admitted at the trial without further proof.

(1) That the plaintiff still remains the owner of  
 30 the land described in the complaint filed herein.

(2) That the defendant still remains the owner of the lands alleged to be owned by it in the complaint filed herein, and has been such owner since on or about April, 1909.

(3) Defendant admits that if any digging was done to the ditch or stream on plaintiff's land, or to the rear and side of plaintiff's land, on or about the date alleged in the complaint, same was done by  
 40 the defendant.

*Jeraldo Maioran, direct.*

JERALDO MAIORAN, sworn for the plaintiff.

*Direct examination by Mr. Hoover.*

Q Where do you live?

A Silver Lake.

Q How long have you lived there?

A Sixteen years.

Q What is your present position?

A Postmaster. 10

Q Are you acquainted with the land which is under discussion in this suit?

A Yes, I was the owner of it.

Q And for how long were you the owner of it?

A Since 1905 until 1909, something like that, when I deeded it.

Q Now, Mr. Maioran, can you tell us what the conditions were out there, the physical conditions of this land, prior to 1905?

A Yes. 20

Q Tell us please, starting with the land which is now the property of the East Orange Land Company.

A I bought 230 lots what they call Silver Lake there, and I see so many little streams, and I thought the best to give it away with so many little streams, and to form a bigger one, and in order not to spoil so many lots I went to the rear of the lots, cutting two and one-half feet from one end of the lot, and two and one-half feet from another end, so when I would sell the lots the owners don't have to suffer for so much loss of their depth on a lot; and so I made a ditch five feet wide and five feet deep, because they are not all level, and some places it would take out four feet, and some places six, in order to get shape for the water to run down nicely. 30

Q Where did you begin that ditch?

A From Bloomfield avenue, you know, after you pass the bridge on Bloomfield avenue, Chester avenue, all the way down to Elmwood avenue, it is my land. 40

*Jeraldo Maioran, direct.*

Q Does that pass the lots of the plaintiff in this case?

A Yes; these lots are just in the middle of my land.

Q Now, what have you to say as to the manner in which the ditch you dug carried off the water? Did it carry it off?

10 A Certainly, nicely, I got every lot fine.

Q And did it back up any water on the East Orange & Ampere Land Company land?

A No, they are a good deal higher than we are; never can back up any like that.

Q Well, it didn't, did it?

A No, it didn't.

Q What was the condition of their land? What was their land covered with at that time?

20 A Their land was almost like ours, so many ponds, almost a little like there, you could see from the trolley car. In order to use their land they built a big storm sewer—

Objected to.

Q Just one minute, before we get that far. You say their land was covered with ponds and lakes, is that so?

A Yes.

Q Did the water drain down from their land over your land?

30 A Partly did there in low spots.

Q Now, in order that we may understand this, did you own from Bloomfield avenue here?

A Yes.

Q Did your land run up to Bloomfield avenue?

A Yes, that is my land.

Q And then you owned down in through here, is that right?

A Yes, sir.

40 Q Where did the water come through, under Bloomfield avenue?

*Jeraldo Maioran, direct.*

A From this other side.

Q From this side came under there?

A Under the bridge; there is a county bridge.

Q A sort of culvert, something like that?

A Yes.

Q Did you start your ditch at this end of the culvert?

A Yes.

Q And run on down through here?

A Yes, sir.

Q Are you sure that that ditch which you dug, which you say was five feet wide and five feet deep, sure that that ditch carried away all the water that came across Bloomfield avenue?

A Yes.

Q Now, confining yourself to the four lots of the plaintiff, how much did you say that you cut off of the back of their lots to make this ditch?

A Two and one-half feet wide by five feet deep.

Q And how about down the side of one lot?

A Two and one-half feet wide and five feet deep on the adjoining lots of all the people that I sold theirs.

Q Now one moment, to get this straight. The most easterly lot owned by Mr. Corbo, I understand the ditch comes down along the side between his lot and the next neighbor?

A Just the same was as in the rear, I cut two and one-half feet wide by five feet deep all the way along the 100 feet.

Q Do we understand you cut two and one-half feet off Mr. Corbo, and two and one-half feet off his neighbor?

A Yes.

Q Now that ditch continued in that fashion how long?

A Until it was widened by some people from the East Orange & Ampere Land Company.

*Jeraldo Maioran, direct.*

Q What year was that?

A About 1911.

Q And you lived around there all during those years, did you?

A Yes.

Q Saw the conditions of the land in all kinds of weather?

10 A All right, almost every day I pass through there.

Q Saw the water in the ditch, I suppose?

A Yes, water in the ditch.

Q Now, what happened, if you know, in 1911?

A What happened?

Q Yes.

A I saw a lot of people that I sold the lot to them, that they come to me and try to stop—

*Mr. Duffield.* I object.

20 Q Don't tell us what anybody said to you, but just tell what you saw?

A I saw some people working at the ditch and making it wider, and I saw some policeman watching the working people, and I asked what was the cause, and when they saw the policeman they couldn't say nothing, it was done by the agent of the City of Newark, or something; so when I saw the policeman I thought—

Objected to.

30 Q What did you see those men do? Did you see some workmen there?

A Yes.

Q On Mr. Corbo's land?

A Not on Mr. Corbo, but on others; I didn't see that spot; I saw other spots at work on it.

*Mr. Duffield.* I move to strike out what took place on other lots.

40 *Mr. Hoover.* I think that is only preliminary; the question will involve the whole length of the stream down past our lots.

*Jeraldo Maioaran, direct.*

*The Court.* Yes, but he said he didn't see any digging on the lots in question.

*Mr. Hoover.* I don't know whether he went quite that far or not.

*The Court.* I think what happened upon other lots is not in issue in this case. I think that should be stricken out.

*Mr. Hoover.* I will withdraw the question. 10

Q Just confine yourself to the four lots. Did you see any work on those four lots?

A No.

Q You did not see any?

A No.

Q Did you see the ditch back of Mr. Corbo's lots, and at the side of Mr. Corbo's lots? Have you seen it since about July, 1911?

A Yes.

Q What have you to say as to the size of the ditch? 20

A It is a good deal wider than what it was, almost double.

Q Now you are speaking particularly about Mr. Corbo's lots?

A Yes.

Q Can you tell us in what manner it was widened? That is, where the land was taken off?

A On adjoining lots where the two and one-half feet was on other people they didn't touch it, because there was a fence, and on the other end, like a square, was higher land, but Mr. Corbo was the lowest land, and that is where they done dig out. 30

Q So the digging was done on Mr. Corbo's land, is that so?

A Yes; I didn't measure how much shorter the lots are now, but I can judge it to be about six feet more than what it ought to be that they dug out these lots; I don't know who did it, but that is what I saw.

*Jeraldo Maioran, cross.*

Q Now, what have you to say about the volume of water that flows back of Mr. Corbo's lots in the rear and down the side? Have you noticed any change in that since 1911?

A Yes; we can see more water now than what we saw before.

Q And how much more?

10 A Might be a fourth part of it more than what I saw before.

Q See more water in the ditch?

A Yes.

*Cross examination by Mr. Duffield.*

Q Mr. Maioran, I understood you to say you have lived in this neighborhood sixteen years?

A Yes.

Q And you formerly owned this tract of land?

20 A Yes.

Q Do you own any of it now?

A Yes.

Q And do you own any land abutting on this ditch that runs through there?

A Yes, sir.

Q About how much do you own?

A About seven or eight more lots, ten lots, something like that.

Q The rest you sold off from time to time?

30 A Yes.

Q Mr. Carbo bought from you, did he not?

A Yes.

Q And you gave him a warranty deed, did you not?

A Yes.

Q And you didn't take any exception out of that warranty deed for—

*Mr. Hoover.* I object to it as immaterial and incompetent.

*Jeraldo Maioran, cross.*

*The Court.* I will sustain the objection.  
Defendant's objection noted as ground of appeal.

*Mr. Duffield.* I think probably I ought to get my offer on record.

*The Court.* I think it sufficiently appears; if you think it does not, you may amplify it.

*Mr. Duffield.* I think probably it does.

Q Now, there is no doubt, is there, that there was a stream running across this land ever since you knew it, wasn't there? 10

A Yes.

Q Always been a stream running across there, hasn't there?

A It was there when I built it, before I built it.

Q When you got it?

A When I got it there was a little stream, but only a trace of it.

Q Where did that stream run as to Corbo's lots? 20

A Ran just from one point to the other point, something like a diagonal.

Q Cut it right in half?

A Right in half, and I thought it best to fix the lot and make it deeper, and then I let it go to the back, and then on the side.

Q Now, that whole land in there was marshy, wasn't it?

A Yes, a lake.

Q And this land that you dug the ditch through was marshy land, wasn't it? 30

A Not all the way through.

Q Well, part of the way through?

A Part of the way.

Q You dug a ditch 5 feet deep, didn't you?

A Yes.

Q You mean to tell me you could dig a ditch 5 feet deep, and only the width of 5 feet, and keep the banks from caving, with the land in a marshy condition like that? 40

*Jeraldo Maioran, re-direct.*

A Well, that is what I done, but couldn't always keep the bank.

Q The land would slide in from time to time, would it?

A From time to time little cave in.

Q And the stream ran up behind the house, didn't it?

A Yes.

10 Q From time to time people would throw things in this stream, wouldn't they?

A Once in awhile, yes.

Q Nobody ever cleaned it out after you built it, did they?

A Yes; the Belleville authorities sent some men once a year to clean it out, take the tin cans and stones.

Q The Board of Health, wasn't it?

A Yes, by order of the Board of Health.

20 Q Now, I understood you to say that the water upon your land never backed up on the high land because of the fact that it was—or on the defendant's land—because of the fact that it was higher, is that right?

A Yes.

Q The water from their land would always run down on your land, wouldn't it?

A The water from your land ran down on ours, yes.

30 Q Always, didn't it?

A Always, yes.

*Re-direct examination.*

Q Did the water at any time to your knowledge, after you dug this 5 foot ditch, ever back up on this land on the west side of—

A No, the bridge is a kind of step, one step higher than our ditch, so that it would go down on ours in time of big heavy storm, but generally always goes  
40 down, never backs up.

*Alfonso Corbo, direct.*

*Re-cross examination.*

Q Well, it backed up when the ditch was filled up with those tin cans in there, wouldn't it?

A Well, I tell you the truth, in such storm like that I never get out of the house; I go and see him after the storm is over.

*Further re-direct examination.*

Q Was there sufficient tin cans and debris in the ditch to cause any stoppage in the water? 10

*Mr. Duffield.* I object. The witness has stated he never went out of the house in heavy storms, and doesn't know the condition.

*The Court.* I suppose, if he ever knew it, I suppose that is what you mean.

Q That is what I mean. Did you ever know the water to back up from the so-called tins cans and debris that was put in the ditch? 20

A Not so much as they was a little what you call tomato cans; it wouldn't hurt, those things.

*Further re-cross examination.*

Q You know it did back up, though?

A Back up on your land, looks like a lake, in time of big storms.

ALFONSO CORBO, sworn for the plaintiff.

*Direct examination by Mr. Hoover.*

Q Mr. Corbo, you, I believe, are a son of the plaintiff in this case, are you? 30

A Yes, sir.

Q What is your profession?

A Minister.

Q Are you acquainted with the conditions at Silver Lake on the lots of your father?

A Yes, sir.

Q How long have you known those lots, and that land? 40

*Alfonso Corbo, direct.*

A I have known those a very long time, when I was a little boy; that is, not the lots themselves, but the whole condition up there, when I was a little boy.

Q What was the original condition of the land both on the upper side of Bloomfield avenue, which is now the property of the defendant, and the lower side of Bloomfield avenue, part of which is your father's land? Tell us what the condition was.

10

*Mr. Duffield.* When?

Q Well, when you first gained knowledge of it.

A The other side it was nothing—

*Mr. Duffield.* I don't want to interrupt the witness, but I think the time ought to be fixed.

*The Court.* Yes, there ought to be reasonable certainty of time fixed, how far his recollection extends back.

Q How many years does your recollection of this land extend back?

20

A When I was about twelve years old, and I am twenty-nine.

Q That would be about seventeen years ago?

A Yes, sir.

Q All right. What was the condition of this land seventeen years ago when you first knew of it?

30

A Why, the place was nothing but marsh, that is, the place was full of water, and also had trees around there; a great many places had trees, and the water always gathered around there, looked like a little pond.

Q Which side of Bloomfield avenue are you speaking of?

A On the side where East Orange and Ampere Land Company is now.

Q Oh, on their land?

A Yes, sir.

Q You say that was marshy?

A Yes, sir.

40

Q Well, what became of the water in their land?

*Alfonso Corbo, direct.*

A Well, the water came on slowly on this other side of Bloomfield avenue.

Q Under Bloomfield avenue?

A Under Bloomfield avenue, a little culvert.

Q And then what happened to the water after it got over on your land?

A Why, it just came in that little bed of streams here and there; couldn't hardly call it streams, just running over everywhere; of course, the biggest volume went right straight through, but here and there streams went. 10

Q Ran on down?

A Yes.

Q Well, that continued up until when, with reference to your land, now?

A Well, the only time I saw after that, afterwards, is when we bought the lots there; then I saw the thing was changed; I never saw the work done. 20

Q You didn't see the ditch dug?

A No.

Q All right. When you bought the lots how did you find conditions then?

A The conditions were very good; the water went on safely right around.

Q What was back of your land?

A A little stream, five feet wide and five feet deep, went right along in back.

Q Describe how that stream ran around your lots. 30

A It came down this way slowly—

Q No, no; I mean as to the position of the lots, where did it run? Where was the stream?

A It was the back and side.

Q Back and side of your lots?

A Yes, sir.

Q And what was the size of that stream at that time?

A It was five feet wide and five feet deep.

Q When was that? What year, about? 40

*Alfonso Corbo, direct.*

A It was about 1906 that we bought the lots, I think, when we bought the lots, around that time.

Q Now, are you familiar with the stream from there on up to Bloomfield avenue?

A Yes, sir.

Q And what is that as to the size of the ditch?

A Well, some places it was a little wider, others a little smaller, because there are sort of little banks there, some places banks, and others came right down, so others are smaller and others are wider.

Q What have you to say as to the flow of water in that ditch from Bloomfield avenue on down across your lots?

A As it is now?

Q As it was then, we are talking.

A The flow of water went on steady—

Q Did it carry off all the water?

A Carried off all the water.

Q All the water that came across Bloomfield avenue?

A Yes, sir.

Q Any trouble about it at all?

A No, sir.

Q In ordinary weather did it fill the ditch?

A No, just about half-way; way down low; I don't think even half.

Q So there was room there to carry off more water?

A A great deal more.

Q Did you ever know of any water being backed up by reason of that ditch on the lots of the defendant across Bloomfield avenue?

A No, sir.

Q You have seen conditions out there in all kinds of weather, have you?

A Some weathers I have been out there—

*Mr. Duffield.* It seems to me these inquiries are rather leading.

*Alfonso Corbo, direct.*

Q Now, did something happen there after that?

A Yes, sir.

Q About what year was that?

A 1911.

Q And about when in the year 1911?

A About June; I was there in the month of June, the latter part of June.

Q All right, what happened?

A We saw some people working there, and as I went there and asked them why were they working on that land, the foreman said that the city was putting that ditch through, and he said, "If you people want to know any more go down to the City Hall to Mr. Nugent, and he will tell you all about it." 10

Q The foreman, what do you mean by foreman?

A The foreman on the gang.

Q A gang?

A The gang that was working right on our property. 20

Q Whose gang was it?

A The East Orange & Ampere Land Company.

Q Did he say that?

A First he said it belonged to the city, and then he began to doubt, and then he told me, "Well, if you want to know any more go to Mr. Nugent." In the meantime I saw him go across Bloomfield avenue right into the East Orange & Ampere Land Company, and speak to another man I don't know, and he looked very worried about it. 30

Q What did they do to your land?

A They cut part of the land to widen the ditch.

Q How much did they widen the ditch?

A I proved that it was eight feet that they measured at the time that they widened.

Q You measured with this foreman?

A I measured with the foreman.

Q How much did they widen the ditch on the back of your lots? 40

*Alfonso Corbo, direct.*

A From eight feet to eight feet and a half, and nine.

Q Off of whose land did they take that?

A Took it off our land.

Q Did you object to that?

A Oh, I objected to that.

10 Q How about the side of the lot where the stream came down the side, how much did they take off there?

A They took eight feet from our side; that is, they took six feet and a half, and two and one-half, supposed to be two and one-half on our side, and two and one-half on the other, so they took about six and one-half feet on our side.

Q Six and one-half in addition to the two and one-half that was supposed to be there?

A Yes, sir.

20 Q Now, did you see any work being done—well, first, did you object to that work?

A Yes, sir.

Q And what was the reply?

A They told us they couldn't stop there because the city was doing that work.

Q Told you the city was doing that work?

A Yes, sir.

Q Did you make inquiries of the city?

30 A Yes, sir, and they told me they were not doing the work, but they gave me the name of the architect, or chief engineer, Mr. VanDuyne; that is where I got the name of the East Orange & Ampere Land Company.

Q Gave you the name of Mr. VanDuyne?

A Yes, sir.

Q Did you see any work being done on the lands of the East Orange & Ampere Land Company about that time, or a little previous to the digging on your land?

40 A Yes, sir.

*Alfonso Corbo, direct.*

Q And what did you see being done here?

A They were digging, and putting a big storm sewer.

*Mr. Duffield.* I object. There is no allegation in this case that the putting in of this storm sewer had any effect whatever on the situation below. The allegation is they filled up a ditch on our land and threw the water on there, but we haven't any allegation that the construction of the storm sewer had any effect on their land. 10

*The Court.* I suppose that is a motion to strike out.

*Mr. Duffield.* Yes, sir.

*The Court.* I think that should remain for the present, and if the putting in of the storm sewer involved the matter stated in the fourth paragraph, I think it is proper; if it does not, a subsequent motion to strike out may be made. 20

Q Now, Mr. Corbo, just tell us what you saw them doing there.

A Well, I saw them digging, and putting a sewer there, and then—

Q How big a thing did they dig?

A Oh, it looked very wide; I couldn't tell exactly, but, very, very wide.

Q In depth?

A Oh, considerable depth right there.

Q And what did they put in there, did you see them put anything in? 30

A I saw some pipes, something like cemeted pipes; I don't know just what they were, but some pipes, or cemeted pipes, and I don't know whether they put any bricks on top or not.

Q How big were the pipes?

A Oh, great big, I think I could almost walk in them myself.

Q What did they do after they put this stuff in the ground? 40

*Alfonso Corbo, direct.*

A They just covered up this, merely covered it, as far as I could see there.

Q Well, now, how far up did that lead?

A Right up to Bloomfield avenue.

Q Right up to that culvert you have been speaking about?

A Yes, sir.

10 Q Did you notice anything on the sides of this thing they had dug there?

A Not at that time, but I notice lately that they have different places where the water runs in to drain off their land; different ditches and things where they can drain off their lots right into ours.

*Mr. Duffield.* I object to that; there is nothing charges us with putting in tributaries.

*The Court.* I overrule the objection. I suppose it is a motion to strike out.

20 *Mr. Duffield.* Yes, sir.

*The Court.* I decline to strike it out.

Q Now, Mr. Corbo, since that work was done on the defendant's land has that changed the surface of their land in any respect?

A Yes, sir.

Q How?

A It has—

30 *Mr. Duffield.* I object as immaterial and irrelevant, and not within any issue raised in the pleadings in this case.

*The Court.* I will sustain the objection.

Plaintiff's objection noted as ground of appeal.

Q Mr. Corbo, since the beginning, or since the work which was done by the defendant on their land, have you noticed any change in the amount of water that flows through the ditch on your land?

A Yes, sir.

40 *Mr. Duffield.* Objected to on the ground that there is nothing to show what may have caused this increased flow, and from the present con-

*Alfonso Corbo, direct.*

dition of the testimony it may have been caused by a variety of causes.

*The Court.* The objection will be overruled.

Q Well, what have you to say as to the amount of increase in the water?

A Oh, it is about four time as much.

Q Four times as much water?

A Yes, sir.

Q And does that continue to the present time?

A Yes, sir.

Q And the water still continues to come under Bloomfield avenue to the same point?

A Yes, sir.

Q I think I have asked you whether or not you have ever noticed any water being backed up on the lots of the defendant on the other side of Bloomfield avenue?

A Not from our lots; not so far as we know from our lots. 20

Q How has the water always run through the ditch on your land?

A Runs right on.

Q Freely?

A Freely, very freely.

*Mr. Hoover.* Cross examine.

*Mr. Duffield.* If your Honor please, we are in this situation, we have subpoenaed Mr. Reimer, who is the county engineer, and he informed me that to-morrow there is a conference of the county engineers of the state in Trenton, and he is chairman of a certain committee. I think we can conclude with him in a few minutes, but I do not know that your honor would care to hold court after four, and I was going to suggest if it is possible to call him now? 30

*The Court.* I presume there would be no objection to that.

*Mr. Hoover.* Not at all. 40

*Frederick A. Reimer, direct.*

*Mr. Duffield.* We will reserve the right to cross-examine this witness, then.

*Mr. Hoover.* Yes. Step aside, Mr. Corbo.  
(The witness leaves the stand.)

FREDERICK A. REIMER, sworn for the defendant.

*Direct examination by Mr. von der Lippe.*

- 10 Q Your business, please?  
A Civil engineer.  
Q You hold a county position?  
A County engineer, yes, sir, of Essex County.  
Q Are you familiar with Meadow Brook?  
A Known as Black Brook in that section, yes, sir.  
Q That is the brook shown on that drawing on the board there, is it?  
A Yes, sir.  
Q What position did you hold before you became  
20 county engineer?  
A I was assistant county engineer, and prior to that city engineer of East Orange.  
Q Did you have occasion as city engineer to observe this stream?  
A Many times.  
Q Will you tell us where it gets its source?  
A It gets its source originally at the corner of Hawthorne avenue and Main street, East Orange.  
Q Where does it empty?  
30 A It empties, taking various courses through the city of East Orange, passing under the Bloomfield branch of the D., L. & W. Railroad, then through the property of the East Orange & Ampere Land Company, and on down, and finally getting into the Passaic river.  
Q As county engineer have you supervised the construction of any culverts over the stream lately?  
A Yes, sir.  
Q Where are they?  
40 A One at Chester avenue, and one at Brook street.

*Frederick A. Reimer, direct.*

Q Are they in the Silver Lake section?

A Yes, sir.

Q Will you tell us, please, the width of that culvert at Chester avenue?

*Mr. Hoover.* I do not see that that has any bearing in this case, and is immaterial and irrelevant.

*The Court.* I sustain the objection. 10

Defendant's objection noted as ground of appeal.

Q Have you observed the stream at Bloomfield avenue?

A Yes, sir.

Q Have you ever observed the culvert there?

A Yes, sir.

Q That is above the lots of Rocco Corbo shown in red on that map?

A Yes, sir. 20

Q Do you know the width of that culvert?

A Crossing Bloomfield avenue?

Q Yes.

A Yes, sir.

Q What is the width at the bed of the stream?

A Nine feet.

Q Will you please describe the stream—

A I would like to go back on that question referring to the property at Bloomfield avenue; the property in red is not at Bloomfield avenue. 30

Q No, the property in red is the property of Rocco Corbo, the plaintiff.

A I understood you to refer to the width of the culvert at Bloomfield avenue.

Q That is above the lots in red, isn't it?

A Yes, sir.

Q And you said the width of the culvert at Bloomfield avenue is what?

A Between 8 and 9 feet.

Q (*By the Court.*) Where is Chester avenue? 40

*Frederick A. Reimer, direct.*

A Just east of Bloomfield avenue, running into Hospital street, where you see the black spot there.

*The Court.* My ruling on the former question will be reversed. This location appears to be right in the lots in question, the lots formerly owned by Mr. Maioran.

*Further direct.*

10 Q Will you point out the Chester avenue culvert on that map?

A Chester avenue culvert is right here (indicating).

Q And where was the next culvert you built?

A At Brook street, which is the next street to the east.

Q And that is how many feet from the lots in red there on the map, approximately?

20 A The Brook street bridge is approximately 300 feet west of the indicated red property, and the Chester street bridge is probably 400 feet west of that yet.

Q Now, will you tell us how large you built the first culvert at the bed of the stream?

A The Chester street bridge is 9 feet wide.

Q And the Brook street is how much?

A Ten feet wide.

Q Now, as county engineer, and as city engineer for the City of East Orange have you had occasion to observe this watershed?

30 A Many times.

Q Can you tell us how far either side of this stream the slope runs to it?

A That takes a very wide description to go over that, takes some 240 odd acres, 245, if I recollect correctly, in East Orange, and something over 200 acres in the town of Bloomfield, before reaching Bloomfield avenue; so there is something like 450 acres coming into the stream at Bloomfield avenue.

*Frederick A. Reimer, direct.*

Q Will you describe—do you remember the building of the storm drain through the land of the East Orange & Ampere Land Company?

A Yes, sir.

Q Will you describe the stream as it ran through the land of the East Orange & Ampere Land Company, and the land on the east side of Bloomfield avenue just prior to the building of that sewer?

10

A Beginning at the westerly end generally, the westerly end of the stream which had its origin in East Orange, and then again at the D., L. & W. Railroad, Montclair branch, the stream took a generally easterly direction, a well defined open stream, through the old Orange Water Company property, until it passed under the Bloomfield avenue, through the bridge which had existed for a good many years.

Q Did you ever notice the average width and depth of the stream?

20

A Well, I have attempted to cross it many times as a boy, and was unable to do so.

Q Was that under normal conditions?

A No, in storm periods.

Q You have observed it in storm periods, have you?

A Yes, sir.

Q Does the flow of water increase largely under storm conditions?

A Very largely.

30

Q Will you tell us as an engineer, Mr. Reimer, what you know about the size of that stream, and its ability to carry off this water after a storm?

A The stream is like all ordinary streams running through farm property, with varying widths of bottom of stream, and varying widths across tops of the banks, but it generally widened from the railroad running easterly, and so that it probably had a width varying from 6 to 7 feet at the railroad to 12 or 15 or more feet over the tops of the banks at various

40

*Frederick A. Reimer, direct.*

points through the property of the Orange Water Company, and then the property of the East Orange & Ampere Land Company. That same condition applied east of Bloomfield avenue until properties began to be built which finally crowded the stream, and diverted it from its original course.

10 Q Now, Mr. Reimer, I want you to observe this map, particularly with reference to the stream as it is now laid out. Do you know it as it is now laid out?

A Yes, sir.

Q And that is the stream running in right angle directions there, isn't it?

A Yes, sir.

Q Would a stream 5 feet deep and 5 feet wide through there be sufficient to carry out the storm water from this water shed?

A No, sir.

20 Q It would not, and you built your culverts at Chester avenue and Brook street wide enough for that, did you?

30 A Yes, sir—that is, qualify that to this extent: in building these county culverts across open streams I have in mind always the fact that in some future development these bridges will be changed and done away with, owing to the fact of the substitution of large storm drains which will take place, and be built, and those drains will be built on public property, and not through private property, and therefore I never build those bridges as large as I otherwise would were the drains to be built along what was the general line of the stream.

Q If those culverts are to be permanent how large would you, as county engineer, build them, in order to provide for the normal water going down that stream?

40 A I would have provided for a cross section area much wider than the present cross section area if I could have imagined the depth—

*Frederick A. Reimer, cross.*

*Mr. Hoover.* I move to strike that out. The culverts were put there by the plaintiff, and they cannot speculate on what somebody else would do.

*The Court.* I think there ought to have been an objection to that question. I think the question indicated just what the answer has been.

*Mr. Hoover.* I move to strike the answer out. 10

*The Court.* I decline to strike it out.

Q *Mr. Reimer, as an engineer, can you say whether the changing of that stream from its natural flow across the property to right angles to a tree which you will find on the map, would that retard the flow of water?*

*Mr. Hoover.* I object to the question in the form in which it is put. I think the question would be did it actually change the flow of water.

Q Did it? 20

A Yes, sir.

Q Are you familiar with the storm sewer through the property of the East Orange & Ampere Land Company?

A Yes, sir.

Q Can you say as an engineer whether that sewer as it is built would, or does, gather the water and throw it down on the lots below in a manner other than it would naturally go?

A Only in so far as any water collected in a built conduit will carry the water off faster than an ordinary open stream, due to the fact that there is less friction, and therefore the water gets away much quicker. But it will not gather the water from the property adjoining any quicker than the original stream. 30

*Cross examination by Mr. Hoover.*

Q The building of this storm sewer which they have now spoken about had a possibility of draining some 450 acres, I think you said? 40

*Frederick A. Reimer, cross.*

A Yes, sir.

Q Don't you think, as a skilled engineer, that the building of that sewer collected more water in that sewer from the 450 acres than would have naturally obtained there as conditions existed before the sewer, so as to increase the flow across Bloomfield avenue?

10 A No, sir; for the reason that the low point in the valley was at the stream, and the water always went there. There has not been one drop of water added to that stream from the building of these conduits. There has been a tributary of the Dunn property carried into it, and the water does not gather any more rapidly than before the building of the conduits.

Q Yes, we agree in that, but after it is collected?

A It runs off much more rapidly, and therefore does not flood the property.

20 Q It sends more water?

A No, sir; sends the same amount of water.

Q The same amount of water?

A Absolutely.

Q (*By the Court.*) But sends it faster?

A Sends it faster.

*Further cross.*

Q Before the sewer was put in there this water ran all over the ground, didn't it, through grass and shrubbery, whatever happened to be on the surface?

30 A Yes, sir.

Q And did you notice it being collected in pools and little lakes on the surface of the ground?

A Ordinary farm conditions.

Q That is the way it was, wasn't it?

A Yes, sir.

*By the Court.*

40 Q Let me ask you this; you say it sends it down faster; does that mean it drains that portion of the land in a shorter space of time?

*Frederick A. Reimer, cross.*

A No, sir; it simply means that after the water has accumulated in well defined laidout conduits, that when it gets into the conduit it goes off faster; it does not collect any faster due to the conduit.

Q Where, with reference to the original stream has the conduit been built?

A Well, it has not followed exactly the lines of the old stream; it has been built through the streets which have been laid out. 10

Q In a straight course?

A No, sir; it has made several turns so as to get around the different streets, and not go through private property.

*Further cross examination.*

Q You are speaking now of the storm sewer on the defendant's land?

A On the East Orange & Ampere Land Company.

Q There are no abrupt turns in that sewer, are there? 20

A Yes, sir.

A There are abrupt turns in the sewer?

A Yes, sir.

Q Is that the way you build it?

A Sometimes have to; I have built many in that way.

Q Don't you think the amount of water which flows down over our lots, back of our lots, has been increased by the putting in of this 13-foot concrete and brick receptacle collecting the water, over what it was before? 30

A Not because of the building of the sewer or the drain.

Q Well, by what cause?

A All right, I can answer your question. Due to the fact of the development of all property, the building of highways, which are imperviously built to-day, so the water does not get through them; the building of many houses along the lines of these 40

*Frederick A. Reimer, cross.*

streets, which throw the water into the gutters. Water which originally went into the ground is now reaching the drain; and is not due to building the conduit at all.

Q Oh, no, we won't quarrel on that; but there is more water runs in there?

10 A Undoubtedly, because the crowding of property, and building of houses, which throws the water into the street and thence into the drain.

Q Now, in building these—by the way, you observed the general conditions of the water there on both of the lands in question, didn't you, before—well, before this East Orange Company put their sewer in?

20 A Only generally so, yes; I was particularly interested in the East Orange property because I had something to do with the work there, and so I was not paying any particular attention to the land east of it.

Q Did you notice any backing up of water on the East Orange Company's land?

A Only as there would be stoppages in the brook which would occur frequently, and had to be cleaned out.

Q That was common to any brook?

A That was common to any brook.

Q But as a common proposition there was not stoppage and backing up of the water?

30 A Not that I know of.

Q The culverts there were large enough to carry off the water?

A Yes, sir.

Q So that your culvert in Bloomfield avenue and Chester avenue and the other streets, while they were built 9 feet wide, did not require a nine foot wide culvert to carry off the water at that time, did it?

A Why, yes, or else it would not have been built that deep.

40 Q The water did not fill up the whole 9 feet, did it?

*Frederick A. Reimer, re-direct.*

A Oh, many times, at ordinary storm periods, which engineers always provide for.

Q How high was that culvert?

A That culvert, to my best recollection, is 5 feet high.

Q So the culvert in Bloomfield avenue is 9 feet wide by 5 feet high?

A That is according to my recollection.

Q How many times do you suppose in the last ten years was that culvert filled with water? 10

A I would not say offhand as to that without looking over the records. I know while I had charge of the East Orange work that brook was crowded, and the culvert was not large enough to take it five times during a ten year period that I know of, that I recollect now.

Q And any backing up that was done on the Ampere Land Company's land was done by the culvert not being big enough, isn't that right, at those times the water could not get through, isn't that so? 20

A That would be my answer.

Q In ordinary conditions it is amply big, isn't it, if you go out there to-day?

A Sure, in time when there is no rain it is big enough. It is a storm drain only; it don't take any sanitary sewage, you understand.

Q Would you mind telling us when you built the culvert in Chester avenue? 30

A I don't know the exact date; it has been within a year. The same on Brook street. Both of those bridges have been built within a year to the best of my recollection, a year and a half anyway.

*Re-direct examination.*

Q Do you remember the stream below, or east of Bloomfield avenue before it was changed?

A I do not, no, sir.

Q Do you know whether or not the building of houses in the proximity of that stream in Silver Lake, 40

*Alfonso Corbo, direct.*

the changing of the course of the stream, and the carrying to the width of five feet, would have a tendency, or did it retard the water, and back it up?

A You mean due to the change in the land, yes, sir.

Adjourned to December 5, 1913.

10

SECOND DAY.

Newark, N. J., December 5, 1913.

Continued pursuant to adjournment.

Appearances as before.

ALFONSO CORBO resumed the stand.

*Further direct examination* by Mr. Hoover.

20 Q Will you tell us something as to the size of this stream, I mean as to the amount of water which flowed through this ditch, before the East Orange Company did their digging?

A About six inches of water.

Q And will you tell us something as to the depth of the water over on the East Orange Company's land, on the defendant company's land, how deep was the water there?

A It was about the same depth.

Q About six inches?

30 A Yes, sir.

Q Flowed on the surface, did it?

A Yes, sir.

Q Now, Mr. Corbo, were there any obstructions or debris in this ditch either back of your lots, or to the side of them, at any time?

A No, sir.

Q It was always clear, was it?

A Yes, sir.

40 Q Now, what have you to say as to the condition of the ditch since the land company did their digging

*Alfonso Corbo, direct.*

in 1911? I mean around your lots. Did it remain the same, or what?

A Yes, it has remained the same.

Q Has remained the same from 1911?

A Yes, sir.

Q Was there ever any complaint made to you on behalf of the land company, prior to the digging in 1911, as to the—was there any complaint made to you as to the water not flowing properly through your lots? 10

*Mr. Duffield.* I object on the ground that this witness is not authorized—

*Mr. Hoover.* I am going to show he was the agent of those lots while the title stood in his father.

*The Court.* Do you expect to show they knew that?

*Mr. Hoover.* Yes, by the acts of the parties there, I think it is pretty well known. 20

*The Court.* I think that had better precede the giving of this testimony. I will sustain the objection to the question.

Q Now, Mr. Corbo, did you see the Chester avenue and the Brook street culverts put in?

A Yes, sir.

Q And when were they put in with reference to the enlarging, or digging, done by the East Orange & Ampere Land Company, before, or after? 30

A After.

Q Now, I believe you testified you are familiar with the land, both on their side of Bloomfield avenue, and this side of Bloomfield avenue. Which is the higher, the land on their side, or the land on your side?

A The land on their side is higher.

*By the Court.*

Q How much higher is it, do you know?

A I couldn't give— 40

*Alfonso Corbo, cross.*

Q Take a point a little west, and a little east, of Bloomfield avenue, is there any difference in the level of the land there?

A Originally must have been about one or two feet higher.

Q Immediately west of Bloomfield avenue?

A Yes, sir.

10 *Cross examination by Mr. Duffield.*

Q Mr. Corbo, I understood you to say yesterday that you had been familiar with this property and the vicinity for seventeen years, is that right?

A Yes; that is, I know it from when I was about twelve, but I have been going there now and then right along.

Q And you were familiar with this stream running through there all this time, weren't you?

A The stream on the west side.

20 Q I mean this stream that ran down through the property here that you say was about six inches deep?

A Yes, sir.

Q And that stream rises very rapidly in wet weather, doesn't it?

A Rises very rapidly.

Q Yes; in a rain storm that stream rises very rapidly, doesn't it?

A Yes.

30 Q And when rain comes you would not say it was only six inches deep, would you?

A No, that is an exception, of course.

Q And you want us to understand you dug a ditch five feet deep and five feet across to carry six inches of stream?

*Mr. Hoover.* I don't think that is a proper question.

*The Court.* He has not said he did that.

40 Q The ditch you dug was five feet—dug by Mr. Maioran, you know that ditch, do you not?

*Alfonso Corbo, cross.*

A Yes, sir; I know that ditch.

Q And that, I think you said, prior to the change made by the land company, was a ditch five feet wide?

A Yes, sir.

Q And five feet deep?

A Yes, sir.

Q Was that ditch dug for the purpose of taking care of this six inch stream of water, if you know? 10

Objected to as improper.

*The Court.* I do not understand, Mr. Duffield that this man's father was the owner of the land at the time the ditch was dug; it was dug by Mr. Maioran. I do not quite see how he can tell what might have been in Mr. Maioran's mind as the reason for digging it.

*Mr. Duffield.* I will withdraw that question.

Q Did this six-inch stream to which you have referred flow down this ditch five feet wide and five feet across? 20

A Yes, sir.

Q How deep was the ditch? Six inches?

A About six inches, yes, sir.

Q I understood you to say there were no obstructions in this ditch near your place at all; a perfectly clear ditch?

A That was prior—

*Mr. Hoover.* One moment; he said around these lots. 30

*Mr. Duffield.* I understand; around these lots.

Q Is that right?

A Well, do you mean before, or after?

Q I mean at the time the ditch five feet was put there. I understand you to say while that was there there was a perfectly clear, uninterrupted flow of water, and no obstructions, as far as your property is concerned, were in that ditch, is that right?

A Yes, sir. 40

*Alfonso Corbo, cross.*

Q I show you a photograph and ask you if you recognize where that photograph—the locality in which that photograph is?

A This here photograph is starting on the upper side, almost from our lots.

Q It is right at your lots, isn't it?

A Not right at our lots, no, sir, because our lots  
10 have a round corner where the water turns around, and I took a photograph of that myself.

Q Have you that photograph?

A Yes, sir.

Q Where is your lot? That is the ditch, isn't it, that you refer to?

A Yes, it is the ditch.

Q Does that fairly show the condition of the ditch at the time just prior to the digging by the East Orange Company?

20 *Mr. Hoover.* Now, I would like to know where the photograph referred to.

*The Court.* The witness has identified the point.

*Mr. Hoover.* As above?

*The Court.* Yes.

*Mr. Hoover.* Then I object to the question on the photograph as immaterial and improper.

*The Court.* If it is above.

*Mr. Hoover.* Yes, sir; above.

30 *By the Court.*

Q Does the photograph show the land in the rear or at the side of your lots?

A Shows the land in the rear.

Q The photograph shows that?

A Yes, the rear part; not our land, but shows above our land here.

Q Does any part of the photograph show your land?

40 A Well, you can't distinguish it here, for the simple reason I can't see the houses that are con-

*Alfonso Corbo, cross.*

nected on the streets. Now here, in back here, I could not distinguish at all, because I couldn't show—there is supposed to be a low bridge here on our land, and I don't see that bridge there.

Q What I would like to know is whether or not you are able to distinguish upon that photograph the lots which your father owned?

A I could not distinguish on this photograph, no sir. 10

*Further cross examination.*

Q I call your attention to the amount of water in the ditch at the time the photograph was taken; you would not say that was six inches, would you?

*Mr. Hoover.* I object to those questions as improper. It is not shown that it is our land.

*The Court.* I think what the photograph shows the photograph should speak for. If you recognize that, then it is proper, perhaps, to have the jury say what it shows, not the witness. 20

*Mr. Duffield.* I ask to have it marked for identification.

Said photograph marked D. 1 for identification.

Q When you were a boy didn't you use to fish in this stream?

A No, sir.

Q They used to fish in this stream until that property was built up, didn't they, right along? 30

A I didn't fish in it myself.

Q No, but they did fish in it?

A Oh, yes, it was known as Silver Lake.

Q And it was a well recognized stream flowing through that valley, was it not?

A Oh, there was a stream there, yes, sir.

Q And prior to the erection of these houses on the Maioran tract that stream was more than a six-inch stream, wasn't it?

A I don't think so, not a regular part. 40

*Alfonso Corbo, cross.*

Q And that six-inch stream required a twelve foot culvert to take care of it, didn't it?

*Mr. Hoover.* Your honor, that is not a proper question.

*The Court.* I sustain the objection.

10 Q It was this six-inch stream that ran down through the Bloomfield avenue culvert we have been talking about, wasn't it?

A Yes, sir.

Q And it was this six-inch stream that ran around your place, was it not, or formerly across your place, and diverted to run around your place, wasn't it?

A I don't know anything about that time; that is, that time I did not go around to see whether it went around our place or not, because the place wasn't in that condition.

20 Q You don't recall where that stream ran seventeen years ago?

A I only recall that the stream went on, there were different little streams, there was one center stream went along, I don't think it was more than a foot deep, I don't think it was that much, either, but there were separate little streams that ran water up there.

Q Several little streams?

A Yes.

30 Q I am asking about the main stream into which these little streams emptied; was that more than six inches deep in your opinion?

A More than six inches deep?

Q Yes.

A I don't think so.

Q Now, I understand that when this ditch was widened it was made—they took 8 feet off of your land, is that right?

40 A They widened the ditch 8 feet in the rear, and made it 12 feet; that is including the other people's land; 12 feet on the sides.

*Alfonso Corbo, cross.*

Q A 12-foot ditch?

A 12-foot ditch on the sides.

*By the Court.*

Q How much in the rear?

A Eight feet.

Q Eight feet wide?

A Eight feet wide.

Q The entire width?

10

A The entire width was 8 feet wide.

Q In the rear?

A In the rear.

Q And 12 on the side?

A Twelve on the side.

*Further cross examination.*

Q Was it 12 at the top? I mean 12 feet across the top and 8 feet across the bottom, sloping, is that it?

A I was not talking about sloping; I was talking about the top part. 20

Q It was 12 feet across?

A Yes.

Q And how deep was it, do you suppose?

A When I saw the men working there, I recognized one of the men, it was almost at his head.

Q So it must have been about 5 feet deep?

A About that.

Q So they did not deepen the ditch very much from what it was before, but more widened it, is that right? 30

A There was more widening than deepening.

Q How was the bottom, do you remember? Did it slope down?

A Not very much; just came down a trifle this way (illustrating).

Q After they had cleaned this ditch out and widened it did you notice the flow along the bottom of that ditch? 40

*Alfonso Corbo, cross.*

A Yes, sir.

Q How deep was the water after that?

A A great deal deeper. I noticed the water a great deal deeper; must have almost doubled the amount of water.

Q I ask the amount of depth; do you remember?

A I didn't go down and measure it, but just looking at it it must have been about a foot of water.

10 Q And when a rain storm would come that ditch would be pretty nearly full?

A Yes, it would overflow.

Q Now, prior to the erection of this big ditch, when a rain storm would come the ditch would overflow, would it not, the 5-foot ditch?

A What is that?

20 Q I say prior to the enlargement of this ditch, the old 5-foot ditch, when a rain storm would come that ditch would overflow, wouldn't it?

A Not very much; just come up almost even to the lots, and probably sometimes it would spread over a little bit, but not very much. Considering now and then, it is almost like a river now, considering to that time.

Q So that since the 12-foot ditch has been there the water overflows, but when the 5-foot ditch was there it did not overflow, is that right?

A Yes, sir.

30 Q And when that stream was there before the 5-foot ditch, how about that? Did it overflow then?

A Oh, well, it ran right into the lake then.

Q So when these men went down to dig this ditch they were accompanied by policemen, were they not?

A I did not see the policemen myself.

Q There was no trouble down there, had no row?

*Mr. Hoover.* I object to that as immaterial.

*The Court.* I sustain the objection.

40 Defendant's objection noted as ground of appeal.

*Alfonso Corbo, cross.*

Q I understood you to say that it was claimed by these parties that they were doing this work for the City of Newark, is that right?

A That is what the foreman told me, the city was doing the work.

Q You had no difficulty in discovering that these persons were connected with the East Orange Land Company, did you? 10

A No, sir.

Q And they did not conceal the fact that they were connected with the East Orange Land Company, did they?

A When I went out—can I explain this matter?

Q Answer the question.

A When I went down to the City Hall to find out, they told me—

*Mr. Duffield.* I don't think that is an answer to the question. 20

*The Court.* No.

*Witness.* May I have the question?

Q (Question read as follows: "And they did not conceal the fact that they were connected with the East Orange Land Company, did they?")

A No.

Q Didn't they tell you that they were doing this under advice of the Board of Works, or under the direction of the Board of Works? Something of that sort? Wasn't that what was said? 30

Objected to as immaterial.

*The Court.* You have asked this witness for the conversation with the foreman. I suppose the conversation with the foreman will be proper.

Q (Question read.)

A No, sir.

Q They did not lead you to believe that they were city employees, did they?

A When I was on the property? 40

*Alfonso Corbo, re-direct.*

Q Yes; do you remember just what they said about that?

A Why, he just told me that the city was doing that work.

Q But what I am trying to find out was, they did not contend that they were city employees, did they?

A Well, they never told me—they didn't tell me where they came from.

10

Q Said the work was being done under direction of the city, didn't they?

A Yes, sir.

*Re-direct examination.*

Q Now, about this digging at the back, in the rear and side of your lots; you testified, I believed, that the back was increased to eight feet?

A Yes, sir.

20

Q Now, where was that additional land taken? Off of your lots, or the neighbor's lots, in the rear?

*The Court.* You mean the additional three feet?

*Mr. Hoover.* The additional three feet, yes, sir.

A Off our lots.

Q And was that also true of the additional seven feet on the side?

A Yes, sir; most of it.

30

Q Now, they talked about some photographs here; I show you a couple of pictures and ask who took them?

A I took those myself.

Q And what are they views of?

A This is a view of the stream.

Q Where?

A On the side.

Q On the side of your lots?

A Yes, sir.

40

Q And where are the other photographs a view of?

A This is the rear.

*Alfonso Corbo, re-cross.*

Q And when were they taken with reference to the digging?

A They were taken a year ago—

Q Well, with reference to the digging, after, or before?

A After.

Q And are they correct representations of the conditions as they exist out there now?

A Yes, sir. 10

Q Since the digging?

A Yes, sir.

*Mr. Hoover.* I offer the four photographs in evidence.

Said photographs marked Exhibit P. 2, Exhibit P. 3, Exhibit P. 4 and Exhibit P. 5.

*Re-cross examination.*

Q I understand these two pictures, P. 2 and P. 3, show the conditions back of your lot, is that right? 20

A Yes, sir.

Q And I call your attention to the obstructions in the way of broken down fences and refuse that seems to have gathered in that ditch, and ask you when those got in the ditch?

A The obstructions of the fences here is not on our property; our property is on this side here. This is our property right here (indicating).

Q So there were obstructions on the other side of the stream from your property all the time, weren't there? 30

A On the other side of the property?

Q On the other side of the stream, directly behind your property?

A Well, just obstructions of fence, and things like that.

Q And the conditions shown by that picture have existed there for a long time, haven't they?

A Well, right after the people did the digging.

Q And before, too, weren't they? 40

*Rocco Corbo, direct.*

A No; before you did the digging those fences were in pretty good condition.

Q They were?

A Yes, sir; they were in very good condition, and I noticed the day they were digging on the side, and almost tore down the fence.

10 Q Don't you think that this picture, D. 1 for identification, pretty well shows the conditions prior to the digging, on the back of these lots?

*Mr. Hoover.* I object to the use of that picture until we know something more about it.

*Mr. Duffield.* All right; I guess the pictures show themselves. That is all.

*Further re-direct examination.*

Q Those fences—of course, the pictures speak for themselves—those fences are not in the ditch, are they?

20 A No, sir.

Q They are hanging along the sides; don't touch the water, do they?

Objected to.

Objection sustained.

Q Well, where are those fences? Just explain to the jury where they were.

A The fences are on the other side of our lots.

Q Which side?

30 A For instance that faces the lot this way, the property this way, and our property is on this side, and the fence is on the other.

ROCCO CORBO, sworn for the plaintiff (through an interpreter).

*The Court.* The swearing of this young man who will act as an interpreter is waived. He is not the regular interpreter.

*Mr. Duffield.* We have no objection.

40 *Mr. Hoover.* We have no objection.

*Alexander M. Borrie, direct.*

*The Court.* He is from the juvenile court.

*Direct examination* by Mr. Hoover.

Q Mr. Corbo, you are the plaintiff in this suit, are you not?

A Yes, sir.

Q And you are the owner of the four lots in question in this suit, are you not?

A (By the Interpreter.) He has given his property to his son. 10

Q He don't understand.

*The Interpreter.* Now he says yes, he is the proprietor.

*The Court.* He says he owns the property.

*Mr. Hoover.* I understand Mr. Duffield will admit he has given charge of the property to his son. That is all, then.

NOT CROSS EXAMINED.

20

ALEXANDER M. BORRIE, sworn for the plaintiff.

*Direct examination* by Mr. Hoover.

Q What is your profession?

A Surveyor.

Q You are connected with the firm of Borrie & Kreiner, this city, are you not, surveyors?

A Yes, sir.

*Mr. Duffield.* We admit his qualifications. 30

Q Your firm, I believe, was employed to go out to these lots and make a survey, or do some measurements, were you not?

A Stake out the property, yes, sir.

Q What time was that?

A Some time during 1911.

Q Have you got your record?

A Yes.

Q I show you a paper and ask you what it is?

A That is my report of our survey. 40

*Alexander M. Borrie, direct.*

Q Is that your official survey?

A Our official survey, yes.

Q What date does that bear?

A July 11, 1911.

Q Now, does that show the conditions of the four lots in question on that date?

A It shows the locations of those lots and any—

10 Q I mean as to the ditch?

A Any encroachments as to the ditch, yes.

Q Now, will you please tell us as to the width of that ditch, both on the back and the rear of these four lots.

A Well, it varies; on the back it varies from seven and one-half feet to nine feet; on the side, the north side, it runs up to twelve feet about twelve feet.

Q (*By the Court.*) On which side?

A The north side of the lots.

20 *Further direct.*

Q You refer to—

A The side away from Bloomfield avenue.

Q Now, what have you to say as to where the ground was taken from, which side of the center line?

A Do you mean the—

*Mr. Duffield.* I have not heard any testimony yet that this gentleman knew the conditions prior to the time of this survey; how could he testify where it was taken from?

30

*The Court.* Yes. I suppose all he could testify to would be the width of the ditch on one side of the line, and on the other, wouldn't it?

*Mr. Hoover.* Yes, sir; that is what I wanted to get out.

*The Court.* It is not shown he knew anything about the condition before the acts complained of.

40

*Alexander M. Borrie, direct.*

Q Well, I may ask this question: does your survey show the lot line?

A Yes.

Q Now, from that can you tell which side the ground was taken from?

A No. All I—

*The Court.* What you really want is the width of the ditch on each side of the line, isn't it? The testimony already is that when the ditch was originally dug it was dug two and one-half feet on each side of the line. 10

*Mr. Hoover.* I wanted to find out from this witness, if he knows, and can tell, from which side the increase was taken off.

Q Can you tell that, Mr. Borrie?

A No, sir; this only shows the ditch at the time of the survey.

*Mr. Hoover.* I offer the survey in evidence. 20  
Same marked Ex. P. 6.

*By the Court.*

Q Is that plan drawn to scale?

A Yes, sir. It is not marked on it. I had better mark it. It is twenty feet. However, all the distances are marked on it, so the scale does not enter it.

Q Mark the scale on it.

A (The witness marks the scale on the survey.)

Q How much of the ditch in the rear of the lot is west of the plaintiff's line? 30

A Practically none of it.

Q How much of the ditch in the rear is east of the plaintiff's line?

A Practically all of it; that is, the entire ditch is practically on Corbo's ground.

Q Now, on the north side how much of the ditch is upon Mr. Corbo's land?

A About two-thirds of it.

Q Well, in feet, what would you say? 40

*Pietro Fazio, direct.*

A About eight feet; that varies; runs from about eight feet in the rear to about ten and one-half in front.

Q On Corbo's land?

A Yes.

Q (*By Mr. Hoover.*) Eight feet to ten and one-half?

A Eight feet to ten and one-half.

10

NOT CROSS EXAMINED.

PIETRO FAZIO, sworn for the plaintiff.

*Direct examination by Mr. Hoover.*

Q Mr. Fazio, what is your business?

A Contractor.

Q And where do you live?

A Silver Lake.

20 Q Do you know this land, these four lots of Corbo's?

A No, I didn't know the lots, all I know the section.

Q Well, did you ever do any work out there?

A Yes, sir.

Q When did you do it?

A I done 1905.

Q What did you do?

A I dig a ditch.

30 Q And where did you dig the ditch? Where did you start from?

A I started from Bloomfield avenue and go—

Q Which direction did you go?

A I go east.

Q And what size ditch did you dig?

A I dig five feet in width.

Q And how deep?

40 A Well, some places five feet, some places four, some places three, some places six; I had it to give the fall of the ground.

*Raffaello Rizzolo, direct.*

Q So that you got a level bottom, I suppose?

A I get so the water run.

Q The ground is not all level there?

A Well, you couldn't exactly.

Q Did you see the ditch after you dug it?

A Why, sure, I did.

Q And did you see the water run down through the ditch after you dug it?

10

A I seen the water, yes.

Q And did the water run freely or otherwise?

A The water ran very freely when I finished.

Q And do you know the ditch as it is now?

A Yes, I know the ditch there now.

Q Has anything been done to it?

A Well, it widen out a little bit.

Q And do you remember about when that widening was done?

A Well, no, I don't.

20

Q You don't remember that. Now, what have you to say as to the amount of water which comes down through that ditch since the widening, as compared with the amount that came down after you did the digging?

A Well, might increase more or less.

NOT CROSS EXAMINED.

RAFFAELLO RIZZOLO, sworn for the plaintiff.

30

*Direct examination by Mr. Hoover.*

Q Mr. Rizzolo, where do you live?

A North Eleventh street.

Q Do you know the Corbo land?

A Yes, just right alongside.

Q And how long have you been living out in that neighborhood?

A Eight years.

Q And were you living in that neighborhood before Mr. Fazio dug his ditch?

40

*Raffaello Rizzolo, direct.*

A No, after he dug the ditch.

Q Now, are you familiar with the ground out there, and the land, since Fazio dug his ditch?

A No, I don't see him at all; when I move up there find out is diggin.

*Mr. Hoover.* He don't understand what I mean.

10 Q You have seen the land out there, have you?

A Yes, sir.

Q Since you have been living there?

A Yes.

Q Now, what kind of ditch was there there when you first went there?

A About 5 feet, may be more may be less, I can't tell you that, because I don't measure.

Q About 5 feet?

A Yes.

20 Q Did that run down past the Corbo lots?

A Yes, sir.

Q Where did it come from?

A It come from Bloomfield avenue, you know, come right down.

Q And how much water ran through the ditch at that time? How deep was the water?

A About a foot and a half of water.

*Mr. Hoover.* He don't understand again.

30 *The Court.* Do you think he will understand better through the interpreter?

*Mr. Hoover.* I think so, yes, sir.

*The Court.* Very well, you may ask the questions through the interpreter.

Q (Through the interpreter.) Now, Mr. Rizzolo, we are talking now of when you first moved out there, before the East Orange Land Company did any digging in that ditch?

*The Interpreter.* He understands.

40 Q Now, about how much water was there running through that ditch at that time?

*Raffaello Rizzolo, direct.*

*The Interpreter.* Before the East Orange Land Company did anything with it?

*Mr. Hoover.* That is right.

A At times there was nothing at all, and at times there was about a foot and a half.

Q Did the water run freely, or otherwise, down the ditch?

A Ran freely. 10

Q Now, do you know whether anything happened there about 1911?

A They widened the ditch.

Q Who widened the ditch?

A Don't know who widened the ditch, but he knows that the people objected to it being widened, and they sent the police at the time.

*Mr. Duffield.* I ask that it be stricken out as irresponsible.

*The Court.* The latter part may be stricken out; however, it is admitted that it was widened by the defendant. 20

Q Were you there when these people were doing their widening?

A Yes.

Q And what did they use? Just tell us what tools did they have?

A From the Eleventh street side, he says, they widened the ditch; they worked from the Eleventh street side. 30

*Mr. von der Lippe.* That is not responsive, if your honor please; he asked what tools they used.

Q (Question read).

A Picks and shovels.

Q Now, what did they do with those picks and shovels?

A They took out the dirt and widened the ditch.

Q And did they make the ditch very much wider than it was before? 40

*Raffaello Rizzolo, direct.*

Objected to as leading.

*The Court.* I will overrule the objection.

A They widened the ditch as much as it was, about once as much as it was.

Q Now, Mr. Rizzolo, did you notice—have you noticed any change in the amount of water that comes through that ditch since that digging?

10 A It is more.

Q How many times more, if you know?

A Seven or eight times more.

Q You mean, now, that is in—when it rains?

A Yes.

Q Now, you know the land of the East Orange & Ampere Land Company, do you?

A Yes, sir.

Q Did you see any work being done there in about 1911?

20 A Before and after.

Q About what month was that in 1911, if you remember?

A Don't remember the month.

Q What did you see them do there?

A They were digging ditches.

Q How big a ditch, or how deep a ditch, were they digging?

30 *Mr. Duffield.* This case is confined to one ditch, I object to the introduction of others; the only allegation is we deepened the old ditch running across their property.

*The Court.* I think under the pleading it should be limited to that ditch. My view is that under the pleadings you are confined to the effect of the digging of this ditch across the plaintiff's land.

Q Now, fix your mind on the time before the East Orange Land Company did the digging on their land. See if he understands that?

40 A Yes.

*Raffaello Rizzolo, direct.*

Q Now, how did the water run over their land at that time?

*The Interpreter.* At the time before the company—

A It was all water there.

*The Interpreter.* I think he means all marshy.

Q And was there a stream there?

A The water was in little puddles all around, there wasn't one stream. 10

Q Well, now, you say the East Orange Land Company dug a ditch, is that right?

A Yes.

Q How big a ditch did you see them dig?

A The ditch they dug is composed of pipe about 5 feet, and all that water that laid there in puddles now runs through this pipe.

Q Well, did they dig out the ground to put this pipe in? 20

A Sure.

Q And how big a trench did they dig?

*Mr. Duffield.* I don't know what allegation this is. I think, under your honor's ruling, we are entitled to know before we get the description.

*The Court.* Proceed.

A Enough to fit the pipes in.

Q Well, how deep was that trench?

A Some places two, some four, some five, some ten, some twelve feet. 30

Q Now, where is this ditch with respect to Bloomfield avenue?

A It starts at Bloomfield avenue and Thirteenth street, and up towards East Orange.

Q Does the water which flows in the ditch run under Bloomfield avenue?

A Yes, sir.

Q And does that connect with the ditch on the east side of Bloomfield avenue? 40

*Raffaello Rizzolo, cross.*

A No.

*The Interpreter.* I told him to speak in Italian; it would be better; he said he don't know what he is talking about; I said, "Never mind, just answer what I ask you."

Q Have you seen any water running under Bloomfield avenue?

10 A When there was a bridge he did see water there, now he don't see water any more; it is covered up.

*Cross examination by Mr. Duffield.*

Q When this ditch was dug across back of the Corbo lots—I mean back of, and on the side of the Corbo lots—ask him if he remembers when the ditch behind and on the side of the Corbo lots was widened?

A Don't remember the exact date.

Q No, but ask him if he remembers it was done?

A Yes.

20 Q Ask him if he saw—

*The Court.* Don't you think it would be better to put the questions in the first person? It would be better on the record.

Q Did you see the work being done?

A Yes, sir.

Q Did you see any rubbish being taken out of that stream at the time it was widened?

A Pure dirt.

30 Q Was the flow of the water increased after the ditch was widened?

A Certainly, it was swifter.

Q After the ditch was wider the water increased?

A Yes, sir.

Q Ask him if it was increased before the ditch was widened, the flow?

A The water was the same.

Q The water was just the same until the ditch was widened, is that right?

A That is the right answer, he says.

40 Q You own property up on this ditch, do you not?

*Peter D. Ackerman, direct.*

A Yes, sir.

Q This ditch that you say was dug you described as a large rounded ditch, is that right?

*Mr. Hoover.* He did not say that, if your honor please.

A No, sir.

Q He says it was not rounded?

*The Interpreter.* "No, sir"; was his answer.

*Mr. Duffield.* I will withdraw the question. 10  
That is all.

PETER D. ACKERMAN sworn for the plaintiff.

*Direct examination by Mr. Hoover.*

Q Mr. Ackerman, where do you live?

A Belleville.

Q How long have you lived out there?

A Thirty-eight years.

Q Are you familiar with the Silver Lake section of 20  
Belleville?

A Well, I have known the place for the last thirty-eight years; been in it very often.

Q And what is your business?

A I am a practicing architect.

Q And ever buy and sell any real estate out there?

A Yes, I have dealt in real estate to some extent; bought lots and sold lots two or three times.

Q Do you know the value of this land in this section? 30

A Not exactly in that section.

Q I ask you if you know the value of land in this section?

A Oh, yes, yes. I have had a great deal of dealings there with the people in relation to land; building houses, and so forth.

Q Now, you are familiar, I suppose, with the physical conditions of this neighborhood; have been for thirty-eight years, have you?

A Yes. 40

*Peter D. Ackerman, direct.*

Q Now, tell us what the condition of the land out there was before any ditch was dug?

A Way back thirty-eight years ago?

Q Yes, go way back, and then come right down.

A This whole section where these lots lay in question was then a pond; it was all covered with water, extending up to about where Bloomfield avenue is now; the pond was shallow water, and covered quite a large surface there. And some years after that the property was bought by John Honness. Mr. John Honness drained the property, and put it into building lots.

Q What was the condition of the property across Bloomfield avenue, which is now owned by the East Orange & Ampere Land Company?

A That was a swamp, and was very wet; I have seen it almost like a pond many times; water was standing there; a great sheet of water.

Q Then both sides were about the same, as far as that goes, is that right?

*Mr. Duffield.* I object to that.

A Both sides were similar.

Q Now it has been testified here that before the digging of the ditch on the east side of Bloomfield avenue, there was a stream ran down through there; do you recall that?

A How it that?

Q It has been testified in this case that before the digging of the ditch on the east side of Bloomfield avenue there was a stream ran down through those lots, more or less well defined, do you recall that?

A Digging done down on that side, you have reference to, at the present time?

Q Before the digging was done, Mr. Ackerman, you know what digging I mean, before the Maioran ditch, I will call it that, I believe you know it as that, before that was done how did the water run down over this section east of Bloomfield avenue?

*Peter D. Ackerman, direct.*

A It used to run under through Bloomfield avenue, and down in this pond.

Q Now, you remember the digging of the Maioran ditch, do you?

A I don't remember what time it was dug; I saw it after it was dug.

Q You remember it was dug?

A I remember it was dug.

Q Now, what kind of ditch was that, Mr. Ackerman? 10

A It was a ditch about, I presume, about four or five feet wide, in some places four or five feet deep, kind of rough.

Q Did that ditch carry the water off from Bloomfield avenue, the water that came under Bloomfield avenue?

A That I couldn't tell you. I couldn't tell you that because I never examined since that ditch was made; never examined the place to find out whether the water was running in that ditch or not; that I couldn't tell you. 20

Q Did that ditch go clear up to the east side of Bloomfield avenue?

A I think it did.

Q And it took the water away; took the water that came under Bloomfield avenue; is that right?

*Mr. Duffield.* I object; he said he couldn't answer that question.

A Years ago; I don't know about recently; way back. 30

*The Court.* If there is any misunderstanding about it you may answer again.

(Answer read.)

*The Court.* Practically the same answer.

Q Now, did you see water in that ditch?

A I saw water in the ditch, yes, sir.

Q And how did that water flow, freely or otherwise? 40

*Peter D. Ackerman, direct.*

A Oh, freely.

Q Any trouble about the flow?

A Never saw any trouble about it.

*By the Court.*

Q What ditch now are you speaking about?

A The ditch on the Belleville side of Bloomfield avenue.

10 Q That is the east side?

A The ditch that extends across this Maioran property.

*Further direct examination.*

Q Known as the Maioran ditch?

A The Maioran ditch, yes.

Q Now, did anything happen to that ditch in the last couple of years?

A The ditch is as wide again as it used to be.

20 Q Wide again as it used to be?

A Just about double the width what it used to be.

Q And is that true of the ditch surrounding the Corbo lots?

A Yes, sir.

Q Now, what have you to say as to the amount of water that now flows through that ditch as compared to the flow in the Maioran ditch, as we call it?

A There is a great deal more water, in my opinion, flows through that ditch now than what there was originally.

30 Q Now, Mr. Ackerman, did you make an appraisal of these Corbo lots?

A Yes, sir.

Q And what have you to say as to the value of these Corbo lots, four lots—what have you to say as to the value of the four Corbo lots now as compared with their value when the Maioran ditch was there?

A Well, I should say the property has depreciated very much in value since that time.

40 Q And what caused the depreciation?

*Peter D. Ackerman, direct.*

A Why, the amount of land that has been taken for the ditch off the property.

Q And what in your estimation, is the difference in the value of the four dots?

A The difference would be—I have had that figured out somewhere—I can't carry it all in my head, but I will tell you in one moment—(referring to paper). The difference in the valuation of those lots at the present time, and at the time when the Maioran ditch was there, I calculate to be about \$416 depreciation. 10

Q Now, Mr. Ackerman, will you tell us how you arrived at that?

A Measured by the amount of land that has been taken—

*Mr. Duffield.* I think we ought to have the appraisement as of the date of the commencement of this action; conditions may have been changed up there. 20

*The Court.* Of course, that must be eventually shown.

*Mr. Hoover.* It has been testified the conditions were exactly the same as when Fazio was there in 1911.

*The Court.* While the conditions may be the same, values themselves may have changed in that time.

*Mr. Hoover.* I don't have reference to that change in value; he is going to give the facts on which he bases this, and I think you will see then. 30

*Mr. Duffield.* There is no dispute that these two twelve feet culverts have been erected to take the water from Bloomfield avenue, and emptying into this ditch. Those conditions have been testified to, have been created since the construction of this. Those two things might materially change the situation as to the flow of 40

*Peter D. Ackerman, direct.*

water. My objection now is that this witness is testifying to a value existing as of to-day. I think he ought to be limited to a value as of the time at the commencement of this suit.

*The Court.* Suppose it should subsequently appear there has been no change in values.

*Mr. Duffield.* Then I have no objection.

10 Q Please tell us the facts on which you base this opinion.

A There is 1,200 square feet of property been taken there for ditching, exclusive of the original ditch of 5 feet, which is  $2\frac{1}{2}$  feet on the Maioran property, and at the present price of the surrounding property, at about nineteen cents per square foot, brings that amount up to \$228, the property that has been taken, really taken, for the extra ditches.

Q (*By the Court.*) How much?

20 A \$228.

Q (*Further direct.*) Go ahead.

A Now, the balance of the land that is left, the three lots, we count a depreciation there of ten per cent. on the value of the land and that was left outside of the ditches, of the three lots, that would make \$125 more depreciation; that is on the three lots.

Q What have you to say as to the fourth lot?

30 A Now, the fourth lot, there is 550 feet, including that in the 1,200, altogether a depreciation of that lot on account of the strip, the ditch, being taken off the whole lot, leaves the balance of the lot in such a shape it cannot be used for any purpose for building, and we count there twenty per cent. depreciation in the value of that lot, the remaining ground; that is outside of the ditches.

Q (*By the Court.*) What does that amount to?

A \$59.85 depreciation.

Q (*Further direct.*) Does that make your total?

40 A The total depreciation of the 1,200 feet is \$416.

*Peter D. Ackerman, direct.*

Q (*By the Court.*) Just give me those figures again, please. \$228?

A \$228.

Q \$125?

A \$128.25, and \$59.85.

Q (*Further direct.*) Now, Mr. Ackerman, when did you make your appraisalment that you are testifying to?

10

A About a week ago.

Q Well, now, in your estimation has there been any change in the value of these lots from the time the East Orange Land Company did their digging there, until you made your appraisalment? Any change in value?

A Not that I know of.

Q About the same?

A About the same; the valuation is about the same, as far as I know.

20

Q The values don't fluctuate very much out there, do they?

A Not very much.

Q Now, you spoke about the fourth lot; which lot do you refer to when you say that?

A The lot on the northerly side of the property; the ditch extends down to North Eleventh street.

Q Is that the lot where the ditch runs in the rear and down the side? A That is the lot.

Q And you say that that lot is not fit to be built upon as it is now?

30

A Could not be used for any building purpose of any account; it is too small.

Q Now, Mr. Ackerman, just another question. Since the digging of this ditch, or the enlarging of the ditch by the land company, have you observed any difference in the flow of water through that ditch?

A I think there is more water coming down there now than there used to be.

Q In the Maioran ditch?

40

*Peter D. Ackerman, cross.*

A Oh, yes.

*Cross examination by Mr. Duffield.*

Q Mr. Ackerman, I understood you to say you were a resident of Belleville?

A Yes, sir.

Q And your business is that of an architect?

A Yes, sir.

10 Q And your experience in real estate has been incidental to your profession as an architect?

A Yes, sir.

Q How far is this property from where you live, Mr. Ackerman?

A About a mile and a half.

Q And how frequently do you go up there?

A Very frequently.

Q And you have been doing that for the last thirty years, more or less?

20 A Yes, oh, yes, sir.

Q And you remember the conditions that existed there before the first ditch was dug, the Maioran ditch?

A Yes, sir.

Q I understood you to say that this whole tract was then a lake, or pond, practically?

A Yes, sir.

Q And the property on the other side of Bloomfield avenue was swampy and marshy?

30 A Yes, sir.

Q There was a brook running down through there, was there not?

A A feeder for the pond came through there.

Q The pond being located on the tract where the Corbo lots are?

A Yes, sir; that was a pond at that time.

Q And this feeder ran right down across the Corbo lot, didn't it?

40 A The Corbo lot was all covered with water at that time.

*Peter D. Ackerman, cross.*

Q But in the dry season when the pond would dry up a little bit, you could trace a stream running right across those lots, could you not, an ancient stream?

A All the stream was at that time was nothing more than a little depression in that part of the property that carried the surface water, and so forth, away.

Q You are familiar with this Black Brook, or Meadow Brook, as it is called here? 10

A Yes, sir.

Q A sort of natural water shed for that whole section, wasn't it?

A What do you say?

Q That was a sort of natural stream carrying off the water from that whole section, was it not?

A It is a question whether it carried off all the water.

Q It used to come down when it rained, or was a storm, so that the surface water came down from that water shed, that stream would rise very rapidly and very high, wouldn't it? 20

A Well, that question I couldn't answer, how rapidly the stream would rise.

Q You have seen that stream when there was a little water running through it, and when there was a great deal of water, haven't you?

A There don't seem to be very much variation in the stream of late years since the Maioran ditch has been there. 30

Q No, I was talking about the time before the Maioran ditch was dug, when the stream existed in its natural condition; didn't it vary very much in the amount of water coming there?

A No; it was a little pond at that time, and there was a spillway, and I think it helped itself.

Q You don't get the idea. When this old stream, natural stream, flowing down that valley, varied very 40

*Peter D. Ackerman, cross.*

little as to whether it was wet or dry weather, didn't it?

A It was wet the year around, that section, always wet.

Q Was the stream any larger when it was raining, had rained for a week, or when you had had a drought for three months?

A Naturally would be.

10 Q Yes, and it was quite a marked change, wasn't it? There was quite a marked change, depending on weather conditions, wasn't there?

A A heavy spell of rain there would be more water to carry away.

Q Now when the Maioran ditch was dug you say that that took care of all this water, do you not?

A That took care of the water.

20 Q The pond over here disappeared then; when the Maioran ditch was dug that pond disappeared?

A That pond disappeared. That pond disappeared before the Maioran ditch was dug. That pond was drained, the dam removed, and the water that came down there naturally spread over quite a large surface; it was wet through there.

Q Now, after the Maioran ditch was dug I understood you to say that you were familiar with the values of property in this section?

A Yes, sir.

30 Q And that the property did not vary very much?

A Has not varied very much in the last year or two.

Q Well, how about the preceding year?

A Well, the property is worth considerable more now than it was several years ago, on account of the improvements surrounding improvements.

40 Q Yes. Did you, in making your investigations from which you concluded that this increased width of ditch had damaged this property \$416, take into consideration the price paid for the property?

*Peter D. Ackerman, cross.*

A I don't quite understand.

*Mr. Hoover.* I don't think that is proper. It ought to be just before the damage we complain of and after the damage.

*The Court.* The objection will be overruled.

*Mr. Hoover.* I ask for an exception.

*The Court.* The objection will be noted.

Plaintiff's objection noted as ground of appeal. 10

Q Will you answer the question, please?

A Just state that question again, please.

Q In arriving at the conclusion which you have stated, that this property had been damaged by the increased size of the ditch to the extent of \$416, did you take into consideration the price which the owner had paid for that property when he bought it?

A No, sir; I did not.

Q Did you know it?

A I think I knew at the time; someone told me what he had paid for it; I couldn't tell you now exactly what it was. 20

Q If you had known it to be a fact that the owner had, within a comparatively short time, purchased those lots at a cost for the entire four lots of \$250, would that have altered your opinion?

*Mr. Hoover.* I object, if your honor please. That is clearly incompetent. There is no testimony of any such thing, and I don't think it is a fact. 30

*The Court.* That does not appear yet in the case. I suppose the examination should be based on proven facts, or facts you expect to prove.

*Mr. Duffield.* This witness is called as an expert, and he is testifying upon a condition which exists. Of course, we have not yet put in any defense, and it is difficult, I appreciate, to examine him along the lines. I simply wanted to know whether that would have affected his opinion at all. 40

*Peter D. Ackerman, cross.*

*The Court.* I thought it was entirely proper for you to ask him whether or not he took into consideration the cost price, but to mention a cost price which is not in the case I doubt the propriety of.

*Mr. Duffield.* I will withdraw it.

10 Q How many sales of property up there have taken place, within your knowledge, within the last two or three years?

A In this section?

Q Yes.

A Oh, any quantity of them.

Q Just tell us the consideration paid for one or two up there, will you?

*Mr. Hoover.* I don't think that is material.

20 *The Court.* I think as to other properties the location and condition should be substantially similar, and they should have been sold near the time when the damage is alleged to have occurred.

Q What did you value these lots at in arriving at your conclusion?

A \$450 a lot.

Q How did you come to arrive at that figure?

A On account of the surrounding property in that section selling about at that price.

30 Q Now, tell us the nearest lot to the Corbo lot that you know of that has been sold within the last few years.

A Now, I could not answer that question; I do not know the owners' names; I know that there has been a whole lot of lots sold there the last two or three years back.

Q Tell us a single lot on the block between Brook street and Lawrence street that has been sold at \$450 to your knowledge?

40 A I don't keep any record of that.

*Peter D. Ackerman, cross.*

Q Do you know of a single lot in that section that has been sold for \$50?

A No particular property that I could name that has been sold in the same direction that the Corbo lots are within the last couple of years. The owner of the property there could answer that better than me, because I don't keep any record of those things.

Q Then you don't know of a single lot in the vicinity of the Corbo lots that has been sold at all, do you? 10

A Oh, yes; there has been dwellings built there around that section.

Q Dwellings have been built, but do you know of a single lot that has been sold, or the consideration paid for it, if it has been sold?

A I can't call it to mind now, but lots have been sold.

Q Isn't it a fact that the conditions between Brook street and Lawrence street are about the poorest that there are in that whole section? 20.

A The lots between Brook street and Lawrence?

Q Yes, you know where that is, don't you?

A Yes, I know where it is.

Q Now, isn't it a fact that the conditions between the two streets that I have named on this tract, are poorer than they are in the whole neighborhood?

A No, sir; I don't think so.

Q Isn't it a fact that property, as you get up nearer Chester avenue, is worth more money? 30.

A I don't see why it would be, it is on the same level.

Q Then in your opinion it is not. How about Lawrence street over here on the other side of North Eleventh? What do you think of that property?

A On the north side of Eleventh street?

Q Yes.

A That is on the Belleville avenue side.

Q Yes, I should think so.

A That is about the same. 40

*Peter D. Ackerman, cross.*

Q So, in your opinion, in this whole section lots are worth about \$450 a piece?

A In that section I should think they would be.

Q Will you tell us on what you base your conclusion that lots in that section are worth \$450 apiece?

A I use my own judgment in that matter.

10 Q Notwithstanding the fact that you do not know of a single purchase or sale in that whole neighborhood?

A I don't know any person, that is, I could not call them to mind personally any one that has bought lots there, because they are generally Italian people, and the lots are sold on the installment plan, and so forth.

Q Have you gone to the trouble of finding out what lots are held for there by individual owners?

A Not particularly.

20 Q Have you done anything to ascertain definitely the value of real estate in this vicinity which you are now testifying as an expert?

A Looked up the real estate that has been bought and sold around there, and about what people ask for their lots.

Q Who have you inquired what people ask for their lots up there? Who did you ask what they were asking for lots in that neighborhood?

A I can't name them now.

30 Q Did you ask anybody?

A I asked Mr. Maioran, and those people that has been selling lots there all the time.

Q Mr. Maioran, where is his land?

A He claims the lots is worth every cent of what we appraised them at.

Q Then you are basing your appraisal on Mr. Maioran's opinion and not on your own judgment?

A That is one part of it.

40 Q Then all that you really know about the value up here is what you have learned from Mr. Maioran is that right?

*Peter D. Ackerman, cross.*

A Mr. Maioran and other people in those sections.

Q But you did not ask them whether they had land to sell, did you, at that price?

A I don't know as I asked if they had land to sell at that price; that was the valuation that they helped us to place.

Q Who was up there with you?

A Judge LaFaucherie.

Q And you went up there to make an appraisal for the purpose of this suit, didn't you? 10

A Yes, sir.

Q When did you go up? In November last?

A Went up about a little over a week ago, I guess it was.

Q Now, who told you about the amount of land that had been taken from these lots to construct this new ditch?

A We measured it up ourselves.

Q What did you base your measurement on? 20

A On sixty feet for the street, and one hundred feet for the lots, the same as the map calls for.

Q Sixty feet for the street and one hundred feet for the lot?

A Yes, sir.

Q You did not take into consideration that Maioran had a ditch dug there, did you?

A Yes, sir; we allowed for that ditch, too.

Q Did you ever measure the Maioran ditch?

A No, not particularly, never took exact measurement. 30

Q Then you did not know how much increase had been made by this new ditch, did you?

A It is really twice as wide as it used to be, that I know.

Q How do you know?

A Because I was there when the ditch was small, and I have been there since it was large.

Q Did you ever measure the Maioran ditch? 40

*Peter D. Ackerman, cross.*

A Yes, sir.

Q When did you do that?

A A week ago.

Q The Maioran ditch?

A The ditch as it is there now.

Q When did you measure the Maioran ditch?

A I don't know as I ever did measure the Maioran  
10 ditch.

Q Then you did not take into consideration, when  
you made your estimates of the land actually taken,  
the true extent of the Maioran ditch, because you did  
not know it?

A We allowed just for the Maioran ditch what it  
calls for on the maps, and so forth, that was made  
there at the time, where the ditch is shown on the  
map.

Q What maps? Have you got a map?

A It doesn't call for the number of feet there, but  
20 the understanding was, or we were informed, that  
the ditch was to be five feet wide, two and one-half  
feet in each abutting property, and that is what we  
worked from.

(The witness produces a map.)

Q What is this?

A There is the Corbo lots there (indicating);  
here is the ditch coming down across the rear of the  
Corbo lots, and then on the side of the Corbo lot,  
30 coming down to North Eleventh street; and that is  
the ditch originally, so they informed us, was to be  
five feet wide, two and one-half feet on each property.

Q And you assumed then, in making your esti-  
mate, that the Maioran ditch was in fact five feet  
wide, of which two and one-half only was on him?

A Yes, sir.

Q Did you take any measurement of this ditch  
after the digging took place? I mean the land com-  
pany ditch?

40 A Yes, sir.

*John C. La Faucherie, direct.*

Q You measured that at that time, did you?

A Oh, no, measured it now; the condition we find it in now.

Q Isn't it a fact that ditch has been increased recently in width and size?

A I couldn't answer that question.

Q Did you measure it since the culverts have been put in on Bloomfield avenue and Chester street?

A No, sir; I didn't measure that at all. 10

Q The only measurement you made in connection with this matter was made by you a week ago when you went up there?

A Yes, sir, directly on the property.

Q And you assumed in making your calculations that the ditch had been opened by the East Orange Land Company?

A It had been opened by someone.

Q Your appraisements are all based on the condition of the ditch as you find it at the present time? 20

A Yes, sir.

Q And no estimate was made by you prior to a week or two ago when you went up there?

A No, sir.

JOHN C. LAFAUCHERIE, sworn for the plaintiff.

*Direct examination by Mr. Hoover.*

Q You live where?

A Second Ward, in Belleville. 30

Q And what was your former occupation?

A Mason builder.

Q I know. You were a justice of the peace at one time, were n't you?

A I have been settling them troubles the last twenty-five years.

Q Well, Judge, to give you your title, are you familiar with this land up here, the Corbo lots, and the surroundings?

A Yes, sir. 40

*John C. La Faucherie, direct.*

Q How long have you lived in that neighborhood?

A Twenty-eight years—not in that immediate neighborhood.

Q No, I understand; in Belleville. Are you connected with any building and loan?

A Yes, sir.

Q What building and loan?

A Belleville.

10 Q What office do you hold?

A I have been president for seventeen years.

Q And does your building and loan have occasion to make loans on this Silver Lake property?

A We have made loans, yes.

Q Now, I believe you went up with Mr. Ackerman to make an appraisal of this property, is that so?

A Yes, sir.

20 Q And you have heard him testify as to the value there, and as to the decrease in value on the Corbo four lots?

A Yes, sir.

Q What have you to say as to the correctness of that?

A Well, my testimony as to that would corroborate what Mr. Ackerman has already sworn to.

Q You were both together, were you?

A Yes, sir.

30 Q You heard Mr. Ackerman say that he valued these lots at \$450 a lot. Do you think that is a reasonable valuation for those lots as they exist there, or should have existed before the damage was done?

A That would be a proper, I think, valuation for the lots the way they formerly was.

Q That is what I mean. And you base that, do you, from your experience—

*Mr. Duffield.* Now, one minute.

Q Upon what experience do you base it?

*Mr. Duffield.* No, I object to that.

40 Q On what do you base that?

*Wilmer C. Van Duyne, direct.*

A Well, my connection with the building and loan, president, I have quite a great deal also as appraiser where loans was asked for; I examine the property.

Q I suppose, then, the figures that you have testified to would be the same as Mr. Ackerman; you have said that, didn't you?

A I don't quite understand.

Q I believe the figures you testify to are the same as given by Mr. Ackerman, is that right?

A Yes, sir.

*Cross examination by Mr. Duffield.*

Q Do you know of any property up in that neighborhood that has been sold for \$450 in the last two years?

A I don't, only from hearsay.

WILMER C. VAN DUYNÉ, sworn for the plaintiff. 20

*Direct examination by Mr. Hoover.*

Q Mr. Van Duyne, what is your profession?

A Why, I am in the engineering business.

Q I believe you are the engineer for the defendant company in this suit?

A I am the engineer of the East Orange & Ampere Land Company.

Q And you were so back in 1911?

A Yes, sir.

Q And you were in charge of the work which they did on their land at that time, is that right?

A Yes, sir.

Q Now, Mr. Van Duyne, what digging did your company do on your land back in June and July 1911?

*Mr. Duffield.* I object.

*The Court.* I suppose you mean with reference to this ditch?

*Mr. Hoover.* With reference to these lots. 40

*Wilmer C. Van Dwyne, direct.*

*The Court.* With that understanding the objection will be overruled.

A In what time?

Q When you did that work out there, June and July, 1911?

A There was no digging specially on our property that I recall, Mr. Hoover, on our side.

Q Well, when was the digging?

10 A I think you would have to—you see, I have had in my charge employees, and I have had contractors, and things of that kind. I think you will have to ask me to tell you just exactly what you want, or otherwise than that I will be—

Q Were you the engineer in charge?

A Yes, I was the engineer in charge.

Q Then you must know what went on out there, don't you?

A Yes.

20 Q What did they do with reference to this ditch?

A In June and July, 1911, to the best of my knowledge, there was nothing was done to the storm drain at all on our side.

Q All right, when was it done?

A If you ask that question then I can talk, but the way your questions are coming I can't answer at all. The storm sewer was put in one year previous to that, when the storm sewer was put in.

Q And what digging did you do then?

30 A Along the whole line of it?

Q Yes.

*Mr. Duffield.* We admit that some time during the year 1910 we constructed across our property covering substantially the line of the old Meadow Brook, a storm water sewer for the purpose of carrying off the storm water from our property formerly going down the brook.

40 Q Now, I just want to ask you a few questions as to the size of the storm sewer. What was the size of this storm sewer that was put through there?

*Wilmer C. Van Duyne, cross.*

A Thirteen feet wide, three and one-half feet deep, as it will be shown on this plan.

Q Well, it ran down a little to the bottom?

A Yes, ran down a little on each side.

Q That plan shows it, does it?

A Yes, sir.

Said plan marked Ex. P. 7.

Q How far below the surface of the ground is that storm sewer? 10

A At Bloomfield avenue the surface of the ground—this is not the bed of the stream, this is the surface of the ground; the storm sewer does not go along the old alignment, you see, for the water course.

Q You diverted it a little?

A At Bloomfield avenue it is about three and one-half feet. When I say three and one-half feet I refer to the invert of the storm sewer.

Q (*By the Court.*) What do you mean by that? 20

A The invert is the portion of the storm sewer over which the water runs.

Q The lowest point?

A Yes, the inside lowest point.

*Further direct.*

Q That is about three and one-half feet below the surface?

A About three and one-half feet below the surface.

Q And you say the storm sewer does not run in the bed of the old ditch? 30

A No, it does not.

Q You diverted that a little?

A Yes; it goes down one street and up another.

Q (*By the Court.*) You mean at that point the top of the sewer is above ground?

A Yes, sir; it is above the old ground, as you can see by this plan.

*Cross examination by Mr. von der Lippe.*

Q Mr. Van Duyne, will you tell us how much below the bed of the old stream the invert, or inside bottom of this storm sewer is? 40

*Motion for Non-Suit.*

A How much below the bed of the old stream?

Q The natural stream, on the land of the East Orange & Ampere Land Company?

A At the outside it is half a foot. We take information on each side of the stream, and in the center, and from the lowest point it was half a foot lower.

10

## PLAINTIFF RESTS.

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30

*Mr. Duffield.* I desire to move for a non-suit in this case upon the ground that there is no evidence to substantiate the cause of action set forth in the complaint. As I understand the cause of action it is two-fold. The first complaint is that by deepening our ditch we have caused an increased flow on our land. I submit, taking the testimony in its most favorable aspect, we have the isolated fact that our ditch was deepened six inches. We have another isolated fact that at some time, one witness says, after that, there was an increased flow in the ditch down there along their lots; but there is not a scintilla of evidence to show that the deepening of the ditch on our land six inches, or less, caused the dropping of a single drop of water on their land. There isn't any evidence to show what caused this increase, except the isolated fact that there was a storm sewer put in there in 1910, and an increased flow observable in 1911. So, I say, if that was the only charge in this case I think your honor would be bound to non-suit the plaintiff, because there is no relationship shown between this alleged increased flow, and the fact that our ditch—

40

*The Court.* I doubt whether there has been substantial damage shown for that, but still the question might remain of nominal damages.

*Motion for Non-Suit.*

*Mr. Duffield.* The other charge is that we trespassed upon their lots. Of course, your honor is familiar with the fact that if the flow to which we were entitled from our land was impeded on their land by any obstructions created by them, or suffered or permitted by them, we had a right to go in and restore the flow from our land; and not increasing the same. Had a right, in other words, to have the same amount of water taken off our land that had been formerly taken off. The testimony in this case shows that formerly the brook took it off; they all testified to that; subsequently the Maioran ditch took it off, because they said it did not overflow; and the ditch as now constructed is not too great to take the water from our land, because of the fact that it is now overflowing, which they say is double and triple the size of the Maioran ditch. Now I say if the change of conditions which exist by the reason of the building of houses, macadamizing streets, the placing of cement culverts, causing the water to collect with more rapidity on that land, we still have a right to have a sufficient ditch across the land of the plaintiff. We have a right to have a sufficient ditch to leave our land in the condition that formerly this stream left it in, and subsequently the Maioran ditch left it in. And, therefore, there being no proof in this case that any breach of the peace was committed, or that we did more than was necessary to drain our land properly, I submit that the trespass charge also falls, and we are entitled to an order of non-suit.

*The Court.* I will deny the motion to non-suit.

*Mr. Duffield.* Your honor will grant us an exception?

*The Court.* An objection to that ruling will be noted.

10

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*George Dorer, direct.*

Defendant's objection noted as ground of appeal.

GEORGE DORER, sworn for the defendant.

*Direct examination by Mr. von der Lippe.*

Q Mr. Dorer, where do you live?

A 12 Springdale avenue, East Orange.

10 Q How long have you lived there?

A Seventeen years.

Q What is your business?

A Dairyman.

Q Have you a dairy at 12 Springdale avenue?

A Yes, sir.

Q Have you a number of cattle there?

A Yes, sir.

20 Q Do you know the land of the East Orange & Ampere Land Company, east of your property on Springdale avenue?

A Yes, sir.

Q How long have you been familiar with that land?

A Practically since childhood.

Q Driven your cows over lots of times?

A Yes, sir.

Q Are you familiar with the Silver Lake section of Belleville?

30 A To a certain extent, not quite as well as I am with the section nearer home.

Q Do you remember the Black, or Meadow Brook?

A Yes.

Q When do you first recollect that brook, Mr. Dorer?

40 A I remember as far back as I can remember, when a child five years old, a portion of that brook ran close to the house; we formerly lived in a cross street; that is practically the same brook. The source of this brook is further west or northwest, than the East

*George Dorer, direct.*

Orange & Ampere Land Company; and, of course, I am going back; that question asked—

Q (*By the Court.*) Suppose you tell us how many years you can remember.

A Probably thirty-two to thirty-three years. I mean by saying that I remember the brook, I don't remember the section approaching Silver Lake, but that same stream right near my home; that is, I recollect it was there practically at that time, and previous to that time. 10

Q (*Further direct.*) Do you remember the condition of the brook at Bloomfield avenue, Mr. Dorer, prior to 1905?

A Yes.

Q Do you remember the condition of Silver Lake prior to that time?

A Well, I remember it, but I can't state definitely exactly when the changes took place; that is, I don't know the year, or possibly two or three years, when most of the building was done; I remember the plot previous to that time, and after. 20

Q (*By the Court.*) Previous to the improvements?

A Yes.

Q (*Further direct.*) Prior to the building on Silver Lake what was the condition of the property down along Black Brook?

A Well, Black Brook emptied into what is known as Silver Lake, or Sun Fish Pond. 30

Q Do you remember Sun Fish Pond, or Silver Lake?

A Yes.

Q What was the condition of the land of the East Orange & Ampere Land Company prior to that time?

A The bulk of the land on the section nearest Bloomfield avenue, say possibly 800 to 1,000 feet wide, was heavily wooded, and the brook took a zig-zag 40

*George Dorer, direct.*

course through this wood; it ran up to the culvert at Bloomfield avenue.

Q Describe that brook as you remember it prior to that time.

A Why, the width of it varied somewhat, wherever there was a pond, sometimes there was a considerable depth of water. And the main way we had of recognizing that, in the spring of the year, previous to the  
10 time Sun Fish Pond emptied, the boys around the neighborhood would go spearing for suckers; they used a gaff, or spear; we used candle light or lamp light in order to do that, and lots of times we would follow the course of the brook in the daytime for no apparent purpose except to see if we could see fish.

Q Did you ever fish in the brook?

A Yes, sir.

Q Have you any recollection of the width of it?

A Well, there were spots where you could jump  
20 across it, possibly 4 feet; once in a while there might be a spot where there was a tree on both banks whose roots held it up, it was a little bit narrower; but the average width was so you couldn't cross it; 5 or 6 feet, sometimes wider, where it made a pond.

Q What was the condition of the land whether it was dry or marshy prior to 1905?

A We usually were able to follow the bank of that stream—

*Mr. Hoover.* I move that that be stricken out.  
30

*The Court.* Yes, whether it was marshy, or not.

A There were a few spots of marshy ground.

Q (*By the Court.*) What was the general character of it?

A The general character, I should consider it—well, the average was so a person could walk through without getting wet feet. I don't know how to describe it.

Q (*Further direct.*) And did you often go through  
40 that way?

*George Dorer, direct.*

A Yes.

Q Do you remember the commencement of the development of Silver Lake?

A Yes.

Q You don't remember the exact time?

A Well, the nearest way I can describe it is the time that the Branch Brook Park system was developed, they bought a great deal of land in the section between Park avenue and Bloomfield avenue from private individuals, mostly Italians, and as that property was purchased the majority of those people moved up towards Silver Lake, more into Silver Lake section and some just east of that, in Newark. Now how many went to Silver Lake, I can't say. 10

*Mr. Hoover.* I submit all this is hearsay; I don't think it is material at all.

*The Court.* It is of no importance unless it is shown when this improvement took place, Branch Brook Park. 20

Q Do you remember when the Maioran ditch was built?

A Not exactly, no.

Q You fixed the time with relation to the park?

A That is the only way I can tell.

Q Do you remember the condition of the land west of Bloomfield avenue after this ditch was built, and improvement commenced in Silver Lake, with reference to water? 30

A Yes.

Q Tell us what you saw, please, what you know?

A As far as the conditions on the west side of Bloomfield avenue are concerned, there haven't been any great change for a number of years. The only difference that you could realize was that the woods was cut down, and after the woods was cut down you could see a little further and clearer than you could previous to that time. 40

*George Dorer, direct.*

Q With reference to the water, on the property west of Bloomfield avenue, tell us what you remember after the building of the Maioran ditch, and the commencement of improvements in Silver Lake, Belleville?

10 A Why, the brook possibly changed its courses slightly at some points where the soil was sandy, but the general direction remained the same, and the average flow of water did not change perceptibly in all that time that I recall.

Q Did the water back up on the land—

*Mr. Hoover.* Objected to.

*The Court.* Objection sustained.

Q Do you remember when Silver Lake drained out?

A Yes, sir.

20 Q Do you remember Silver Lake immediately after that?

A Well, not that I have taken any more than ordinary observation passing through. I did not follow what formerly was the bed of the stream; but from the surroundings—that is, the streets that were nearest to it, say from Bloomfield avenue, and from Delavan avenue, I think it is, westerly, you could see where the lake had formerly been, and there was a little brook, or ditch, that followed the lowest part of the basins where the lake had formerly been.

30 Q Do you know whether or not that ditch carried the water off the land of the East Orange & Ampere Land Company, or the land west of Bloomfield avenue?

A Well, I don't think there was any difference in the—what I mean, in the flow of water before or after that lake had been there.

Q Did you notice any difference in the flow of water before and after the Maioran ditch was built?

A Not particularly, no.

40 Q Have you seen both lands since 1911?

*George Dorer, direct.*

A Yes.

Q Did you notice whether or not there is any change in the flow of the water after the opening of the Maioran ditch by the East Orange & Ampere Land Company?

A I didn't take any particular notice, except shortly after the ditch was cleaned out, or widened. I haven't viewed it in the last two years, not since that time. 10

Q Did you do any work for the East Orange & Ampere Land Company in the widening of the ditch?

A I did; that is, some of my men worked for them.

Q Will you tell us what you did?

A I had some teams hired by the East Orange & Ampere Land Company to remove rubbish that was thrown out of the ditch, that would consist of most anything you will find in an ordinary scavenger dump, tin cans, wagon springs, anything of that kind. 20

Q What was the size of those wagons of yours?

A It is what we call a cattle wagon, used for transporting live cattle. Five feet wide, five feet deep and twelve feet long.

Q Did you use this to transport this refuse?

A Yes, sir.

Q How many loads to your recollection did you cart away?

A I don't remember exactly, but I am under the impression that it was somewhere near a dozen loads. 30

Q That all came out of this stream?

A Yes.

Q (*By the Court.*) Which side of Bloomfield avenue?

A That is the Belleville side; the easterly side of the avenue.

Q (*Further direct.*) Did you notice the condition of our land prior to the removal of those obstructions?

A Yes.

Q From the ditch? 40

*Martin H. Rowe, direct.*

A Yes.

Q What would you say as to its condition?

A Why, it appeared at several points along the course of the concrete drain, or storm sewer, that there were a number of places, I think, where there were little holes upon the side to allow water to get in the drain from different spots that were above the level of the bottom of it; it appeared that water was standing in the drain, in the culvert, or whatever you call it, in the concrete—

10

Q Do you know whether or not any of that water came out of those deep holes and went over the property?

*Mr. Hoover.* Objected to as leading.

*The Court.* The objection is overruled.

A Why, I don't know, I didn't take any particular notice, any more than I see the water standing there.

20

*By the Court.*

Q Did you notice the same place after these obstructions were removed?

A Why, the—

Q No, did you observe it after they were removed?

A Yes.

Q What was the condition then?

A The water ran freely.

30 *Cross examination by Mr. Hoover.*

Q Mr. Dorer, I suppose included in this stuff you carted away was considerable dirt, wasn't there?

A No, none whatever; nothing but practically metal, anything in the line of—

*Mr. Hoover.* No further questions.

MARTIN H. ROWE, sworn for the defendant.

*Direct examination by Mr. von der Lippe.*

40 Q Mr. Rowe, did you ever live near, or along Bloomfield avenue, in the Silver Lake section?

*Martin H. Rowe, direct.*

A Well, born and raised in that territory, yes, sir.

Q Do you know the lands of the East Orange & Ampere Land Company, formerly the Dodd farm, or Dodd property?

A I certainly do.

Q Do you know the lands lying west of that, formerly the Shepard property?

A Yes, sir.

Q Do you know the Silver Lake section of Belleville? 10

A I do.

Q Do you remember the Meadow or Black Brook in its original estate?

A Well, very much, I do.

Q How long back does your memory carry you with reference to that stream?

A Probably thirty, thirty-five years.

Q Do you remember Silver Lake when it was a lake? 20

A I certainly do.

Q Do you remember the property immediately west of that, on the opposite side of Bloomfield avenue, when that was a lake?

A West of Bloomfield avenue?

Q Yes, the Dodd property.

A I remember the property well.

Q What was the condition of that property with reference to timber? 30

A Well, good big timber onto it.

Q It was all woods?

A Yes, sir.

Q What was the condition of the property with reference to whether it was wet or dry land?

A It was naturally wet, but not that wet that anything wouldn't grow onto it.

Q Did you have occasion to observe the stream in wet and dry weather?

A Yes, sir; I did, very often. 40

*Martin H. Rowe, direct.*

Q Do you recall whether or not after a storm that stream carried the water from those woods you speak of?

A It always carried the water, yes, sir.

Q Always carried the water off?

A Yes, sir.

Q Was there a lake on the west side of Bloomfield avenue?

10 A No, sir.

Q Did you often go through there?

A Yes, sir.

Q Did you ever catch any suckers in this stream?

A Lots of them.

Q Do you remember the breaking of the dam in Silver Lake?

A I do.

Q Do you remember the general developments that followed?

20 A What is that?

Q Do you remember the developments that followed?

A Well, naturally all through the Dodd property pretty much the same thing.

Q Take Silver Lake.

A Well, of course, that grew up, and so forth, which I never took particular notice of, any more than a bird's eye view of it.

30 Q Tell us what you noticed of the Silver Lake after the giving away of the dam.

A I noticed after that it began to build up; I noticed the ground west of Bloomfield avenue was a little wetter; that you could easily see; that is, there was that much water that lots of the timber died which grew there previous.

Q (*By the Court.*) After the dam was taken away?

40 A Yes, sir; after the dam was taken away, and years rolled on, you know, as it was built up.

*Carl V. Keifer, direct.*

Q (*Further direct.*) Did the timber commence to die after the building up of Silver Lake?

A Yes, sir; that was what was left there.

*Mr. Hoover.* I don't think we are chargeable for the death of a lot of timber there.

*The Court.* Oh, no, but they can show conditions, of course.

Q Did you ever observe the Maioran ditch as they call it? 10

A That I don't know anything about any more than a bird's eye view of it; not to speak of.

Q What did you notice with reference to the lands west of Bloomfield after the development of Silver Lake?

A I noticed, as I said before, that it was a little more marshy; never was dry before then, but it was marshier after.

20

NOT CROSS EXAMINED.

CARL V. KEIFER, sworn for the defendant.

*Direct examination* by Mr. von der Lippe.

Q What is your business, Mr. Kiefer?

A Law student.

Q Were you ever in the employ of the East Orange & Ampere Land Company?

A I was.

Q When? 30

A For two summers.

Q What summers?

A 1909 and 1910.

Q What did you do for that company?

A A sort of helper in the engineering line.

Q You were on the engineering force?

A Yes, sir.

Q Do you remember the storm sewer that is testified about? 40

*Carl V. Keifer, cross.*

A I do.

Q Were you an inspector on that work?

A I was.

Q Do you remember the lands at Bloomfield avenue, approximately at the outlet of that storm sewer?

A I do.

Q And this was in what year?

10 A Before the storm sewer was in, 1909.

Q And you remember the land then?

A Yes, sir.

Q The storm sewer was built in what year?

A 1910.

Q And you remember the land then?

A Yes, sir.

Q Tell us what you remember as to the land, whether it was wet or dry at that time?

20 A It was very marshy on the west side of Bloomfield avenue; the water was backed up.

Q (*By the Court.*) When?

A In 1909.

Q (*Further direct.*) Was that condition true in 1910?

A In 1910 they started the storm sewer there, and the water was turned off to one side to go through.

*Cross examination by Mr. Hoover.*

30 Q You don't know, Mr. Kiefer, anything about the condition of the land prior to those years, do you, up there?

A Nothing except as a casual observer walking along Bloomfield avenue.

Q Well, was the westerly side of the land always marshy and wet?

40 A There was a natural marshy tendency; I often went there shooting, and it wasn't as wet then as it was in 1909; but that was a number of years before; I went in 1904, or 1905; it was much drier then than it was in 1909 when I was working there.

*James Williams, direct.*

JAMES WILLIAMS, sworn for the defendant.

*Direct examination by Mr. von der Lippe.*

Q Mr. Williams, where are you employed?

A At present?

Q Yes.

A Simms Magneto Company.

Q Where is that?

A East Orange. 10

Q Did you work on the property of the East Orange & Ampere Land Company at Bloomfield avenue testified about?

A Yes, sir.

Q Who did you first work for on that property?

A Andrew E. Duryea Company.

Q And after that for whom?

A East Orange & Ampere Land Company, Mr. VanDuyne.

Q What was your position? 20

A Foreman of labor.

Q Were you foreman of labor in the spring of 1911?

A Yes, sir.

Q Were you in charge of the gang that did the digging in the Maioran ditch?

A Yes, sir.

Q Do you remember the Maioran ditch?

A Very well, sir.

Q What year do you remember this ditch? 30

A Why, I was familiar with that ditch from August, 1910, until the present.

Q Did you go down the ditch in 1910 and 1911?

A Yes, sir; several times.

Q What did you find there?

A I found more or less pollution in; clogged up; nearly a filled up ditch.

Q Did you find any obstructions in the ditch?

A Yes, sir. 40

*James Williams, direct.*

Q Tell us what they were, if you remember them, please?

*Mr. Hoover.* One moment. I think we are entitled to know where the obstructions were.

Q Were the obstructions the entire length of the ditch?

Objected to.

10 Q Do you remember Mr. Corbo's property?

A Yes, sir.

Q Tell us what you found the conditions right there to be.

A We backed that ambulance wagon that Mr. Dorer spoke of up on that property—

*By the Court.*

Q No, what were the conditions there at the Corbo property?

20 A The ditch wasn't very different there from what it was anywhere else. Of course we cleaned the ditch from one end to the other.

Q What were the conditions there at the Corbo property?

A The ditch was largely filled in and badly obstructed.

*Further direct.*

Q Did you take any obstructions from the ditch right there?

30 A We loaded that wagon that Mr. Dorer spoke of once, if not twice, on that property; stuff that came out of that trench by that property.

Q Did you meet Mr. Corbo during this work?

A Yes, sir.

Q You were in charge of the gang when they did the excavation at his property?

A Yes, sir.

Q And he was present when the work was going on?

*James Williams, direct.*

A He came there when the ditch was about two-thirds completed around his property; possibly three-fourths completed.

Q Tell us whether or not you widened the ditch at his property, and if so, how much?

A Why, we deepened that what you consider as the ditch; I consider a ditch the amount of land that is under water—

*Mr. Hoover.* One moment; we don't want his opinion.

*The Court.* The answer will be stricken out.

Q (Question read.)

A We widened the ditch at the surface of the water on his property, possibly two feet on his side, and one foot on the other; the banks sloped themselves and slid in; what the width was on top of the banks I could not say.

Q What section of the property are you speaking concerning now? 20

A On Mr. Corbo's property.

Q Yes.

A On all of it.

Q How much did you widen the ditch on the northerly side?

A Why, I dug that ditch as it evidently had been; I wanted—

*Mr. Hoover.* I move that that be stricken out.

*The Court.* The answer should be stricken out. It is not shown that he had any knowledge of how it was originally constructed. 30

Q (Question read as follows: "How much did you widen the ditch on the northerly side") of Mr. Corbo's property?

A Well, speaking from recollection I should say I widened the ditch two feet.

Q How much of that widening did you take from Mr. Corbo's property?

*James Williams, direct.*

A I haven't any idea where Mr. Corbo's line went; I tried to take it from either side.

Q How much land did you take off of the southerly side of the stream at Mr. Corbo's property?

A Around three feet.

Q Do you remember the Corbo property?

A Yes, sir.

10 Q Do you know whether or not that picture, D. 1 for identification, indicates the property?

*Mr. Hoover.* I don't think this witness is qualified as a photograph expert.

*The Court.* I understood him to say a moment ago he didn't know where the Corbo property commenced and where it ended.

*Witness.* I beg your pardon! I said I didn't know where the line between the Corbo property and the adjoining property was in that stream.

20 *The Court.* Oh, that is what you meant; perhaps that is what you said?

*Witness.* That is what I meant.

Q Do you know where Togo place is?

A Yes, sir.

Q Do you remember whether the stream ran along the rear of Mr. Corbo's lots at Toga place?

A Yes.

Q Or along the rear, and down the side?

A It ran as it runs on that map.

30 Q How much land at the rear—how much did you widen the stream on the easterly side, along the rear of Mr. Corbo's lot as indicated by the pointer?

A To answer that question you will have to tell how much you widened that trench—

Q No, just answer the question, if you understand it. This is the east side of the ditch, in this direction; this is the Corbo property?

A Yes.

*James Williams, direct.*

(Last question and answer read.)

*Mr. von der Lippe.* I will withdraw the question.

Q Tell us how you dug this ditch, if you will, Mr. Williams?

*The Court.* You mean the ditch west of Bloomfield avenue?

Q The ditch at Mr. Corbo's property. 10

A I simply dug the ditch to make an even flow of water, and at no time had more than seven feet wide of flowing water.

Q Were the banks perpendicular up there?

A They were sloping.

Q Do you remember the width of the bed of the ditch where you left it?

A Not wider than seven feet.

Q And the width at the top?

A Why, as much as twelve, and where we had a bad cave-in, fifteen. 20

Q How much did you take from the top of the ditch around Mr. Corbo's property?

A I aimed to take off about approximately three feet of the top all the way around the property.

Q Was that distributed on each side?

A Yes, sir; as far as I could do it.

Q Now, then, would that slope to the bed?

A Slope to the bed as much as it would, and not fall. 30

Q Did you take off three feet at the bed?

A No, sir.

Q What did you do with the dirt that you took off the sides of the ditch at Mr. Corbo's property?

A Threw it up and leveled it back on the property.

Q Was any of the dirt carted away?

A No, sir; not to my knowledge.

Q Were there any heavy rain storms while you were at this work? 40

*James Williams, cross.*

A Not that I recollect, no, sir.

Q Were there any just before it?

A Yes, sir.

Q Will you tell us the condition of the land on the west side of Bloomfield avenue immediately before the cleaning out of this ditch, and after a rain storm?

10 A Why, there was a lot of water backed up there after every rain storm.

Q How would it flow off?

A Why, it would slowly leak off down to a certain limit, and the remainder would stay there.

Q With reference to time how would it flow off?

A Take approximately twenty-four hours to get down to its ordinary flow if we had a heavy storm.

Q Take a day to relieve itself?

A Yes, sir.

20 *Cross examination by Mr. Hoover.*

Q Now you say you got how many cart loads or wagonloads of refuse off of the ditch around the Corbo property?

A You speak of metal junk, refuse, out of the ditch?

Q Yes.

A To the best of my recollection eleven loads.

Q How much?

A Around the Corbo property?

30 Q Yes.

A One, possibly two; my recollection is of one absolutely, possibly two; I will swear to one.

Q What did that consist of?

A Spring beds, bicycles, tin cans, milk cans, one or two dead cats, a dead goat.

Q Did you see those things taken off the Corbo property?

40 A I saw those things pulled out of the trench surrounding the Corbo property, and loaded on this wagon.

*John W. Dobbins, direct.*

Q Saw it taken out, did you?

A Yes, sir.

Q Sure none of it was taken out below, or above?

A Not of that particular load, no, sir.

Q Or possibly two loads?

A Or possibly two loads.

Q So you only got eleven loads out of the whole ditch, is that right?

A We hauled the stuff away from the outlet of the culvert near the southwestern end of the Corbo property; then we hauled more away near Bloomfield avenue.

10

Q Altogether you had eleven loads?

A Had eleven loads of metallic junk.

Q You remember seeing Mr. Corbo there when you were doing the digging?

A Yes, sir; Mr. Corbo and I met there.

Q Do you remember taking a string and measuring what you had dug with him?

20

A We searched up some land marks, and measured that ditch to the best of our ability.

Q You did measure with him?

A Yes, sir.

JOHN W. DOBBINS, sworn for the defendant.

*Direct examination* by Mr. von der Lippe.

Q Mr. Dobbins, what is your business?

A Chief of the Essex County Mosquito Commission.

30

Q Do you know the Black, or Meadow Brook, in Silver Lake?

A Yes, sir.

Q Did you know it in 1905?

A Yes, sir.

Q Did you know it in 1911?

A Yes, sir.

Q Did you inspect it in 1911?

A Yes, sir.

40

*John W. Dobbins, direct.*

Q With reference to mosquito work?

A Yes, sir.

Q Do you know the stream at the point there marked in red on the map?

A I am not familiar with that map. Oh, I see. I am familiar with the brook its entire length, from one end to the other.

10 Q Have you seen it from one end to the other?

A Yes, sir.

Q In 1911?

A Yes, sir.

Q Can you tell us the condition of that stream as you found it then?

A Why, that stream has always been bad; in fact it is bad to-day.

Q Will you explain what you mean by "bad," Mr. Dobbins?

20 A My first connection with that stream was just after, I think, Mr. Maioran came in control of it; I think that was about 1905, or 1906. At that time it was quite marshy and swampy all through there; stagnant water stood at many points; and in connection with my work I got in touch with Mr. Maioran, and we began draining out there for mosquito extermination work, getting rid of pools, and different places that drained into that brook. It was the only natural drainage point to direct the flow of water;  
30 and it has been bad all the time, I may say, collecting refuse at different times. We frequently cleaned it out ourselves.

Q Was it a mosquito breeder?

· Objected to.

Objection sustained.

Q (*By the Court.*) I suppose you mean, when you say it has always been bad, from the point of view of your work?

40 A Yes, sir.

*John W. Dobbins, cross.*

*Further direct.*

Q That is, at the time Mr. Maioran took hold?

A Just about that time, yes, sir.

Q Did the water stagnate?

A It stagnated at several points, yes, sir; that is, the flow was so slight you hardly noticed it.

Q Did you ever notice obstructions to the stream?

A Yes, sir.

Q Will you tell us what you observed there?

*Mr. Hoover.* I think that ought to be confined to the Corbo land.

Q Was any one section of the stream better than another as you found it?

A Yes, it is blocked up to-day; I saw it this morning; it is blocked up this morning.

Q I don't think you understand the question. Was any one section of the stream better than the other when you inspected it in 1911?

A Well, in connection with our work, it was. You see, our work, probably, is different from—

Q In reference to stagnating, was there any difference?

A Well, I might say that five or six days after a rain we always inspect that brook from one end to the other.

*Cross examination by Mr. Hoover.*

Q Mr. Dobbins, I suppose that whole section is objectionable to your line of work, isn't it?

A Yes, sir.

Q Both on the other side as well as this side?

A Yes.

Q It is a low, swampy, marshy place, and always has been?

A Yes.

10

20

30

40

*Casper Benz, direct.*

CASPER BENZ, sworn for the defendant.

*Direct examination* by Mr. von der Lippe.

Q Mr. Benz, what is your business?

A Sanitary inspector of the Board of Health.

Q Of the City of Newark?

A Yes, sir.

Q How long have you been such?

10 A Well, been such for seven years.

Q You are familiar with Black, or Meadow Brook, in Silver Lake?

A Yes, I have been transferred up there from different sections here in 1911.

Q Do you remember this stream in 1911?

A Well, I remember the stream, yes, sir.

Q Did you have occasion to inspect it then?

A Well, that is only the city part of it; I did not—

20 Q (*By the Court.*) Only the city part of it?

A Yes.

Q (*Further direct.*) Do you know whether or not the stream is—whether any of the stream is in the city of Newark?

A Oh, yes, oh, yes.

Q How much?

30 A Well, from—let me see, now—there is a part from north of Bloomfield avenue runs, I presume, to cross the culvert there about 75 feet, I should judge; then starts into Belleville; and then the stream goes on across and comes out at Delavan avenue and Eleventh street, North Eleventh street; a part of it which comes out about at the dividing line of Belleville and Newark, and Eleventh street; then it continues on down Delavan avenue to North Ninth street, and so on out to the Second River.

Q How did you find the stream with reference to its condition in 1911?

40 *Mr. Hoover.* I object to that, as we are not concerned with the Newark branch of the stream,

*Casper Benz, direct.*

and the witness has testified that his knowledge of the stream is confined to the Newark part.

*The Court.* Upon this map of Newark I have here there appears to be a stream which is the dividing line between the City of Newark and Belleville, which crosses Bloomfield avenue at about thirteenth street.

*Mr. von der Lippe.* I intended to follow this testimony up by showing that that is the stream. 10

*The Court.* Perhaps you had better do that first; then I can rule more intelligently.

*Mr. von der Lippe.* I cannot show that by this witness.

*The Court.* If you can show that, and propose to do so, I am inclined to permit this, because he said he inspected the part of it within the city.

Plaintiff's objection noted as ground of appeal.

A That was right north of Bloomfield avenue. 20  
Why, there, of course, there were a lot of tin cans, boilers, and old spring mattresses, and different obstacles in there.

Q When you say "right north," how far north?

A That would be about, I should say, from Bloomfield avenue, about 75, probably, to 100 feet.

Q That is as far as you saw it?

A That part of it, yes, sir.

*The Court.* The testimony will be stricken out. 30

*Witness.* Your Honor, I wish to say that I think that Eleventh street, a part of this belongs to Belleville, that sometimes I cut around that section into Belleville, and come out on Delavan avenue into Newark, and I observed there where the stream came down from Belliville, and still continued on, there was quite a lot of obstruction there the same as at the other part. I can recall that.

Q Can you point that part out on the map? 40

*Casper Benz, direct.*

*The Court.* Point upon the map the part you observed. You understand the map?

*Witness.* Well, partly. This here I think is the outlet into here; here is Lawrence street; here is Eleventh street; this, I think, is the outlet here in this stream here, is it not? I don't understand the map thoroughly, your honor.

10 *The Court.* Oh, no. He ought not to be asked unless you explain the map to him so he says he understands it.

Q Do you know the opening of the Meadow Brook sewer?

A That is the big sewer that was put in here some two or three years ago, isn't it?

Q Yes. Do you know where the mouth of that is?

A The mouth of it is, as near as I can recollect, on Delavan avenue.

20 Q And what?

A And near Tenth street.

Q That is this point right there (indicating).

A That is correct.

Q Here is Bloomfield avenue; that is the culvert which is now the mouth of Meadow Brook sewer, right there; now do you understand the map?

A Here is Ninth street, continues on down.

Q No, that is Eleventh street; here is where the sewer commences; do you understand the map now?

30 A Yes.

Q Now, just point to the part that you have inspected of that stream.

A (Indicating on map.) Right over here, Eleventh street, Tenth street, down here to—

*The Court.* You see, evidently, he does not understand the map.

Q Mr. Dobbins, this is Bloomfield avenue (indicating). You know Meadow Brook as it exists today?

40 A Yes.

*Edward S. Rankin, direct.*

Q It runs from a culvert on Bloomfield avenue to the Meadow Brook sewer?

A Yes.

Q (Indicating.) This is Bloomfield avenue and the culvert, this is the mouth of the Meadow Brook sewer right at that point, Tenth street and Delavan avenue?

A Exactly.

Q This is the ditch, that line I am pointing to now, this blue line; do you see that blue? 10

A Yes.

Q We are not concerned in that; that is the bed of the old stream; we don't know anything about that. This is the ditch.

A Yes.

Q Do you understand that?

A Yes, that is all right.

Q Do you understand it runs into the Meadow Brook sewer there? Do you understand that? 20

A This runs into the Newark sewer.

Q Now, have you ever inspected this ditch from a point—

Objected to as leading.

*The Court.* Yes, that is leading.

Q You understand the map; do you understand the ditch, now?

A Yes.

Q Now indicate on that map the sections of that drain that you inspected in 1911. Mr. Benz, do you understand the map? 30

A Not thoroughly, no.

*Mr. von der Lippe.* The witness is excused.

EDWARD S. RANKIN, sworn for the defendant.

*Direct examination* by Mr. Duffield.

Q Where do you reside?

A Newark.

Q And you hold an official position? 40

*Edward S. Rankin, direct.*

A Yes, sir.

Q What is that?

A Engineer of the sewer department.

Q How long have you held that position?

A As head engineer since 1903; been in the employ of the city since 1886.

10 Q And all that time you have been engaged in civil engineering work, have you?

A Yes, sir.

Q Are you familiar with this Meadow Brook located over near Bloomfield avenue?

A Yes, sir.

Q How long have you been familiar with conditions there?

A Why, practically all of the time since 1886, and before that.

20 Q There used to be a pond over there, do you recall that?

A Yes, sir.

Q Known as Silver Lake, I believe?

A Silver Lake, or usually known as Sun Fish Pond.

Q (*By the Court.*) How was that formed?

A Formed by a dam at what is known as the old road to Bloomfield.

Q That is not Bloomfield avenue?

30 A No.

Q (*Further direct.*) And this Meadow Brook was the feeder of the pond?

A Yes, sir.

Q The pond was constructed by reason of the dam in Meadow Brook, wasn't it?

A Yes, sir.

40 Q Will you describe in general what this Meadow Brook was like—one minute; you remember when the ditch was constructed there on the Silver Lake property. After the dam was taken down and the pond

*Edward S. Rankin, direct.*

disappeared, a ditch was constructed; do you remember that?

A I don't remember the construction of the ditch.

Q But you know there was a ditch there?

A I know there was. May I explain it in my own way?

Q Certainly.

A When the dam washed out during the heavy storms the original bed of the stream there on the ground, I saw that, was familiar with that; afterwards there was an artificial ditch constructed which I was also familiar with later on, but not at the time it was actually dug. 10

Q Subsequently to the construction of the artificial ditch there was quite a development there, was there not?

A Yes, sir.

Q Houses erected and streets laid out? 20

A Yes, sir.

Q Now, going back to the conditions existing there before the construction of the drain, can you describe what sort of stream Meadow Brook was? After the dam was gone down, and east of Bloomfield avenue?

A It was an ordinary—it was like a stream running through a flat valley.

Q Can you tell us where the water shed—the extent of the water shed drained by that brook?

A The boundary lines of it, do you mean, or the area? 30

Q How much territory?

A Drained approximately 500 acres, I should say, extending—well, I could not give you the boundaries—extended up into East Orange, Bloomfield and Newark.

Q Covered quite a broad area, did it not?

A Yes.

Q And this was the natural drainage of that area, this brook? 40

*Edward S. Rankin, direct.*

A Yes, sir.

Q All of this land in that vicinity was wet land, wasn't it? Low lying?

A Yes, sir.

Q And quite sharply the land rises, doesn't it?

A No, quite a broad valley.

10 Q Now, after the construction of this ditch did that follow the old natural water course?

A Approximately.

Q Were there any right angles in this ditch?

A Yes.

Q Speaking from your experience as an engineer would the construction of a ditch with right angles at various points in any way tend to impede the natural and ordinary flow of the water?

20 *Mr. Hoover.* I object to that, if your honor please. I don't know whether it is a hypothetical question, or what. Certainly, if that is the contention of it, it does not include all the elements here.

*The Court.* The objection will be overruled.

Plaintiff's objection is noted as ground of appeal.

A Yes, it would.

30 Q Taking this particular ditch, in your opinion as an engineer did the construction of this particular ditch, with angles made in the way in which they were made there, tend in any way to impede the flow of water, natural flow of the water?

A Yes, sir.

Q What would be the effect of the impeding of that water? Back it up?

A It would tend to back it up on the land further toward the west and north.

40 Q Now, assuming—or, not assuming, because you say you know—would the improvements that were erected on the Silver Lake district tend to in any way prevent the natural seepage of water from the

*Edward S. Rankin, direct.*

high lands down through this Silver Lake district?

*Mr. Hoover.* That is objected to; they cannot charge us with the improvement of the locality.

*The Court.* I think that is not competent.

Defendant's objection noted as ground of appeal.

Q Did the erection of this five foot ditch, after that was in, in your opinion, tend to diminish the natural flow of the water down that old water course? 10

*Mr. Hoover.* I think that is too far fetched.

*The Court.* Do you mean that question just as you asked it?

*Mr. Duffield.* I don't know how I asked it; I meant it as I intended to ask it.

*The Court.* I understand it entirely eliminated the flow from the old stream.

*Mr. Duffield.* Strike out the question.

Q In your opinion as an engineer would a five-foot ditch constructed in the way in which this ditch was constructed, take care of the normal flow of water going down that Meadow Brook? 20

A No, sir—well, what do you mean by the normal flow? The average flow?

Q I mean when it rains would it take care of the surface water flowing in the Meadow Brook, so as to relieve the danger of backing up on property—

*The Court.* Do you think that is the test? Would not the test be, if a test at all, whether or not this ditch five feet wide and five feet in depth would carry the water which had been accustomed to flow in the natural bed of the stream as it was before? 30

*Mr. Duffield.* I do not so understand it, your honor. My thought is we had the right to have this lower land carry off the natural and normal flow of the water.

*The Court.* Regardless of what was carried off by the natural stream before? 40

*Edward S. Rankin, direct.*

*Mr. Duffield.* Yes, sir. That seems to me to be the test. I think we have a right to have carried down in any manner the normal natural flow of the water.

10           *The Court.* Suppose a change had not been made at all in the ditch, do you mean to say you would have had the right to come down there and remove, not only the obstructions which may have gotten in the natural water course, but to deepen it and widen it in order to carry off the water from your land?

*Mr. Duffield.* If the water was backing up on our land by reason of the improvements.

(Argued.)

20           *The Court.* You might ask such questions as will raise that point, if you desire to do so, and I will rule on them.

Q Mr. Rankin, I think you said that this Meadow Brook was the natural drainage for that entire section?

A Yes, sir.

Q It was the water course draining that section. Did it drain it with any degree of completeness?

A Why, so far as I know it did.

30           Q And what about this five foot ditch that was put in there? When that was put in there did that take care of the water coming down through the old water course?

*Mr. Hoover.* I object to the question in the form in which it is put.

*The Court.* Well, if it is meant by that question whether or not it took the water to the same extent as the old water course did, I am inclined to permit it to be answered.

40           Q All right, I will ask it in that form. After this five foot ditch was constructed did that take care of the surface and drainage waters formerly flowing

*Edward S. Rankin, direct.*

down the Meadow Brook as fully and as completely as Meadow Brook had formerly taken it?

*Mr. Hoover.* One moment. That is not the test. To the same extent as the water formerly flowed over.

*The Court.* I will overrule the objection.

Plaintiff's objection noted as ground of appeal.

10

A Do you mean do I know from my observation whether it did, or whether it would theoretically?

Q Both.

*Mr. Hoover.* I object to theoretically.

*The Court.* If he does know whether it did or not.

Q Do you know?

A I have never been on that particular ground after heavy rain to see whether this ditch carried the water off.

20

Q In your opinion would a five-foot ditch constructed as this is take care of the water formerly going down Meadow Brook?

*Mr. Hoover.* I object to the opinion.

*The Court.* I think an engineer who has known the situation there for the length of time he has, is qualified to answer such a question. He may give his opinion, and the jury may consider as to what value it may have.

A My opinion would be that a five-foot ditch would not carry off the waters from that drainage area during a heavy storm.

30

*The Court.* No, that is not the answer to the question. That will be stricken out. The question is whether or not a five-foot ditch would carry off the waters to the same extent that they were carried off by the natural stream prior to the building of the ditch; prior to the digging of the ditch.

40

*Edward S. Rankin, direct.*

*Witness.* I would answer that no, and explain why I give that answer.

Q (*By the Court.*) Certainly, you ought to do so.

A Considering the original brook, I would call it, not a ditch, flowed through a flat valley, where there were no improvements of any kind, during a heavy storm the slight depression which was the brook in dry weather, would no doubt overflow, but there being  
10 no improvements there the water would find its way down to the lower end of the valley without being obstructed. Now, after this artificial ditch was dug, and houses were built, there was no course outside of the ditch itself for the water to flow in without damaging property. Therefore, I say that the five-foot artificial ditch was not capable of carrying the water as well as the original stream was.

Q (*Further direct.*) Now, you are familiar with  
20 the present ditch there, are you not?

A Yes, sir.

Q In your opinion is that any larger than sufficient to carry the flowage of the waters formerly running down this Meadow Brook prior to any improvements there whatever?

A No, the—

*Mr. Hoover.* One moment, before that is answered, I think we ought to know what he knows as to the extent of this ditch, where it is, and so  
30 on.

*The Court.* The objection is timely. It may appear on your cross examination. I think he has shown sufficient familiarity to answer the question.

Q Now, Mr. Rankin, a drainage ditch, when you come to a right angle turn, is there any necessity to have—such as existed on this Corbo property here—  
40 is there any necessity in the construction of a drainage ditch, of having at the right angle the ditch wider

*Edward S. Rankin, direct.*

or deeper than it is on the straight run, in order to carry the water?

A It would carry the water with more velocity if it was curved, in other words, widened out, at the angles.

Q Did you see the condition of this ditch between Bloomfield avenue and Delavan avenue prior to the construction of the bigger ditch?

10

A Yes, sir.

Q And what was the condition of that ditch along there during that time?

A It was obstructed in parts.

*Mr. Hoover.* I ask where the obstruction was.

*The Court.* That must be shown to amount to very much as applied to this plaintiff.

*Witness.* I would say it was obstructed all the way through, more or less.

Q How about the sides, I mean the banks, were they well defined, or had they broken down? 20

A In some places they had been shored up with timber.

Q How was the water flowing at the time, freely, or—

A No, rather stagnant flow.

Q Mr. Rankin, I understood you to say that the present ditch was not too large to take care of the water flowing down Meadow Brook; will you tell me on what you base that statement?

30

A Why, on calculations from the area and general condition of the water shed and the grade of the fall of the ditch, and dimensions of it.

Q Will you tell us how you came to make those calculations?

A I was requested to do so for this case.

Q And what did they show? Just tell us generally what they showed.

A Why, they showed that in order to properly carry off—

40

*Edward S. Rankin, cross.*

*Mr. Hoover.* I do not think that is material, for the reason we do not know whether the original ditch was large enough.

*The Court.* I do not think it is what is now sufficient to carry off the water, but whether or not the ditch as constructed before, or the ditch as enlarged, is sufficient to take care of the water that formerly flowed in the natural stream.

10

*Mr. Duffield.* I supposed, from this witness's familiarity with the whole question, that I had confined the question within the limits stated by your honor.

*The Court.* It seems to me the answer does not confine it within those limits, unless that should be applied also to the original stream.

20

*Mr. Duffield.* Mr. Rankin can probably tell us whether he comes within the limits of your honor, for I do not wish to take up the time of the court and jury with fruitless inquiry.

*Witness.* I do not think I quite gather what you want me to answer.

*Mr. Duffield.* I will withdraw the question. That is all.

*Cross examination by Mr. Hoover.*

Q Mr. Rankin, how many times did you see that stream as it originally was?

30

A The original stream?

Q Yes.

A I made a survey of it in 1892.

Q That took you there on one or two occasions, didn't it?

A It kept me there continuously for two or three days.

Q And the stream existed there for a good many years back, as far as your memory goes, didn't it?

A No, before that there was a lake there.

40

Q I am talking about since the lake was taken away.

*Edward S. Rankin, re-direct—re-cross.*

A The survey was made shortly after the lake went away.

Q What kind of stream was it? How big a stream in normal conditions? How much water came under Bloomfield avenue in normal conditions?

A Do you mean the depth of it?

Q Yes.

A I should say six or eight inches.

10

*By the Court.*

Q Won't you please describe the bed of the stream east of Bloomfield avenue after the dam went out, and Silver Lake was drained?

A You mean the condition of the bed?

Q I mean the depth of it, the width of it, and the general condition of it?

A Well, that was in 1892, to the best of my recollection, it was a stream from four to five feet wide, possibly two or three feet deep, with a smooth bed, no obstructions in it whatever, and where it was not straight, flowing in very easy curves.

20

*Re-direct examination.*

Q Won't you describe the banks of the old stream, as to whether they were well defined banks or not?

A Yes, well defined.

Q Steep banks, or sloping?

A No, they were sloping banks.

Q Was there any change in the condition of the stream at times of wet weather?

30

A That I could not answer.

Q I mean to say, more water going down there after a rain, than in a dry season?

A Well, naturally. I say I could not answer it, not from observation.

*Re-cross examination.*

Q You were describing the bed of the old natural stream, of Silver Lake as it appeared after it was drained?

40

*Wilmer C. Van Duyne, direct.*

A Yes, sir.

Q Four or five feet wide, and two or three feet deep?

A To the best of my recollection.

Q And that was, as I suppose all those streams are, rounded out?

A Yes.

10 Q And how much water ran down through that stream under ordinary conditions?

A You mean in depth?

Q Oh, yes, in depth.

A Well, as I say, this was twenty years ago, nearly; I should say six or eight inches.

Q About the same amount that came out of Bloomfield avenue?

A Yes, I should judge so.

20 Q And the bottom of Silver Lake was marshy, wasn't it?

A It was muddy at that time, just muddy.

WILMER C. VAN DUYNE, re-called for the defendant.

*Direct examination* by Mr. von der Lippe.

Q You have already testified that you are an engineer?

A I am, yes, sir.

30 Q Are you familiar with the storm sewer built by the defendant on the west side of Bloomfield avenue?

A I am, yes, sir.

Q How much experience have you had in storm sewer work?

A Why, I have had experience in building storm sewers for the East Orange & Ampere Land Company running in to probably over \$100,000.

Q You superintended the construction of that sewer?

40 A I did, yes sir.

*Wilmer C. Van Duyne, direct.*

Q Does that sewer as it is now erected gather more water than the original stream?

A No, sir; it does not.

Q Were you in charge of the cleaning out of this ditch?

A I was, yes, sir.

Q Do you remember the ditch before it was cleaned out?

10

A I do.

Q Did you ever take any photographs of it?

A I did, yes, sir.

Q I show you a photograph marked D. 1 for identification, and ask you whether you took that photograph?

A I did.

Q Does that show the condition of the property at that point as you found it?

A It shows the condition of the property right in the rear—

20

Q Well, the property on that picture?

A Yes, sir.

Q Shows the true condition?

A It does.

Q Take the pointer and show us on the map where you stood when that picture was taken, and which direction your camera was pointed?

A I stood right on the bridge just at a little alley called Togo place, and I looked up the alley towards the west.

30

*Mr. Hoover.* Now, I object to any further testimony on that picture as not binding on us, anything that happened above us.

Q How much of the plaintiff's property is shown in that picture?

A The stream as far as you are able to see it is on the plaintiff's property.

Q Is that the rear of the plaintiff's property?

40

*Wilmer C. Van Duyne, direct.*

A It was the rear of the plaintiff's property at that time.

Q Which is the plaintiff's property, the left or right hand side of the picture?

A The left hand side of the picture.

Q I show you a picture and ask you where that was taken, and in what direction you were looking?

10 A That was taken right at that point of a little concrete wall which is marked on the plans, and from that point, looking down along that concrete wall that was there at that time.

*Mr. Hoover.* I do not think that that is material; that is way up above our property.

*The Court.* It has not been offered yet.

*Mr. von der Lippe.* I offer it in evidence; my reason being—

20 Q Does that represent the true conditions at that point before you cleaned the stream?

A It does.

*Mr. von der Lippe.* It has been testified that this was a six-inch stream of water that ran down, and I am offering this picture to show what kind of stream it really was.

*By the Court.*

Q When did you say that was taken?

A The date is on it; the 10th of April in that year.

Q What year?

30 A 1911. We cleaned the stream out one month afterwards, and the next month, beginning the 8th of May, up until the 19th of May.

*The Court.* I don't understand the testimony in the case to be that there was only six inches of water in that drain after you built the storm sewer, and as I remember the testimony the storm sewer was built in 1909.

40 *Mr. Duffield.* I asked the witnesses if the increase of flow did not occur prior to the digging out of the ditch, and they swore positively it did

*Wilmer C. Van Duyne, direct.*

not, there was no increased flow in that ditch prior to digging it out, and that was six months after the construction of the storm water sewer.

*The Court.* I am inclined to think that is so, and if there is any testimony at all which is to be rebutted by such a thing, I think it may be received. The photograph will be admitted.

*Mr. Hoover.* I object to it first on the ground 10  
that it does not show our property, and on the second ground that it does not show the depth of the water.

*The Court.* Whatever it does show will be for the picture to show.

Plaintiff's objection noted as ground of appeal.

(Said photograph marked Ex. D. 2.)

*Further direct examination.*

Q Mr. Van Duyne, I hand you a number of photographs and ask you whether any of those are pictures of this brook at the plaintiff's property? 20

*Mr. Hoover.* If it is above or below it I object to it.

*The Court.* I overrule the objection.

A Yes, sir; here is one on the property.

Q Is that a picture of Mr. Corbo's property?

A I stood right on Mr. Corbo's property at this corner, and took a view going that way, easterly, and took a picture of the place where I stood when I took the other picture which is in evidence in regard to this property. 30

Q And is this the picture which you took from that point?

A That is the picture.

Q That picture truly represents the conditions that you found on the day you took it?

A It does.

Q What is the date of that photograph? 40

*Wilmer C. Van Duyne, direct.*

A The 10th day of April, 1911.

(Said photograph offered in evidence.)

*Mr. Hoover.* I make the same objection.

Q (*By the Court.*) This little bridge that is shown in the picture, where is that?

A That bridge is a little alley there.

Q Togo place?

A Yes, sir; on Togo place.

10 Q And the portion of the ditch here shown is which part?

A Right beginning a little bit to the west of Togo place, and extending a little to the east of Togo place.

Q In the rear of plaintiff's property?

A Yes, sir; in the rear of plaintiff's property.

*The Court.* The picture will be admitted.

(Same marked Ex. D. 3.)

*Further direct examination.*

20 Q Mr. Van Duyne, did you observe the property west of Bloomfield avenue just before the cleaning out of this stream?

A I did.

Q Tell us what you found its condition to be?

A Why, I found the condition to be that of a stream in which, well, there had been permitted to be ash cans, and tomato cans—

Objected to.

*The Court.* That may be stricken out.

30 Q What did you find the condition of that property to be just prior to the cleaning out of this stream?

A The property was in, well, a damp condition, always had—

*The Court.* No, not "always;" the question is the condition just before the ditch was cleaned out.

*Witness.* Low ground.

40 Q What was the condition? Did you observe the storm sewer just before the ditch in Silver Lake was cleaned out?

*Wilmer C. Van Duyne, direct.*

A Why, yes.

Q What did you find the condition to be within the storm sewer at that time?

A Why, every time of storm, rain storm, the water could not get away from our property, took it about from one to two days to run off the property.

Q Did you make any investigation to determine the cause of that?

A Almost every time when we had a storm I put on a coat, an oil coat, with a pair of rubber boots, and went over the storm sewer, opened the manhole heads, went down in through the outlet stream, all the way down to the Meadow Brook storm sewer, and along the Meadow Brook storm sewer to the end of the Meadow Brook storm sewer to determine what the conditions were; not only our storm sewer, but the storm sewer which was constructed by the City of Newark, and extended way down there.

10

Q Did you inspect that portion of the stream between Bloomfield avenue culvert and the mouth of the Meadow Brook sewer constructed by Newark?

20

A I did.

Q Did you inspect that with reference to—

*Mr. Hoover.* Wait a moment; it is too leading.

*The Court.* I am not sure this question is leading.

Q Did you inspect that with reference to whether or not it had anything to do with the water backing up in the storm sewer of the defendant company?

30

*Mr. Hoover.* Now, I object to it as very much leading.

*The Court.* I overrule the objection. It may be answered yes or no.

A May I have the question read?

Q (Question read.)

*Mr. Hoover.* I object to the question as immaterial, because the test is not the proper one to which we are subjected. We are not bound to sup-

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*Wilmer C. Van Duyne, direct.*

ply a stream on our land sufficient to carry the water off from a storm sewer after the storm sewer had been put in.

*The Court.* The objection is overruled.

A I did.

Q What did you find?

A I found that from the outlet of our storm sewer  
10 to the inlet, the entrance, to the Meadow Brook storm sewer, that the open plaintiff's ditch was carrying all the water which it could possibly carry, but at the same time it was not carrying enough to take the water as it came down.

Q Did you endeavor to ascertain the reason for this brook not carrying enough of the water as it came down?

A I did.

Q What did you find to be the reason for it?

A Why, because the area in that stream was not  
20 ample to take care of the amount of water which would come down at those times.

Q Were there any obstructions in the stream?

A Yes.

Q Did you notice any obstructions?

A Yes.

Q Did you notice any obstructions at Mr. Corbo's property?

A Yes.

Q Tell us generally what they were; what the con-  
30 dition was in this stream at Mr. Corbo's property?

A Why, in the rear of the property it was obstructed with—especially in the rear—with tin cans and springs, and so forth, and also with weeds.

Q Springs, you mean bed springs?

A Yes, bed springs. Weeds which were out on the  
40 bank, in some cases running across the opening which was there; the undergrowth which was in the stream along the edges would extend almost half-way across the stream.

*Wilmer C. Van Duyne, direct.*

Q You have already said, I believe, that you superintended the cleaning out of the stream?

A Yes.

Q Tell the court and jury to what extent the stream was cleaned with reference to the flow of water.

*Mr. Hoover.* Where?

Q At Mr. Corbo's property.

A Why, on the side, and on this side.

10

Q (*By the Court.*) The north side?

A Yes, on the north side, east side, if you care to call it that, there was about eighteen inches off of the upper part of the bank on each side. In the rear there was a couple of times that amount taken off the top of Mr. Corbo's property; on the east side it was distributed half and half.

Q (*Further direct.*) Did you widen it more than enough to take the natural flow of the water?

A No, we did not.

20

Q How did you determine that?

*Mr. Hoover.* I think that is objectionable. How could he tell?

*The Court.* I think the question may be answered.

A Why, just simple observation, after we cleaned the stream, with relation to the same condition before. Even then the stream was not ample to carry off the water half the time after a storm.

Q After you cleaned this stream did the water back up in the storm sewer?

30

A Yes; it still backed up there.

Q To as great an extent as before?

A Oh, no, not as much as before.

Q Does the water still back up in the storm sewer?

A It does after a heavy storm.

Q To what extent, approximately?

A I have seen it in a little storm on one afternoon in August, 1911, in which our storm sewer, as far up as about half a mile above Bloomfield avenue, at one

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*Wilmer C. Van Duyne, direct.*

point on our storm sewer the head of the water below would not allow the water coming down the stream ample passage, and collected in our property until such time as it was able to find a way to the storm sewer once more.

Q Did you observe the Corbo property immediately after any storms, before the cleaning out of the ditch?

10 A I did.

Q Can you tell us whether, in the storms you observed, what the flow of water was?

A Well, I tell you every time when there was a storm—

*Mr. Hoover.* Is that a competent question?

*The Court.* I don't quite understand that. I will sustain the objection.

Defendant's objection noted as ground of appeal.

20 Q Have you made calculations of this water shed, Mr. Van Duyne?

A I have, yes.

Q Will you tell us whether a ditch five feet wide, built perpendicular 5 feet deep, with right angles, as the Maioran ditch is built, is sufficient—would be sufficient—to carry off the normal flow of water from that shed within a reasonable time, or the same time the natural stream would carry it off?

A It would not be able to.

30 Q Would the right angles tend to retard the natural flow of water?

A Yes, they would.

Q Would the filling in of Silver Lake, the building of fences along the stream, the growing of grass in the bed of the stream, and the obstructions which you have testified you found on Mr. Corbo's property, have a tendency, or would they back up the water from the shed which that stream was intended to supply?

40 *Mr. Hoover.* One moment; I think that question is objectionable.

*Wilmer C. Van Duyne, direct.*

*The Court.* It is rather leading; I will sustain the objection.

Q Would the obstructions which you found at Mr. Corbo's property in this stream, and the right angles—

*The Court.* Would not the proper question be, "What was there about the stream, if anything, to obstruct the flow of the water?"

Q Mr. Van Duyne, as an engineer, can you say whether this ditch having been constructed five feet wide, and five feet deep, perpendicular, would stay that way? 10

*Mr. Hoover.* I object to that.

*Mr. von der Lippe.* The point of the question is this; they tell us the stream was five feet wide and five feet deep, and they say we have widened it several times its natural width—

*The Court.* I am inclined to allow the question.

A Why, the side would simply crumble in. 20

Q To what extent would that be?

*Mr. Hoover.* I object.

*The Court.* I sustain the objection. You had better ask him first whether he is able to calculate that with any degree of accuracy.

Q Are you able to calculate with any degree of accuracy how much of the top of the land of the stream five feet wide and five feet deep, perpendicular, in the course of six years, would find its way, knowing the extent and the slope of that water shed, into the bed of the stream? 30

*Mr. Hoover.* I object to the question as incompetent.

*The Court.* He can say whether he can.

A Why, yes.

*The Court.* It is a mere matter of opinion. Do you want to cross-examine him?

*Mr. Hoover.* No, sir; not on a question like that. 40

*Wilmer C. Van Duyne, cross.*

Q How much of the land on either side of such a ditch would find its way into the bottom?

A At least an amount equal to the height of the stream. In other words, if the stream should be eight feet wide it would naturally cave in until it would strike a height in which it would extend out at least eight feet.

10 Q (*By the Court.*) And that, again, all depends on what the original slope was, doesn't it?

A Yes.

Q (*Further direct.*) Is that a matter of scientific knowledge among engineers?

A Why, certainly; every engineer knows that ground will slip, and slip, until it finds what we call the angle of repose.

20 Q (*By the Court.*) And there, again, it all depends upon the character of the land, doesn't it, whether it is red clay or sand?

A It does, but we have our own property on the other side, and I have had an opportunity to observe all this.

*Cross examination by Mr. Hoover.*

Q Mr. Van Duyne, you say that in heavy rainstorms you speak about, that some water backed up in your sewer?

A Yes, sir.

30 Q That also drained away, didn't it, you say, in about twenty-four hours, don't you?

A Well, I will say twenty-four hours; one time a little less; another time a little more.

Q How about your land before you put your sewer in, in a heavy rain storm, a like rain storm, wouldn't there be an accumulation of water on your land?

40 A In almost every rain storm, unless it was only a little sprinkle, there would be an amount of water on our property for a certain length of time; in a very small storm it would take maybe an hour.

*Wilmer C. Van Duyne, cross.*

Q Taking the same kind of a storm you spoke about a while ago there would be a backing up on your property for a short time, and it would drain off again in the same way?

A What do you mean by "short time?"

Q Whatever you say it is; twenty-four hours, two days, whatever you want to put it.

A Well, average it, take at least one day, even now, after a rain storm. 10

Q And it took about the same time before the sewer was put in?

A Yes, sir.

Q Now, don't you think, Mr. Van Duyne, as an engineer, the fact of your sewer being six inches below the stream has something to do with the water backing into the sewer?

A We have made our—

(*By the Court.*) You can answer that question yes or no, I think. 20

A Yes, it would hold it back; the six inches would hold it back to a certain extent.

*Mr. Hoover.* That is all.

*By the Court.*

Q Do you know anything about conditions there prior to the digging of the first ditch?

A Which ditch do you mean, the Maioran ditch?

Q Yes.

A I remember being on the property a number of times as a little boy; they used to call it the herb woods, and I remember transplanting some of the old herb woods down in our home at Newark, a little elm tree; and I know at that time, when I went in after the tree, the ground was in pretty good shape. 30

Q You are speaking of the land west of Bloomfield avenue now?

A Yes, sir.

Q I am speaking of the land east of Bloomfield avenue. Do you know anything about the natural stream east of Bloomfield avenue? 40

*Alfonso Corbo, direct.*

A I don't remember the old Silver Lake farm.

Q You don't know anything about the quantity of water which the natural stream would accommodate prior to the digging of the Maioran ditch?

A Not from observation, your honor.

*Re-direct examination.*

10 Q Mr. Hoover questioned you concerning the depth of the water; is the backing up of the water in the sanitary sewer of the defendant more or less than six inches?

A It is over that amount; way over.

Q It is more or less now than it was before you cleaned out that ditch?

A Not so much now as it was.

*Mr. Hoover.* One moment. I do not think that is the test.

20 *The Court.* No, that is not the test, but it may have a bearing, and I will permit the question.

*Mr. von der Lippe.* That is all.

ALFONSO CORBO, recalled for the defendant.

*Direct examination by Mr. Duffield.*

Q Mr. Corbo, when did you buy this plot, do you remember? Or your father bought it?

A About seven years ago.

Q What did he pay for it, do you remember?

30 *Mr. Hoover.* I object to that, if the court please. Suppose we got it for nothing.

*The Court.* The objection will be overruled.

Plaintiff's objection noted as ground of appeal.

A At that time we paid \$1,000 for four lots, and then afterwards we had the sewer put in there, and it cost us \$200 extra, and then also we paid taxes, and a great many things.

*Cross examination by Mr. Hoover.*

40 Q You heard this gentleman on the side of the defendant testify that he took out a wagon load, or

*William T. Von der Lippe, direct.*

probably two wagon loads, of tin cans and bed springs, and a few other articles from back of your lot, is that so?

*The Court.* That is not cross examination; you had better put things in an orderly manner.

WILLIAM T. VON DER LIPPE, sworn for the defendant. 10

*Direct examination by Mr. Duffield.*

Q You are an attorney and counsellor-at-law, and counsel for the East Orange & Ampere Land Company, are you not?

A Yes, sir.

Q Their property is directly across the street from the plaintiff?

A Yes, sir.

Q Are you familiar with the plaintiff's property? 20

A Yes, sir.

Q Are you familiar with the defendant's property?

A Yes, sir.

Q And as counsel for this institution you are familiar with real estate matters, are you not?

A Yes, sir.

Q Will you tell us the character of these two tracts of land, the Silver Lake tract, or, particularly, this plaintiff's property, in comparison with your property across the street? 30

A The property on the west side of Bloomfield avenue, in 1910, when I became counsel for the company, was normal low land, but so that it could be trodden upon; but Silver Lake, at that same time, at Mr. Corbo's property and on Eleventh street, was an Italian neighborhood, the lots of which had been filled up; it was filled in ground, all of it.

Q What was its condition as to improvements?

A In 1909 the land of the defendant was a tract without improvements; the property of the plaintiff 40

*William T. Von der Lippe, direct.*

was like an open lot, simply indicated on the map, with some sort of a street indicated by the erection of buildings upon it, but no well defined street line, curb, or sidewalk.

Q Now, that was in 1909?

A Yes, sir.

10 Q Now, you conducted the sale of the property out there, didn't you, on your own land?

A I conducted an auction there on our land in May, 1912.

Q And how many lots did you sell?

*Mr. Hoover.* I don't think that is material.

*The Court.* You cannot establish value by auction.

*Mr. Hoover.* Especially in 1912.

20 *Mr. Duffield.* I offer to show by the witness that at a widely advertised sale property in the immediate vicinity of the lots in question, or the land owned by the plaintiff, was sold at auction at a price which would not justify the appraisal made of the lots of the plaintiff.

*Mr. Hoover.* I object to the offer.

*The Court.* And when do you say the sale was?

*Mr. Duffield.* 1912, approximately at the time of the commencement of this suit.

30 *Mr. Hoover.* I do not think it is a proper test of the value; it is an auction sale; it is not a test of the value of the property in any sense of the word.

*The Court.* Other sales in the immediate neighborhood, of sales of similar property near the time in question, may afford some guide as to the value of the property in question, but I have never understood that auction sales constitute a proper guide. I think I should exclude the offer.

40 Defendant's objection noted as ground of appeal.

*William T. Von der Lippe, direct.*

*Witness.* If I may be permitted to say so, I know of a sale in North Tenth street.

Q (*By the Court.*) Near this property?

A North Tenth street near Bloomfield avenue.

Q (*By Mr. Duffield.*) How far from this prop-

A Just a block or two across.

*Mr. Hoover.* I do not think they could pick out an isolated sale. 10

*The Court.* If you show the conditions are substantially the same, and near the time, I am not sure about that. Sometimes the conditions may be very different, but it may be they are substantially the same here.

Q Describe the property sold.

A The property sold was on North Tenth street at Beardsley avenue, I believe they call it; it is opposite the public school playground; it has all improvements except macadam or improved roadway, and was sold in September or the latter part of 1912. 20

Q Now, what was the price brought for that?

*Mr. Hoover.* I object.

*The Court.* Do you desire to cross examine him?

*By Mr. Hoover.*

Q How do you know all the facts?

A Drew the contract.

Q Did you see the money paid? 30

A Yes, sir.

Q What were the circumstances surrounding the sale?

A Fortunately I remember the man who bought the lot is in court. It was an ordinary sale; the lots were offered and the gentleman agreed to buy them.

*Mr. Duffield.* I am willing to withdraw the question, and withdraw this line of inquiry.

*Wilmer C. Van Duyne, direct.*

ALFONSO CORBO, re-called for the plaintiff in rebuttal.

*Direct examination by Mr. Hoover.*

Q You heard this gentleman testify that he took a wagon load or two wagon loads of tin cans and refuse out of the stream back of your lot; is that so?

A No, sir.

10 Q Are you familiar with your lot, and what might have been there?

A Yes, sir.

*Cross examination by Mr. Duffield.*

Q Were you there during the entire time of the excavation?

A Just at the time was on the side, and about to go around the corner, I know just what was in there.

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PLAINTIFF RESTS.

*Mr. von der Lippe.* I intended to prove the location of this stream with reference to Mr. Corbo's property. They have a survey here, and our survey disagrees. I intended to prove that, and I would like to have some testimony from Mr. VanDuyne as to how he locates this stream with reference to this man's property; whether it was all or a part of it on it.

30

*The Court.* You may do that.

WILMER C. VANDUYNE, re-called for the defendant.

*Direct examination by Mr. von der Lippe.*

Q Mr. VanDuyne, did you survey this tract before you did any work on it?

A Yes, I did.

40 Q Did you survey it around the property of Mr. Corbo?

*Motion to Direct Verdict.*

A Yes, I located the whole stream right down through.

Q Now where did you find the center line of this stream to be with reference to the westerly side of North Eleventh street, in feet and inches?

A Ninety-six feet.

Q So that the center line was almost directly on his rear line? 10

A Yes, sir.

Q How wide was the stream at that point before excavation?

A Six and one-half feet at that point.

Q How wide was it at that point after excavation?

A Six and one-half feet at the time we excavated, and after excavation in the rear it was eight feet and a little over; also—

Q I show you Exhibit P. 6 and ask you whether that shows the location of the stream with reference to Mr. Corbo's property, both along the rear and sides, as you surveyed it? 20

A Yes; I agreed with this very closely after the excavation had been done.

NOT CROSS EXAMINED.

TESTIMONY CLOSED.

*Mr. Hoover.* Now, I want to move for the direction of a verdict. It does not seem to me the defendants have shown any justification for their act in coming over and digging out and taking away our land. The facts are admitted by all their witnesses to more or less extent, some say two feet, some say three feet, and our witnesses say a little more. Their own witnesses admit they came over and dug out our land. I think under any theory of law they are not entitled to do that. They were, perhaps, entitled to come and clean out the stream if there was anything in it, but 30 40

*Motion to Direct Verdict.*

I do not think they were entitled to come and dig out our land. Now, as to the flow of water, there has not been a witness who has not said that since the operations on their land the flow of water has been increased on our land. We are entitled to nominal damages for the overflow, and something for the other.

10 *The Court.* You concede that the damages you could receive for the excess flowage is six cents

*Mr. Hoover.* I think that we are entitled to that, yes, sir.

20 *The Court.* My theory is not exactly that which is contended for by either side, and I think I ought to state it, so you can be heard upon it. My view is this. I think the law is that an upper riparian owner has the right to have his land freed of water in the way in which it has been accustomed to flow from him; that is, that he is entitled to the unobstructed flow of water below his land; that if the stream had been in its natural state, all he would have been entitled to do would have been to remove obstructions from the stream, but not to have excavated from that stream to take care of additional water which might come down from above by reason of changed conditions. Further than that, the plaintiff in this case, or, rather, the former owner through whom the plaintiff derives title, had the right to divert the waters of this stream in any way which did not interfere with the rights of the upper and lower riparian owners. If in 30 this diversion he created a condition applicable to this case, by which this ditch five feet wide and five feet deep would not carry off the water from above as the natural stream formerly conducted it, then the upper owner would have had the right to either widen or deepen that stream, so that the water might be carried off to the extent it had been formerly carried off through the natural stream unobstructed. If they went beyond that that would be a trespass. But it 40 would not be a trespass, if the plaintiff, or a former

*Charge to Jury.*

owner, in diverting this stream, had lessened the quantity of water which might flow through it under normal conditions; that is, lessened it below what the natural stream would have carried off in normal conditions.

I will overrule the motion for direction of a verdict, and an objection to the ruling will be noted.

Plaintiff's objection noted as ground of appeal.

Counsel for respective parties agree to submit the case without argument.

10

**Charge to Jury.**

The court charged the jury as follows:

DUNGAN, J.

Gentlemen. This case is an action in what would have formerly been called trespass. The plaintiff complains that the defendants, who were owners of land upon a stream above the lands of the plaintiff, came upon his lands, and not only cleaned out the bed of a stream, or ditch, but actually excavated into the plaintiff's lands, thereby taking away from the plaintiff much of the surface of the land which added value to his lots; and in such a case the measure of damage, if the plaintiff is entitled to recover, would be the difference between the value of his lots immediately before and immediately after the damage was done. Mr. Ackerman, a witness, on behalf of the plaintiff, testified that he fixed the depreciation in value of this land at \$416. He tells you how he fixes it. He says there were 1,200 square feet of surface taken, exclusive of the original ditch, which, at the value of land in that location, nineteen cents per square foot, amounted to \$228. He says that he took ten per cent. depreciation from the three southerly lots, amounting to \$128.25, and twenty per cent. depreciation from the most northerly lot, which he says could not be used for

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*Charge to Jury.*

building because of this narrowing, and that amounted to \$59.85; amounting altogether to \$416.10. But this is simply the opinion of Mr. Ackerman. It is true that it is practically the only opinion which has been given in the case, certainly the only opinion given with any detail, but you are not obliged to accept absolutely the opinion of Mr. Ackerman; you have a right to consider all the testimony; and you have a right to consider Mr. Ackerman's knowledge, or his lack of knowledge, of conditions and values there at that time. After considering all the evidence in this case which may bear upon value, if you find that the plaintiff is entitled to recover, then remember that the measure of damage would be the depreciation, or the difference in value, of these lots immediately before and immediately after the wrong was done. But, of course, you will not come to the question of damages at all unless you decide that what the defendants admit they did there was wrongfully done. I say what they admit they did there. It is an admitted fact in the case that whatever was done there was done by the agents of the defendants in this case.

There is further testimony as to the amount that was excavated there that I shall not recite. Indeed I shall recite very little of the testimony, because it is fresh in your minds, and you have heard it all, and should consider it all, whether it is recited by the court, or not.

We may start in this case with the proposition that every riparian owner—a riparian owner being the owner of lands upon a natural stream—is entitled to the natural flowage of water. That is, he is entitled to have it flow as it has been accustomed to flow. And every riparian owner is entitled to have the water flow as it has been accustomed to flow without any obstruction below which would interfere with or damage his property. A lower owner is entitled to have

*Charge to Jury.*

the flowage from above of all the water which naturally flows through a stream, the upper owners reserving only such as is necessary and desirable for family use, for instance, or the use of, say, cattle, or whatever is reasonable in the beneficial use of their land, and taking only such small quantity as may be necessary for that from the stream. I do not mean by that that they may take large quantities of water for special purposes. But this, however, has little or no bearing upon this case, which rests largely upon the rights of the owners above to do what they did.

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Upon the point of the obstruction of flowage below backing up upon the lands of the defendant, they admit in this case that the storm sewer, or the storm drain, which was erected through their land, the bed of it, is six inches below the bed of the natural stream at Bloomfield avenue. If this deepening, or lowering of the bottom of the stream six inches, is responsible for the back-flow upon their land, of course they are not entitled to plead that as a defense in this case. It is only if the action of the lower owner has been responsible for that condition. I may here state that the defendant would not be entitled in this case, if there had been no change in the stream below, to go upon the lands below and remove such portions of the bed of the stream as would have taken the flow of water from above due to improvements, or changed conditions. All that the defendant in this case would have been entitled to would have been the flowage in the stream of such water as would have been accommodated by the bed of the stream in its natural condition. They would have had the right to have removed from the bed of that stream any obstructions which had been placed therein, or which had gotten into the stream naturally from the falling in of the banks. But they would not have had the right, in order to accommodate this increase of water from above, to have gone into the stream below and have excavated

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*Charge to Jury.*

to a greater depth, and to a greater width, than the stream would have been in its natural condition. Every owner has the right to divert the waters of a stream through his own land, provided he returns the water to the bed of the stream again where it leaves his land undiminished in flow, except for the purpose I have already mentioned. And it may be that in this case that is exactly what the plaintiff did. He diverted the waters of this stream for the purpose of making more valuable his tract of land, which he had divided into lots, by digging a ditch which he says was five feet wide and five feet deep, and conducting it around the rear and sides of the lot, so that they might be of greater value, and sell to better advantage. Undoubtedly that was his object. When he did this, when he made this change, although he had the right, it was his duty to make that ditch of sufficient width and sufficient depth to accommodate the waters which before had naturally flowed through that stream, through the natural bed of the stream, unobstructed. It is insisted in this case that that is what he did; and if this ditch five feet wide and five feet deep was sufficient to carry the waters which would naturally have flowed through the natural bed of the stream, then he did no more than he had a right to do, and all the defendants in this case under those conditions would have had a right to do would have been to remove obstructions from that ditch, and not to have deepened, or widened it. But if the ditch as dug by the plaintiff, or his predecessor in title—when I speak of the plaintiff I mean his predecessor in title—was not of sufficient size to accommodate the water which would naturally flow through the stream in its natural condition, unobstructed, and by that reason the water backed up on the defendant's land, and it was thereby injured, then it had the right, not only to remove obstructions from that ditch, but to widen it and deepen it so as to accommodate that natural

*Charge to Jury.*

flow of water. But they had no right to widen and deepen one foot or one inch beyond what would be necessary to accommodate that natural flow as mentioned. If it went beyond that, if it excavated upon the plaintiff's land beyond what was necessary for this purpose, then it is guilty of a trespass in this case, and you should award to the plaintiff such damages as you may find he has sustained by reason of such trespass. In the first place, if you find the amount of excavation to have been what the plaintiff's witness, Mr. Ackerman, says it was, then to the extent of such excavation. If you find that the ditch was not sufficient to carry the water in its natural state, and that it was necessary to excavate some of the plaintiff's lot, but not to the extent that it was excavated, then your award of damages should be regulated by that difference.

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It is also insisted in this case that the plaintiff is damaged by the increased flowage of water. An upper riparian owner has no right to collect and deposit upon a lower owner a greater quantity of water than would naturally flow through the stream, to the damage of the lower owner. The testimony upon the part of the defendants in this case is to the effect that no greater quantity of water by the building of the storm drain was collected and deposited upon the lower owner. The testimony on the part of the plaintiff is that after the storm drain was constructed more water flowed through the ditch below than had formerly flowed through it. If you believe that that is so, and that it is due to the widening and deepening of the stream—the building of this storm drain six inches below the bed of the natural stream—and that thereby the plaintiff was injured in any way, he would be entitled to damages in this case. But it is necessary that the damages be proven with some certainty, and there has been no certain damage shown in this case which the plaintiff has suffered from this extra

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*Charge to Jury.*

flowage of water. So that in any event, by reason of the additional flowage of water, the plaintiff would be entitled only to what is called nominal damages, which is six cents, or some other trifling sum.

The burden of proof in this case, as in all cases of this character, is upon the plaintiff to prove by a preponderance of the evidence—that is by the greater  
10 weight of the evidence—the facts necessary to entitle him to recover. If he fails in that, then your verdict should be in favor of the defendant.

You may retire.

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## New Jersey Court of Errors and Appeals

ROCCO CORBO,

*Plaintiff-Appellee,*

*vs.*

EAST ORANGE & AMPERE LAND

COMPANY, a corporation,

*Defendant-Appellant.*

*Action at  
Law.*

*On Appeal.*

### **Brief of Appellant.**

#### **Statement of the Case.**

Plaintiff owns four contiguous city lots lying east of Bloomfield avenue, in the City of Newark, in what is known as the Silver Lake section. The defendant owns a large tract of land lying west of Bloomfield avenue. A natural water course, draining an area of about 450 acres, flowed through the lands of the defendant, and, passing through a culvert under Bloomfield avenue, flowed through the said Silver Lake section on the east of Bloomfield avenue, running through and over plaintiff's said lots in its course.

In the Silver Lake section the land was low and marshy, and the stream, after leaving the culvert on the east side of Bloomfield avenue, seeped over and through the section in many little streams (Bk. p. 19, l. 23; p. 25, l. 27; p. 29, ll. 1-15; p. 52, ll. 19-26; p. 78, ll. 20-25).

Plaintiff's predecessor in title, who owned 230 lots in the Silver Lake section, including the four lots in question which he subsequently conveyed to plaintiff, undertook to develop this Silver Lake basin, and to that end dug a ditch 5 ft. wide and 5 ft. deep, into which

the surface water coming under Bloomfield avenue was diverted (Bk. p. 19, l. 23). The ditch, in part of its course, ran along one side of the lots in question, and then, making a right angle turn, ran along the rear of the lots. Of the five feet of the width of the ditch,  $2\frac{1}{2}$  ft. lay on the lots in question, and the other  $2\frac{1}{2}$  ft. lay on the lots adjoining those in question, that is, the boundary line of the lots in question was the middle line of the ditch. The section developed; streets were opened; houses were built; and the water which had formerly spread over and flowed through the lake bottom was of necessity confined to the artificial ditch.

It was defendant's contention that at and immediately prior to the time of the alleged wrong for which plaintiff's action was brought, the water which had formerly flowed through the said stream on its land and which had freely drained through the said culvert and into and over the Silver Lake basin, as aforesaid, was obstructed and backed up on its land, and did not flow off its property as freely as it had been wont to do prior to the time the said ditch was dug on the easterly side of Bloomfield avenue; that it was entitled to have this water drain off its land onto the land east of Bloomfield avenue as freely and to the same extent as it had done prior to the said changes which had been made in the Silver Lake section; that the said ditch was not adequate for that purpose and that the said ditch had, moreover, become obstructed.

Accordingly the defendant, without committing any breach of the peace, caused the ditch to be cleaned out and widened it throughout its entire length. Defendant's witnesses testified that not more than  $2\frac{1}{2}$  ft. were added to the width of the ditch on plaintiff's side of it, but plaintiff's witnesses testified to some six or eight feet.

Plaintiff's complaint contains three counts. The *First Count* alleges damages to have been suffered by plaintiff by reason of an "increased flow of water over

the lands of the plaintiff." The *Second Count* alleges that defendant "broke and entered the aforesaid lands and premises of the said plaintiff and then and there dug out a large quantity of the land of the said plaintiff of great value, to wit, the value of \$1,000, and took and carried away the same and converted and disposed thereof to its own use." The *Third Count* alleges that defendant "broke and entered the lands and premises of the said plaintiff and with feet in walking trod down, tramped upon, consumed and spoiled the grass, shrubbage and land of the said plaintiff."

The action was commenced and the complaint drafted under our new practice act, and by rule 17 appended to that act (embodied in 1913 rule No. 31), must be deemed to "contain a plain and concise statement of the issuable facts on which the pleader relies."

Defendant admitted (Bk. p. 18, l. 35) "that if any digging was done to the ditch or stream on plaintiff's land, or to the rear and side of plaintiff's land, on or about the date alleged in the complaint, same was done by the defendant."

In its answer defendant denied the three specific charges above mentioned, and in justification of its entry and digging it set forth, in substance, its contention as hereinabove stated (Bk. p. 12).

The case was tried at the Essex Circuit, and a verdict rendered and judgment entered against the defendant for \$329.40, from which judgment the defendant now appeals.

The case is more important than the amount of this one verdict would indicate, for this action relates only to four lots out of a great number through which the ditch ran, and this appears to be a test case.

### Grounds of Appeal.

As grounds of appeal the defendant urges the following (Bk. p. 2) :

#### I.

Because the court denied defendant's motion for a non-suit. (Bk. pp. 90-91.)

Because the court overruled the following questions propounded by defendant to the witnesses examined, and excluded the following evidence offered.

#### II.

On cross examination of Jeraldo Maioran, sworn on behalf of plaintiff (Bk. p. 24, l. 31) :

Q Mr. Corbo bought from you, did he not?

A Yes.

Q And you gave him a warranty deed, did you not?

A Yes.

Q And you didn't take any exception out of that warranty deed for—

*Mr. Hoover.* I object to it as immaterial and incompetent.

*The Court.* I will sustain the objection.

#### III.

On direct examination of Edward S. Rankin, sworn on behalf of defendant (Bk. p. 118, l. 37) :

Now, assuming—or, not assuming, because you say you know—would the improvements that were erected on the Silver Lake district tend to in any way prevent the natural seepage of water from the high lands down through this Silver Lake district?

*Mr. Hoover.* That is objected to; they cannot charge us with the improvement of the locality.

*The Court.* I think that is not competent.

## IV.

On direct examination of Wilmer C. Van Duyne, sworn on behalf of defendant (Bk. p. 134, l. 8):

Q Did you observe the Corbo property immediately after any storms, before the cleaning out of the ditch?

A I did.

Q Can you tell us whether, in storms, you observed what the flow of water was?

A Well, I tell you every time when there was a storm—

*Mr. Hoover.* Is that a competent question?

*The Court.* I don't quite understand that. I will sustain the objection.

## V.

Because the court charged the jury as follows:

(A) "In such a case the measure of damage, if the plaintiff is entitled to recover, would be the difference between the value of his lots, immediately before and immediately after the damage was done."

(B) "Mr. Ackerman, a witness on behalf of the plaintiff, testified that he fixed the depreciation in value of this land at \$416. He tells you how he fixes it. He says there were 1,200 square feet of surface taken, exclusive of the original ditch, which, at the value of land in that location, 19 cents per square foot, amounted to \$228. He says that he took ten per cent. depreciation from the three southerly lots amounting to \$128.25, and twenty per cent. depreciation from the most northerly lot, which he says could not be used for building because of this narrowing, and

that amounted to \$59.85; amounting altogether to \$416.10.”

(C) “You have a right to consider Mr. Ackerman’s knowledge, or his lack of knowledge, of conditions and values there at that time.”

(D) “After considering all the evidence in this case which may bear upon value, if you find that the plaintiff is entitled to recover, then remember that the measure of damage would be the depreciation, or the difference in value, of these lots immediately before and immediately after the wrong was done.”

(E) “When he did this, when he made this change, although he had the right, it was his duty to make that ditch of sufficient width and sufficient depth to accommodate the waters which before had naturally flowed through that stream, through the natural bed of the stream, unobstructed. It is insisted in this case that that is what he did; and if this ditch five feet wide and five feet deep was sufficient to carry the waters which would naturally have flowed through the natural bed of the stream, then he did no more than he had a right to do, and all the defendants in this case under those conditions would have had a right to do would have been to remove obstructions from that ditch, and not to have deepened, or widened it.”

(F) “But if the ditch as dug by the plaintiff, or his predecessor in title—when I speak of the plaintiff I mean his predecessor in title—was not of sufficient size to accommodate the water which would naturally flow through the stream in its natural condition, unobstructed, and by that reason the water backed up on the defendant’s land, and it was thereby injured, then it had the right, not only to remove obstructions from that ditch, but to widen it and deepen it so as to accommodate that natural flow of water. But they had no right to widen and deepen one foot or inch beyond what would be necessary to accommodate that natural flow as mentioned.”

### Argument.

THERE WAS NO EVIDENCE TO SUBSTANTIATE THE CAUSE OF ACTION SET FORTH IN THE COMPLAINT, AND DEFENDANT'S MOTION FOR NON-SUIT SHOULD HAVE BEEN GRANTED. (Bk. pp. 90-91.)

The first count complained that defendant had caused an "increased flow of water over the lands of the plaintiff." Let it be assumed that there was some evidence that defendant had increased the flow of water by constructing a storm sewer on its property which caused the surface waters to be discharged through the culvert with more velocity or even in greater volume. (Bk. p. 41, l. 25, to p. 44, l. 11.) There was no evidence of any damage sustained by plaintiff under this count. At the close of the trial plaintiff claimed only nominal damages in this regard (Bk. p. 144, ll. 2-12) and the court charged the jury accordingly (Bk. p. 150, ll. 1-4).

The court refused to non-suit as to this count, saying (Bk. p. 90, l. 38), "I doubt whether there has been substantial damage shown for that, but still the question might remain of nominal damages."

If the defendant "can improve his land by changing the water course thereon which passes from his land to and upon lands of the lower proprietors *without substantial injury* to such lower proprietor, he may do so. To this extent he may increase the volume or velocity thereof by surface or under-drainage. *The lower proprietor has no right to complain unless he can show material injury.*" *Schnitzius vs. Bailey*, 48 N. J. Eq., 409; affirmed 32 Atl. Rep., 219.

Even if it be assumed, then, that the improvement made by defendant on its property did increase the

volume or velocity of the flow, plaintiff, nevertheless, has no right to complain, and, therefore, had no cause of action in view of his admitted failure to show that he suffered any injury whatever by reason thereof.

Defendant was, therefore, entitled to a non-suit so far as plaintiff's first count is concerned.

The second count alleged trover and conversion by defendant of plaintiff's earth. Plaintiff introduced not one word of evidence to prove that any earth was carried away by defendant as alleged. The only evidence in the record on this point was introduced by defendant, and stands uncontradicted, to the effect that all of the earth which was dug out in widening the ditch was thrown up on the bank and there leveled off on plaintiff's property. (Bk. p. 998, l. 30; p. 107, l. 33.)

As to the second count, then, defendant's motion for non-suit on the ground that there was no evidence to substantiate the cause of action set forth in the complaint, should have prevailed.

The third count complains that defendant entered plaintiff's close and trod upon his grass, shrubbage and land. There is not one whit of evidence of there ever having been any grass or shrubbage on plaintiff's property. Though it was not properly pleaded under the new rule of pleading above mentioned, this count was treated as raising the issue whether defendant had trespassed upon plaintiff's land in enlarging the ditch as it did.

“Where water, whether coming from springs or rains or melting snows, has flowed over lands of the complainant in a well-defined channel for a period of time so long that the memory of man runneth not to the contrary, to and upon lands of an adjoining proprietor, the court will, by its mandatory injunction, require such adjoining proprietor to *remove any obstruction placed upon his*

land to prevent such water from flowing to and over his lands." *Schnitzius vs. Bailey, supra; Earl vs. De Hart*, 12 N. J. Eq., 280.

There is no doubt that the water in question was surface water; that it flowed over lands of the defendant in a well-defined channel until it had passed under the Bloomfield avenue culvert, from which point it flowed to and over the Silver Lake basin which was owned by plaintiff's predecessor in title; that it had so flowed for a period of time so long that the memory of man runneth not to the contrary; that plaintiff's predecessor in title diverted it east of Bloomfield avenue and confined it to an artificial ditch which he dug, after which the Silver Lake basin was developed so that all this water which had formerly seeped and flowed over it from the culvert was of necessity confined to the ditch.

When plaintiff took title to the lots in question, then, he took it subject to the artificial water course which had been dug, and assumed the burden of maintaining that ditch in a condition adequate to carry off the surface water which drained from defendant's land. If the ditch was not adequate a mandatory injunction might have issued to compel the maintenance of an adequate ditch, or if the defendant, without committing a breach of the peace, could enforce its right without invoking the aid of a mandatory injunction, it had the right so to do.

The only question was, then, whether plaintiff had proved *prima facie* that defendant had exceeded its right to merely remove obstructions to the drainage to which it was entitled, that is, whether it enlarged the ditch beyond what was necessary to take care of the flow from defendant's land.

Before any ditch was dug the water from the culvert "ran right into the lake" bottom (Bk. p. 54, ll. 29-31). It always ran down from defendant's higher land

onto this lower land, and never backed up (Bk. p. 26, ll. 20-31). But after the construction of the ditch the water backed up on defendant's land so that it "looks like a lake in time of big storms" (Bk. p. 27, ll. 10-26). The ditch, even after defendant had enlarged it, was inadequate because when a rain storm would come it would overflow" (Bk. p. 54, ll. 10-13).

As was urged on the motion for non-suit (Bk. p. 91), "the trespass charge also falls," and the motion should have prevailed.

THERE IS NO EVIDENCE IN THE RECORD AS TO THE MONEY EQUIVALENT OF THE INJURY WHICH PLAINTIFF SUFFERED, IF ANY; THE RECORD CANNOT SUSTAIN A VERDICT FOR MORE THAN NOMINAL DAMAGES; THE COURT ERRED IN ITS CHARGE AS TO THE BASIS UPON WHICH DAMAGES SHOULD BE COMPUTED BY THE JURY.

A judgment against the defendant, on account of the digging, must rest upon the ground that in increasing the dimensions of the ditch it did that which it had no right to do.

By doing that which it had no right to do it could not and did not acquire a right to have the ditch remain in its enlarged state.

Plaintiff had and has the right to undo any wrong done by defendant, and, if the ditch was wrongfully enlarged, may restore it to its former dimensions.

In enlarging the ditch on plaintiff's property all that was done was to throw the earth taken from the ditch up on the embankment, and there level it off on plaintiff's property (Bk. p. 98, l. 30, and p. 107, ll. 31-38).

This is the uncontradicted testimony.

All that plaintiff need do, then, to be placed in *statu quo*, is to throw this earth back into the ditch, and so restore the ditch to its former dimensions.

There is no evidence as to what it would cost to so restore the ditch to its former condition, nor is there any evidence that plaintiff was injured or suffered any loss or damage of any nature beyond what it would cost to restore said earth to its former place in the ditch.

The court charged the jury that "the measure of damage, if the plaintiff is entitled to recover, would be the difference between the value of his lots immediately before and immediately after the damage was done." This portion of the charge, taken by itself, might not be erroneous, for the difference in the value, before and after the damage was done, might be deemed to be the cost of restoring the lots to their former condition. This portion of the charge is, however, vague, indefinite and practically meaningless without taking into consideration the evidence and the portions of the charge which relate to the basis upon which the difference in value is to be computed.

As to this basis of computing the damage the court erred in its charge. The court clearly indicated to the jury and in effect unequivocally charged (though not in these same words) that the jury should determine how many square feet of plaintiff's land had been wrongfully added to the ditch by defendant, and should then determine what the market value per square foot of the land was, and multiply that value per square foot by the number of square feet which they found to have been so wrongfully added to the ditch, and that in addition to the sum so found they should award compensation for the decrease in value of the remainder of the lots on account of having been so narrowed as to be useless for building purposes (Bk. pp. 145-146). The effect of the charge was to convey to the minds of the jury that what defendant had wrongfully added to the ditch had been absolutely, entirely and forever lost to the plaintiff, just as though the defendant in

doing the alleged wrong had acquired title to so much of plaintiff's land as had been added to the ditch.

After reviewing the only evidence which plaintiff had offered as to damages, to wit, the testimony of Mr. Ackerman, the court said (Bk. p. 146, l. 3): "But this is simply the opinion of Mr. Ackerman. It is true that it is practically the only opinion which has been given in the case, certainly the only opinion which has been given with any detail, but you are not obliged to accept absolutely the opinion of Mr. Ackerman; \* \* \* and you have a right to consider Mr. Ackerman's knowledge or his lack of knowledge, of conditions and *values there at that time*. After considering all the evidence in this case which may bear upon *value*, if you find that the plaintiff is entitled to recover, then remember that the measure of *damage would be the depreciation, or the difference in value*, of these lots immediately before and immediately after the wrong was done."

The language of the Court as to the basis upon which such difference in value should be computed by the jury is as follows (Bk., p. 145, l. 30): "Mr. Ackerman, a witness on behalf of the plaintiff, testified that he fixed the depreciation in value of this land at \$416. He tells you how he fixes it. He says *there were 1,200 square feet of surface taken, exclusive of the original ditch, which, at the value of land in that location, nineteen cents per square foot, amounted to \$228. He says that he took ten per cent. depreciation from the three southerly lots, amounting to \$128.25 and twenty per cent. depreciation from the most northerly lot, which he says could not be used for building because of this narrowing, and that amounted to \$59.85; amounting altogether to \$416.10.*" (See Ackerman's testimony, Bk., p. 74, l. 10—p. 75, l. 32). This is all the evidence and all of the charge relating to damages on account of the digging.

The verdict and judgment are for \$329.40 damages, that is *the full market value of the fee* to all of the

land added to the ditch on plaintiff's side, taking the full number of square feet claimed by plaintiff to have been so added to wit,  $19c. \times 1,200 = \$228$ . In addition to this wonderful award, \$101.40 was awarded for depreciation in the value of that part of plaintiff's lots which was not added to the ditch, but which was rendered less useful because the dimensions of the lots were supposed to be materially reduced and rendered unsuitable for building purposes. If defendant had been condemning those 1,200 square feet by eminent domain and this had been a jury to fix the compensation and damages of plaintiff for that which was being taken, the award could not have been larger, and yet here we are dealing merely with a trespass upon lands, in an action in which the only complaint is that the land was damaged by being trod upon.

The result of this verdict is that the defendant pays more than the purchase price of the land as in condemnation proceedings, but acquires no right, title or interest in return.

The only supposed evidence in the record as to damages being evidence of the value of the fee of the land which was trespassed upon, and that evidence not affording any proper basis upon which to compute a verdict, the jury should have been so instructed; nominal damages, if any, are the most that the evidence could by any possibility support; the Court erred in charging the jury as it did upon the method and basis of computing damages.

This contention is amply supported by the strikingly analogous case of *Robert Thompson vs. Morris Canal & Banking Co.*, 17 N. J. L., 480, which is cited and followed by this Court in *Elvins vs. Del. & Atl. Tel. Co.*, 63 N. J. L., at 245. See also *Louce vs. Apgar*, 60 N. J. L., 447, to the effect that "if the extent of the injury is not proven, nominal damages only can be recovered."

THE COURT EXCLUDED EVIDENCE WHICH WOULD HAVE TENDED TO SHOW THAT THE DITCH DUG BY PLAINTIFF'S PREDECESSOR IN TITLE WAS INADEQUATE TO CARRY OFF THE WATER WHICH HAD BEEN WONT TO DRAIN FROM DEFENDANT'S LAND INTO THE SILVER LAKE BASIN AND ERRONEOUSLY CHARGED THE JURY IN THIS REGARD.

The stream in question drained the surface or storm water from an area of about 450 acres before it reached Bloomfield Ave. (Bk., p. 38, ll. 33-40). The culvert under Bloomfield Ave. was 8 or 9 feet wide (Bk., p. 37, ll. 21-39). The flow of water naturally increased largely under storm conditions (Bk., p. 39, ll. 25-30). The stream had its origin in East Orange, and passing under the D., L. & W. R. R., it "took a generally easterly direction, through the old Orange Water Company property" (now part of defendant's tract), "a well defined open stream, until it passed under the Bloomfield Ave. bridge which had existed for a good many years" (Bk., p. 39, ll. 10-18). "It was like all ordinary streams running through farm property, with varying widths of bottom of stream, and varying widths across tops of the bank \* \* \* varying from 6 to 7 feet to 12 or 15 or more feet over the tops of the banks." (Bk., p. 39, ll. 34-40). East of Bloomfield Ave., however, there had once been a pond known as Sun Fish Pond or Silver Lake which was formed by a dam (Bk., p. 116, ll. 12-36). The dam was removed and the lake disappeared some time prior to 1892 (Bk., p. 124, l. 31, and page 125, l. 1) after which "the water that came down there naturally spread over quite a large surface; it was wet through there" (Bk., p. 78, ll. 20-24). The whole lake bottom was covered with little streams (Bk., p. 52, ll. 20-27; p. 19, ll. 23-26; p. 29, ll. 3-14). Plaintiff's predecessor in title, who dug the ditch originally, testified (Bk., p.

26, ll. 20-31), that the land west of Bloomfield Ave. was higher than his land and the water always ran down on his land and never backed upon the high land, and (on p. 19, ll. 23-36) he testified: "I bought 230 lots, what they call Silver Lake there, and I see so many little streams, and I thought the best to give it away with so many little streams, and to form a bigger one, and in order not to spoil so many lots I went to the rear of the lots, cutting 2½ ft. from one end of the lot and 2½ ft. from another end, so when I would sell the lots the owners don't have to suffer for so much loss in their depth on a lot; and so I made a ditch 5 ft. wide and 5 ft. deep."

In view of this condition and of the fact that the water from defendant's land had drained through the Bloomfield Ave. culvert into and over the Silver Lake basin, it was defendant's contention that it had a right to the continuance of such drainage; *that the main bed of the stream through the Silver Lake basin took care of only a part of this surface water* and the rest seeped and flowed over the whole lake bottom; that it was not limited merely to the right to have that water taken care of which flowed through the main stream in the lake bottom, but was entitled to have all that water taken care of which naturally flowed through the culvert to the same extent as it had done before the changes were made on the east side of Bloomfield Ave., that is, to have its land drain into the land east of Bloomfield Ave. (Bk., p. 119, l. 20 to p. 120, l. 15; also p. 91).

But the court took the view (Bk. p. 119, l. 29, *et seq.*) that the right was not to have the higher land drain onto the lower to the same extent that it had done before the improvements were made east of Bloomfield avenue, but that the test should be "whether or not this ditch five feet wide and five feet deep would carry the water *which had been accustomed to flow in the natural bed of the stream as it was*

before." Accordingly the court charged (Bk. p. 148, l. 17 to p. 149, l. 10) that "it was plaintiff's duty to make that ditch of sufficient width and sufficient depth to accommodate the waters which before had naturally flowed *through that stream, through the natural bed of the stream* \* \* \* but if the ditch as dug by the plaintiff \* \* \* was not of sufficient size to accommodate the water which would naturally flow *through the stream in its natural condition*, unobstructed, and by that reason the water backed up on the defendant's land, \* \* \* then it had the right \* \* \* to widen it and deepen it, so as to accommodate *that* natural flow of water. But they had no right to widen and deepen one foot or one inch beyond what would be necessary to accommodate *that* natural flow as mentioned."

It is earnestly urged that this ruling and charge of the court was error which greatly prejudiced defendant's substantial rights. During storms "the slight depression which was the brook in dry weather" would overflow, but so long as there were no improvements in the lake basin "the water would find its way down to the lower end of the valley without being obstructed" (Bk. p. 122, ll. 8-14). As plaintiff's predecessor in title said, his land was lower, and the defendant's higher land had always drained off on his, and the water did not back up. Manifestly, however, "the slight depression which was the brook in dry weather" was not adequate in itself to so drain the storm and surface water from the higher land. When the flow was increased by rains the water overflowed "the natural bed of the stream," and spread over the whole lake bottom.

The right of defendant was that of unobstructed drainage. It was error to limit the necessary capacity of the ditch to merely accommodating the water which had formerly flowed "through the *natural bed of the stream*" or through "*the stream* in its natural condi-

tion" on the Silver Lake bottom, for the stream in its natural condition and the natural bed of the stream did not formerly accommodate all of the drainage. As defendant's counsel urged (Bk. pp. 119 and 120), "we have the right to have this lower land carry off the natural and normal flow of the water" \* \* \* "regardless of what was carried off by the natural stream before," and defendant had a right to remove obstructions or deepen and widen the ditch "if the water was backing up on its land by reason of the improvements."

The case of *Schnitzius vs. Bailey*, declares the law of this State in this regard. It is reported first on Order to Show Cause, the Vice-Chancellor's opinion being found in 13 Atl. Rep., 247, also in 45 N. J. Eq. at p. 179. The order first made was reversed by this court, 45 N. J. Eq., 178, the only question on that appeal being whether a mandatory injunction should have issued at that stage of the case. The Vice-Chancellor's opinion on the final hearing is reported in 48 N. J. Eq., 409, and was affirmed 32 Atl. Rep., 219.

UPON THIS SAME THEORY IT IS URGED THAT IT WAS ERROR FOR THE COURT TO OVERRULE THE FOLLOWING QUESTION WHICH WAS ASKED THE WITNESS EDWARD S. RANKIN (Bk. 118, l. 37) :

"Now, assuming—or, not assuming, because you say you know—would the improvements that were erected on the Silver Lake district tend to in any way prevent the natural seepage of water from the high lands down through this Silver Lake district."

This question was asked of a witness sworn on behalf of defendant and qualified as an expert (Bk. p. 115, l. 40). Plaintiff objected to it, saying, "they cannot charge us with the improvement of the locality," and the court ruled, "I think that is not competent."

Manifestly, the question was not designed to charge the plaintiff with the improvement of the locality. On the contrary, plaintiff's predecessor in title had testified that defendant's higher land had always drained off on his lower land and the water had never backed up. We have seen that this drainage took place by the water running or seeping over the whole lake bottom; that plaintiff's predecessor in title had constructed the ditch to take care of these "many little streams." Having elected to make that change he, and plaintiff after him, assumed the duty to defendant of maintaining a ditch which should be adequate for that purpose. The question was designed to and would have brought out the fact that this water could not any longer seep over the whole lake bottom, but was confined to the ditch. This, then, had a direct and material bearing upon the question of whether the ditch as constructed was adequate to carry all of that water.

LIKewise, IT WAS ERROR TO EXCLUDE THE TESTIMONY OF WILMER C. VAN DUYN AS TO HIS OBSERVATIONS AS TO THE FLOW OF WATER IMMEDIATELY AFTER OR DURING STORMS BEFORE THE DITCH WAS CLEANED OUT ON PLAINTIFF'S PROPERTY: "CAN YOU TELL US WHETHER, IN THE STORMS, YOU OBSERVED WHAT THE FLOW OF WATER WAS?" (Bk. p. 34, ll. 8-19).

This should be considered with what is found on page 119, line 20 of the book to page 121, line 40. Defendant's contention, as hereinabove set forth, had been urged upon the court, and the court said (p. 120, l. 17), "You might ask such questions as will raise that point, and I will rule on them." The question above quoted raised the point of defendant's contention and was ruled on adversely to defendant. Further light is thrown upon this ruling by what is found

at lines 30 to 40 on page 121. There the witness Rankin had said, "My opinion would be that a five-foot ditch would not carry off the waters from that drainage area during a heavy storm." The court interposed by saying: "No, that is not the answer to the question. That will be stricken out. The question is whether or not a five-foot ditch would carry off the waters to the same extent that they were carried off *by the natural stream* prior to the building of the ditch."

This is the limitation which the court adhered to throughout the trial, and which entirely ignored the facts that the "natural stream" overflowed in times of storm, that the highland nevertheless drained onto the low land, and that the ditch should have been adequate to carry not only the water which flowed through the natural bed of the stream but all the water which drained onto and flowed and seeped over the Silver Lake bottom, to the same extent and as freely as it had drained off prior to the digging of the ditch.

It is respectfully urged that the theory upon which the court conducted the trial and excluded the evidence and charged the jury was prejudicial to defendant's substantial rights and constitutes reversible error.

IT WAS ERROR TO OVERRULE DEFENDANT'S CROSS EXAMINATION OF JERALDO MAIORAN AS TO THE WARRANTY DEED BY WHICH HE CONVEYED THE FOUR LOTS IN QUESTION TO THE PLAINTIFF (Bk. p. 24, l. 31).

This was plaintiff's predecessor in title, the person who constructed the ditch, who sold the lots in question to plaintiff, and who was plaintiff's principal witness.

Defendant, on cross examination of him, desired to show that he had an interest in the outcome of the

suit. He had testified that he gave plaintiff a warranty deed. The question which was overruled was whether he had taken any exception out of that warranty for the encumbrance of this water course. If he had not, and this case were decided in defendant's favor, he would have been liable to plaintiff for breach of his warranty. He might have been testifying to save himself. Defendant should have been permitted to show this circumstance to the jury so that they might take it into consideration in determining how much credence should be given to the testimony of plaintiff's principal witness.

*Haven vs. Central R. R.*, 64 N. J. L., 312.

It is respectfully submitted that the judgment below should be reversed and a new trial granted.

WILLIAM T. VON DER LIPPE,  
*Attorney for Defendant-Appellant.*

RALPH E. LUM,  
*Of Counsel.*

## New Jersey Court of Errors and Appeals

ROCCO CORBO,

*Plaintiff-Appellee,*

*vs.*

EAST ORANGE AND AMPERE LAND  
Co., a corporation,

*Defendant-Appellant.*

*Action at Law  
On Appeal.*

### **Brief of Appellee.**

#### **Statement of the Case.**

Plaintiff-Appellee is the owner of four contiguous lots lying East of Bloomfield Avenue in the City of Newark, and in what is known as the Silver Lake Section. The Defendant-Appellant, owns a tract of land lying west of Bloomfield Avenue and above the lots of the plaintiff. The natural drainage is in an easterly direction from the lands of the defendant across Bloomfield Avenue past the lands of the plaintiff.

Originally this section, known as Silver Lake section, was low and marshy and covered with surface water. The land both on the east and west side of what is now Bloomfield Avenue was covered with swamps or little lakes or pools of water. (Bk. p. 20, 23, 40, 70.) Through this land a natural water course flowed over the surface from a westerly to an easterly direction. This condition continued until Bloomfield Avenue was projected through this property, when a culvert was shot through under Bloomfield Avenue by the city authorities to carry off the water from the west side to the east side; this cul-

vert being the only means of conducting the water from the lands of the defendant over and across the lands of the plaintiff after the said Bloomfield Avenue was laid out, as Bloomfield Avenue is higher than the lands on either side of it. The size of this culvert is between eight and nine feet wide by five feet high. (Bk., p. 37, ll. 30 to 40; p. 45, ll. 1 to 40.)

In 1905, plaintiff's predecessor in title dug a ditch through his land five feet wide by five feet deep (Bk., pp. 62 and 63) which connected with the culvert immediately on the east side of Bloomfield Avenue; by means of which ditch the water coming through said culvert under Bloomfield Avenue was carried off. This ditch, in part of its course, ran along the back of plaintiff's lots and down the easterly side of the most easterly lot owned by the plaintiff. Two and one-half feet of this ditch being taken off of the plaintiff's lots and the other two and one-half feet was taken off of the adjoining lot. This ditch carried off all the water that came through the culvert under Bloomfield Avenue. (Bk., pp. 20-21-26-30-71 and 72.)

This condition of affairs remained until about the year 1910, when the defendant decided to improve its lands, and in doing so, erected a large blind storm sewer built of brick and concrete, extending from the west side of Bloomfield Avenue all the way across the lands of the defendant. This storm sewer is thirteen feet wide by three and one-half feet deep (Bk., p. 89, ll. 1 to 40; Bk., p. 90, ll. 1 to 10) and was placed under the ground, the bottom of the same being lower than the bottom of the culvert (Bk., p. 137, ll. 1 to 30) under Bloomfield Avenue which it joined. (Bk., pp. 89-90.) This storm sewer was not laid by the defendant in the bed of the old stream (Bk., p. 43, ll. 1 to 20) but deviated therefrom, being built with twists and turns to accommodate the proposed streets to be laid out by the defendant company. After the building of this storm sewer by the

defendant on its lands, then its alleged troubles began; it claiming that water backed up on its land. However, whatever backing up of water occurred, if any did occur, was due to the fact the defendant tried to discharge the water which it collected from this large water-shed into its storm sewer, thirteen feet wide, through the culvert under Bloomfield Avenue, which was only nine feet wide, the bottom of the storm sewer being lower than the bottom of the culvert, is clearly shown by its own witness, Mr. Frederick A. Reimer (Bk., p. 45, ll. 20 to 30) as follows:

“Q And any backing up that was done on the Ampere Land Co.’s land was done by the culvert not being big enough, isn’t that right? At those times the water could not get through, isn’t that so?”

A That would be my answer.”

That the jury would not believe that any backing up of water on the defendant’s land, if any occurred, was the fault of the plaintiff by anything which he may have done on his land, is clearly shown by the verdict which they returned, so that the facts as to this question have been determined by the jury in favor of the plaintiff and against the defendant, and there was abundant evidence on which the jury could base its conclusion.

*One of the fallacies in the position taken by the defendant as outlined in its brief, is that it assumes some injury was done to its lands either in backing up water or otherwise, by the acts of the plaintiff in digging his five foot ditch, when, as a matter of fact, and as a matter of record, this question was decided by the jury in just the opposite way, namely, that the plaintiff in digging his ditch on his side of Bloomfield Avenue did not in any wise injure the defendant’s land, and this was a question of fact found by the jury adversely to defendant.*

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Another fallacy in the position taken by the defendant, as outlined in its brief, is, that it does not take into consideration and makes no mention whatever of the fact that it had attempted to improve its lands by changing the ancient water course by diverting it from its natural bed and confining it in the large storm sewer which it built; so that the defendant in attempting to right its fancied wrong, a thing with which the plaintiff had nothing whatever to do, was clearly not warranted in law or otherwise, in forcibly coming upon the land of the plaintiff and digging out and enlarging the ditch which ran to the rear and side of plaintiff's lots in the manner in which it did without the consent of the plaintiff, without even notifying the plaintiff, and upon the representations to the plaintiff that the work was being done by the City of Newark, in the hope of trying to improve the conditions which it created on its own lands. (Bk., p. 54, ll. 30 to 40; p. 55, ll. 1 to 40; p. 56, ll. 1 to 20).

It will be remembered that the ditch, which was constructed originally to the rear and along the side of the lots of the plaintiff, was five feet wide by five feet deep, taking two and one-half feet off of plaintiff's land and two and one-half feet off of his adjoining neighbor's land. This ditch as widened by the defendant is as follows: That portion of the ditch in the back of the plaintiff's lots is from seven and one-half feet to nine feet wide in place of five feet, as it originally was; on the side, the ditch is twelve feet wide in place of five feet, and all of this additional digging, namely the difference between two and one-half feet and seven to nine feet on the back; and the difference between two and one-half feet and twelve feet on the side, was taken by the defendant entirely off of the land of this plaintiff, and this testimony is undisputed, being the testimony of a disinterested experienced surveyor, Mr. Alexander M. Borrie of the firm of Borrie & Kreimer, of Newark, N. J., whose

qualifications as an expert, the defendant readily admitted. See his testimony (Bk., pp. 59-60-61-62.)

The only defense made to this action by the defendant in its answer and, as set out in defendant's brief, p. 2, was that the flow of water which ran through the stream on its land, then through the culvert and then through the ditch on the plaintiff's land, was obstructed and the water backed up on the defendant's land and did not flow off as freely as it had done prior to the digging of the ditch on the plaintiff's land. This contention would seem to be purely a question of fact for the jury. Unfortunately for the defendant, the jury did not believe the evidence which the defendant produced at the trial to substantiate this contention, but on the contrary, did believe the evidence produced by the plaintiff in controversion of this contention, so that the defense raised in this case was one of fact, and it being decided against the defendant, and there being abundant evidence to support the jury in its finding in this respect, this Court will not interfere on that ground.

The complaint of the plaintiff contains three counts:

The first count complained that the defendant, in coming upon the lands of the plaintiff, and through its agents and representatives, digging out and enlarging the ditch or bed of the stream on the plaintiff's land to the extent of two to three and four times, *caused damage to the lands of the plaintiff and increased the volume of the flow of water thereover.* It will be seen from this that there are *two* causes of complaint set up in this count; the first cause being that of damaging the land by reason of the digging, etc., and secondly, as a result of the digging, increased the flow of water. There was abundance of evidence to show that the acts of the defendant did increase the flow of water in this ditch across the plaintiff's land. (See Bk., pp. 23-24-54-68-72.) That it is an

actionable nuisance for an upper owner to turn a new stream into the alleged stream or by means of a reservoir or other artificial receptacle to increase the flow of the water naturally flowing in the stream, is clearly held by the Court of Errors and Appeals in this State in the case of *East Jersey Water Co. vs. Bigelow*, 60 N. J. L., p. 201 at 207.

As to the second cause of complaint alleged under this count, namely, that of damaging the lands of the plaintiff, there was clear and sufficient evidence to carry this question to the jury, because whatever damage was done to the plaintiff's land was admitted by the defendants to have been done by them and the jury found that the defendant had damaged the plaintiff's land to the extent of the amount of the verdict. It was, therefore, perfectly proper for the trial court to refuse to non-suit this count.

The second count of the complaint is the ordinary trespass *quare clausem fregit* count. It was admitted by the defendant that it did go upon the plaintiff's land without the consent of the plaintiff. Therefore, the burden was on the plaintiff to justify their action in going upon the land as aforesaid. The mere fact of its going upon the land and doing the digging and which they admitted was done, is *prima facie* evidence of trespass. Therefore, the trial court would not be justified in non-suiting the plaintiff on this count and whatever evidence there was on this question would have to go to the jury.

The third count complains that the defendant through its agents and servants broke and entered the lands of the plaintiff and with feet, in walking, trod down, trampled upon, consumed and spoiled the grass, shrubbage and land of the plaintiff. This is the regular trespass count, and the injury complained of is the injury to the land of the said plaintiff. The defendant admitted that it did the digging which was done without the plaintiff's consent. Therefore it was up to the defendant to show some legal justifica-

tion for their acts. This it attempted to do by alleging and endeavoring to prove that owing to certain alleged obstructions in the ditch running past plaintiff's land, the defendant was justified in law in going upon the plaintiff's land and cleaning out the obstruction. However, the question as to whether the alleged injury, namely the backing up of water, was caused by obstructions in the plaintiff's ditch or in some other manner was purely one of fact for the jury to determine from all evidence introduced. There was abundant testimony to show that the backing up of water was not caused by the ditch on the plaintiff's land (Bk., pp. 45, 26), nor was the backing up caused by any obstruction in the ditch. Added to this, the fact was admitted by the defendant's own witnesses that the large storm sewer which it built was built below the bottom of the culvert running under Bloomfield Avenue, and that whatever backing up was done was done by reason of this fact. These were all purely questions of fact and the jury believed the testimony on behalf of the plaintiff. Therefore, these facts being found adversely to the defendant, as a consequence thereof, it was not lawfully entitled to go upon the plaintiff's land in the manner in which it did, because the supposed justification being removed, the fact of its trespass remained. Therefore, the trial court could not have rightfully non-suited the plaintiff on this count. *The case of Schnitzius vs. Bailey, 48 N. J. Eq., p. 409, does not effect the decision in the case at bar* for the reason that the cited case simply holds, that where water, either coming from springs or rains or melting snow, has flowed over lands of the upper proprietor in a well defined channel, for a time, so long that the memory of man runneth not to the contrary to and upon lands of an adjoining lower proprietor a mandatory injunction requiring such lower proprietor to remove any obstruction placed upon his

land to prevent such water from flowing into and over his lands will lie. The plaintiff does not quarrel with this principal of law, *but he does say the facts were not proven in the case at bar, so as to make this rule of law applicable.* In other words given the proven fact of some obstruction by the lower proprietor, then, of course, the rule of law, as above laid down, will apply, but a very important feature in applying this rule is that it must be predicated upon the proven fact, and this is just what is lacking in the case under consideration, namely, the defendant did not succeed in proving, as a question of fact, that there was any obstruction placed by the plaintiff upon his land, which interfered with the flow of water, so that the case cited by the defendant has no relevancy.

### Law

The rule of law covering the respective rights of upper and lower proprietors on natural water causes as laid down by the New Jersey Court of Errors & Appeals in the case of *East Jersey Water Co. vs. Bigelow*, 60 N. J. L., p. 201 at 207 is as follows:

“It would be equally unreasonable that one man should have the right to turn more water over the land of his neighbor than would naturally go in that direction, and so far as regards the rights, it is altogether immaterial whether it be productive of injury or benefit. No one has a right to compel another to have his property improved in a particular manner. It is as illegal to force him to receive a benefit as to submit to an injury.”

“It is the right of every owner of land upon a stream to have the water come to him in its natural flow, undiminished in quantity and unimpaired in quality, and, it may be added, with no increase of the volume except from natural

causes. Therefore, it is an actionable nuisance, at common law, for a mill-owner or other person to turn a new stream into the stream, or, by means of a reservoir, to increase the volume of water naturally flowing in the stream. It is no defence to an action for such an injury that the person complaining is benefited by the increase in the volume of water, for no person can be compelled to have his premises improved, and has a right to their enjoyment in their natural condition and according to his tastes and inclination."

This same principle is held in the following cases:

*Society vs. Low*, 17 N. J., Eq., p. 19.

*Society vs. Morris Canal Co.*, 1 N. J. Eq., p. 157; 40 Cyc., p. 559.

*Davison vs. Hutchinson*, 44 N. J. Eq., 474.

*Merritt vs. Parker*, 1 N. J. L., p. 526.

As to the question of damages, it is submitted the court's charge as to damages is perfectly correct. The rule laid down by the trial judge in his charge on the question of damages is this:

"After considering all the evidence in this case which may bear upon value, if you find that the plaintiff is entitled to recover, then remember, that the measure of damage would be the depreciation or the difference in value of these lots immediately before and immediately after the wrong was done." (Bk., p. 146).

That this is a correct explanation of the law as to damages is shown by the decisions of this State, the leading case on the subject being, *McGuire vs. Grant*, 25 N. J. L., p. 356 at 368.

"The measure of damages in such case is not what it will cost to restore the lot to its former situation or to build a wall to support it, but what has the lot diminished in value by reason

of the acts of the defendant \* \* \* The only true criterion of damages, therefore, is the diminution of the value of the lot."

This rule as to damages has been followed in the case of *Freeman vs. Sayre*, 48 N. J. L., p. 37 at 42.

Likewise in the case of *Manda vs. Orange*, 77 N. J. L., p. 285 at 286, where the court, through Mr. Justice Swayze, says:

"That rule was stated in an admirably clear charge, as follows: 'The damage done to the real state as counsel has stated, is generally the difference between the value of the property immediately prior to the trespass and its value after the trespass has been committed.'"

This same rule has been followed by the Court of Errors & Appeals in the case of *East Jersey Water Co. vs. Bigelow*, 60 N. J. L., p. 201 at 206, 210, 211. There is, therefore, no justification in the contention set out by the defendant that the only remedy the plaintiff had, if his ditch was wrongfully enlarged, was that he might restore it to its former dimensions.

There is no justification in this case either in fact or law for the contentions made by the plaintiff that the result of this verdict is that the defendant pays more than the purchase price of the land, as in condemnation proceedings, but acquires no right, title or interest in return. The verdict is for \$329.40 and costs, and covers the injury for all four lots owned by the plaintiff. The plaintiff's witness testifies (Bk., p. 138, ll. 20 to 40) that the plaintiff paid \$1,000 for the four lots at the time he bought same; that he afterwards paid sewer assessments of \$200. extra, and also paid taxes and a great many other things, so that it could be easily seen that the lots at the time plaintiff bought same were valued at least \$1200, and it is testified by Mr. Ackerman that at the time the injury was done to these lots by the defendant, the value was \$450. per lot (Bk., p. 80), which testi-

mony was also corroborated by Mr. John C. Lafau-  
cherie, who testified he was president of a Building  
& Loan, which made extensive loans in that neigh-  
borhood, and was familiar with the value of the land.  
See his testimony (Bk., p. 85 and 86).

It is respectfully submitted that this case was fairly  
and properly tried, no reversible error was committed,  
the charge of the trial judge was correct, broad, and  
comprehensive as to both the legal rights of the plain-  
tiff and defendant and as to the question of damages.

It is, therefore, submitted that the judgment in the  
lower court should be affirmed.

Respectfully submitted,

PEIRCE & HOOVER,

*Attorneys for Plaintiff-Appellee.*



