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Complaint.

New Jersey Supreme Court

BERGEN COUNTY.

SAMUEL B. GARRISON, Plaintiff, vs. THE BOROUGH OF FORT LEE, Defendant.	Action-at-law.

Plaintiff, a resident of the Township of Teaneck, in the County of Bergen, says, that:

1. Defendant, The Borough of Fort Lee, is a municipal corporation of the State of New Jersey.

2. Plaintiff at the times hereinafter mentioned was the owner and possessor of certain lands in the City of Englewood in the County of Bergen, including a tract of six acres, which tract was covered with a body of water known as Crystal Lake which, before the grievances hereinafter mentioned was supplied with pure water from a natural stream known as Crystal Stream and which stream runs from the Borough of Fort Lee into and through the said City of Englewood.

3. Upon the land adjoining said lake, plaintiff had constructed and still maintains, large ice houses, capable of holding 4,000 tons of ice and he has been engaged for fifteen years in the business of cutting ice, from said Crystal Lake housing, and selling the same to merchants engaged in the retail ice trade.

4. For the purposes of said plaintiff's trade and business it was necessary that the said water should be, and, except so far as natural causes rendered it otherwise, he was entitled to have the use of pure water free from noxious unwholesome, fetid, deleterious matter and other impurities.

5. Said Crystal stream and lake, until the commission of the grievances hereinafter mentioned, had always been such a body of pure, fresh water, fit for use for all domestic purposes, potable, and of such degree of purity that the ice cut from Crystal Lake was of the very highest quality.

6. Defendant, The Borough of Fort Lee, during the years 1914 and 1915, caused to be constructed a sewer system in said borough and completed the same in the spring of the year 1916, and thereafter from the first of April, 1916, until the commencement of this suit, said borough has been daily discharging from the said sewer into Crystal stream noxious foul, fetid, and poisonous effluent and matter in large quantities, which were carried down said stream into Crystal Lake and polluted its waters.

7. In consequence of the pollution of said stream and lake by said defendant, the ice formed upon

said lake in the winter of 1916-1917 which was of the required thickness for cutting, housing and selling, that is to say, in the month of December, 1916, and the months of January and February 1917, could not be cut, housed, and sold, as its use was dangerous to the public health, and said plaintiff was not able to cut sell and dispose of his ice harvest.

8. The Board of Health of the City of Englewood, in which municipality said lake lies, restrained said plaintiff, by notice, from gathering said crop of ice, because of the polluted condition of the water of said stream and lake and consequent danger to the public health.

9. Said ice crop, which the plaintiff was unable to cut, house, and sell amounted to 4,000 tons. He will further be obliged to expend large sums of money in restoring said lake to its original state of purity, in case the defendants cease its pollution.

To the damage of the plaintiff $25,000.

WILLIAM B. GOURLEY,
Attorney of Plaintiff.

Answer.

NEW JERSEY SUPREME COURT,

BERGEN COUNTY.

SAMUEL B. GARRISON, Plaintiff, vs. THE BOROUGH OF FORT LEE, Defendant.	Action-at-Law.

Defendant, a municipal corporation, situated in Bergen County, New Jersey, answering the plaintiff's complaint, says:

1. Defendant admits the first paragraph.

2. Defendant admits so much of paragraph two as alleges that there was a body of water or pond in the City of Englewood, which was supplied by a natural stream which runs from the Borough of Fort Lee into and through the City of Englewood, and defendant denies the remaining allegations of said paragraph.

3. Defendant admits so much of the third paragraph as alleges that plaintiff has ice houses upon the land adjacent the body of water described in paragraph two. As to the remaining allegations of paragraph three, the defendant has no knowledge or information sufficient to form a belief and the same are therefore denied.

4. Defendant denies paragraph four.

5. Defendant denies paragraph five.

6. Defendant admits so much of paragraph six as alleges that this defendant, during the years 1914 and 1915 caused to be constructed a sewer system in said Borough, and completed the same in the spring of the year 1916. The remaining allegations of paragraph six are denied.

7. Defendant denies so much of paragraph seven as alleges that plaintiff was not able to cut, sell and dispose of his ice harvest in consequence of the pollution of said stream and lake by defendant. Defendant admits the remaining allegations of paragraph seven.

8. Defendant admits paragraph eight.

9. Defendant denies paragraph nine.

FIRST DEFENSE.

1. Pursuant to the statute in such case made and provided, defendant prior to the spring of 1916 caused to be constructed a sewer system and storm water drainage system in the northwest part of the Borough of Fort Lee, known as the Leonia Heights Section, in accordance with plans and specifications made by a competent engineer and duly approved by the State Board of Health.

2. Said sewer system was designed to receive all sewage and drainage, other than storm water, in said Leonia Heights Section of the defendant Borough, and to conduct the same to certain tanks or basins from which the same was to be pumped into a trunk theretofore constructed, and was to

be discharged through said trunk sewer into the Hudson River.

3. Prior to the construction of said storm water drainage system the storm water from the said Leonia Heights Section of said Borough, as well as from a large part of the City of Englewood and the Borough of Englewood Cliffs, was carried off by the natural flow thereof through and over the streets and other lands of said municipalities into a natural stream and thence passing an artificial pond formed by diverting the waters of said stream and impounding the same, into the Overpeck Creek.

4. Said storm water drainage system was designed to receive from said Leonia Heights Section, said storm water only and to discharge same as it had always theretofore discharged into the said stream and thence into Overpeck Creek.

5. Said sewer system and storm water drainage system were not designed to cause or permit any noxious, unwholesome, fetid or deleterious matter or other impurities to be discharged into said stream, nor to discharge into said stream anything other than the drainage which, by the natural flow thereof through and over the streets and other lands, in the defendant Borough, would have been carried off by said stream, had said sewer and drainage system not been constructed.

6. Except as hereinafter mentioned in paragraph seven the said sewer system and storm water drain have always operated as designed and no sewer or drainage, other than the storm water as aforesaid, has been discharged into said stream.

7. During the year 1916, there was an unexpected, temporary, partial failure of said sewer system to operate as designed, by reason of an accidental failure of the pump at one of the tanks or basins and the accidental breakage of one manhole and the accidental mixing of sewage and storm water at another manhole, and by reason thereof, some of the sewage was discharged temporarily into said stream.

8. Defendant did not cause or permit any noxious, unwholesome, fetid, deleterious or impure discharge from said sewer and drainage system into said stream, and defendant had no notice thereof until the happening of the events alleged in paragraph seven, and subsequent notice by plaintiff.

9. Defendant immediately thereafter, and as soon as practicable, had said pump and manholes repaired and had said condition completely remedied so that the water in said stream then became, has continued to be and now is as pure and wholesome as the natural and geographic conditions of the locality will permit, and then became, has continued to be and is now in every way equally pure and wholesome as the same was and would have been had said sewer and drainage system not been constructed.

WILLIAM M. SEUFERT,
Attorney for Defendant.

I consent that the foregoing answer be filed as in time.

WILLIAM B. GOURLEY,
Attorney for Plaintiff.

Reply.

NEW JERSEY SUPREME COURT.

SAMUEL B. GARRISON, Plaintiff, vs. THE BOROUGH OF FORT LEE, Defendant.		Action at Law.

1. The plaintiff admits that the defendant constructed a sewer system and storm water drainage system, as alleged in paragraph 1 of the first defense, and denies the remaining allegations of said paragraph.

2. Plaintiff has no knowledge or information as to what the said sewer system was designed to receive, as alleged in the second paragraph.

3. As to the statements contained in the third paragraph, plaintiff has not any knowledge or information thereof sufficient to form a belief.

4. As to the statements in the fourth and fifth paragraphs, plaintiff has not any knowledge or information of what said storm water drainage system was designed to receive or what it was designed not to receive.

5. He denies the sixth paragraph.

6. He admits that during the year 1916 sewage was discharged into said stream, as in the seventh paragraph alleged, and denies the remaining allegations of said paragraph, and avers that such pollution has been continuous.

7. He denies the eighth paragraph.

8. He has no knowledge or information as to whether such pump or manholes were repaired, as alleged in said ninth paragraph, and denies the remaining allegations thereof and avers that said stream has been continuously polluted, as in the complaint alleged.

WILLIAM P. GOURLEY,
Attorney of Plaintiff.

Replication.

NEW JERSEY SUPREME COURT.

BERGEN COUNTY.

SAMUEL B. GARRISON, Plaintiff, vs. BOROUGH OF FORT LEE, Defendant.	Action at Law.

1. The defendant denies the averment in paragraph six of plaintiff's reply, that such pollution has been continuous.

2. The defendant denies the averment in paragraph eight of the plaintiff's reply, that said stream has been continuously polluted, as in the complaint alleged.

WILLIAM M. SEUFERT,
Attorney for Defendant.

BERGEN COUNTY CIRCUIT COURT.

SAMUEL B. GARRISON,
Plaintiff,

vs.

BOROUGH OF FORT LEE,
Defendant.

Hackensack,, March 11, 1918.

Before Hon. WILLARD W. CUTLER, Judge, and a jury.

For the plaintiff, WILLIAM B. GOURLEY.

For the defendant, WILLIAM J. MORRISON, Jr., and WILLIAM B. MACKAY.

(Mr. Gourley opened for plaintiff.)

Mr. Mackay: At this time I want to enter an objection to the opening of counsel. The suit was started in July, 1917, and under the pleadings they claim for the loss of the 1916-17 crop. I don't see how, under these pleadings and the issue we are meeting, we can be asked to meet anything for this year, in case they have a right of action.

The Court: Your pleadings only cover last year?

Mr. Mackay: Suit was started in July, 1917; consequently they only cover 1916-17 and not 1917-18, which Mr. Gourley just said that they intended to claim as damages.

Mr. Gourley: This is a continuing nuisance, a continuing trespass, and under the act we are entitled to damages to date.

Tthe Court: You may proceed. We will see when it comes up. An action for damages may be brought to the time of trial in certain cases.

Mr. Mackay: This isn't the case.

The Court: I cannot tell until I hear the evidence.

(Mr. Morrison opens for the defendant.)

SAMUEL B. GARRISON, sworn in his own behalf, testifies as follows:

Direct Examination by Mr. Gourley:

Q. Mr. Garrison, where do you live? A. Teaneck.

Q. How long have you lived in Teaneck? A. Twenty-odd years; about twenty-three.

Q. What is your business? A. General contractor.

Q. Anything to do with the ice business? A. Yes.

Q. How long have you been engaged in the ice business? A. In Englewood ever since 1902.

Q. Before that had you any experience in ice? A. In the ice business?

Q. Yes. A. Lots of it.

Q. Well, what? A. In New York State, one place what we call Bear Mountain.

Q. When did you become interested in Englewood ice? A. In 1902; that is, I bought the property in 1902, but I had filled the house once or twice for other parties before that; the two houses, rather, for one or two years previous to the time I purchased it.

Q. When did you buy it? A. In 1902, April second or seventh; I guess it is the seventh.

Q. From whom? A. Estate of William Walter Phelps.

Q. Did you enter into occupation of the premises? A. Yes, sir.

Q. When? A. The same time.

Q. Have you occupied it from then until now? A. Yes, sir.

Q. What have you done with the property in relation to the pond? A. I made a great many improvements into it; made a new dam; made a filtering course; that is, a concrete filtering course; concrete walls and concrete sluice-way to carry the water from a southerly stream that comes down from Leonia into the pond, nearly two hundred feet long. I spent a great deal of money and time there in improving the property; it has been in proceess of development ever since I have had it, up to the present time, except the last two years.

Q. What is the extent of the pond? What do you call it technically? A. Crystal Lake, the sole name before I bought it.

Q. What is the extent of the lake? A. About six acres; maybe a little more; maybe a trifle less, but very little.

Q. Did you cut ice from it every year that there was ice? A. Yes.

Q. During the intervening years? A. Yes.

Q. Did you cut any ice, say, last year; that is to say, 1916-17? A. I didn't put any up. There was lots on the lake; couldn't put it up.

Q. Why not? A. I was prevented; wouldn't give me a permit from the Board of Health of Englewood.

Q. Why not? A. On account of its pollution.

Q. What was the extent of the ice? The thickness of the ice, I mean. A. In 1916-17 it was fourteen inches.

Q. How does that compare for proper harvesting? A. Excellent.

Q. Was it good ice or— A. It was good ice, except the pollution. It was good and solid and clear.

Q. What was there observable about the pollution? A. There was fecal matter.

Q. First, this water of the lake comes from where? A. Two branches; one comes from the northeast section, way up in the Palisade Mountains, the swampy area, and the other, the southeasterly branch runs up through Fort Lee.

Q. Taking that branch of the brook, how far is it from Fort Lee to your lake? A. About two miles.

Q. What is the character of the soil as to topography, as to hills or hollows? A. Fine.

Q. Is it level or hilly country? A. It is hilly country; fed by springs all the way.

Q. Do you know anything about the volume of this brook, the number of gallons per day, anything of that kind? A. No, I couldn't say.

Q. What is the width of the stream near the pond, near the lake? A. That varies very much; it covers a large area; it covers a large area; all the section through, from the west part of Englewood and a part of Leonia and a part of Fort Lee; so that it forms a very large area, and at times a very large stream. The dam over which it flows at times it has reached two feet in height and a little over sixty feet long.

Q. Which dam are you speaking of? A. The new concrete dam I built some few years ago.

Q. At the point of the lake? A. Yes.

Q. The width of the brook, then, as it enters the lake is how much—near the Englewood Golf

grounds? A. The width in it there was fifteen feet. Of course there wouldn't be fifteen feet of water there, but when it rises, it spreads out, so that at places it is more than fifteen feet.

Q. To-day, for example, or last Saturday night; how wide is it now? A. Saturday I had about twelve feet wide.

Q. Up near Fort Lee, how wide is it? A. That varies too; I think, on an average, some five or six feet in width. That may be a rough average, but, to the best of my recollection, I should judge it was about that wide.

Q. Is it that wide near where the sewer goes into the stream? A. No, it narrows up in there.

Q. At that point how wide is it? A. The mouth of the sewer is twenty-four inches, and then spreads out; washed out.

Q. How wide is the brook at that point, near the mouth of the sewer? A. At that point I think it was from four to six feet; it varies; it goes in and out.

Q. What kind of sewer is that? A. Well, it is—

Q. Concrete or brick sewer? A. It is a pipe sewer, a large pipe sewer, twenty-four inch pipe; it is vitrified pipe, twenty-four inches in diameter.

Q. It covers what area of ground? I mean what area does the whole sewer system cover in Fort Lee, do you know? A. I don't know. There are several branches; run all through that elevation; run in various directions; almost impossible to trace.

Q. Is it several miles of sewer, I mean? A. Not in that section. It runs southeast, and I don't know how far it runs. I know it extends up from the hollow to the top of the hill, and then goes down through the hill.

Q. Does it run through several of the streets of Englewood? A. Fort Lee?

Q. Fort Lee, I mean, yes. A. Yes, it does. Then it extends to the west over the other hill; it runs over from the westerly pumping station through a six-inch pipe and goes into the second pumping station, and from there it is pumped over into the gravity sewer and from that on down to the Hudson River.

Q. What is the volume of water flowing through this sewer into the brook? In other words, how much of this twenty-four inch pipe is filled with water? A. Most of the time it is a little over half full.

Q. How many times have you been there, Mr. Garrison? A. A great many times.

Q. Have you been there during the winter, last winter, 1916-17? A. Yes, sir.

Q. Have you been there while the ice crop was being formed? A. Yes.

Q. Or about that time? A. Yes, seen it right along.

Q. What was the volume of water then? A. I think there was a volume of water coming out of there on an average of two to three hundred thousand gallons a day.

Q. That would mean—how full would the pipe be? A. I am not scientific enough on that; I am not up on that; I could not say. But I should judge, my—I base my conclusion on the fact that one of those large picture concerns, on their own acknowledgment, are sending through there about one hundred thousand gallons a day, and the other one, I should assume, is just as large, doing the same thing, although they did not tell us that.

Mr. Mackay: I ask that that be stricken out.

The Court: That will be stricken out.

Q. Do you mean the film companies? What film companies? A. Universal and Paragon.

Q. Moving picture companies? A. They are.

Q. Can you tell whether they were discharging water into this sewer? A. Yes.

Mr. Mackay: Unless he knows—

Mr. Gourley: If he knows.

The Court: Do you know this? Not what somebody told you.

A. I do know.

Q. Were they? A. Yes, they were.

Q. Was that observable in any way in this brook? A. Very much so.

Q. Tell the jury what you noticed in the water of this brook? A. I know the water changes every day; sometimes it is green; sometimes it is red, and sometimes it is black. The bottom of the brook is black, so that you can trace it to the river, right through my lake. I know the brook has turned a very dark color, whereas before that it was a nice, clean, white, sandy color.

Q. You mean before the sewer was constructed? A. Yes, sir, before the sewer was constructed.

Q. What was the condition of the brook before the sewer was constructed? A. Fine condition, all the way through.

Q. Anything about the water? What condition was that in? A. I know that people along that brook have been using it; they were up to the time of its pollution; now it is impossible to use it.

Q. What was there about the appearance of the

water, the color of the water, before the sewer was started? A. Fine, excellent.

Q. Could you use it for— A. It was named Crystal stream and Crystal brook because of its purity and fine quality.

Q. Did that characteristic exist before the sewer was turned into it? A. It did.

Q. You cut ice, I think, the previous year, 1915-16? A. Yes.

Q. What was the quality of that ice as to purity? A. I had the ice analyzed—an analysis was taken and it was in excellent condition.

Q. After the sewer was put in, you found this condition; did you find any other conditions—of pollution, I mean? A. Only from that one particular place.

Q. What other evidences were there of it? A. Of pollution?

Q. Yes. A. Why, there were lots of fecal matter, paper, toilet paper and rubber bands and other things that came down from those moving picture concerns, and tobacco, of cigar stumps—I know lots of other things came down; I guess some of the other witnesses can tell you more about it than I can.

Q. You said something about films. A. Yes, they were in it, too.

Q. What? A. They call them films; that is all I can say about it; paper, long strips of paper, and there were clothing in there, too; pieces of clothing.

Q. Long, thin strips? A. Yes.

Q. What was the smell, if any, from the brook pollution? A. Extremely bad.

Q. Was it a noticeable smell? A. Indeed it was.

Q. Could you smell it before you got to the bank

of the brook? A. Smell it for a mile down the brook, and further than that.

Q. Down stream? A. Yes, almost to the lake.

Q. In other words, walking down stream for a mile— A. Yes, sir, fully a mile.

Q. You could notice that? A. At times it is fully as bad as the Passaic River.

Q. As bad as that? A. It is.

Q. You would think it is an open sewer? A. It is an open sewer.

Q. The condition of the ice last year, 1916-17, was what? A. Bad; so bad they wouldn't allow me to put it up.

Q. How many tons did that lake in that winter yield? A. The season before?

Q. Yes, last year, 1916-17? A. I could have put up six or seven thousand tons—

Mr. Mackay: I object to him guessing at it.

Witness: I am not guessing.

Mr. Mackay: Let him state positively.

The Court: I don't suppose he got any in.

Mr. Mackay: He said "about." I assume he is guessing.

Witness: I know that there was over six thousand tons on the lake. I could have put up five thousand if I had been permitted to do so.

Mr. Mackay: I object to that and ask that it be stricken out.

The Court: Have you figured out the quantity of ice that was on your lake?

Witness: Not last year. I did that this season. There is over twelve thousand—

The Court: We are not talking about this

winter. You are asked about the winter of 1916-17.

Witness: I know there was over six thousand tons in 1916-17. It is easily computed.

Q. You cut ice off of that pond before and stacked it? A. No.

Q. Well, you have housed it? A. Never stacked any there.

Q. You have housed it? A. Yes, I have. I did put up a small stack there; I forgot about that; two years ago this winter; outside of the house.

Q. You cut it and housed it when there was ice? A. Yes.

Q. What was the capacity of your houses? A. If it is solid it will hold four thousand tons, but the way we figured it, it is less than that. We figured we had not quite that there.

Q. How much will your house hold? A. Hold nearly four thousand tons.

Q. Had you ice enough on the pond to fill the houses? A. A year ago?

Q. Yes. A. Yes, and a good deal more.

Q. Do you know what the price of ice was, the market price of ice during that year? A. Last year?

Q. Yes.

Mr. Mackay: 1916-17?
Mr. Gourley: 1916-17.

A. The ice in that section, natural ice, was three dollars a ton.

Q. Where was that? A. Englewood.

Q. Sold at retail or wholesale? A. Sold right off the bridge at the pond.

Q. What do you call selling off the bridge? A. I

have concrete platforms on which we lay the ice, and at that point the ice brought three dollars a ton, and they took it from that point and put it in their wagons.

Q. What does it cost to house four thousand tons of ice? Can you tell us anything about that? A. The cost was fifteen to twenty cents a ton; in fact, cost twenty cents up to now; that is what it was in Seventeen.

Q. Last year, 1916-1917; that would be January, February, 1917, a year ago, what was the price, the average price? A. Twenty cents a ton is the high price.

Q. What? A. Twenty cents a ton is the high price.

Q. Was that the cost then of housing ice? A. It wasn't so much as that.

Q. How much was it? A. I didn't put any up; I know what the cost was; I know what the cost to put it up was, between fifteen and twenty cents. It varies very much, owing to the season that you have, and the thickness of the ice and the condition of the weather; so that it varies very often; it varies; impossible to say just what it will cost people to put it up.

Q. Not what it would cost you now; speaking about that particular time, not the present time? A. The ice last year could have been put up for sixteen to seventeen cents a ton.

Q. That included what? A. Included all of the work of harvesting the ice—cutting, floating it in, hoisting it with the elevator, storing it and delivering it.

Q. Now, taking it out and putting it on the bridge, what does that cost? A. That costs from twenty-five to thirty-five cents; costs about thirty-five cents now. It can be taken out—owing to the

time of taking it out, how fast you are taking it out—if you are taking it out in small quantities, it will cost more.

Q. Taking it out to sell at three dollars a ton, is that in small quantities? A. Thirty-five cents is the high price.

Q. What is a fair price? We are not concerned with the high or low. What is the fair price? A. Thirty-five cents is a fair price at present.

Q. Fair price now? A. Yes; thirty was a fair price last year, for taking it out.

Q. What shrinkage is there in the ice in your houses? A. About one-quarter is a good estimate for shrinkage in the house if it is properly cared for.

Q. What way had you for caring for your ice? A. We care for it by—our house is protected by two air chambers; there are two, with a partition between, and then they are lined with three coatings of tar paper so that the air cannot get through. There is a difference of opinion in regards to the protection of ice. Some claim that chambers is better and then others claim that sawdust is better. If there is a large quantity of sawdust, that is better; if the sawdust is the proper thickness, if it is fine enough.

Q. What was your method of putting it up? I am not asking about others; asking about your method of putting up ice; is that the way you have described? A. The second, new building is protected by air chambers; the first one is protected by sawdust.

Q. Is that a good method to prevent shrinkage? A. Yes, they are both good.

Q. Is there any better method of preventing shrinkage? A. Never heard in my experience of any better.

Q. I think you told me that the shrinkage found by your experience in your house— A. Was about one-quarter, taking the season through.

Q. So that if four thousand tons were housed, you could sell three thousand tons? A. Yes.

Q. In other words, you could sell three thousand tons on the bridge, with the deduction for these charges for putting it up and taking it out? A. Yes, you could—with proper care and proper protection, you could do that.

Q. Now, what difference is there in the cost this year? A. Well, labor is a little higher this year; in the winter time there are more men around there. I could get men there from three to four dollars a day. In that place I generally pay a little more, because I want to get through as quickly as possible.

The Court: Let me hear what you have to say about fixing the date of your damages for this year. I think we will save time by taking up the discussion now. I notice that your pleadings do not allege anything of that kind; there is nothing in the pleadings that would lead the defendant to imagine for a moment that you intended any such thing.

Mr. Gourley: That is immaterial. We know what the damage is now. He would know.

The Court: You don't allege nuisance even.

Mr. Gourley: We allege what the nuisance is.

The Court: How do you fix the date of your damages?

Mr. Gourley: In which case?

The Court: For this year.

Mr. Gourley (reading from statute): "Where damages are determined with respect to any continued cause of action, they shall be determined to the time of assessment at the trial."

The Court: You allege they are "continuing?"

Mr. Gourley: Certainly; continuing right up to the present time.

The Court: What have you to say, gentlemen?

Mr. Mackay: Well, here is a suit started for a crop of ice; we are supposed to meet it, aren't we? We come here prepared to meet it. They say, we want two crops. Are we compelled to go on? They allege a continuing nuisance prior to 1916, but not after the 1916-17 crop, not after that date, and we came in fairly and squarely to meet the situation in their pleadings. That is what we came in to meet. If anything additional, other than what we are here to defend, is alleged, we are entitled to have time to combat it and meet it. We are entitled to fairness and justice in our defense as well as counsel is entitled to anything that he claims on his part for the plaintiff. We are here to answer the pleadings, and prepared to meet the question of the 1916-17 crop, and such damages as may be done by injury to the pond.

The Court: I shall allow the evidence to go to the jury as it stands, on the theory that this is a continuing nuisance, under that last clause of the complaint that has been read by counsel; and if you have any law on the

subject, I will hear you before the matter goes to the jury finally.

Mr. Mackay: Your Honor also decides that the pleadings, the complaint in this case alleges a continuing nuisance?

The Court: Yes; otherwise it would not be competent at all.

Mr. Mackay: In other words, you say that the complaint states a cause of action sufficient to show a continuing nuisance and to entitle the plaintiff to put in evidence as to the 1917-18 crop?

The Court: That is it exactly.

Mr. Gourley: Under this statute.

Mr. Mackay: And we ask an exception.

The Court: You may take an exception, and if you have any law to the contrary you may give it to me before the case goes to the jury.

Q. What difference in price was there in housing ice this year? Or what was the cost of housing ice this year? A. About five cents a ton more.

Mr. Mackay: Will it be necessary to object to every question?

The Court: No; you have put in a general objection to all evidence in reference to the 1917 ice, what it cost and what it is worth, so that you have got the whole question. I will allow it to come in, subject to your objection, and give you an exception, and the right reserved to you to furnish the Court with any law you may have to support your stand now. If you have any law that will warrant it, the Court will strike out the evidence afterward. I will allow it to

stand now. It is a mere question whether the complaint is broad enough to make it a continuing nuisance, and I think it is.

Q. The price of ice now on the bridge is what? A. Just at present—unless it has gone up, it is three dollars.

Q. Do you know anything yourself about the United States Government stopping the use of ammonia for artificial ice? A. Yes.

Mr. Mackay: I object to that.

The Court: How is that competent?

Mr. Gourley: As affecting the price of ice.

The Court: Oh, no, I do not think so. You have got now what it is worth at the present time. That is as far as you can go.

Q. What has been your experience in the past, Mr. Garrison, between the price of ice in March and in July for the last ten years?

Mr. Mackay: I object to that as speculative.

The Court: If he knows.

Q. Do you know? A. Yes.

The Court: I will allow that question, whether he knows.

Q. Will you tell us what it has been?

Mr. Mackay: I object to it.

The Court: I will sustain the objection as too remote.

Mr. Gourley: Exception.

Q. What was the character of the ice this winter, Mr. Garrison? A. Excellent, except the pollution.

Q. Putting the pollution aside; as to the thickness of the ice—that is, the winter of 1917-18? A. We had twenty-four to twenty-five inches on our lake this winter. It went to as high as twenty-five inches.

Q. Had you enough ice, then, to fill your houses? A. Three times over.

Q. In such case as that, have you stacked ice outside of the houses? A. Beg pardon?

Q. Was there enough ice to stack outside? A. Lots of ice for to stack.

Q. Did you have enough ice up on the pond to fill the houses and have a surplus to stack outside? A. Yes, we had.

Q. In this last winter? A. Yes.

Mr. Mackay: I don't think that is an element, your Honor.

The Court: He may proceed on that line, if he desires.

Mr. Mackay: I do not think it is admissible, I cannot tell what the answer is going to be.

The Court: I think it is.

Q. And you had enough ice to stack? A. Yes, we had.

Q. How much ice could you have stacked outside after filling your houses with this winter's ice? A. I could have stacked fully seven thousand tons.

Q. How is it stacked? Have you ever stacked it? A. I have.

Q. How do you stack ice? A. By putting a building right around it; putting up both ice and stack at the same time.

Q. Is that a permanent structure or just temporary? A. No, temporary.

Q. Ice men take those things down when the ice is out? A. Yes, sir.

Q. The shrinkage in those houses is higher, I suppose? A. Oh, yes, the shrinkage.

Q. I mean, is the percentage higher in the stacks than in the properly protected houses? A. Depends entirely upon how the stack is built. In most all cases there is a little more.

Q. The shrinkage is more in such a case than there would be in a properly protected house? A. There is a little more shrinkage in the method of keeping the ice in the stack than there is in the ice houses.

Q. What is the difference in percentage? A. That depends very largely on the method of constructing the stack. If the ice is well protected by a good building and tar paper or rubberoid put on the outside, so as to prevent the air from getting in, and filling the inside of that, making a solid wall, packed in with sawdust, you can keep it almost as well as in a house. In fact, if it is done thoroughly, it will keep better than it will in some houses.

Q. Why? A. Some houses are not properly protected.

Q. We are talking about your house now; not anybody else's house? A. I could have made a stack almost equal to the house, and I so arranged.

Q. You had arrangements made for that purpose? A. Yes.

Q. When? A. I had not built the stack, but I had it located and everything for that purpose.

Q. Did you engage anybody? A. Yes.

Q. Who? A. Mr. Ferry drew the plans for me.

Q. Didn't you know that the ice was still polluted? A. Yes, I did.

Q. Why did you do that? A. I did that so as to know how much I could put up. I had the ice there.

Q. As an estimate of what your loss would be? A. Yes, what the loss was.

Q. What do you say about the pollution of this winter, of this ice? A. It is just as bad, or worse than it was the previous winter. I think it is worse.

Q. What about the condition of the brook? A. It is the same.

Q. Tell us whether that has continued during the last— A. Continued right up to to-day, right up to yesterday.

Q. What? A. Continued right along, every day, right up to to-day.

Q. What did you see yesterday, you say? A. I saw the sanitary sewer flowing right into the storm sewer and in the brook, down to the lake.

Q. You have mentioned two sewers; what do you mean by sanitary and storm sewer? A. I mean two sewers built parallel, and that sanitary sewer is so contructed, into the other, that when anything happens to the sanitary sewer, it flows right over into the storm sewer and so down the brook into the lake.

Q. You mean, the sanitary sewer is inside of the storm sewer? A. Yes, it is.

Q. Open at the top? A. Open at the top, flows right over into the storm sewer, and has continued that way ever since the system—

Q. On the side of the storm sewer? A. Yes, sir.

Q. So that when it falls, it falls right over into— A. Right over into the storm sewer, and everything

that goes down into the sanitary sewer—I mean, everything that goes over it that can go over, and the greater part of it does go over, goes through. There has been no time that there hasn't been fecal matter and sewage coming down that brook.

Q. During this period? A. Yes, sir.

Q. Was it so during the formation of the ice last year? A. It was; been continuing that way every day. There hasn't been a day—

Q. Did you make application to the Board of Health of the city of Englewood for a permit to cut ice this year? A. Yes.

Q. What did they say about it? A. Refused the permit on account of that pollution.

Q. Well, are there any other evidences of pollution that you want to tell us about? Have you any fish in that pond or lake? A. I wouldn't say now; we did have.

Q. What became of them? A. Killed by the poisonous stuff that is in the brook.

Q. When was that? A. Last summer. I let the lake off, and the water ran out through my pipe where I let the lake off; and where it settled, every time I would look, I would see that the poison had killed them in there by the hundreds; laid in there in piles, of fish.

Q. You have some photographs, haven't you, of your pond or lake? A. Yes, I have.

Q. Is that (showing) one of them, this postal card? A. (Referring) Yes, sir, that is one.

Q. Where are the other photographs? A. In a paper, underneath there, beside the bag (indicating); I think you have a couple of other small ones too.

Q. This shows a scene of cutting ice; where is that? Where was it? What does that represent?

A. (Referring) That represents the center of the lake and over on the easterly shore.

Q. When was that taken? A. That was taken about eight years ago.

Q. Is there any change in the lake now as to extent? A. Yes, some; just a little larger than it was then.

Q. I show you that one— A. (Referring) Yes, taken about the same time; I think the same day. That is another section.

Q. What change is there? Isn't the general character of the houses the same? A. No, the houses are enlarged.

Q. I don't want it then. What have you here showing them at the present time? Just pick out those, now, that affect only the present time, so as to give the jury an idea of the plant. A. This (indicating) shows the effluent, the large sewer pipe, the storm sewer, at the mouth of the storm sewer at Fort Lee.

Q. When was that taken? A. That was taken— I haven't got the date.

Q. Is the photographer here? A. Yes, sir; he can tell.

The Court: You can put the photographer on and show that. That is the better way of doing it.

Q. These were all taken at the same time? A. All taken on the same day.

Mr. Gourley: I offer in evidence, sir, agreement for the sale of land from the Phelps estate to Mr. Samuel Garrison and a man named Holden, bearing date the 7th

of April, 1902; it is acknowledged and signed by the executors.

The Court: Why is that evidence needed if he has got a deed for it?

Mr. Gourley: The deed came later, sir.

The Court: What difference does it make?

Mr. Mackay: We deny that he was owner. He said he was owner in the pleadings, in July; we deny that he was owner.

Q. Is that the agreement that you refer to as having purchased? A. Yes.

Mr. Mackay: I object.

Q. And under it had you entered— A. Yes.

The Court: What is the objection?

Mr. Mackay: I object on the ground that he pleaded that he was owner and possessor. We denied it in our pleadings. Agreement to purchase is not evidence of ownership.

The Court: I will allow it to go in evidence. The effect of that will be a question.

Mr. Mackay: Exception. His pleading of possession is not ownership; we are entitled to know what the possession consisted of.

The Court: I will allow the evidence to go in, and then we will see where we are.

Mr. Gourley: I offer in evidence a deed from the Phelps estate to Samuel B. Garrison, dated the first of April, 1917; acknowledged and recorded on the 4th of October, 1917, in Book 970 of deeds for the County of Bergen.

New Jersey State Library

Mr. Mackay: I object to that; recorded after suit was started.

Q. Did you get this deed from the Phelps estate in pursuance of the other agreement to buy? A. Yes.

The Court: I will allow it to go in, subject to your objection.

Mr. Mackay: Exception.

Exhibit P 2.

Q. You say you wrote to the Board of Health of the City of Englewood; I show you what purports to be a letter from the Clerk of the Board of Health of the City of Englewood, dated December 20, 1917, and ask you whether that is the letter you refer to as having been received from the Board of Health in answer to your application?

Mr. Mackay: I object to that.

A. Yes, sir.

The Court: He is asking you if that is the letter?

Witness: Yes, sir.

Mr. Gourley: I offer the letter.

Mr. Mackay: I object to it.

The Court: Why?

Mr. Mackay: On the ground that it is no evidence of value, and not the best evidence.

The Court: What would be the best evidence?

Mr. Mackay: An official or authority, to examine him, cross examine him.

The Court: You may cross examine as to that, if you desire, before it is admitted.

Mr. Mackay: I could not cross examine later. That is the reason for my objection.

The Court: Oh.

Mr. Gourley: Communications of the Board of Health? This is the reply of the Board of Health, receipt of the letter. That is evidence as a statement and admissible.

Mr. Mackay: I don't see how it binds us in any way.

The Court: I do not think it binds you, but I will admit it.

Mr. Mackay: Exception.

Exhibit P. 3.

Cross Examination by Mr. Mackay:

Q. You are living where at the present time, Mr. Garrison? A. Teaneck.

Q. How long have you been getting ice at this particular pond? A. Ever since 1902.

Q. And that was the date of this contract that you offered in evidence? A. Since that day, yes.

Q. You were interested alone, were you? A. Not for the first year; but part of the first year I were not.

Q. After that you were alone? Were you? A. Yes, ever since.

Q. The size of the pond has always been the same? A. Practically since I owned it. We made very little change in the size of it.

Q. Well, what did you do each year—for instance, the first year you had it, what did you do? What did you do with the pond, the first year you had it? A. What do you mean by doing? You

mean something outside of the gathering of ice?

Q. Was it a pond when you took it in 1902? A. Yes.

Q. What name was it known by then? A. Crystal Lake.

Q. Crystal Lake? A. Yes.

Q. That comprised the same six acres? A. Yes.

Q. The same size it is to-day? A. Practically. We enlarged it a little on the southwest corner by enlarging the dam. We had to make it a little larger at that point; and then on the south side where I put in a concrete wall, I think somewheres like a hundred feet long. That cut it back very little.

Q. The pond wasn't the drainage place of this stream, was it? A. The stream runs through it.

Q. The stream goes alongside of it, doesn't it? A. It does not; goes right through it—except I put a barricade on the south side in the lake.

Q. To keep the water from the stream from getting into the lake? A. Not at all.

Q. Didn't you have a filter there? A. Yes, now.

Q. How long have you had the filter? A. Why, I think it is about five years; four or five years.

Q. What is the object of that? A. The object of that was to get the cold water—the easterly section of the lake is comprised of several strong springs; which, in the winter time, the water is warm. Of late years the winters have been very mild, and in those mild winters—there was much spring water in there and the ice—had a job for the ice to freeze; and the growth growing up in the water along where the springs were—so that the object of the dike was, in the winter time when we have heavy freshets and storms—along the first few years I had trouble with the leaves coming

down and that spoiled the ice for gathering, very largely.

Q. What year was that? A. I don't know; I haven't got a record of that. Then we built that dike around, so that it would carry the filth away, so that this rough stuff and leaves would go right over the dam instead of coming down through the centre of it; and then we found that the cold water was going around the dam and the easterly section of the pond had all spring water in it, so that we had a job to get the ice to freeze enough so that we could cut ice; and then we had to open up through, and made this filtering course, which is about five feet wide—our surveyor will have that on his map; I had him make a map of it; he can show it to you. I think the plan shows it to be about five feet wide and probably five feet high, and in the neighborhood of twenty-five or thirty feet long. After we built that, I put them screens across to protect the leaves coming over there, and at the westerly section of those screens we had filled that up with stones, so that it made an excellent filtering course, and the water came in and mingled in with the warm water and we did not have very much trouble with it. But we found the stream was strong then, that it ran down through the section of the pond and it made—the ice was very thin; we had a job with it. Then I put the barricade right across in front of that so as to discharge the cold water out through the section where the water came out there from the springs, and then we found we had the thing in the right condition. That only happened just a couple of years before the pollution took place.

Q. The outlet of this stream is Overpeck Creek, isn't it? A. Yes, Overpeck Creek, that is right.

Q. So that this stream goes right beyond your pond and right up in Overpeck Creek? A. Flows over my dam and past the dye works into Overpeck Creek, that is it.

Q. This particular stream takes the surface drainage, you said, from different areas? A. Yes, the whole section of the country.

Q. What do you mean by the whole section of the country? A. The sloping section that comes down through there.

Q. It runs from what point? Where does it start from? A. It is starting now from the mouth of this sewer. That is the origin of the streams, to the southeast.

Q. I am speaking of before that time. It came down through that section over the surface of the ground.

Q. From where? From what place? A. From that same hollow up there.

Q. That doesn't give any clear idea. From what place? A. If flows right on from the south.

Q. From what city? From what town? From what municipality? A. From the Borough of Fort Lee.

Q. From the Borough of Fort Lee? A. Yes.

Q. It doesn't come from Englewood, Englewood Cliffs, too? A. Yes, that is another branch. This is the main branch.

Q. Does it come from the Borough of Palisade Park? A. It does not.

Q. Leonia? A. There is a little stream that comes from Leonia; off to the south further.

Q. Suppose you tell us the different places that are drained? A. I cannot describe it to you very clearly; I will do the best I can. There is a little stream from the south that goes down through and

under the trolley road, Broad Avenue; that runs up through the southerly section of the golf grounds—very nice, clean section—and the northerly—the northeast section, branches out of it; that runs off to the section of the country to the northeast, through the swampy area, over to the top of the mountain, near the Palisades.

Q. So that all the land on either side of that is drained into that stream? A. Comes down through there, yes.

Q. Where, on the other side—Fort Lee? A. That second large stream comes from Fort Lee, and now has its origin at the mouth of this large sewer pipe.

Q. About how many streets are drained in Fort Lee, the surface drainage? A. I only know of three.

Q. What is that? A. I only know of three.

Q. What streets are they? A. Fort Lee Road—I have forgotten the name, that runs to the north, from Fort Lee Road, right along in that hollow; I cannot recall; I think it is Hillside Avenue. Maybe there are somebody here that can tell you. I cannot tell you, Mr. Mackay.

Q. Haven't you been around this section for a good many years? A. Twenty-odd years.

Q. I mean, you have been along this drainage area? A. Yes.

Q. You know just about what is drained? A. I do.

Q. How many miles would you say are drained? A. There is nearly two miles in southeasterly direction that comes from this sewer.

Q. How much from the north branch? A. The northeast?

Q. Yes. A. I should judge it was three miles to the extreme end; maybe more. I cannot tell you.

I know it is a nice, beautiful section, all fine dwellings.

Q. I did not ask you that. I asked you about drainage. A. I am trying to tell you—running through this beautiful place—several of them have very nice dams, and it is clean; you can drink the water right along, and we did drink it continuously; have, right up to this pollution. There hasn't been a day that we have not had that water for our horses and ourselves when we had been working.

Q. Do you mean to say that the City of Englewood never before condemned this ice? A. Never have.

Q. Didn't they give you notice at one time? A. I have never heard of its being condemned by the City of Englewood.

Q. Didn't the Board of Health notify you not to use this ice, a number of years ago? A. Never.

Q. You never received any notice from them? A. Never.

Q. Do you remember Doctor Curry of Englewood? A. I do.

Q. Did you ever receive a notice from him not to use this ice? A. Never did.

Q. Are you positive of that? A. I am; just as positive as I am of sitting here.

Q. Didn't you have your ice tested? A. We did.

Q. When did you have that test, what years prior to 1916? A. I think it was either two or three years before.

Q. Well, which years was that? You must remember. A. I think it was in the winter of 1916, and the year or two years previous to that. We have the analysis of that, Mr. Mackay, right here. A. I am just asking you, now. Don't get too—

Mr. Gourley: Gay!
Mr. Mackay: Gay, that's right.
Witness: I will try not.

Q. I am asking you if you had it examined or had it tested prior to 1916? A. Yes, I did.

Q. And do you remember what year it was? A. Why, I think it was 1915, I should say—unless you show the date.

Q. I am asking you; I want to find out what you know about that. A. Well, I know that.

Q. Why did you have it tested? A. For the good of my trade; so that there could be no question about pollution, or its impurity; did that voluntarily.

Q. You did it voluntarily in 1915? A. I did.

Q. Did you do it in 1914? A. That I am not sure. I think I had three different tests made of the ice.

Q. Well, that was quite important to you, wasn't it, having tests made of that ice? A. I so considered it.

Q. Can't you remember the time? A. I am giving it to you just as near as I can. If you will let me have the analysis, I can tell you exactly the exact time.

Q. Do you know about how long before the next test, without referring to the analysis? A. I only had it analyzed three times previous to this pollution; now I cannot tell you just the dates that we had it done. I know there were two in the winter time. Immediately after we had the ice put up I had the ice analyzed.

Q. Those two tests were made about when, within a month or two months? A. They were in two different winters.

Q. They were in two different winters? A. Yes.

Q. And the third test, was that made in another, different winter? You said you had three tests prior to 1916. A. There was one test made between those two winters, in the summer time. The object of that—some doctor over in Fort Lee, he saw some green stuff in the ice; he thought it was bad—

Q. I am asking you prior to 1916. A. What is the question?

Q. If it isn't a fact that you had the ice tested; you said you thought you had it tested in 1915, for the benefit of the people—

Mr. Gourley: He has answered three different times.

Mr. Mackay: Yes, and each time more indefinite than the other.

The Court: Read the question; see if you can get a direct answer.

Pending question read.

Q. Is that right? A. Yes; I said I thought it was 1915; and I think it is.

Q. Mr. Garrison, I want to know from your memory now; you are very much interested; you claim to be the plaintiff in this case? A. That is the fact.

Q. Very much interested in this matter; you say you have been getting ice there since 1902? A. That is right.

Q. You were telling us a while ago how you fixed the dam, how you put up a barricade, how the ice was protected to keep out the leaves, and did everything nicely— A. I have said so.

Q. I want to know—you had such an interest in this thing and your mind was fixed on everything—I want to know when prior to 1916 these tests were made?

The Court: If you know, that is?

A. I told you, just as plain as I possibly can, that I am quite sure I had the test made in the winter of 1916; it may have been 1917; but it was that winter.

Q. I am asking you prior to 1916; I want to get that in your head. A. I had that test made the winter previous to that; whether it was 1914-15, I could not say; that is, it was the winter of 1914-15.

Q. And the object of that test was what? A. So that I could make sure that that ice could not be questioned.

Q. Had it been questioned? A. No, it had not. I did that for my own good.

Q. Had you the ice tested before that day, before 1914? A. I am not sure about that. I think perhaps not.

Q. Had you ever had it tested before 1914? A. I don't remember that I did; never considered that it was necessary. The water had been so pure—

The Court: No, no; just answer questions; we will get along better.

A. I don't think so, Mr. Mackay.

Q. Your first test was in 1914-15, that is as near as you can recall, isn't it? A. Yes.

Q. After the ice season was over—for instance, going back, we will say, to 1912, 1913—after the ice season was over, did you drain the pond?

Mr. Gourley: What year?

Mr. Mackay: The year prior to 1915.

A. I made it a point to drain the pond pretty much every year, during the summer, once or twice.

Q. About what time of the year would you drain the pond? A. Oh, at different times; sometimes drain it, let the water off in July; sometimes let it off in November, owing to the circumstances in which I was placed, and my contract work; sometimes be a little slack with our work and want to make improvements and that to let the lake off and make the improvements. That was a process of development right along—from 1903; I don't remember that we did anything in 1902 in that respect; but after that it was a continuous process of development right along.

Q. You kept the place in pretty good shape, did you? A. I did.

Q. What cleaning did you do? A. Why, sometimes I would take out a lot of soil in there, grade it up around the sides and deepen it. One year I had to take out over 400 yards. The greater part of that came down when they were constructing the road through there. We had a tremendous flowage, and it came down through there so that I had to take out about 400 yards of sand. The object was, to let off that end for the purpose of giving them a chance to build a sewer along what we call North Avenue alongside of the lake. They couldn't build the sewer with the lake in there, with the lake near. They asked me if I would care if they consented to do that. It cost me $100. They were so long in putting it in there that the grass grew up in there as high as my head. I had to take that out; cost me $100 to clean it out.

Q. What did you do, scrape the pond—scrape the bottom of the pond? A. We took out the—yes, scraped the bottom of the pond.

Q. When did you do that? A. I made that a point to have that lake so that there could be no

question about it; so that the inspector, when he come around there, would be perfectly satisfied. He always seemed to be satisfied.

Q. You did that every year, did you? A. Not every year; when I didn't do it, then I made—it was bad for me, because the growth, as I said, in those springs grew up, a wonderful growth and accumulation, and then I would have to take the growth out, as it froze up in the ice and I had to lose by it.

Q. So that you were very particular about keeping the place clean? A. I was, every year; took extra pains with it right along.

Q. You never bothered having the ice tested in those years, but in 1914 or 1915 you thought it was a good idea to have it tested? A. Yes; and knowing that the town decided to have it drained, I thought they would come there and take the water from the pond. I did not know at the time who they were. I imagined afterwards, from what I heard, that they were—

Q. I am asking you what you know. And you never had any objection from any individual of the city of Englewood or the city council or the Board of Health or anyone? A. Never did.

Q. They never objected to your ice? A. Never did.

Q. Never said you could not use the ice, couldn't sell it either? A. No.

Q. Never compelled you to have tests made? A. No. I should have done it, but I didn't do it.

Q. I say, they never compelled you to, told you that you had to? A. No, never.

Q. Or told you how you should do it? A. No, never did.

Q. No objection from Englewood or any other municipality? A. No other place.

Q. Where did you dispose of your ice? A. The last three or four years I sold it to two men from Fort Lee, by the names of Hugo and Heft—Peter Heft—Charles Heft and Joseph Hugo.

Q. You sold all your ice to them? A. Yes.

Q. Wholesale, did you? A. Yes, wholesale; right in the houses after I got it filled up.

Q. That was in 1915, 1916? A. Yes; it was previous to the pollution; up to the time of the pollution.

Q. That would be 1915, 1916. What ice did you cut that year? A. What year?

Q. 1915-16. A. Cut it off the lake.

Q. How much? A. We filled it pretty well up, full, that year.

Q. How much? Well, the way we measured it, I think we measured up about thirty-seven hundred tons; thirty-six or thirty-seven hundred tons.

Q. Did you dispose of all that to Hugo? A. Yes, I did.

Q. Where did they get it? Did you send it to them or did they call for it? A. They took it themselves; I had nothing to do with it; sold it right in the houses; didn't touch it.

Q. Did they cut it? A. I cut it and put it in the house; they took it out of the house.

Q. What price did you get for it? A. I sold them what we had in the house for $4,850. I sold them a little stack that we put up outside so that we wouldn't have to open the house the first thing in spring and got $145 for that, making a total of $4,995.

Q. Forty-nine—what? A. $4,995.

Q. When you started this suit you were not the owner of the property, were you, Mr. Garrison? A. What is that?

Q. When you started this suit, you were not the owner of the property, were you? A. Yes, I was.

Q. You had no deed for it? A. No, but I owned it just the same.

Q. Who was the owner of it? A. I was.

Q. At the time suit was started, you had no deed of this property, had you? A. I know, but I owned it just the same.

Q. What do you mean, you owned it? A. I owned it by contract.

Q. You bought it under contract, didn't you? A. Yes.

Q. In 1902? A. Yes.

Q. Whom did you buy it from? A. From the estate of William Walter Phelps.

Q. You are connected with the estate of William Walter Phelps, aren't you, in some way or another? A. No way at all; except I lease the place from them. I am living on the estate, part of it.

Q. That is where you have been living for the last fifteen or twenty years, isn't it? A. Ever since I have been living in the State of New Jersey I have been living on their estate.

Q. Then you bought this by contract in 1902? A. Yes.

Q. And what money did you pay at that time, Mr. Garrison, on this property? A. I could only tell you that by having the record. (Referring) July 14, 1902 I paid $334. October, 1902, paid $587.46, and so it continues right along, one payment after another one. Do you want more payments?

Q. What was the next payment, next year? A. The next payment is $573.57. Next payment, 1902, $573.57; and the next one after that was 1903, $243.75.

Q. Was that the principal and interest? A. Yes.

Q. Principal and interest? A. Yes.

Q. Is it noted how much was principal and how much was interest? A. (Referring) Yes, it is. For instance, in 1903 the amount was $243.75. April 9, 1903—

Q. Have you the totals there, of principal and interest, that you paid on this property? A. Up to date?

Q. No, up to the time you got the deed for it, at the time you bought it . A. Have a little trouble to figure it out.

Q. Is it all there on that paper? A. Yes, it is all here on this paper.

Q. You don't recall how much it is without referring to that? A. No, I don't. The balance that I owe on it, do you want that?

Q. What was the price, $11,000? A. $11,000.

Q. How much did you spend on it after you got it? How much more? A. I spent a good many thousand dollars on it since I have had it; enlarged the house. The whole things stands me in something like $30,000, on which I owe $4,500.

Q. What is that? A. On which I owe $4,500.

Q. That is the amount of mortgage that you gave when you took the deed? A. No, the amount of mortgage was just double the amount I owed; the amount that I owe is $4,500.

Q. That is the amount of the mortgage? A. No, it is not. Yes, that is the amount of the mortgage; only I had to give a bond double that amount, which the law requires.

Q. What taxes did you pay? A. The taxes on that property this year, if my memory has not failed, strikes me is close on $500. Not on that particular part; there is two parcels together

there; on those two parcels the taxes are about $500.

Mr. Gourley: How is this of any importance? I don't see what the taxes have got to do with the polluting of this stream. Can you tell us, Senator?

The Court: Proceed; the evidence is now in.

Q. What insurance? A. Insurance on the ice house—

Mr. Gourley: I object to that. What is the significance?

The Court: What difference does it make about the insurance?

Mr. Mackay: This is a part of the expense of it, in decreasing the profit.

Mr. Gourley: There isn't any proof about that. I don't care whether he had a million dollar plant there.

The Court: Find out whether he insured his ice.

Mr. Mackay: Insured his buildings?

The Court: And contents.

Q. Did you insure the ice? A. The building is insured.

Q. For how much?

Mr. Gourley: What significance has this?

The Court: How could that make any difference? How can it make any difference as to whether or not the building is insured?

Mr. Mackay: Well, it is all a part of the expense. I think that is to be taken into consideration.

The Court: How can it? You see, the expense here is the gathering of that crop of ice.

Mr. Mackay: To gather that crop and to properly handle it and properly place it, he has to have buildings; has to have land. He has to have all these things that cost money. He has made an investment.

The Court: No, the question, is what the loss would be by reason of the failure to sell this ice. I do not think anything else comes in, except the cost of gathering that ice crop. If the ice crop was insured, I suppose that would be an element. If it was only the building that was insured, I don't think it would be.

Mr. Mackay: Your Honor sustains the objection?

The Court: Yes, I will sustain the objection; not if you want to show that he insured the ice crop. That I will allow you to prove. That would be an element. But the building would not, any more than the land. I do not think that has anything to do with it.

Mr. Mackay: I ask any exception to that.

The Court: Yes, take your exception.

FRANK M. WYBORN, sworn for the plaintiff, testifies as follows:

Direct Examination by Mr. Gourley:

Q. You are a photographer by profession? A. Yes, sir.

Q. Those photographs before you were taken by you, and if so, when? A. (Referring) Yes, sir; February 18, this year.

Q. What do they represent? Let us take this one. (Referring) This—I don't know what you call it—it is the stream coming out of this large pipe.

Mr. Mackay: I want to have my objection entered as to these pictures, February, 1918, not showing the original condition.

Mr. Gourley: It does show the condition any how.

Mr. Mackay: The condition in 1917-18 might be different from the condition in 1916-17. I would like to have my objection noted.

The Court: You may note your objection.

Q. This (indicating) is the mouth of the sewer? A. Yes, sir.

Q. Where, at Englewood? A. Down the hill; I call it Fort Lee.

Q. At Fort Lee? A. Yes, sir.

Mr. Gourley: Do you want to see these, or will you take my word for it?

Mr. Mackay: I would like to look at some of them.

Mr. Gourley: I offer that, sir, the mouth of Fort Lee sewer, and ask to have it marked.

The Court: You are going to show conditions to be the same now in the photographs as they were in the fore part of—

Mr. Gourley: Mr. Garrison testified to it; simply pictures of the land, houses and all; don't have to identify it from that time to now, at all.

The Court: I will admit them, subject to your objection.

Mr. Mackay: Exception.

Exhibit P. 4.

Q. The next one represents what? A. That is the house, ice house and part of the lake, showing vaulas, I should say.

Q. Crystal Lake, as Mr. Garrison called it? A. Yes, sir.

Mr. Gourley: I offer it.

Exhibit P. 5.

Q. I show you another and ask you what it represents? A. That is a part of the lake showing the ice houses.

Mr. Gourley: I offer that.

Exhibit P. 6.

Q. I show you another— A. Almost the entire lake; this little thing in here (indicating), which I couldn't get in; we didn't go back far enough.

Mr. Gourley: I offer that.

Exhibit P. 7.

Q. I show you another and ask you what that is? A. The part of the ice house showing the run, where they gather the ice.

Mr. Gourley: I offer that.

Exhibit P. 8.

Q. No. 8 shows the vaults? A. Yes, sir.

Q. I show you No. 9 and ask you what that is? A. I should say that is the northern half of the ice house; part of the run-way on the left.

Exhibit P. 9.

Q. I show you No. 10 and ask you what that is? A. The western side of the ice house.

Exhibit P. 10.

Q. I show you No. 11; what is No. 11? A. That is some refuse here (indicating).

Q. Where was No. 11 taken? A. This was taken seventeen paces from the mouth of this sewer.

Q. This is up at Fort Lee? A. Up, yes, sir. This (indicating) is Fort Lee; a little grade here; seventeen paces.

Q. Then this dark color in front, in the foreground, the dark effect in brown, in No. 12 shows what? A. Some refuse.

Q. What do you mean by refuse? A. I would call it manure, human manure.

Q. Was that near the pumping station? A. Yes, sir.

Q. Can you tell whether this stuff comes from the refuse of the pumping station? A. Yes, sir.

Exhibit P. 12.

Q. When was it that you made this trip? A. February, 1918.

Q. Did you notice this brook at that time? Were you along this brook? A. This brook which come from the mouth of this paper?

Q. Yes. A. Yes, sir.

Q. What did you see? A. I saw toilet paper; refuse came from there.

Q. What do you mean by refuse? A. Human manure, I call it; my phrase of it.

Q. Did you go down stream any distance? A. Slight distance.

Cross Examination by Mr. Mackay:

Q. Mr. Wyborn, this P. 7 shows the stream alongside of the pond, doesn't it? A. You refer to this here (indicating)?

Q. What you called the brook stream? A. I call this all the entire stream. Mr. Garrison called this sort of—run-way.

Q. I ask you if this photograph, P. 7, shows a stream alongside of the pond? Doesn't it—where the water runs right on and goes beyond the pond? A. I didn't notice it run on the pond.

Q. Do you know where it goes to? A. I think it ran right along here (indicating).

Q. Does this stream run directly into the pond or alongside of it? A. I would call this all the pond. I understood this was a dike to keep out—

Q. Where does the water run into this pond, at what point? A. Well, I couldn't just say.

Q. You located every place when you took the pictures, didn't you? A. I just made this here (indicating). I didn't look where the brook was, anything of that sort. I made pictures all around the lake.

Q. You were rather observing; you saw the manure, you say? A. This was up at Fort Lee.

Q. You observed the ground and contour, and so forth? A. Yes; up there, yes.

Q. When you take a picture you see where the stream runs into the pond? A. That I didn't pay particular attention to.

Q. That you didn't pay particular attention to? A. No.

Q. You don't know whether the stream runs into that pond or not, do you? A. Well, no.

CHARLES M. NICHOLS, sworn for the plaintiff, testifies as follows:

Direct Examination by Mr. Gourley:

Q. Mr. Nichols, what is your business? A. Assistant sanitary engineer, State Department of Health.

Q. How long have you been such engineer? A. It will be two years in May.

Q. Do you know Crystal Brook, what used to be called Crystal Brook? A. I know it, in the vicinity of the outlet of the storm sewer of Fort Lee.

Q. When did you first see that brook? A. (Referring) February 27, 1917.

Q. What was the purpose of your visit there? A. At the orders of the director of the State Department of Health to meet Mr. Garrison and go over the situation, and with a letter of complaint that the department had received from Mr. Garrison.

Q. Did you therefore go over the brook? A. I met Mr. Garrison in Teaneck at the station, and he took me with several other gentlemen to the ice pond.

Q. Who were the others? A. (Referring) John A. Madison—

Q. Who is he? A. He is sanitary inspector of the City of Englewood.

Q. Yes. A. And Mr. Harry Bennet.

Q. Who is he? A. I understand he is agent of the Phelps estate.

Q. Well, what did you do? A. Mr. Garrison just called my attention to the pond, to the ice houses, and then we proceeded to Fort Lee.

Q. What did you find as to whether the brook was polluted or not?

Mr. Mackay: Are you reading from something, Mr. Nichols?

Witness: I have a third copy of my inspections and what was found. I could not depend on my memory for that.

Mr. Gourley: You shouldn't read from it, but you can use it for the purpose of refreshing your memory.

Mr. Mackay: Was it made at the time you were on the job?

Witness: These notes?

Mr. Mackay: Yes.

Witness: No, this is a copy of my reports.

Mr. Mackay: Made at the time of inspection?

Witness: This copy was not made at the time, no, sir.

Q. But the original memorandum, was that made at the time? A. Yes, sir.

Q. How long after you visited the brook did you make the memorandum? A. I made the memorandum on that day while I was there; the reports of which these are all a resume were made the night the inspection was made.

Mr. Mackay: I think the witness ought to testify from memory.

The Court: He says he could not remember all; so he uses this as data to refresh his memory.

Mr. Gourley: An official report.

Q. Use your memory where you can, and if you need your notes to assist your memory—

Mr. Mackay: I would suggest that he put them away. If he is going to use notes, we want to see under what circumstances—

The Court: Can you remember without the use of your notes?

Witness: I could not.

The Court: Then you may use your notes.

Mr. Mackay: I object to using the notes.

The Court: This is a true copy of your report?

Witness: Yes, sir. My reports are entered in a book.

The Court: Your original reports?

Witness: Yes.

Mr. Gourley: Always make use of originals—always.

Mr. Mackay: I am not now objecting to the original or a copy; I am objecting to the use of notes at this time when there has been no attempt made to testify without notes, to test his memory on it. He can simply read off that paper and make evidence; very simple matter.

Q. So far as your memory serves you, let us have that; when it doesn't, you may look at your notes in order to aid you memory?

The Court: I have just asked the question and he says he could not remember.

Mr. Mackay: I think he ought to put the notes away until such time as he cannot remember. I could come in here as a witness with a typewritten sheet and say I could not

remember anything, read the whole thing off and make evidence.

The Court: I will allow him to use the memorandum. You say you cannot remember without it?

Witness: I make a good many inspections in a year.

The Court: In this particular case can you remember?

Witness: No, sir.

Mr. Mackay: I ask an exception.

The Court: You may use the memorandum. They do not object to using a copy instead of the original. Using that memorandum to refresh your recollection, tell us what you found.

Q. Where did you begin your examination, at which end of the brook? A. As I remember we began our examination at the outlet of the storm sewer; went there first.

Q. What did you notice, if anything, coming out of the storm sewer, in the way of discoloration or impurities of any kind? A. We noticed—

Q. Use your notes when you don't remember. A. We noticed that the color of the effluent from that pipe was a dark brown color, an unnatural color.

Q. Was there anything else there or lower down in the stream, if you noticed? A. Yes.

Q. What? A. Lower down the stream—we walked down the stream a short distance, and along the banks of the stream we found toilet and newspaper in the twiggs; and we also saw feces along the bank.

Q. Are there any buildings near there? I mean to say, was that near the outlet to the sewer? A.

This was a distance, I should say, not greater than 100 feet down the stream, from the outlet of the storm sewer.

Q. Then what other evidence did you find of pollution? A. No other evidence than what I have spoken of.

Q. How general was that? A. The unnatural brown coloration and the feces and the toilet paper and newspaper.

Q. What about the odor? A. I didn't notice the odor.

Q. How far down stream did you go? A. I do not think it was more than one hundred yards.

Q. You are speaking now of your first visit, are you? A. Yes, sir.

Q. Did you give us the date of your first visit? A. February 27, 1917.

Q. Did you make any further examination that day? A. Yes.

Q. What? A. We went over to a manhole which is, I should say, three hundred feet south of the Edwin street pumping station, the sewage pumping station in the Borough of Fort Lee, and we lifted the manhole cover and we did not find the sanitary sewer overflowing into the storm sewer at that time. The pumps in the pumping station were working as we passed the pumping station, and they stopped soon after that. After we looked at that manhole, we went to a manhole on the east side of Edwin Street; I should say it is 150 feet from the stream and on the side of the hill; we went down in that manhole—I went down, and I believe Mr. Garrabrant went down, and there was a very large flow through that manhole. There is a number of different laterals that come into that manhole from different directions; from the direc-

tion of Main Street in the upper sewer, which I understand to be the sanitary sewer, was a very large flow coming into the manhole. But due to a broken down ledge or getting near these other laterals into the manhole, this flow was diverted into the lower or storm sewer. The color was identical to the eye with the color of the flow from the storm sewer at the outlet. Then after that we proceeded to Main Street to find out where this flow came from, and we took the lid off the manhole and looked down into that manhole; that was from the top of the manhole, and there is a sanitary sewer and storm sewer at the bottom; the sanitary sewer on the upper ledge and the storm sewer at the bottom, and this large flow was coming from a westerly direction down Main Street, and came from a large pipe, I should judge, about a fifteen-inch pipe; it came right down Main Street from the west and from the direction of the Universal Studios. About three or four feet under the surface, this flow, and volume of it, was so great that it arched over the manhole and fell against the opposite wall; and as it fell, it fell into the sanitary sewer, and in doing so, of course there was some splashing that went down into the storm sewer, but most of it fell into the sanitary sewer and was carried back towards this manhole east of Edwin Street which we had just visited; and I judged, from the evidence of the eye, that this sewage, or this flow that we had seen in the manhole east of Edwin Street, was the same as this heavy flow that came from this pipe on Main Street.

Q. Did you make a further examination that day? All this testimony has been by memory, I notice; you haven't looked at your notes? A. We went to the office of the borough engineer, Mr. Lang.

Q. Don't give us what he said, because that is not evidence. Did you with him go anywhere? A. Yes; I requested him to come up and look at the conditions which we had just seen, and he came with me and looked at the manhole in Main Street; the manhole visited before that, on the east side of Edwin Street, and the manhole about 300 feet south of the Edwin Street pumping station; and I believe that he also observed the storm sewer outlet; I cannot be sure.

Q. Did you go up to the film places? A. No.

Q. Does that conclude your examination of that day? A. Yes.

Q. When did you visit him again after that day? A. My next examination was on April 23, 1917.

Q. Whom did you meet that day and with whom did you go? A. I do not think that I met any one. I may have proceeded to the borough engineer's office, but I cannot be sure of it; but I did examine the manhole 300 feet south of the Edwin Street pumping station and found that it was operating satisfactorily. There was no overflow on that day.

I would just like to say this, that on the day of the former examination, February 27, 1917, at the manhole 300 feet south of the Edwin Street pumping station, we found that the top of the apron, over which the sanitary sewer, when it does overflow, overflows into the storm sewer at the bottom—we found on the top of this apron, the apron was very wet and we found clumps of toilet paper right on the top ridge, and other fecal matter.

Q. By that do I understand you to mean that inside this sewer there was a shoulder carried along the wall of it, which you call the sanitary sewer? A. Well, it is very hard to describe, but—

Q. Is it that in effect? A. Well, the sanitary sewer—

Q. Do you say that would be a fair description of the sanitary sewer? A. The sanitary ran more this way (illustrating), open at the top.

Q. Any other sewer, as the storm sewer, is closed at the top? A. No, the storm sewer is not closed at the top.

Q. The area over it is what? A. It is a manhole with an iron cover.

Q. But the sewer itself, running all the way down is closed, built over it on top? The street is over it? A. Well, the street is over it, but so constructed that when you take the cover off the manhole—

Q. As one manhole or is there a distance between the manholes? A. Distance between the manhole covers.

Q. The storm sewer has this arrangement at the top, is that right,—this apron at the top? A. I don't know what it has between the manholes, but any manholes, you take the cover off, you can see both sanitary and storm sewer, both together.

The Court: It isn't separate?

The Witness: They are divided by a concrete wall.

The Court: Between the two?

The Witness: Yes.

Q. Just draw a little diagram. A. (Referring.)

Mr. Gourley: May I show that, with your consent, to the jury?

The Court: Show it to counsel first.

Mr. Mackay: (Referring) No objection.

Mr. Gourley: Just come over here (to the jury), while you are illustrating.

The Court: Let the witness explain it to

the jury. Go over there and explain to the jury.

The Witness: (To jury) Of course there is a manhole lid here, iron lid, just the same as there is anywhere. This is a brick and concrete manhole, built up, and the upper lid in the manhole is the sanitary sewer that runs here (indicating); it is open here on top, and the only thing that separates the sanitary and the storm sewer is this wall of concrete, and when this sanitary sewer fills up to this (indicating) level, of course there is nothing to do but find the natural level over the wall into the storm sewer.

Q. In other words, this point where I hold the pencil now is the top of the sanitary sewer? A. Yes, if that is the point.

Q. This is made of what, brick or cement? A. Made of cement; maybe a brick wall under it, but there is cement.

Q. When this shoulder, so to speak, on this sewer, this sanitary sewer, fills up, it flows over the top of that and drops down into the storm sewer? A. That is the idea.

Q. Was there anything more about that visit? A. That visit we are now discussing was April 27, 1917, and I again was brought by reference back to the first inspection. There is nothing more on the inspection of April 23, 1917. I found it was not overflowing in this manhole on that date.

Q. Anybody with you at that time? A. No, sir.

Q. Well, you examined the brook at that time? A. I do not think I did.

Q. Did you find out anything about the film companies? A. Not on that day, apparently.

Q. When did you find out, if at any time, about the film companies? A. On the inspection of February 27, 1917, Mr. Lang told us about the film companies.

The Court: Never mind what he told you; that is incompetent.

Q. Did you know whether there were any prior complaints of putting water in the storm sewer or sanitary sewer? A. The department had received a complaint previous to this, that the film companies—

Mr. Mackay: I object.

The Court: That is objectionable.

Q. Did you make any investigation to see whether there were any putting water into the storm sewer or not? Did you know from the appearance of the water, or from any evidence that you had on that point? A. On the date of February 27, 1917, the appearance, the brown appearance in the stream, I believe to have come from the movie studios.

Q. Why do you say from the appearance? What led you to believe it came from the movie studios? A. Well, it appeared to be a dye that was not natural to the stream.

Q. Was it a dye discoloration? A. It appeared to be a dyeing discoloration.

Q. Do you know whether it appeared to be of a uniform color or did it change and was it only a temporary color? A. It was not uniform. I have seen it different colors.

Q. Do you know what quantity of water they used in their work? A. About 200,000 gallons a day, I believe.

Q. What was that water used for? A. It is used for washing the films, cleaning them. I believe it involves a certain amount of chemicals; I don't know what they are; receives these coloring matters that were used in those ways.

Q. Did you visit the place again at any time? A. (Referring) My next visit was on May 17, 1917.

Q. Who were with you at that time? A. I was accompanied by another inspector, Mr. I. R. Riker. We came up for the purpose of making a test on the two movie studios, the Paragon and Universal.

Q. Your visit was only for the films? A. Well, we examined the brook on that date.

Q. What did you find the condition of the brook? A. Crystal brook was colored a dark bluish green.

Q. Blue green? A. Blue green, yes.

Q. How extensive was that discoloration? Did it reach over the whole brook? A. The whole brook, yes, sir.

Q. On the surface or through the whole water? A. The water was perfectly clear, and it seemed to go through the whole volume of the water.

Q. Any evidences of this fecal matter or paper? A. Not noticed on that day, no, sir.

Q. Did you notice anything at these visits about the odor from the brook? A. No, I could not say that I did.

Q. You have no memorandum of that? A. No.

Q. Well, what further did you find? A. That is all, directly conneected with the question that day.

Q. That covers your examination of the subject? A. No, I made other inspections at later dates.

Q. What did you find on those inspections, just generally?

The Court: When were they? Give us some idea when they were?

A. The next inspection was on July 16, 1917. Well, that inspection was for the purpose of observing the studios, the condition of the connections.

The Court: Did you examine the brook?
Witness: No, sir.

Q. Did you examine the brook again at any time? A. Yes.

Q. When? A. On September 17, 1917.

Mr. Mackay: I object on the same general line.

The Court: Yes, I will allow you an exception to that. I will allow it.

Q. What did you find? A. An examination of the combined manhole that I have spoken of, about 300 feet south of Edwin Street pumping station, where the construction was as described, showed that the sanitary sewer was overflowing into the storm sewer at that time.

Q. Well, any other— A. I went to the pumping station, Edwin Street pumping station they were working on one pump, repairing it; the duplicate pump was working at that time.

Q. This was overflowing when you saw it? A. Yes.

The Court: To what extent?

Witness: Well, I could not give you the exact volume.

The Court: You have some idea whether it was just dropping over or whether there was a considerable quantity?

Witness: No, there was a considerable quantity. I visited the office of the borough engineer at that time.

Q. He told you a lot, I suppose, but we cannot take it in this way. Anything else? A. On December 19, 1917—

The Court: You may take an exception to that. Proceed.

Mr. Mackay: That goes to all this?

The Court: Yes.

A. On December 19, 1917, I was accompanied by Mr. John A. Manson, sanitary inspector of Englewood; we viewed the effluent of the storm sewer into Crystal brook, and at that time we saw toilet and newspaper along the edge of the brook, right at the point where the sewer empties into Crystal Brook; and also feces. We went to the manhole which is 300 feet south of the Edwin Street pumping station, the combined manhole.

Q. That is the first manhole? A. Yes. Well, no, it is not the first manhole; but it is the first manhole into which the two sewers appear in one manhole. That is the date of the flow going over the sanitary sewer.

The Court: What did you find there?

Witness: Found that the sanitary sewer was overflowing into the storm sewer at that point. Then on January 5, 1918, I met Mr. Manson, sanitary inspector of Englewood, and on that date we made a dye test. Our

method of discovering and tracing a pollu tion from its source to the particular place where we wished to trace it, is to take a dye, which we call the—which colors the water a bright green, and we place that in the flush of the toilet of some house in the particular town that we are interested in, and flush that through and observe it coming through the sewer, the color, at different points. And that was done that day. Mr. Manson witnessed my placing the dye into the flush of the property at the southeast corner of Jane and Main Streets in Fort Lee. We went to the combined manhole, near the pumping station, and we witnessed the dye appear in the sanitary sewer with the green color; we witnessed it overflow over this concrete apron into the storm sewer. We went down further, to the outlet of the storm sewer, and we witnessed the green color appear in Crystal Brook at that point.

Q. Was there a later date than that? A. (Referring) On March 4 I went to the pumping station—

Mr. Mackay: Same objection, your Honor?

The Court: Yes.

Witness: On March 4—

Mr. Mackay: What year?

Witness: 1918. I went to the pumping station on that date; Mr. Manson was with me; and also Mr. Eckerson, the engineer; and we took samples. I colored samples from the storm sewer outlet into Crystal Brook; and those samples were colored in

sight of Mr. Eckerson and Mr. Manson, and the number of those samples was noted by them on the bottles. Those bottles were placed in a container and kept in my possession until I delivered them to the chemist in Trenton for analysis.

Q. What is the chemist's name? A. Mr. Applegate.

Q. Is he here to-day? A. Yes.

Q. Did you take any other samples of the water at any other time? A. No, I believe not.

Q. That completes, you think, your connection with the question? A. Yes.

Cross Examination by Mr. Mackay:

Q. The first time you came out to Fort Lee, you came from Trenton, did you, Mr. Nichols? A. I do not know whether I came direct from Trenton. My home is in Caldwell, New Jersey, and I use that as a sort of headquarters.

Q. But you made an appointment to meet Mr. Garrison, did you? A. Yes.

Q. And it was at Mr. Garrison's request that you went over there? A. That is right.

Q. Where did you meet him in Teaneck? A. Teaneck station.

Q. And then went over with him to look— A. In an automobile.

Q. —over this condition? A. That is right.

Q. When you went on April 23 it was at Mr. Garrison's request? A. (Referring) No, that was a routine inspection that I made to see in what condition matters stood at that time.

Q. Did you meet Mr. Garrison? A. No.

Q. Did you meet him in May? A. No.

Q. Did you meet him again after that? A. (Referring). Except this inspection of March 4, that I have spoken of, at Fort Lee.

Q. At his request was that? A. Yes.

Q. He asked you to come over there? A. He did.

Q. Did you come out from Trenton? A. I do not think so, directly, no.

Q. Where did you come from? A. Came from Caldwell.

Q. From your home? A. Yes.

Q. And met Mr. Garrison at the Teaneck station? A. No, I met him in Fort Lee.

EDWIN G. APPLEGATE, sworn for the plaintiff, testifies as follows:

Direct Examination by Mr. Gourley:

Q. Mr. Applegate, what is your profession? A. Chemist, State Department of Health.

Q. How long have you been a chemist? A. A little over four years.

Q. Where were you graduated from? A. Princeton University?

Q. When? A. 1913.

Q. Take your degree? A. Bachelor of Science.

Q. What have been your activities in your profession from that time until now? A. A few months after I graduated I took a position with the State Department of Health, and since then I have been a chemist, analyzing water, sewage and other wastes.

Q. For the department? A. For the department.

Q. Have you any of your time to yourself for outside work? A. No, I haven't done any outside work.

Q. Did Mr. Nichols submit to you some bottles for examination? A. He did; three one quart bottles.

Q. The contents of which were for examination? A. Yes, sir.

Q. Have you those bottles with you? A. I have, yes.

Q. Just let us see them, please.

The Court: When did you get those?

Q. Yes, when did you get those? A. (Referring.) I will have to refer to the slips which Mr. Nichols filled out. March 5th, 1:30 P. M.

Mr. Mackay: What year?
Witness: 1918.
Mr. Mackay: I object.

Q. What marks are on the bottles?

The Court: I am going to allow it.
Mr. Mackay: Exception—on the same ground as previously entered.

A. The bottles and slips have duplicate numbers, serial numbers.

Q. There are three bottles here: 3354, 3355, 3356? A. Yes, sir.

Q. "Department of Health." What do you say about the slips? What slips do you mean? A. There are slips which were filled out by Mr. Nichols, containing his signature, and turned over to me, together with the bottles; the slips describing the source of the liquids in composition.

Q. Those were handed to you at the time by Mr. Nichols? A. Yes.

Mr. Gourley: May I ask Mr. Nichols a question here?

The Court: Yes, I suppose you may.

Mr. Nichols: Those are the slips.

Q. In consequence of that what did you do, Mr. Applegate? A. I performed various chemical analyses upon the contents of the bottles, representing the portions which have been removed, and I performed a similar analysis upon each one of the bottles and secured certain chemical results.

Q. Through what form did these analyses take you? In other words, what did you do? How was it done? A. I performed one test for bacteria of fecal origin on each of the samples, and I performed a test on the samples for nitrogen in various aspects; one is nitrogen, and one is nitrates as nitrites; another is nitrogen as nitrates, to decide the alkalinity of the samples, and the amount of free ammonia present.

Q. Amount of which? A. Free ammonia present.

Q. What was the result of that examination, of each bottle? A. Each one of the samples had the same analysis on.

Q. Any other analysis made? Did you subject the water to any other treatment? A. I performed an analysis for the amount of oxygen absorbed by this sewage in process of oxidization.

Q. Those two inquiries covered the field, in other words? A. Yes, they covered the main chemical analysis I made, with one exception.

Q. What is that? A. Upon one of the samples I noticed a peculiarity that I followed out, which

was a capacity of the sample for absorbing oxygen in the form of permanganate (?) while cold. Sewages ordinarily do not have any such properties to any considerable extent. There was in this one sample—I ran in potassium permanganate to obtain the amount it would absorb; that is, the extent it would be absorbed at ordinary temperatures. That was an extreme absorb for sewage.

Q. What did that lead you to conclude if anything? A. That there was some material in there which was not in ordinary sewages, which would remove, extend, or, as we speak of it, chemically reduce chemical compounds.

Q. All this led to a conclusion about the purity of the water? A. Well, I merely performed an analysis upon the samples. I rendered no opinion on it.

Q. Did those analyses indicate to you whether the water was pure or not for potable purposes? A. Yes. The analyses indicated that there were chemicals indicating organic material in those quantities, which is not normal to water.

Q. I notice here that the samples show a different shade or color; 3354 seems to be lighter than the other, and 3356 seems lighter than 3355; what significance has that, if any? A. I could not testify to that, because I just received these three bottles of water, and I haven't any further information other than what is contained in these slips, that Mr. Nichols has written.

Recess until 2 P. M.

Afternoon session.

EDWIN G. APPLEGATE, resumed.

Cross Examination Continued by Mr. Gourley:

Q. What bacteria did they show? A. I made a test for bacteria which originate from the intestines from warm-blooded animals, namely bacillus coli, and I found those present—shall I give you the quantities?

Q. You may. A. Sample 13354—

The Court: Now, which is that? Point it out,—the bottle.

The Witness: 13354.

Q. What bacteria did you find in that? A. Coli present in 1 one-thousandth in a CC—cubic centimeter, that is.

The Court: One one-thousandth?

The Witness: Yes, one one-thousandth in a CC. Sample 13355, one bacillus coli present in two thousandths of a cubic centimeter; 13356 had baccillus coli present in 2 one-thousandths of a cubic centimeter.

Q. What does that indicate, the presence of that bacillus? A. It indicates that matters have been forced into this liquid which originates from the intestines of warm-blooded animals.

Q. Do any of these results indicate sewage? A. The analyses of all three indicate that the liquids are sewage,—fairly strong sewage.

Q. And what effect has sewage in that water? A. It affects it in several ways. First, the presence

of these germs from the warm-blooded animals, which, of course, will be communicated by disease germs, because this is a test for just one particular kind, which is used as an indicator of the presence of the general germs which are found in sewage, and that is the bacterial side, and from the chemical side, the running in of this material which consumes oxygen will consume the oxygen which is dissolved in the water of the stream, and if the sewage is present in large enough quantity, and the flow of the stream is small, it will present more organic matter than the oxygen will oxidize, leaving the stream in a putrescent state.

Cross Examination by Mr. Mackay:

Q. This is the condition that you found there in March, 1918, isn't it? A. That is the analysis, yes, sir.

Q. And you received them on what date? A. March 5th.

Q. March 5th, 1918? A. Yes.

Q. That is the only samples you had and the only tests you made? A. It is.

Q. So far as you know, the only ones that were made? A. Yes.

Mr. Mackay: That is all.

By Mr. Gourley:

Q. That is all that were made by you? A. Yes, sir, all the analyses made by me.

CHARLES M. NICHOLS, recalled.

Re-direct Examination by Mr. Gourley:

Q. Mr. Applegate says he received those three papers from you. Did you give them to him? A. I did, personally.

Q. You handed them to him personally when? A. At 1:30 P. M. on March 25.

Q. 1918? A. 1918.

Q. Was that at the time you gave him those three bottles that are before you now? A. Yes, sir.

Q. On the upper left hand corner are numbers, 3354. What does that indicate? A. That indicates that it was taken from a certain place which is given here.

Q. Does that represent the contents of the bottle of that number? A. It does. It is a corresponding number. The numbers on the bottle and on these slips correspond.

Q. Well, that slip you have in your hand is 3354? A. 13354.

Q. Oh, 13354? A. Yes, sir.

Q. Now where, looking at that slip, can you tell us, this water in bottle 13354, was taken from? A. That was taken from the brook which flows from the Borough of Fort Lee into the Borough of Leonia; it was taken within the Borough of Leonia, about 50 feet west of the Fort Lee line.

The Court: That was taken in the Borough of Leonia?

The Witness: Yes.

The Court: Then how does that throw any light on this subject?

The Witness: Well—

The Court: I am asking Mr. Gourley, not you.

By Mr. Gourley:

Q. Well, how far is that from the mouth of this sewer? A. This is not connected strictly with the sewer leading into Crystal Brook, but this brook receives sewage at times which, in its normal course, would be pumped over the ridge into Crystal Brook at Eben Street Pumping Station.

Q. I see. But this point in Leonia is how far from Crystal Lake, where you got the water in that bottle before you,—how far is that from Crystal Lake? A. Well, this brook does not run into Crystal Lake. I suppose, about two miles.

Q. Up the stream, you mean, or below? A. It is below the stream.

Q. I see. Well, how far below Crystal Lake? A. Well, I cannot say. This brook does not flow into Crystal Lake.

Q. Then, on 13355, what does that indicate? A. That sample 13355, which is this sample (indicating), was taken from Crystal Brook at the point where the Storm Sewer System of Fort Lee empties into it, on March 4th, at 1:45 P. M.

Q. I show you the third slip. A. Sample 13356, which is this sample (indicating),—that was taken from the same point at 10:55 A. M. on March 4th, 1918.

Mr. Gourley: I offer those slips, sir.

The Court: Mr. Gourley, how do you connect the first sample with this case at all?

Mr. Gourley: It is only illustrative, sir, that is all.

The Court: Well, I should strike it out.

Mr. Gourley: To show the condition of the brook—it doesn't affect this brook at all. They did this for the purpose of a comparative analysis, I suppose. I am perfectly willing to let it go out.

The Court: Strike out all the evidence in reference to the first sample.

Mr. Gourley: The two darker colors.

Mr. Mackay: My objection will be noted to the effect that these samples were taken —13355 and 13356 were taken on March 4th, 1918.

The Court: The date being anterior, you think it is not competent?

Mr. Mackay: Yes.

The Court: You may take your exception. I will allow it to stand except so far as this first number is concerned.

Cross Examination by Mr. Mackay:

Q. You took these samples yourself personally? A. I did, personally.

Q. And put them in those bottles? A. In those bottles.

By the Court:

Q. How did you get the sample? Did you take the bottle and let it run in, or how? A. I put the bottle down into the brook and let it fill up.

(Witness excused.)

The Court: The testimony of Mr. Applegate with reference to the first sample, Bottle 13354, is stricken out.

JOHN A. MASON, called as a witness on behalf of the plaintiff, being first duly sworn, testified as follows:

Direct Examination by Mr. Gourley:

Q. Mr. Mason, what is your business? A. Sanitary inspector for the city of Englewood.

Q. For where? A. The City of Englewood.

Q. How long have you been such inspector? A. Ten years.

Q. Was your attention called to Crystal Brook in reference to the question of its pollution? A. Yes.

Q. When was your attention first called to it? A. In April of 1916.

The Court: 1916.

Q. 1916 or 1917? A. 1916.

Q. 1916? A. Yes.

Q. When was the sewer of the Borough of Fort Lee finished and in operation? A. That I do not know.

Q. In reference to the time your attention was called to it? A. I don't know.

Q. Well, what did you do when your attention was called to it; did you make any examination then? A. Yes, I went over the brook and found that the water was very much discolored, and I wrote a letter to the Board of Health of the Borough of Fort Lee, and called their attention to that fact, and they replied that they would look into the matter at that time.

Q. Did you later make any examination, or did you make any notes? A. Yes, a number of times.

I have some correspondence here which you can have if you want it.

Q. I will look at it. What examination or inspection did you make yourself, Mr. Mason, to determine about the pollution of the brook? A. Why, I went over the brook and noticed particularly the discoloration of the water in the brook. Later I went to Fort Lee and found that pollution went into the brook from a large pipe which was termed the storm sewer.

Q. How wide is the brook just at that point where the mouth of this storm sewer joins it? A. Two or three feet.

Q. And where is that—is that in the Borough of Fort Lee or in Englewood? A. In Fort Lee, the source of the brook.

Q. How far does the brook run down before it enters the City of Englewood? A. A mile; I would say about a mile—before it enters the Borough of Englewood?

Q. Yes. A. Oh, I don't know the distance; a quarter of a mile or half a mile.

Q. A quarter or half a mile? A. Yes.

Q. Then it runs down into Crystal Lake? A. Yes, sir.

Q. And that is in the City of Englewood? A. Yes, sir.

Q. Now, what examination did you make in person, or what, if anything, did you notice on any of these visits concerning the condition of the pollution to the brook? A. Well, I did notice in various inspections such things as burnt matches, cigar stumps, dish water—that is small crumbs indicating dish water, and various kinds of pollution—polluting material coming out of this pipe and entering directly into the brook. In fact, I have never been there when it ran clear.

The Court: What do you mean by that?

The Witness: I mean by that—I tried to correct myself, that all inspections I have made, I have always found turbid water.

Q. How many inspections did you make, Mr. Mason? A. Oh, I couldn't recall; probably a dozen or more.

Q. Covering what period of time? A. From April, 1916, up to the present time.

Q. Was anyone with you during this time? A. Yes, Mr. Nichols, from the State Board. I have been with him two or three times, and on one occasion there were two inspectors, or two men from the Lederle Laboratories in New York.

Q. What date was that, Mr. Mason? A. That was in November, as near as I can tell; about that time.

Q. Which year? A. 1916.

Q. Last November, or the November before? A. What say?

Q. Last November or the November preceding? A. I think it was a year ago.

Q. That would carry it over to November, 1916, then? A. Yes; I haven't the dates here.

Q. Who was there? A. Mr. Garrison introduced these two men, and they were up there for the purpose of going over the brook and take samples of the water. We took samples that day.

Q. Was Mr. Brosky one of them? A. Mr. Brosky, yes.

Q. Do you know where Mr. Brosky is? A. No.

Q. You don't know whether he is in one of the southern camps? A. No.

Q. I say, do you know that?

Mr. Mackay: I object to that as leading.

Q. Do you go to his church?

Mr. Mackay: Objected to as leading.

The Court: He says he don't know where he is.

Mr. Gourley: You don't object to a man serving his country?

Mr. Mackay: Well, I object to your stating it; I don't mind a witness testifying.

Q. Who was the other one? A. Mr. Bramley.

Q. Is he here in court now? A. I don't see him—yes, here he is (indicating).

Mr. Gourley: I think that is all.

Cross Examination by Mr. Mackay:

Q. You say you have been connected with the Board of Health for how long? A. Ten years.

Q. And in what capacity? A. Sanitary inspector.

Q. And the first inspection you made was what date? A. Some time in April of 1916.

Q. And did you go alone that day, or was someone with you? A. That day I was alone; the first time I went was on complaint of people living along the brook.

Q. And what did you find that day? A. I found the water very much discolored.

Q. Discolored? A. Yes.

Q. Just what part of the brook did you examine? A. Why, the branch that leads from the Borough of Fort Lee into the Golf Club in Englewood—the golf course; the southern branch of the brook.

Q. What color did it appear to be? A. Dark blue—that is, purple.

Q. Dark purple? A. Yes.

Q. And the same color all along the stream? A. No; it varied, but the bottom of the brook bed was very much discolored, showing that the discolored matter must have come down for some time.

Q. How long would you say it had been coming down? A. Oh, I don't know.

Q. Can you give us about? A. Why, you can form your own conclusion. I said the bottom or the bed of the brook was very much discolored. That wouldn't happen in a day or two. I don't know.

Q. A month, two months, or a year? A. Perhaps; I don't know.

Q. Some length of time? A. Some length of time, no doubt.

Q. Had the Board of Health ever prevented Garrison from cutting ice on this pond? A. No.

Q. Never? A. No.

Q. Did they ever condemn the ice? A. 1916, yes; 1916 or 1917.

Q. Prior to that time had they ever objected? A. No.

Q. Never in any way? A. Not that I know of, no.

Q. Wasn't there a time that it was condemned by reason of some growth in the pond? A. That was a later development, and Mr. Garrison was just verbally requested not to dispose of that ice for potable purposes, but that was after the ice was harvested.

Q. When was that? A. That was due to the fact that there is some kind of a growth in the bottom of the pond which adhered to the ice, and the ice did not look good.

Q. What crop was this? A. That was 1914-1915, I don't know—1914, perhaps.

Q. 1914 and 1915 crop? A. 1913 or 1914, possible; I don't remember that, but no official action was taken.

Q. Was that a request by the Board of Health to Garrison? A. No, Mr. Garrison spoke of it to me and said he was not going to sell the ice; it did not look good.

Q. Well, I thought you said the Board requested him not to sell it for potable purposes? A. Well, I didn't intend to say that. Mr. Garrison spoke of that himself. He said he couldn't sell the ice, and the next year he cleaned the pond.

Q. He said he hadn't cleaned the pond?

Mr. Gourley: The next year he cleaned the pond.

Q. And he said he hadn't cleaned the pond that year? A. I don't know; I understood that it was the weeds in the bottom of the pond that forced into the ice.

Q. Well, you had some argument or some contention or some correspondence about the ice of 1913 or 1914 or 1915?

Mr. Gourley: Object to it; there was no correspondence or anything of the kind.

The Court: The witness said something about it. Proceed.

Q. Now, let us know exactly what it was? A. Well, Mr. Garrison told me that the ice didn't look good and that he wouldn't sell it or couldn't sell it; I don't recall which.

Q. Did he sell ice in Englewood? A. No.

Q. Was he in the habit of doing it? A. Not that I know of.

Q. Well, what was the occasion, then, for this conversation, do you know? A. Well, it was in regard to cleaning the pond; cleaning the bottom of the pond.

Q. Well, did he come to you or did you go to him? A. I don't recall the circumstances; it was just a conversation we had.

Q. What was the matter with the ice; did you see any of it? A. Yes, I saw some if it; it didn't look clear.

Q. Didn't look clear? A. No.

Q. Well, what color was it? Do any of these bottles show the color? A. No, it was simply some weeds.

Q. Well, did it discolor the ice? A. No.

Q. What was done with the ice? Did he dispose of it for potable reasons, do you know? A. I don't know.

Q. You don't know? A. I don't know.

Q. Did he dispose of it—did you meet him later? A. No.

Q. Did you ever ask him about it? A. No further than that it was simply that conversation we had. He said that some of the grass on the bottom got into the ice.

(Witness excused.)

CHARLES T. WATSON, called as a witness on behalf of the plaintiff, having been first duly sworn, testified as follows:

Direct Examination by Mr. Gourley:

Q. Mr. Watson, are you secretary of the Board of Health of the City of Englewood? A. Yes, sir.

Q. Have you received any request from Mr. Samuel P. Garrison for permission to harvest his ice on Crystal Pond or Lake? A. Yes, sir, we have that.

Q. Have you one for the year 1916-1917? A. I wasn't secretary at that time; I couldn't tell you.

Q. Well, say February, 1917, or along that time? A. I will have to refer to my book.

Q. Well, look at your minutes and see what you have.

The Court: Have you the original records there?

The Witness: Yes, sir.

The Court: All right, proceed.

The Witness: Mr. Mason I believe has a list of the dates.

Q. You have the minutes of the City of Englewood there? A. Yes, sir.

Q. In your handwriting? A. No, sir.

Q. Whose handwriting? A. An inspector's.

Q. Made to you—made to the board? A. Yes, sir.

Q. And written by whom? A. Mr. Mason.

Q. What part did you take in it? A. Well, I act as secretary and act as clerk and inspector.

Q. The minutes are in your possession? A. Yes, sir.

Q. Are they an accurate report of the affairs as they took place? A. Yes, sir.

Q. Can you tell me whether a request was made by Mr. Garrison for a permit to harvest ice? A. Yes, sir.

Q. February 17th or about that time? A. February 17th? Well, the meeting was on February 27th.

Q. February 27th? A. Yes, sir.

Q. Did that cover a request dated January 1st, 1917? A. Yes.

Q. Did you receive a letter from Mr. Garrison bearing dated January 1st, 1917, requesting a permit to harvest his ice at Nordhoff on Crystal Lake? This letter is dated January 1st, as I understand it. A. Then it would be probably February 12th.

Q. Well, whenever the next meeting was, haven't you a meeting there of January 8th, 1917? A. January 10th.

Q. At that meeting does it appear that a letter from Mr. Garrison was taken up? A. Yes, sir, here is one.

Q. Is that the original letter or a copy? A. A copy.

Q. Where is the original letter? A. Mr. Mason has it, I guess.

Q. Do you keep this as secretary and clerk of the board? A. Mr. Mason keeps that.

Q. An inspector keeps them?

Mr. Gourley: Have you that, Mr. Mason?

The Court: Copies of everything there?

Mr. Gourley: Yes, but I want the original.

Q. Well, what do your minutes show? Did you receive a letter? A. Yes, sir.

Q. Now, do the minutes show what action was taken by the board upon it; was it granted or refused? A. It was refused.

Q. When was it refused? A. January 10th.

Q. Is the report there? A. Yes, sir.

Q. What does it say? A. It says, "At a meeting of the Board of Health, your request for a per-

mit to cut ice and dispose of same for commercial purposes was discussed and acted upon to the effect that by a unanimous vote it was decided that the matter should be presented in toto to the State Board of Health, and be acted upon by that body. The alleged pollution of Crystal Lake has developed into an inter-borough affair, and the board is of the opinion that it should not independently decide the matter."

Q. What was the next action of the board on that request that your minutes show? A. Here is a letter to Jacob D. Krise.

Q. No, I mean in references to the granting or refusing a permit later. What do your minutes show? A. Well, I will have to get the date of that, or look all through the books. Mr. Mason was to take them down and give me the dates.

Mr. Gourley (addressing Mr. Mason): Well, Mr. Mason, will you just come up here a minute and give him the dates?

The Witness: This is dated January 27th, 1917: "Your two applications for a permit to cut ice from a body of water within the City of Englewood, known as Crystal Lake, dated January 1st and January 22nd, have been received and acted upon by the Board of Health to the effect that I am instructed to advise you your application is not granted. This action is in accordance with the general statute P-161550, and approved March 18th, 1885, an act in respect to the cutting of ice and the sale of ice in cities of this State * * *."

Q. Was that in accordance with the vote or direction of the Board of Health? A. Yes, sir.

Q. Now, did you write to Mr. Garrison, January 10th, 1917? A. Yes, sir.

Q. You wrote a letter to Mr. Price, director of the State Department, that date, did you, on the subject? A. Yes, sir.

Q. Now, then, on December 26th, 1917, did you send them this letter, Exhibit P-3, which I show you? A. Yes, sir.

Q. Will you turn to your minutes showing your authority for sending him that letter? A. What date was that?

Q. December 26th. Your letter is dated December 26th. Your meeting may have been before that a day or two. A. This is one of January 27th. That is what I have just read.

Q. Yes, the meeting of December 26th, 1917—the meeting preceding that date. What do you find? A. I find here—

> Mr. Mackay: Well, I object to any letter to the State Board of Health. I don't see how it is binding on us.
>
> The Court: It is the action of this Board of Health. He is reading from the minutes of what their action was.
>
> Mr. Mackay: I thought he was reading a letter from the minutes from this board to the State Board.
>
> The Court: Proceed. What do you find there in your minutes of your action?

A. S. P. Garrison, Teaneck, made application for a permit to cut ice at his pond known as Crystal Lake. It was moved that the application be refused. The motion was seconded, and all voting in favor, it was so ordered.

Q. Any reason given in the minutes why that was refused? A. On account of the pollution of the brook.

The Court: No, is there anything in the minutes?

Q. Do the minutes show why it was refused? A. Why, yes.

Q. Did you have any correspondence with the State Board of Health upon the subject? A. Yes.

Mr. Gourley: That is all. No, I will ask one more question.

Q. At that time, did you have the report of Mr. Mason on the subject before you? A. Yes, sir.

No cross examination.

HARRY E. BRAMLEY, called as a witness in behalf of the plaintiff, having been first duly sworn, testified as follows:

Direct Examination by Mr. Gourley:

Q. Mr. Bramley, what is your business? A. Sanitary expert.

Q. And what experience have you had in such profession? A. For twenty years I was a member of the New York Board of Health, holding the positions of Sanitary Inspector and Chief Sanitary Inspector, and for twelve years subsequently, I was the Chief of the Division of Sanitary Inspection work for the Lederle Laboratories.

Q. The Lederle Laboratories are in New York? A. New York City, yes, sir.

Q. Is it a corporation, I mean? A. Yes, sir, a corporation.

Q. Whose business is what? A. Chemical,—bacteriological laboratory, and the making of sanitary investigations.

Q. Are you a graduate of any college? A. No, sir.

Q. And how long have you been engaged in that work? A. Thirty-two years altogether.

Q. Well, how did you become interested in this question of the pollution of this brook? A. Mr. Garrison came to our laboratories and requested us to make an examination.

Q. Did you make such an examination? A. Yes, sir.

Q. Who made it? I mean, on the ground, who made it? A. I made the full examination.

Q. Any one with you at the time you examined it? A. My associate was with me, and Mr. Garrison.

Q. What is your associate's name? A. Mr. Briscoe (?).

Q. Mr. Briscoe is here now? A. No, sir, he is in the service of the United States; in the army.

Q. What camp, do you know, or is he in France? A. He was in Camp Gordon, Georgia, about to be transferred to another camp down in Louisiana.

Q. Well, was there any third person with you? A. I think Mr. Mason.

Q. Mr. Mason, you think, was with you? A. Yes, sir.

Q. Now, what examination did you make, Mr. Bramley, just as brief as you can put it, and yet give us the substance of it? A. We started in at

Crystal Brook in Englewood and followed the stream up to its source at Fort Lee. Along the course of the stream I took samples of the water from the brook at several points, and took them over to our laboratory for bacteriological analysis. We noted the conditions—

Q. Did you have any sterilized container? A. Beg pardon.

Q. Did you have a sterilized container? A. I had sterilized containers with me, yes, sir, and the samples were properly taken in those sterile containers, and carried over to the laboratory and delivered to the bacteriologist to examine.

Q. Who made the examination? A. The examination of the water for bacteriological results was under the charge of Dr. Gay.

Q. He is not here to-day, is he? A. He is not here to-day.

Q. Will he be here to-morrow? A. If you want him he is on call.

Q. Very well. Did you make any examination? A. No laboratory examination.

Q. Your examination was field work only? A. Yes.

Q. Very well, confining yourself to what you actually know of that subject, state just what you found. A. We noticed the water was discolored to a slight extent as it entered Crystal Brook, and as we followed the stream up, the discoloration became more and more apparent; and this discoloration was not only apparent in the water itself, but the stones and the twigs that were hanging in the brook were quite heavily coated, and more so as we went up the stream, with a dark colored sediment. As we reached the source of the brook at Fort Lee, we discovered a sewer or drain discharging into the

head waters of the brook at that point, and a dark colored material—or the material discharging was very dark colored, showing that there was something besides the water of the brook, or the storm water from the surrounding country entering the brook at that point. Subsequently we—

Q. That visit was when? A. I beg pardon?

Q. That visit was what date? A. That was in November.

Q. 1916? A. 1916. Subsequently, the same month and the same year, we visited Dr. Wyler, the health officer of Fort Lee, and asked him if—

Mr. Mackay: I object.

The Court: What he said would be incompetent.

Q. Did he go with you or take any action with you? Your conversation is not evidence. A. I am not giving you a conversation. I am simply saying that I requested him to furnish me with an inspector to go around with me, as I hadn't authority to enter some of the places I wanted to visit. Is that all right, sir? Which he did, and in company with an inspector by the name of Dwyer, I think, we visited the Paragon and the Universal Film Companies, and our examination there disclosed the fact that they were discharging a coloring matter which produced this discoloration of the brook into the storm sewer which empties into the brook. On subsequent visits during that same month—

Q. First, what quantity of water did they discharge daily into the storm sewer? A. I was informed—

Q. Well, I want you to state from your own observation, or any other way you have of ascertain-

ing it, without being told. A. I don't think I better hazard a guess; I don't know.

Q. Well, was it a small or large quantity? A. A large amount.

Q. What was the water used for at such film factories? A. It was from the washing of their films in their developing plant.

Q. Do you know the capacity of that plant for producing films? A. I understood that they used about 100,000 gallons there.

Q. Daily, you mean? A. Yes.

Q. And what was the discoloration, did it vary, or was it one— A. It was practically continuous in the Universal Film plant. In the Paragon plant, it was due to the washing of pails and those receptacles that contain coloring matter in a sink, and also from the final washing of the films, as the water dropped on the floor and passed through a floor drain and into the storm sewer.

Q. Subsequently you say you were there again? A. Yes, subsequently.

Q. What date; can you give us the date? A. I have it in my notes here (witness examines a book). On June 4th, 1917, I was to the plant. On that occasion I inspected the sewers, both the storm sewers and the sanitary sewers. Mr. Garrison was with me at the time, and his son, and also Inspector Mason, and we examined the manholes through which both sewers passed, taking the cover off the manhole. As these sewers pass through the manhole, they are not a complete circular sewer, but as if they were cut in half, and one sewer is above the other, the sanitary sewer, or the sewer which carries the sewage from the houses is the upper sewer, and the storm sewer is the lower sewer as they pass through this manhole, and on this occasion I

noticed that the excreta from the upper sewer had overflowed and fallen into the lower sewer, and from that point finding its way into the brook. I also examined the brook at that point and found evidences of human excreta, fecal matter coming from that opening and discharging into the brook.

Q. When was your next visit? A. I think that was my last personal visit. My associate was there a number of times.

Q. Had you at the laboratories made a personal examination of those waters before the construction of this sewer? A. They made an examination of the ice.

Q. Of the ice from the pond? A. Yes.

Q. Preceding the construction of the sewer? A. Yes, sir.

Q. Do you know what that result showed? A. I have seen the reports, yes, sir. It showed that the ice was—

Mr. Mackay: No.

Q. Who actually made the examination? A. The chemist.

Q. You had nothing more to do with that? A. I had nothing absolutely to do with it. I didn't even collect the samples. I think my associate collected those, but we have a record of them.

Q. Do you know when they were made? A. No, sir, I don't remember the date. I think it was along in 1914 or 1915 somewhere.

Cross Examination by Mr. Mackay:

Q. What date, Mr. Bramley, did you say you visited these film companies? More than once? A. No, only once, I think.

Q. That was what date? A. That was along—I think the 23rd or the 29th—somewhere around there, of November, 1916.

Q. And did you see the method they had of disposing of this wash, as you call it? A. Yes, sir.

Q. And that was disposed of how? A. In which factory? Methods were different in each factory.

Q. Well, both of them. Take whichever you want to first. A. Well, in the Paragon factory, the coloring was disposed of in a cesspool in the rear of the building, built with open stone work, which gradually let out the seep into the soil.

Q. Talk a little louder, will you? A. And as I explained before, I think the drainage from this sink, and some of the final washings of the film entered the sewer from that particular place. In the Universal Film Company, there was a sump under the basement floor, and that collected this waste coloring matter, and from there it was discharged into the main sewer.

Q. And about what quantity entered the storm sewer from the Paragon Film Company? A. I cannot tell you that.

Q. I mean approximately, from what you saw? A. I have my report here, and I think probably I can refresh my memory. May I read from this?

The Court: No, you cannot use your memorandum.

Q. Use it and tell us the quantity. A. While we visited there the film company showed us their plans of the entire method of disposing of that drainage and—

Q. Just read and find out the quantity and then tell us from what notes you have there the quantity. That is what we want to know. A. The

manager informed me that they had notified the Board of Health—

Q. No, answer the question.

The Court: Give the quantity.

A. 100,000 gallons per day.

Q. 100,000 gallons for both companies? A. This man gave me that as the amount coming from the Universal Film Company.

Q. The Universal Film Company disposed of 100,000 gallons? A. The addition of that material would result in increasing the amount discharged to 100,000 gallons a day.

Q. And what quantity from the Paragon? A. I haven't any idea.

Q. That you don't know? A. No, I should think comparatively a small amount.

Q. Well, what would you call small, five, ten or fifteen? A. Well, such as you get from constant dripping of water on films being washed off, and the rinsing and so forth.

Q. Did you see it discharging into the sewer in both cases? A. Yes, in both instances.

Mr. Mackay: That is all.

By the Court:

Q. You said you went up the brook to its source, at the sewer. Didn't the brook go beyond the sewer? A. I should think probably 25 or 50 feet.

Q. Beyond the sewer? A. It seemed to come out from the ground there.

Q. A spring? A. Yes, it is a spring, or it is possible that the channel of the brook had been

built in there to some extent, and it is coming out at that point.

Q. Now, what was the size of the brook above or at the place where the sewer joined it? A. Oh, about three feet or four feet across; you could jump across it.

Q. And what was the comparative flow of the brook compared with the quantity of water that came out of this sewer when you saw it in November, 1916? A. The comparative flow between the discharge from the sewer and in the brook?

Q. Yes. A. Well, I should say probably one-third as much in the sewer as in the brook.

Q. Did you find anything in the brook on that occasion except this discolored water? A. On the occasion of my first visit?

Q. Yes. A. No, sir.

The Court: That is all.

Re-direct Examination by Mr. Gourley:

Q. Mr. Bramley, how did you mark the bottles for Mr. De Ghee's examination? You may not be here to-morrow, and I want to identify them now. A. I marked them with serial numbers 1, 2, 3, 4, 5, 6, according to the number I took.

Q. That is your signature upon the bottles? A. No, they were in my possession until they were delivered to him, and I furnished a memorandum with those samples, indicating the location from which the samples were taken, in the memorandum.

Q. Can you tell us now when that was? A. That was on the 16th of November, 1916. The samples were numbered 1, 2, 3, 4 and 5.

Q. Where was sample No. 1 taken from? A.

That was taken from a spring in the center of the pond. At the time I made the examination, the pond had been drained off so we could walk through the bed of the pond any place. It was moist and muddy.

Q. No. 2 was taken where? A. No. 2 was from a branch or from the main stream, and the branch stream where it branches about probably a mile above Crystal Lake.

Q. Well, was it on this branch of the brook in which the sewage goes? A. Yes, one of these was, and the other was from another branch.

Q. Well, which one was from another branch? I want that made clear. A. No. 2 was from the branch coming from the north, and No. 3 was from what I call the main stream, or the stream coming from Fort Lee.

Q. Well, which one did not come from the stream into which the sewage goes? A. No. 2.

Q. Where was 3 taken from? A. That was taken from the stream that flows down from Fort Lee.

Q. How far between those two points? A. Well, the stream branched off just about a mile, as I say—probably fifty feet beyond the junction of the two.

Q. Well, can you recall that, or have you any note showing that? A. I cannot recall it.

Q. Even the number of the bottles you recall? A. I don't believe I could, offhand.

Q. Nor the fact that No. 3 bottle was taken there? A. Oh, yes, I know that.

Q. Very well, No. 4 was where? A. No. 4 was taken about midway between that point and Fort Lee.

Q. And what other numbers have you? A. No. 5.

Q. Taken where? A. Taken at the mouth of the sewer discharging into the brook.

Q. That is the last number? A. That is the last number.

Q. Now, are these numbers 1, 2, 3, 4 and 5 on these various bottles the only numbers that there are, or are there other numbers to identify them? A. There are other numbers called the laboratory numbers.

Q. Do you know what laboratory number, No. 1 is? A. 158012.

Q. And No. 2 is what? A. No. 158013.

Q. And No. 3? A. No. 158014.

Q. And No. 4? A. No. 158015.

Q. And No. 5? A. No. 158016.

Mr. Gourley: I thank you very much. That identifies them.

(Witness excused.)

JOSEPH W. STAGG, called as a witness on behalf of the plaintiff, having been first duly sworn, testified as follows:

Direct Examination by Mr. Gourley:

Q. What is your business, Mr. Stagg? A. Surveyor.

Q. Did you make an examination of these ice houses of Mr. Garrison to test their capacity? A. Why, I made a location of the ice houses and also the dimensions of the inside, showing the dimensions of the different rooms.

Q. You may tell us what they were.

Mr. Mackay: When was this?

Q. When did you make this? A. On February 27, 1917, I think.

Q. About that time? A. Yes.

Q. Now, tell us what the capacity of those ice houses were or are? A. There are six rooms, and as far as I can recall the capacity now,—I have a sketch there showing it.

Q. Have you a sketch here? A. Yes, sir. Do you want each room separately, or do you want the total of the six rooms?

Q. Well, give us the total? A. The total capacity of six rooms is 144,782.16 cubic feet.

Q. And do you know how many cubic feet a ton of ice takes? A. Very close to 24.

Q. About 24; I haven't figured on it.

Mr. Mackay: 24 what?

The Witness: Cubic feet.

Q. Do you know exactly? A. No, sir, I do not; I have never figured on it.

Mr. Mackay: Well, that may be stricken out?

Mr. Gourley: Strike what out? The answer? I have no objection. If he doesn't know, I do not want it on the record. I think it is larger than that. Can't we agree on 36? There is no dispute about a thing of that kind, surely.

Q. Well, assuming it is 36—

Mr. Mackay: I object.

Q. Assuming it is 36 cubit feet, how many tons of ice would it show?

Mr. Mackay: I object.

The Court: That is a question of figuring.

The Witness: I have never figured it.

Q. Can't you figure it now? A. Yes, but it would take time.

Mr. Mackay: I object to that. That isn't the evidence.

The Court: You can figure it some other time.

Mr. Mackay: Will you note my exception?

The Court: I don't allow it now.

Q. Have you made an examination of the pond there? A. I have made a rough location of it, and a location of the different retaining walls in the ice houses.

Q. What scale is this map? A. A scale of 30 feet to the inch.

Q. Does this map represent the Crystal Lake pond? A. Yes, sir.

Q. And the ice houses of Mr. Garrison? A. Yes, sir.

Q. What are these lines on the outside (indicating)? A. That is as Mr. Garrison outlined his property.

Q. What are these lines taken from? A. From a map Mr. Garrison furnished me.

Q. Have you seen Mr. Garrison's deed or papers? A. No, sir; I have not; he simply had a blueprint and I just enlarged it.

Q. You took them off from there? A. Yes.

Mr. Mackay: Let's see. How did you make this?

A. The ice houses by measurements, but the outline I drew from a map which Mr. Garrison furnished to me.

Q. But the pond itself, was that made from examination—from a survey? A. Not carried in; just simply a sketch.

Q. Just a sketch of it? A. Yes, sir.

Q. What is made from measurements on the map? A. The ice houses.

Q. The rest is not in the scale, then? A. Oh, it is practically on a scale, yes.

Mr. Mackay: Where did you get your dimensions as to the property?

The Witness: Mr. Garrison had a blueprint showing it.

Mr. Gourley: It is only put in as to the ice houses.

Mr. Mackay: Is that all the map is offered for, just to show the ice houses?

Mr. Gourley: That is what it is put in for.

Mr. Mackay: The question now is as to that map.

The Court: The question is whether you can consent to it.

By Mr. Mackay:

Q. Are you able to say whether this map, as to this pond or this lake, is correct or not? A. It is a general location of it, yes.

Mr. Mackay: There is no question about distances on the map. It is only a general location.

The Court: What difference does it make as to the location of these ice houses?

Mr. Gourley: It shows the extent and where they are and the whole thing for examination.

The Court: If counsel objects to it, I will not receive it.

Mr. Mackay: I think they ought to be a little more definite.

Mr. Gourley: I don't care anything about it.

The Court: If you object, I won't allow it.

Mr. Mackay: I object to it if it is not accurate.

The Court: I won't admit it, then. Take it down.

By Mr. Gourley:

Q. Will you oblige me by running these lines tonight so we can put it up in the morning? A. It would take me two or three days to locate those lines.

Q. Now, have you made an estimate in any way as to the capacity of storing ice outside of these ice houses? A. Why, I drafted extensions on there, as the map shows, from figures I received from Mr. Garrison, which he said he had from some architect.

Q. For what purpose? A. For storing ice.

Q. Additional housing for ice? A. Additional housing for ice.

Q. When did you do that? A. February 4th, I think, 1918.

Q. When? A. February 4th, 1918.

Q. Mr. Garrison told you what size he wanted it? A. Yes, sir.

Q. And what did you do after that? A. I calculated the cubic foot contents.

Q. What cubic foot did it amount to?

Mr. Mackay: I object to that.

The Court: How is that competent, unless you show your plans from your architect?

Q. Have you made any computation of that, or made any plan of it? A. I simply have it on the sketch there showing the cubic feet.

Q. Well, let's see that. A. Down in the lefthand corner (indicating).

By the Court:

Q. Is it something somebody else gave you? Did you use some sketch that somebody else gave you? A. I went down there with Mr. Garrison and measured off what he told me he was going to make the extensions.

By Mr. Gourley:

Q. That is the number of cubic feet? A. The extensions.

Q. Now, to provide extensions for 192,397 cubic feet, you had what kind of a plant? A. Why, I went down there several months ago with Mr. Garrison. He decided he could extend this out here 22 by 53; that is one extension. The other extension is on the northeast corner, 22 by 74 feet. This last extension here was 38 by about 90 on the northerly side. There is one more extension on the southwest corner 43 by about 75.

Q. Those were outside of the structures? A. Yes, outside of the structures.

Q. To be made of what, was your plan? A. I didn't make any plan for that; that was the architect's part.

Q. That embraces 192,000 cubic feet— A. Yes, sir.

Mr. Mackay: I object to what it embraces and ask that the answer be stricken out. It is too speculative.

Mr. Gourley: What is the objection? I haven't heard it. He said he provided a room for 192,000 cubic feet. What is the objection to it? He provides the plan—the space where it should go, as a surveyor. Is there any objection to that?

Mr. Mackay: I object to any conclusion from the architect's plans, that is all.

Mr. Gourley: Let's get it.

The Court: I sustain the objection to that.

Mr. Gourley: Your Honor will allow me an exception to that?

The Court: Yes.

The witness's testimony was here suspended temporarily.

JOHN J. FERRY, called as a witness on behalf of the plaintiff, having been first duly sworn, testified as follows:

Direct Examination by Mr. Gourley:

Q. What is your business? A. Architect.

Q. How long have you been an architect? A. Twenty-two years.

Q. Did you make an estimate for Mr. Garrison here as to the cost and method of constructing extension of his building to take in 192,000 cubic feet of ice? A. I did not make an estimate; I made plans for the addition to the ice houses.

Q. What plans did you make? A. The floor plans and elevation.

Q. Have you them here? A. No, sir, I have not.

Q. Where are they—you have them? A. I have them at my office.

Q. You haven't them here? A. No.

Q. Will you bring them in the morning? A. In the morning.

Mr. Mackay: What date did you make them?

The Witness: I couldn't tell you that. They are on the plans.

Mr. Mackay: What year?

The Witness: This year.

By Mr. Gourley:

Q. Why didn't you bring them along with you? A. I didn't understand they were to be used. I wasn't asked to appear as an expert.

(Witness excused.)

CARRIE SWEISBERGER, called as a witness on behalf of the plaintiff, having been first duly sworn, testified as follows:

Direct Examination by Mr. Gourley:

Q. Mrs. Sweisberger, where do you live? A. Up on Jones' Road.

Q. Well, I really don't know where that is myself. A. Englewood.

Q. How near to this brook we are examining

about? A. Well, the brook runs through my property.

Q. How long have you lived there? A. About fifteen years.

Q. What condition is the brook in now? A. Well, I haven't been down to see it lately.

Q. Why not? A. Well, I don't get any water there to wash any more, because it is too dirty; I cannot use it.

Q. Why can't you use it, Mrs. Sweisberger? A. because it spoils everything.

Q. What is the matter with it? A. Because it is too dirty; it comes from the sewers.

Q. Anything like these bottles here on the stand (indicating)? A. Yes, and worse than that.

Q. When did it get bad? A. Oh, it has been like that for about two years now.

Q. Could you use it before that time? A. Yes.

Q. Why, we used it for drinking and cooking and everything. Of course when the sewer went in we couldn't use it at all.

Q. Is there any odor from it at all? A. Yes, sir.

Q. Any smell? A. Yes, sir.

Q. Have you any cattle—any cows or horses? A. No, only chickens now.

Q. Chickens now? A. We had a horse before.

Q. What effect has it on the chickens? A. Do you think I want to kill the chickens with it, poison them altogether?

Q. You don't even give it to the chickens, is that what you said? A. I do not.

Q. Have you any dogs or anything of that kind? A. Yes, I have two dogs.

Q. Well, what about the dogs? A. I don't give them that water.

Q. Don't even let the dogs get to it? A. No.

Mr. Gourley: You can take the witness, Senator.

Cross Examination by Mr. Mackay:

Q. Does the surface water, or water from your property run into the brook? A. I don't think it does.

Q. Where does your water go there—the surface water? A. It runs down the hill; it don't run off into the brook.

Q. Where does it go to? A. Well, I don't know.

Q. You don't know where it goes to? A. Just goes down the hill, that is all I know.

Q. Doesn't some of your water go into the brook? A. I don't think it does.

Q. Are you sure about that? A. Yes.

Q. The brook at the foot of the hill? A. Well, it is at the foot of the hill, sir—away down.

Mr. Mackay: That is all.

Re-direct Examination by Mr. Gourley:

Q. You had a horse formerly? A. Well, we did have horses about two years ago; I sold them in the spring of the year, but we didn't give the horses the water any more, because they wouldn't drink it.

Q. What is that? A. The horses wouldn't drink the water; they got sick from it. We used to water them down there.

(Witness excused.)

ADELINE YACH, called as a witness on behalf of the plaintiff, having been first duly sworn, testified as follows:

Direct Examination by Mr. Gourley:

Q. Mrs. Yach, where do you live? A. Myrtle Avenue, Englewood, down off Jones's road.

Q. How near to this brook? A. Right by the brook.

Q. This brook, does it go through your property or on the edge of it? A. Well, our property goes on the other side of the brook.

Q. The brook runs through your property? A. Yes.

Q. Now, what condition is that brook in the last year or two? A. Well, I noticed it—it will be two years April, it started to run green and all colors, one hour red and the next hour blue, and all sorts of colors.

Q. All sorts of colors? A. Yes, all colors; it looked like dye colors, and in summer the smell was so bad I forbid the children to go down near the brook; they used to go wading in the brook, but now for the last two years they cannot go down; they have to keep away.

Q. Did you make any complaint about it yourself? A. Yes, I wrote to the Board of Health at Englewood to look after it, and they said they would see and stop it.

Q. The Board of Health in what place? A. Englewood.

Q. When did you do that? A. Well, I think it was that summer when we first noticed it; I don't know what month.

Q. In the summer? A. Yes, in summer, when we get the west wind we smell it quite bad.

Q. Do you use it around the house at all in any way? A. Well, we first used it—we had a pipe up from the brook right to the house in the kitchen, but we stopped that; we don't use it now at all.

Q. For what purpose do you use it now? A. We cannot use it; we cannot even use it for planting—the water in the garden—we have to carry it from the other side of the street.

Q. Not even for the flowers? A. Oh, no; we wouldn't dare to.

Cross Examination by Mr. Mackay:

Q. Does your property drain into that brook? A. No.

Q. Where does it drain? A. Well, we have a cesspool from the kitchen sink and tubs.

Q. And where does the overflow from the cesspool go to? A. Well, I don't know how that is built; I am not expert on that.

Q. How near is that to the brook? A. Well, our house is 100 feet from the brook.

Q. And how near is the cesspool? A. Well, we will say 90 feet perhaps or so—or perhaps 100 feet off; I don't know that exactly.

Q. What size cesspool have you? A. I cannot tell you.

Mr. Mackay: That is all.

(Witness excused.)

EMMA JONES, called as a witness on behalf of the plaintiff, having been first duly sworn, testified as follows:

Direct Examination by Mr. Gourley:

Q. Mrs. Jones, where do you live? A. On Jones's Road.

Q. You are the original Jones, then, are you? A. One of them.

Q. How near to the brook is your place? A. About between four and five hundred feet.

Q. Does your property run across the brook or only to it? A. No.

Q. Just to it? A. No.

Q. How near to it do you live? A. Well, about five hundred feet, I think—this road we live on—Jones's Road.

Q. Well, what do you know about the conditon of this brook during this last year or two? A. Oh, it is dreadful—something awful; we have always used it, drank the water from it. I myself have got the water and used it, and we cannot use it now.

Q. Up to what time, Mrs. Jones? A. For two years, anyway—over two years.

Q. Do you know when the sewer was put in? A. Well, I know the water was awfully bad; I don't know what really caused it,, but I know it was terrible.

Q. In what way was it terrible? A. Oh, all colors, and smell; as far as we live from it, why, we could get the smell up on the hill.

Q. In summer time would it be worse or better? A. Very bad.

Q. Ever been along the brook yourself? A. Oh,

yes, drank right from the water under the culvert, right at the foot of the hill. We haven't any water, and in summer time, our well runs dry, and we got to get water from the City of Englewood, but they refused to give us water, so we had to use the brook. Now, we have nowhere to go.

Q. You used it for what purpose,—all domestic purposes? A. Well, yes, we cooked with and drank it, and we washed with it.

Q. Where do you get the water from now? A. Well, while the well is working, it is all right. When we haven't any well, we have to go half way up the hill to get some kind of water.

Q. You don't use this water, however, for any purpose? A. No.

Cross Examination by Mr. Mackay:

Q. How long is it since you used the water, Mrs. Jones? A. Oh, it must be two years and a half.

Q. Two years and a half? A. It is over two years, anyway.

Q. It is over two years? A. It must be.

Q. Do you recall the particular year that you used it last? A. Well, it must have been 1916.

Q. 1916, the early part of the year or latter part of the year? A. Well, it is generally in the hot season, around June or July, when the wells run dry, that is the time.

Q. Then you would use it? A. Yes.

Mr. Mackay: That is all.

Re-direct Examination by Mr. Gourley:

Q. Did you ever keep chickens? A. Yes, we keep chickens, and we wouldn't dare to use it for them.

Q. You don't use it for the chickens? A. Why, we cannot now. We had horses. We used to use it for the horses, and used to use it for household purposes.

Mr. Gourley: That is all.

Witness excused.

STEPHEN JONES, called as a witness on behalf of the plaintiff, having been first duly sworn, testified as follows:

Direct Examination by Mr. Gourley:

Q. Mr. Jones, are you the husband of the last witness? A. Yes, sir.

Q. You live on Jones's Road? A. Yes, sir, corner of Jones's Road and Myrtle Avenue.

Q. And how near to this Crystal Brook? A. I think it is about five hundred feet on one side, and on the other side, the brook passes both in the back, and the front; it forms a horseshoe. On the back,—that would be on the east side, it is about 500 feet. On the west, it is about eight or nine hundred feet.

Q. Well, what was the condition of that brook before the sewer was built there? A. Well, we used to use it since I was a child; I was born alongside of it, you might say, and lived there the biggest part of my life, and we have used it right along for all purposes, drinking, cooking, washing, and everything until the last—

Q. After the sewer was built, was there any

change? A. There certainly was. If you want to see a jar—I can show you a jar—I took it last Saturday at three o'clock.

Q. Of course, that is just what I want to see. A. (A bottle was produced by the witness) That was taken out of the brook at three o'clock last Saturday afternoon before it rained.

Q. I hope there is no number on it? A. No, there is no number on it. You can have it analyzed if you want to. Now, that is practically a very poor sample to what it is in warm weather, because if it was what it is like then, you would not want to have the cork taken out.

Q. It smells like eau de cologne to me; you haven't put any scent in this of any kind, have you? A. There was two witnesses seen me dip that bottle into the stream.

Q. Where did you take this from? A. Right out of Mrs. Yach's yard,—at the foot of their yard, where the brook runs under the culvert.

Q. How far is it from this sewer? A. A half a mile.

Q. A half a mile further down? A. A half a mile further down.

Q. When did you take that out? A. Saturday, at three o'clock.

Q. It was Saturday night the heavy rain was, was it? A. About five o'clock, it started.

Q. This was before the rain? A. It was three o'clock when I took that out.

Q. Well, is there any smell about the brook in the summer time? A. Oh, yes, you cannot stand it; you cannot walk across the bridge without holding your nose.

Q. Well, what is that due to? A. Well, it is due to the stuff that is deposited in the brook.

Q. Well, what do you find deposited there,—anything that is objectionable? A. Yes, everything but what ought to be there.

Q. Well, you can tell us now, Mr. Jones, if you will? A. You can see the color of the water here (indicating).

Q. Yes. A. Probably today it is green, or it is blue.

Q. A kind of a variety of colors? A. Or it is yellow.

Mr. Mackay: I don't think that is material.

The Court: You were asked what you found in the brook at various times.

The Witness: Garbage of all kinds; that is, sewer garbage, practically what would come from a sewer, from other outlets and all such things.

By Mr. Gourley:

Q. Did you notice whether or not the stones of the brook were discolored? A. I have noticed in the summer time; they are coated fully one-eighth of an inch with a slime, and years ago those stones were polished clean and smooth, and today you couldn't hold one in your fingers; it would slip out of your fingers like jelly today.

Q. How far down the stream do you know is that so? A. What is that?

Q. How far down the stream does that condition exist that you have described? A. All the way from the Vreeland's—I believe now it is William Olson's property, to the Crystal Lake. The banks in the summer time are coated with grease and slime where the water washes up on it.

Q. Have you walked up this stream or walked down it? A. I have walked down it, but I have never walked up any further than this William Olson's property. I never went to see—I have heard where this complaint comes in, but I have never went to see it.

Q. Once was enough for you to see it? A. Yes.

Cross Examination by Mr. Mackay:

Q. When did you last walk down the stream, Mr. Jones? A. When?

Q. Yes. A. Why, last Saturday, crossed it both ways, both east of me and west of me.

Q. Before that time? A. Before that I passed it every day, sometimes twice a day.

Q. Up and down the stream? A. Not really up and down it, but I have walked from Myrtle Avenue and followed it all the way down to Nordof.

Q. To where? A. To Nordof.

Q. That would be a distance of how far? A. Oh, a little over a mile, or a mile and a quarter.

Q. And when was the last that you used this water? A. When?

Q. Yes. A. Oh, I guess it is two years ago.

Q. Two years ago? A. The first I noticed it, I used to use the water to water my chickens with.

Q. That would be back in the early part of 1916? A. I found I lost some of my chickens from it, and I stopped right away, and I have never used it since.

Q. You haven't used it since when? Can't you tell us about when it was? A. It is the second summer I haven't used it.

Q. About two years ago? A. I haven't used it in two summers.

Q. You didn't use it in the summer of 1917? A. I don't think I did.

Q. That would be last year? A. Yes.

Q. And you didn't use it in the summer of 1916? A. I think that was the time when I—I am not sure—I know I haven't used it for two summers; didn't dare to.

Re-direct Examination by Mr. Gourley:

Q. Has there been any cessation of that, or has it been so continuously? A. All the time; it is never clear.

ADOLPH YACH, called as a witness on behalf of the plaintiff, having been first duly sworn, testified as follows:

Direct Examination by Mr. Gourley:

Q. Mr. Yach, are you the husband of Mrs. Yach who was on the stand before? A. Yes, sir.

Q. And you live on Jones' Road? A. Yes, sir.

Q. How far from this brook in question? A. How far is this brook?

Q. How far from Crystal Brook do you live? A. Crystal Brook runs right through my place.

Q. Do you remember the time this sewer was connected with the brook? A. Well, it is two years ago, about April; two years ago it started. I was the one who made the first complaint.

Q. Well, before that time, Mr. Yach, what do you say about the condition of the water in the brook? A. Before that time, we used it for drinking, cooking. I had a pump right direct into the

house and we drank it and cooked with it. It was as clear as crystal. It was as clear as any water you could find.

Q. What has it been since the sewer opened into the brook? A. It has been rotten. The stench in the summer time has been something terrible, so bad that we could hardly live there. I couldn't sell the place. My place is a total loss as it stands today, and the slime on the rocks is rotten. There is all kinds of sewage and trash going down that brook all the time, and it is one of the biggest outrages of the country that could be committed, and I know it because I have been in that business for twenty-nine years, and I know sewage when I see it. It is an outrage that such a thing can prevail.

Q. What did you see, if anything, beyond the discoloration of the water? A. Cigar stumps, toilet paper, floating substances of human dung.

Q. Floating down the stream? A. Yes, sir.

Q. And has that been occasional or continuous? A. Continuous. Sometimes it is green, yellow and all colors, but the sewage is always there, and there is a 22 inch pipe up at Fort Lee, which has an overflow; there is a pumping a station there, but I don't know what the pumping station is there for; it is not big enough to take care of this. In the summer time the stench is something terrible.

Q. In the summer time it is worse? A. In the summer time it is a fright; in the winter time you don't smell it so strong, but our children used to wade in it and wash their feet, but we will not allow them to go near it now.

Q. How long have you lived there? A. Ten years in April.

Cross Examination by Mr. Mackay:

Q. And how long is it since you used the water? A. Two years.

Q. That will be two years from this present date? A. From about April, somewheres around April it started to come that way.

Q. Prior to April, 1916, you used it? A. Yes, sir, we used it. There is an old pump—pipe line in there today yet, which I never took up; I disconnected the pump from it.

By the Court:

Q. Have you used this water on your garden? A. Previously I used to.

Q. You haven't used it lately? A. I tried it on a few things, and it died right away. I had some thing planted alongside of the brook, and they were doing nicely, but they are dying now.

Witness excused.

ARTHUR VAN BUSHKIRK, called as a witness on behalf of the plaintiff, having been first duly sworn, testified as follows:

Direct Examination by Mr. Gourley:

Q. You are a lawyer by profession, I think? A. I am.

Q. Practicing in Hackensack? A. Yes.

Q. Did you go up this stream at any time at the request of Mr. Garrison to see what you could find? A. I did.

Q. When did you do that, Mr. Van Bushkirk? A. It was in November last.

Q. November? A. 1917.

Q. That was the last time, or the first time? A. The only time.

Q. You mean November, 1917, or 1916? A. 1916.

Q. Well, what investigation did you make, Mr. Van Bushkirk, and what did you find? A. We started at the ice pond and followed the stream up to Fort Lee, or to the sewer pipe which enters the head of it. At the ice pond the water was dark in color. As we progressed, we began to notice a green slime on the stones, and an odor. I dipped my hand in the water once or twice and smelled it, and found a disagreeable odor there. The green increased in quantity, as I recall it, as we progressed up the stream, and reaching the head, we found this large sewer pipe, possibly 24 inches in diameter, discharging into the stream.

Q. Did you see any evidences of toilet paper or anything of that kind? A. No.

Q. Did you examine it again; did you see the stream again? A. No; I was up to the ice house once after that, I think, but not at the stream.

Q. What quantity of water, if any, was coming from the sewer? A. I couldn't answer.

Q. Do you know how full it was, half or quarter full, or less or more? A. As I recall, it was less than half full.

Q. What was the color of the water coming out of the sewer? A. It was dark.

Q. Could you point to any of these glasses here—do any of these indicate the color (indicating)? A. Well, it was darker than any of those.

Q. Darker than any of those exhibited now? A. Yes.

Mr. Gourley: If it please the Court, I offer in evidence the water in the last bottle offered by the witness Jones.

Mr. Mackay: For what purpose?

Mr. Gourley: To show the discoloration of the water.

Mr. Mackay: I object to it.

The Court: I will admit it.

Mr. Mackay: I object to it on the ground it is irrelevant, immaterial and incompetent.

The Court: Objection overruled.

Mr. Mackay: Exception.

Q. Any other characteristics that you noticed that you have not told us about? A. Except that I thought that the odor might be caused by the use of chemicals from the moving picture plants. I have done a great deal of amateur photography myself and was somewhat familiar with those odors, and I thought it might be caused by that.

Q. Well, you don't develop these moving picture things, these long reels; yours is a small— A. Four by five, and five by seven.

Q. I suppose you waste more water for yours relatively than they do? A. Possibly.

Q. What is the color of your chemicals, red or green? A. It was a reddish,—I used developer.

Q. Do you know whether they used that or not? A. I don't know.

Q. Is that a prevailing chemical for developing? A. It is one that is used quite generally. I don't know what they used, though.

Q. And that would cause the water to turn what color? A. Oh, a reddish or a yellowish—reddish hue; dark.

Q. It would make it unfit for drinking, I sup-

pose, after you got through with it? A. I presume so.

(No cross examination.)

WILLIAM SWEISBERGER, called as a witness on behalf of the plaintiff, having been first duly sworn, testified as follows:

Direct Examination by Mr. Gourley:

Q. Mr. Sweisberger, are you the husband of Mrs. Sweisbeger who was on the stand? A. No, sir; I am a son.

Q. You live on Jones's Road? A. Yes, sir.

Q. And how near to this brook? A. The lot is 209 feet deep. It runs on the other side of the brook.

Q. How near is that located to this sewer,—where the sewer empties into the brook? A. I should judge about 180 feet.

Q. Further up the stream. How far is it from the mouth of this sewer until your property is reached? A. Oh, it is about half a mile; probably a little more.

Q. Your property is further down the stream? A. Yes, sir.

Q. What do you know about the condition of this brook as to pollution? A. I know it is filthy; it is terrible.

Q. Can you tell us how the brook was before the sewer connection was made? A. It was clear, perfect water; it was very clear, and we used to water the horses there, but you cannot do it now. You cannot put your foot into it now; if you did it would be worse than when you put it in.

Q. Do you use if for household purposes at all? A. No, sir.

Q. What about the children? A. The children used to go down there and bathe, but they cannot do it now.

Q. Do you keep any cattle or horses? A. Not at present we don't.

Q. Chickens? A. We have chickens there now.

Q. Did you keep any of them before the sewer was there? A. Oh, yes.

Q. Did you keep a horse after the sewer was connected with the brook? A. We did, for a while, but we never watered the horse there.

Q. Do you know whether or not that water affected them or not? A. They wouldn't drink it; they would go and smell it and turn around and go away.

Q. You can lead a horse to water— A. Yes, but you cannot make him drink.

Q. He didn't drink this, either? A. No.

Q. What have you to say about the odor or smell? A. The odor is worse than a sewer.

Q. Look at the samples on the stand (indicating)? A. They are worse than that; that is nothing.

Q. Including this one of Mr. Jones (indicating). A. Those are nothing compared to what it is at times.

Q. What color would you say it was? A. Saturday morning it was all green,—a light green; good for St. Patrick's Day.

Q. Changes for the different festivities of the year? A. That is a lighter sample that Mr. Jones got in the afternoon.

Q. Now, is there any odor from it, Mr. Sweisberger? A. Yes, sir.

Q. And is that increased or decreased in the summer time? A. Increased in the summer time.

Cross Examination by Mr. Mackay:

Q. Did you say you were present when that water was taken from the brook? A. No, sir, I was not.

Q. You were not present? How long has it been since you used the water? A. About two years.

Q. That would be about March or April, 1916? A. Yes, sir.

Mr. Mackay: That is all.

(Witness excused.)

JAMES H. COE, called as a witness on behalf of the plaintiff, having been first duly sworn, testified as follows:

Direct Examination by Mr. Gourley:

Q. Mr. Coe, I think you live in Englewood? A. Yes.

Q. And what is your business? A. Superintendant of the Englewood Sewerage Company.

Q. How long have you lived in Englewood? A. Fifty-two or fifty-three years.

Q. Do you know Crystal Brook, as it is called? A. Yes, sir.

Q. How long have you known that brook? A. Ever since I have been in Englewood.

Q. Well, do you remember when this sewer was put in there by Fort Lee,—the Borough of Fort

Lee? A. I understand it was put in about two years ago.

Q. Yes, about April, 1916? A. Around that, some time.

Q. Do you know what the condition of the brook was before that time? A. Yes.

Q. Well, what had you known of it and what experience had you had with the brook before that time? A. I have picnicked on the ground there, drank the water, used to use it for cooking, bathed in it. It is a great picnic place all through there.

Q. Ever fish in it? A. No, never fished in it.

Q. You know of better grounds? A. Yes, used to go to the Passaic River to fish.

Q. Well, what condition was it in then? A. Fine.

Q. Well, after this sewer was connected with it, when was your first visit to the place? A. Last summer.

Q. The summer of 1917? A. Yes, sir.

Q. What observation did you make then, and what did you find, Mr. Coe? A. Mr. Garrison came to my office and asked me if I would go down there and look the pond over with him, and I went down there and stayed a short time. There were dead fish, and so forth, and the smell was so bad we had to get out. It was pretty strong. The pond had been let out last summer, and the smell was very bad, and what water there was there was very black.

Q. Did you go up the stream at all? A. No, never been up the stream at all.

Q. Have you been since January up at the mouth of the brook, or, I mean, where the sewer empties into the brook? A. No, sir; I have never been up the stream since the sewer was put in there.

Q. I see, so that was the only observation you made—last summer, that was the only time? A. Yes.

Cross Examination by Mr. Mackay:

Q. What area is drained? A. It takes in most of the springs going up in the hills there, the Palisades there, that work down, and gradually work into the stream right there by the Jones Road. The streams come together there from north and south.

Q. And how far north? A. They make up around, I should say, about as far as Linden, being Englewood.

Q. Where? A. Linden, being up in that section there—lower section.

Q. City of Englewood? A. Yes.

Q. And how far away is that from this point? A. About in the neighborhood of a mile and a half to two miles.

Q. And how far south is drained by the brook? A. It takes in along that section, and what is called the old Watkins section, and in all through that section.

Q. That is in distance how far from the pond? A. About a mile.

Q. What is the entire area drained by this brook? A. Oh, I cannot say.

Q. About how many miles, should you say? A. I couldn't say, because most of these brooks make up there, run north and south—

Q. But they all run into this brook there? A. Yes.

Q. Are there a number of streets that drain? A. The streets?

Q. Yes. A. No, the streets don't drain into that. Just takes the spring waters up through the mountain there.

Q. Well, doesn't it take some of the streets, too? A. No, very few of the streets drain into that brook.

Q. Broad Avenue, where does that drain into? A. Broad Avenue drains south over the surface—some of it comes into the brook; the sewerage is switched off before it gets to the lake.

Q. Does this brook run directly into this pond, or along side of it? A. This brook?

Q. Yes. A. How do you mean?

Q. Crystal Brook, does it run into the center of the pond, or along side of it? A. It used to; there is a brook there to carry it around.

Q. How deep is the pond? A. Well, I can wade in it at one end; probably four or five feet when it is full at the easterly side, to about ten feet—ten to twelve feet down at the dam.

Q. What is its deepest point? A. The dam.

Q. Ten to twelve feet deep? A. I should say about that at the dam.

Q. When the pond is filled with water? A. Yes.

Q. And this stream now runs alongside— A. It is swung around—it goes into the creek, back of the dye house and the dye house creek comes down into what is called the old Fink well on the river there.

Re-direct Examination by Mr. Gourley:

Q. You were formerly county collector, I believe? A. County Collector and on the Board of Taxation, both.

JAMES W. MERCER, called as a witness on behalf of the plaintiff, having been first duly sworn, testified as follows:

Direct Examination by Mr. Gourley:

Q. Mr. Mercer, what is your business now? A. Real estate.

Q. You were formerly sheriff? A. Yes, sir.

Q. Did you at the request of Mr. Garrison examine this brook on one occasion? A. I didn't examine the brook; I examined the pond with him and the sewer inlets at three points, I think.

Q. When was that, sheriff? A. Last spring.

Q. When last spring? A. I am not quite sure of the month; possibly the end of April.

Q. Well, was the water in the lake then? A. Yes.

Q. What observation did you make that you are able to tell us? A. The water was very dark and greasy, and there seemed to be a good deal of sediment at that point.

Q. Was there any noticeable odor at that time? A. Not particularly at that time; I didn't notice it particularly.

Q. Did you notice the color of the water, in reference to these bottles before you? A. It was much darker than either of those.

Q. Could you say anything about the purity of the water in any way? A. At that time?

Q. Yes. A. It was impure; very impure.

Q. What led you to that conclusion? A. The color and the sediment in it, and the grease on top.

Q. You, I think, didn't go up the stream at all? A. I didn't go up the stream—not the stream exactly—I went to the upper part of it.

Q. Oh, did you go up to the brook where the sewer enters the brook? A. Yes, to their power house.

Q. But you went around by the streets, did you? A. Yes, sir.

Q. What did you see there? A. The sanitary pipe, I think they call it, seemed to have the half section of it taken off, and it was open and running over into the other pipe.

Q. Oh, you mean when the manhole covers are taken off? A. Yes.

Q. How far was that manhole cover to the end of the sewer where the sewer enters into the brook? There is a place, I understand, where the sewer empties into the brook. Did you see that point near the pumping station? A. Yes.

Q. You saw that? A. Yes.

Q. How near to that was this manhole cover? Did you take off the manhole cover? A. Yes.

Q. About how far, I mean, was it, one or two openings from the end of the brook—was it the first manhole or the second, or what? A. This is the manhole right at the pump.

Q. Right near the power house? A. Yes; I don't think there is more than fifty feet, probably from this manhole and the pump house.

Q. Well, now, what did you see then, sheriff? A. This pipe overflowing,—the sanitary pipe overflowing into the other.

Q. Have you given us the date of that visit, about? A. I think it was in April last; possibly about the end of April, before we had had any warm weather.

Q. I see. Did you go down to the mouth of the sewer, where the sewer enters the brook? A. As far south from there as Main Street, in Fort Lee, Fort Lee Road.

Q. Well, did you see where the sewer enters the brook at all near the pump house—did you see that; do you remember that? A. Yes.

Q. How much water was going out of the sewer then into the brook; in other words, how much of the sewer opening was full? A. Oh, there was probably at that time a stream this wide (indicating), 15 or 18 or 20 inches wide, possibly, with 6 or 7 inches of water, as I remember.

Q. Now, what was the discoloration, if any, at that point, where that sewage came out? A. The water was dark, black, almost, at that time, and heavy; quite a sediment in it.

Q. Was there at that point any perceptible odor, then? A. At that point, yes.

Q. Did you notice any paper or anything of that kind? A. Yes.

Q. Anything else going— A. It seemed to be just general house sewage, aside from the color of it.

(No cross examination.)

HARRY BENNETT, called as a witness on behalf of the plaintiff, having been first duly sworn, testified as follows:

Direct Examination by Mr. Gourley:

Q. Mr. Bennett, what is your business? A. I am manager of the Phelps Estate, Teaneck.

Q. Is Mr. Garrison one of your tenants? A. He is.

Q. Do you know this Crystal Brook? A. I do.

Q. Did you know it before the sewer connection? A. I did.

Q. In other words, before April, 1916? A. I did.

Q. What was the condition of the water—what do you know about it? A. I have known that brook when the water was clear.

Q. Keep your voice up. A. I have always known the water from the brook to be clear and in good clean condition.

Q. How long have you known it before that time? A. Well, I cannot give the exact number of years, but I suppose it is twenty or twenty-five years.

Q. Have you purchased ice from—have your people purchased ice from Crystal Lake before its pollution? A. We have, yes.

Q. Up to what time? A. Why, I think it is two —two or three years.

Q. How did you find the ice; was there any objection to it? A. No objection to the ice, no.

Q. When did you notice the change? Do you remember when this sewer was put in? A. Why, I don't know anything about the sewer being put in, but I know there was a pollution there.

Q. Well, after you first noticed the pollution, did you make any observation later? A. I did, on two occasions, January 6th, 1917, and February 27th, 1917.

Q. Right near each other. What observation did you make, Mr. Bennett, on each of those visits? A. Why, I found in the brook where it flowed into the lake, that it seemed to me to be raw sewerage, toilet paper and such as that, and from there we went up to the pumping station, I should call it, in Fort Lee, and examined where the sewer—or supposed to be the sewer, I should think, ran into this brook, and coming out of that pipe was a discoloration of water and raw sewerage, and hanging to the sides or banks of this brook was toilet paper and cigar

butts and matches, and so on. And then we went and opened one of the manholes, I should judge, about 300 feet from the mouth of this pipe, and there were two sewers there, a storm sewer and the sanitary sewer, and there were places there where the sanitary sewer was overflowed into the storm sewer.

Q. Was it actually flowing over that day? A. It was.

Q. Was that your first visit or your second visit? A. The first visit.

Q. What did you find on the second visit? A. On the second visit, why, the water was discolored; there was evidences of sewerage there, but there was nothing coming out of the pipe that day.

Q. Nothing out of the pipe? A. No.

By the Court:

Q. Where did this discoloration come from? A. Why, I didn't follow it up, but I imagine—

Mr. Mackay: I object to what he imagines.

Q. Not what you imagine, did you see where it came from? A. I saw it came out of the pipe on Main Street.

Q. Into the brook? A. Into the sewer that ran into the brook.

By Mr. Gourley:

Q. Did you examine the manhole on both occasions, or only once? A. On both occasions.

Q. It was running over on one or two occasions? A. Well, the first occasion it was running over. On the second occasion it showed where it had been

running over, because some of the sewerage had remained there.

Q. Did you notice any odor around there? A. Yes, the odor was pretty strong.

Q. And the color of this water was what, as compared with these samples before you? A. Much darker.

Q. What color was it on these visits that you saw? A. I should call it a kind of a brownish color.

Q. Was there any substance clinging to the stones on the bank of the brook that you noticed? A. Yes, a sediment clinging to the stones, a kind of scum.

No cross examination.

FRITZ GOGOLEN, called as a witness on behalf of the plaintiff, having been first duly sworn, testified as follows:

Direct Examination by Mr. Gourley:

Q. Mr. Gourley, did you work for Mr. Garrison this last winter? A. Yes, sir.

Q. At Crystal Lake? A. Yes, sir.

Q. Doing what? A. Oh, I filled up ice—filled up the cracks with water.

Q. Could you see through those cracks before you filled them up, the color of the water below? A. Yes.

Q. Well, what did you notice about the color of the water there? A. It was yellow.

Q. Like any of these samples? A. Oh, it was worse like those.

Q. Worse than those? A. Yes, sir, worse.

Q. Well, what color would you call it? A. I would call it yellow.

Q. A real yellow? A. A real yellow.

Q. Well, did you have to cut a hole in the ice? A. Yes, sir.

Q. What did you cut a hole in the ice for? A. To get the water out.

Q. To put it in the cracks, to freeze up again? A. Yes, sir.

Q. How large a hole did you cut? A. Oh, I cut about twenty inches round.

Q. A round hole? A. Yes.

Q. And you dipped in that hole? A. Yes, dipped it with a pail out.

Q. And that was the color you found? A. Yes, sir.

Cross Examination by Mr. Mackay:

Q. When did you cut this ice? A. The 21st of January.

Q. 21st? A. 21st of January.

Q. What year? A. This year.

Q. 1918? A. Yes.

Mr. Mackay: That is objectionable, your Honor.

The Court: I am allowing it, subject to your objection.

By the Court:

Q. What did you cut the hole for? A. To get the water to fill the cracks up.

Q. What cracks? A. The ice had cracks in it.

Q. What difference did that make? A. Fill the cracks up so they could skate on it.

By Mr. Mackay:

Q. Wanted to use it for skating? A. Yes, sir; if it has cracks you cannot go over it with your skates there, and I took it up and put it along that ice, and I saw it was all yellow, the ice.

Q. How deep down did you cut? A. How deep? Oh, it was about 20 inches thick, the ice.

Q. Twenty inches thick? A. Yes, sir; it might be more; I didn't measure it. It was anyhow twenty inches. It might be more yet.

Q. But that is what it looked to you; you didn't measure it? A. No.

Q. It looked like twenty inches to you? A. Yes, but I couldn't say.

VIOLA MERRILL, called as a witness on behalf of the plaintiff, having been first duly sworn, testified as follows:

Direct Examination by Mr. Gourley:

Q. Mrs. Merrill, where do you live? A. Englewood.

Q. Do you live near this brook at all? A. I live near Crystal Lake.

Q. You live near Crystal Lake? A. Yes, sir.

Q. How long have you lived there? A. It will be six years this October.

Q. Do you remember the time when this sewer was connected with the brook—about that time? A. Well, I couldn't just tell you that time, no, but I remember of hearing everyone speak about it.

Q. Well, when you first went there, take it that way, what condition was the lake or brook in? A. Well, at that time, it was clear.

Q. When did you first notice it was not clear? A. About two years ago.

Q. What did you notice around that date? A. A very dirty smell.

Q. Did you see anything? A. Yes, I did.

Q. What? A. Well, numerous things.

Q. Well, tell us, if you kindly will? A. Well, it looked more like sewerage to me than it did anything else.

Q. What color was it? A. It was a dirty, nasty yellowish color.

Q. Look like anything in these bottles? A. Oh, that is no comparison whatever.

Q. At what point did you notice the water? A. At the lake—Crystal Lake.

Q. Very well. Now, how long did that continue? A. This continued right up to the present time.

Q. Did the odor continue? A. The odor continued something terrible, and when we got a southwest wind, it is something awful.

Q. Is it offensive? A. It certainly is.

Q. Do you know this last witness on the stand, Fritz Gogolen? A. Do I know him? I have seen him in Mr. Garrison's place.

Q. Do you remember a time he used a pail on the lake? A. I do.

Q. Well, how, what do you remember about that? A. It was so bad I almost told Mr. Garrison to go out of the house with the pail.

Q. When Mr. Garrisn brought the pail to the house, did you make any remark about the pail then? Don't tell us what you said. A. I did.

Q. Now, I ask you, was there any odor from that pail? A. Indeed there was.

Q. Was it pleasant or unpleasant? A. Very unpleasant.

Q. Did you make any remark at the time about it? A. I did; I said to Mr. Garrison—

Mr. Mackay: I object.

Q. Did you make any remark at the time? A. I did.

No cross examination.

JAMES M. HOLDEN, called as a witness on behalf of the plaintiff, having been first duly sworn, testified as follows:

Direct Examination by Mr. Gourley:

Q. Mr. Holden, what is your business? A. I am in the ice business.

Q. Are you at present in the ice business? A. Yes, sir.

Q. You bought this place, I think, in conjunction with Mr. Garrison, originally from the Phelps Estate? A. Yes, sir.

Q. And then you sold your half interest the next year, I think, was it, to Mr. Garrison, or shortly after? A. Yes, sir.

Q. Shortly afterwards, was it? A. Yes, sir, it was in the fall; it was the same year.

Q. Did you at that time or later notice the condition of the brook as to its purity? A. Why, I have always noticed that it has always been a very pure piece of water.

Q. Did you examine it before you bought it to see whether it was fit for ice making purposes? A. Yes, sir.

Q. What did you find? A. Very good water.

Q. Was it fit for making ice? A. Sir?

Q. Was it fit for making ice? A. Yes, it couldn't be better.

Q. Was that the purpose for which the ground was bought? A. Yes, sir, that was the idea.

Q. Was there an ice house there then on the property? A. Yes, sir, there were two.

Q. There were two. Now, do you remember the time the sewer was connected with the brook? A. Well, not exactly; I don't know just exactly when that sewer was put there.

Q. Have you noticed any change in the character of the water as to purity or impurity? A. I certainly did.

Q. When did you notice that first? A. That is a year ago this past summer.

Q. How did you come to notice that, Mr. Holden? A. Well, I am driving by the lake every day.

Q. What attracted your attention to that? A. Why, one thing was the looks of it, and another thing the smell of it.

Q. The looks of it was what? A. Very dark—very brown.

Q. Look at these bottles. Was it as dark as those? A. That is nothing like the brook as I saw it.

Q. Do you mean it was lighter or darker? A. Oh, much darker than that.

Q. Was there any smell from it at any time? A. There certainly was, all along the brook.

Q. Was that smell offensive or otherwise? A. That certainly was very offensive.

Q. Did you go up the brook? A. I never went up the brook.

Q. What parts of the brook did you examine? A. I have been up to the pumping station, up by

Fort Lee, but I have never followed the brook all the way up.

Q. When was your visit to the brook? A. I think the last—I think it was on the 19th of December when I went up with Mr. Garrison.

Q. Does this brook carry on beyond that, or is that the end of it? A. I think it has been covered over, where this sewer pipe is.

Q. That is the beginning of it, so far as you saw? A. Yes, sir.

Q. Well, what quantity of water was the sewer discharging? I don't mean in gallons, but in filling up the opening? A. Well, I think it is about a 24-inch pipe, probably, not quite half full, discharging, the first visit we were up there, if I remember correctly.

Q. What color was that, Mr. Holden? A. Well, it was very dark. There was plenty of toilet paper coming out, and other sewer matters, the first trip we went up there.

Q. Have you given us the date? A. Sir?

Q. Have you given us the date? A. That was the 19th.

Q. You mean last year? A. No, this last year, in December.

Q. In December, 1917? A. Yes, sir.

Q. Was that your first visit to the mouth of it? A. Yes, sir.

Q. Well, have you been there since? A. Yes, sir, I have been up since.

Q. You have been up there since? A. Yes, sir, twice.

Q. What days? A. Oh, I haven't got the date down definitely.

Q. How long after the first visit? A. Well, I should judge—it will be four or five weeks ago this past Thursday.

Q. I see. What did you find then? A. Well, it was in better condition that time. Of course, the water was very dark, but there was not much other matter coming out.

Q. Did you look through any of those manholes? A. Yes, we did.

Q. What did you find? A. Well, in the first manhole we went through—of course, it was not overflowing just then into this pipe, you see, from the main sewer, but you could see toilet paper and other matter where it had catched on these little places here when it runs over.

Q. Where the overflow was? A. Where the overflow had been there was some lodged there.

Q. You are in the ice business? A. Yes, sir.

Q. Familiar with the market price of ice during this last year or two? A. Fairly, yes.

Q. What was the market price per ton of ice in 1917, in July? A. $3 per ton.

Q. How did it vary during the year 1917? A. Well, it was that price right straight through.

Q. What was it in March? A. It was $2.50 in March up till the first of May, I think it was; then it was $3.

Q. Then after that it was $3? A. Yes, and it is $3 at the present time.

Q. Do you know the number of cubic feet in a ton of ice? A. How is that?

Q. Do you know how many cubic feet is taken up with a ton of ice? A. Well, I should judge—

The Court: Do you know?

The Witness: Well, not exactly, no. In storing ice—

Mr. Mackay: I object, if he doesn't know.

Q. In storing what? A. In storing ice in a house, I think it is about—

Mr. Mackay: I object. I don't want Mr. Gourley to insist on the witness answering something when I object to it, until your Honor rules.

The Court: I think he should tell us whether he knows or whether he does not.

Q. What do you know about it? A. Well, in buying ice—in cutting ice and buying ice from other people is a different thing, but I will tell you my knowledge from what I know from other people.

The Court: That won't do.

Q. No, it is a simple question. Do you know how much space a ton of ice will take in a house? A. Well, I wouldn't like to say exactly, no; not within a couple of feet, for it might vary.

Q. What is ice now a ton? A. $3.

Mr. Mackay: I object.

The Court: I will allow that.

Mr. Mackay: Exception.

Q. What is it? A. $3 a ton.

Q. Is there a market for ice? A. Yes, sir.

Q. Was there last year a market for ice? A. Yes, sir, a good market.

Mr. Gourley: Take the witness.

Cross Examination by Mr. Mackay:

Q. Is the market exactly the same this year as it was last year? A. At the present time, yes. I

was notified the other day that the first of the month it would go up to $4 a ton.

Q. How do you fix the market price? A. Well, I don't have the fixing of that; I buy my ice from the Ice Company.

Q. Where are they located? A. Well, they have branches in all these suburban towns.

Q. Where are you located? A. Englewood.

Q. Where is this company's ice cut? A. Well, they have several different places where they cut their ice. They have cut ice as far out as Pennsylvania.

Q. Well, where do you get it—where do they get the ice that you buy? A. I couldn't tell where it comes from. It is shipped in by cars.

Q. Where is it shipped in? A. The Erie Railway.

Q. By railway? A. All their ice is shipped by railway.

Q. Are you buying ice all the time? A. Yes.

Q. Every day? A. For the last two years, ever since I started in business here.

Q. And you are paying $3 per ton for ice? A. $3.

By the Court.

Q. When you give that price of $3 a ton at the present time, is it that in small quantities? A. That is the one price, never mind whether you take one ton, ten tons or fifty tons, if they deliver it on the dock.

Q. Do you mean to say there would be a market for 4,000 tons of ice, say, at $3 a ton at the present time? A. Not in a day or a week. There is more ice sold than that sold in Englewood and Leonia in a year.

Q. I mean could you sell to-day— A. Yes, if I had 5,000 tons of ice to-day, I could contract to sell it for $3 a ton.

Q. Yes, for future delivery, but what could you get to-day for it, is what I am getting at? A. They would be willing to pay that.

Q. You mean to deliver it some time in the future? A. Of course it is during the ice season, for the number of months.

By Mr. Gourley:

Q. You make your contracts in the spring for future delivery? A. The company that I buy from don't make contracts with their people; they can raise their price any time they have a mind to, but, of course, last summer, it remained that price right straight through.

Q. And then you pass it on to the other fellow? A. Yes.

Q. Have you any knowledge, Mr. Holden, as to the cost of housing ice? A. I couldn't give the correct figures, right down to the bottom figure. Of course, in housing ice it would cost more money one winter than another, because some winters you might have a lot of extra labor. Now, you might have a heavy snow storm, or two or three of them, and of course that is all extra work and of course that is added on to their housing of the ice.

Q. Well, you haven't housed ice this last two or three years? A. No, I haven't housed any myself.

Whereupon an adjournment was taken to Tuesday, March 12th, 1918, at 10 A. M.

CHARLES ECKERSON, called as a witness on behalf of the Plaintiff, being duly sworn, testified as follows:

Direct Examination by Mr. Gourley:

Q. Mr. Eckerson, what is your business? A. Civil and mining engineer.

Q. And you practice your profession where, principally? A. All over the United States.

Q. Your chief office is where? A. Englewood.

Q. How long have you lived in Englewood? A. I am not living in Englewood.

Q. I see. Were you familiar with this brook at a time before the sewer was constructed? A. Yes, sir.

Q. What familiarity had you with it? A. I made the original sewer plans for the Borough of Fort Lee, making a contour map of the entire Borough, and in consequence know practically all that there was to know about the brook.

Q. What was the condition of the brook before the construction of the sewer? A. An ordinary brook, running clear water.

Q. As to the purity of the water? A. Ordinary brook water in clear weather.

Q. Fit for potable purposes? A. At that time, in 1906.

Q. Was it then you made this survey? A. Yes.

Q. Have you noticed the construction of the sewer? A. I have.

Q. It is said that there are openings in the sanitary sewer of the manholes, did you notice that in

your examination? A. I noticed, I examined the condition of the manholes, yes.

Q. What did you find? A. I found that the system is designed, the system is designed so that if any possible stoppage can occur, the sewage from the sanitary sewer is bound to go into the storm sewer and so into the brook. That is the design of the system.

Q. Stopped in what way? A. Any obstacle should get into the sanitary sewer, it would immediately overflow into the storm sewer.

Q. Would it have that effect in case the pumps were not working? A. It would.

Q. Fast enough? A. It does.

Q. Do you know anything about the pipe, the diameter of the pipe leading from the pumping station? A. I do.

Q. What is the diameter of the pipe? A. The pipe leading from the pumping station in the Crystal Brook district is a four-inch pipe.

Q. What is that designed for, what does it do? A. It is presumed to take the sewage in the pumping station, carry it easterly to the top of the rise of ground from whence by gravity it runs into the brook system.

Q. Have you any knowledge as to the quantity of flowage that a four-inch pipe would take under normal conditions? A. When I made those plans I computed the amount of sewage that would go into that system.

The Court: Read the question.
(Question read.)

A. I have.

Q. Would that depend somewhat upon the

engine? A. It depends upon the system of pumping used.

Q. Had you taken into calculation the quantity of water used by the film companies? A. In my plans?

Mr. Mackay: I want to object at this point, your Honor, unless this man qualifies. I am assuming now that Mr. Gourley thinks his design was used, perhaps.

Mr. Gourley: No; I ask at this time whether he knew.

Mr. Mackay: Then it is immaterial.

Mr. Gourley: The quantity of water used by the film companies, approximately.

The Court: Just read your question as you have it now, please.

(Question read.)

The Court: Objection sustained, unless it appears that the plans were used.

Q. Do you know the quantity of water approximately, used by the film companies in 1907? A. There was none, there were no film companies at that time.

Q. Do you know when the film companies were established at Fort Lee? A. Not exactly; I know it was a few years ago.

Q. Assuming that the sewer, the storm sewer was designed to carry away the ordinary flow, what effect would the use by the film companies of one hundred, one hundred thousand gallons of water per day have upon that sanitary sewer?

Mr. Mackay: I object.

The Court: I think that objection is well taken. You see you have two sewers, and

you are combining the two. Your question combines, asking what effect it would have upon the other.

Mr. Gourley: Your Honor doesn't understand.

The Court: I think the Court does. I sustain your objection.

Mr. Gourley: The question is, after the sanitary sewer was designed for the ordinary flow, what effect would it have on that sewer by adding one hundred thousand gallons of water per day.

The Court: There is no evidence in this case upon which you can predicate that question, that the flow from the film companies goes into the sanitary sewer.

Mr. Grouley: Certainly, the expert said that the representative from the State said a change was made afterwards upon it.

The Court: I do not so understand.

Mr. Gourley: Originally it was put in the storm sewer; changes were made afterwards; your Honor will recall that.

The Court: The Court: does not so understand the evidence.

Q. Well, if one hundred thousand gallons a day were added to a system designed to take charge—a four-inch pipe designed to take charge of the normal flow, what effect would that have upon it?

Mr. Mackay: I object.

The Court: Yes, I will allow that question.

Mr. Mackay: He hasn't qualified, your Honor.

The Court: As an expert?
Mr. Mackay: Yes.
The Court: You may cross examine.

Cross Examination by Mr. Mackay:

Q. Where are you living, Mr. Eckerson? A. Closter, New Jersey.

Q. How long have you been living there? A. All my life, with the exception of around seven years.

Q. You said you were a mining engineer? A. Mining and civil engineer, yes.

Q. Have you any degrees? A. Columbia University, 1898.

Q. Columbia University in 1898? A. Yes.

Q. And obtained what degree? A. Mining engineer.

Q. And any other college and universities other than Columbia? A. No university other than Columbia. I had a university fellowship granted me the next year.

Q. And what is that? A. That is free tuition and a certain gift of money to those who have shown themselves specially gifted in any line of work.

Q. That is on account of your getting a degree of mining engineer? A. Nothing to do with that, special qualifications in this line of work.

Q. And other than getting that degree, did you get any other degrees? A. No, sir.

Q. After you became a mining engineer, what did you do? A. I taught mining engineering in the University of Minnesota for a year, and then came back to Columbia as Assistant Professor of metallurgy for a year.

Q. Teaching mining engineering? A. Metallurgy. I then practiced mining engineering until 1904 or 1905; at that time, took up civil engineering, and have been in that ever since.

Q. When did you take up civil engineering? A. 1904 or 1905.

Q. And where were you living then when you took it up? A. Closter.

Q. And do you know a civil engineer by the name of J. H. Serviss? A. Yes.

Q. He died shortly after that? A. He did.

Q. You bought his maps? A. I did.

Q. Is there a man by the name of Willard E. Cass who died? A. Yes.

Q. And you bought his maps? A. I did.

Q. And you became a civil engineer? A. No; I was a civil engineer before buying those maps.

Q. Did you ever work in sanitary sewer systems? A. Yes, sir.

Q. Where? A. I have constructed one in the Borough of Leonia. I have also had two sets of plans approved by the State Board.

Q. Did you construct the sewer system of the Borough of Leonia or part of it? A. I constructed the system put in last year, and I constructed part of the system that was in before that.

Q. What was that, from where to where? A. During the years I was in the office of Borough Engineer.

Q. Who did the work? A. Different contractors, and the sewer companies themselves.

Mr. Gourley: Are you satisfied, or do you want some more?

Q. Was this sewer company's sewer a sanitary sewer? A. A sanitary sewer; we had no storm sewer in Leonia.

Q. Was it a combined sewer? A. It was a sanitary sewer.

Q. Combined storm sewer? A. Sanitary sewer plain and simple.

Q. You are sure of that, are you? A. Absolutely.

Mr. Mackay: I don't think he is qualified, your Honor.

The Court: I am going to allow the question.

Direct Examination by Mr. Gourley:

Q. Did you ever design a sewer system like this one? A. No, I wouldn't—

(Question read.)

Mr. Mackay: I object to that.

The Court: I am going to allow it.

Mr. Mackay: I ask an exception.

A. If I might, Mr. Gourley, if I could explain this—

The Court: No, no; that is your question. Can you answer?

A. Increase the amount of flow, that is all.

Q. Did you make any examination of this sewer, Mr. Eckerson? A. I did.

Q. Through these manholes at any time? A. Yes, sir.

Q. You may tell us about that, if you will, what you found and when you made it? A. I made four examinations.

The Court: Tell us when they were.

The Witness: Two were in 1916 and two were in 1917. Those in 1916 were in the month of June, pardon me, in 1917, in the month of June, and I made two this year in the month of March.

Mr. Mackay: I object to the two in 1918 and any in 1917 after the commencement of this suit.

The Court: Yes.

Q. What did you find? Give us what you found in each visit? A. I found—I examined some twenty-two manholes and these manholes were located in the section known as the Crystal Brook section; that is north of Central Avenue, Fort Lee. I found in every manhole which I examined that the sanitary sewer was placed partially up on the side of the manhole and the storm sewer was placed below. Both sewers were open in every instance. If any stoppage could occur in the sanitary sewer, it would immediately overflow in the storm sewer and so into the brook. I also found in the manholes some three hundred feet south of the pumping station in the Crystal Brook district that there was a regular—it looked like a constructed weir which had been constructed for that purpose, so that the sewage would flow directly into the pipe of the storm sewer. It had every appearance of being constructed for the purpose of the sewage overflowing. I found when I was there on Monday, a week ago, I found the pumps were working, or the pump was working in the pumping station. I got there about ten minutes past ten, and left there at two twenty. The pump was still working at two twenty, and during the entire period the sewage from the sanitary sewer was overflowing into the storm sewer and so into the brook.

Q. What quantity of flow was there? A. There was a stream eighteen inches wide practically, and from a half to three-quarters of an inch in depth overflowing over this weir into the storm sewer. There was a four-inch pipe that couldn't take the sewage in sufficient quantity as the flow was constantly increasing over this weir.

Q. Why would it not? A. It is too small. I also found in my examination of the sewerage system and the brook that sewage matter was constantly, during all four trips I was there, overflowing into the brook. On each trip I went to the mouth of the brook at the outlet pipe, and I found sewage in every instance overflowing into the brook.

Q. What was the characteristic of the water, as to discoloration or any foreign substance in it? A. The water was turbid and different colors, green, brown and yellow, and the odor was offensive.

Q. And any evidence of toilet paper? A. Toilet paper was there in profusion and other articles such as are usually found in sewage.

Q. Well, on the next visit, was there any difference? What examination did you make on your next visit? A. This applied to both of my visits, 1917 and 1918; the same condition prevailed on all four visits.

Mr. Gourley: That is all. Take the witness.

Cross Examination by Mr. Mackay:

Q. How much water do these pumps pump, do you know? A. I have no idea.

Q. What quantity would this sewer hold? A. As I have not seen the plans and do not know the grade upon which it is laid, I cannot tell you.

Q. What is the diameter of this discharge pipe? A. Approximately twenty-four inches.

Q. Of the discharge main from the pump? A. I measured that at four inches. Going over the hill easterly, you mean?

Q. What is its capacity? A. I don't know, I only know—

Q. How do you know it wouldn't carry one hundred thousand more then? A. The one hundred thousand doesn't get into that main. The one hundred thousand is in the storm main; doesn't get in the sanitary main at all. It is in the storm pipe.

Q. Why do you say it wouldn't carry it then? A. I didn't say anything about the one hundred thousand with reference to carrying, the carrying capacity is the sewage it pumps. It is there to pump sewage.

Mr. Mackay: That is all.

By the Court:

Q. Do you know into which sewer the water from the two film plants goes? A. Yes, sir.

Q. Which does it go into? A. Into the bottom or storm sewer.

Q. Not in the sanitary sewer? A. No.

Q. When did you find that? A. On my visit in March. The discoloration of water—

Q. This year? A. Yes, last month.

PETER D. HENDERSON, called as a witness on behalf of the plaintiff, being duly sworn, testified as follows:

Direct Examination by Mr. Gourley:

Q. Mr. Henderson, what is your business? A. Wholesale ice business.

Q. Been in that business how long? A. Twenty six years.

Q. You house ice yourself? A. Yes, sir.

Q. Where is your pond? A. The pond is situated in Saddle River Township right east of Paterson.

Q. And how long have you housed ice there? A. Twenty-six years.

Q. Were you engaged in the ice business last year and this year? A. Yes sir.

Q. Do you know what the market price of ice was last year, July, on the bridge? A. Yes, sir.

Q. What? A. Three dollars a ton to dealers, and four dollars a ton to consumers.

Q. What is it now on the bridge? A. The same price has been all winter.

Q. Was there any change in the price last year between March and July? A. The change took place the first of June. It had been selling, winter ice, what we call winter ice or water ice, that is, ice right out of the water onto cars, never been in the house, sold on the bridge for two dollars a ton until the first of June. Then the price went to three and four.

Q. Can you tell us what the cost of housing a ton of ice is? A. I can tell you what my cost was.

Q. What distinction is there between your method—Have you seen these houses of Mr. Garrison? A. Yes, sir.

Q. You examined them? A. Yes, sir.

Q. Know how close the pond is to the house? A. Yes, sir.

Q. And know how close your own pond is to your house? A. Yes, sir.

Q. Well, taking that into consideration, would yours be cheaper or dearer (don't tell me what it is) than his, or would it be about the same? A. It would be the same; he has the same method.

Q. What was your cost of housing last year? A. Eleven cents a ton.

Q. What was the cost of taking it from the house and putting it on the bridge? A. About fifteen.

Q. What shrinkage is there per ton of housed ice? A. Why, I open my—it all depends on how quick you take it out. I open my houses in February and they were open this year until the 22nd of December. My shrinkage was twenty-five per cent.

Q. Is that higher or lower than— Is that a high or low average? A. That is a high average.

Q. This year I presume there has been no noticeable shrinkage yet? A. No, no shrinkage yet.

Q. Was there a market for ice last year? A. Oh, yes.

Q. A market now? A. Oh, yes.

Q. Do you know the capacity of these houses of Mr. Garrison? A. I don't know; I have never figured them up.

Q. Do you know the number of cubic feet a ton of ice takes? A. I have bought ice at house measurement and I have sold ice at house measurement, and you were allowed forty-five cubic feet for a ton of ice; if it was not spaced. If it were spaced, we allowed forty-two.

Q. What about the analysis of the ice? Do you get your ice analyzed? A. Every year.

Mr. Mackay: I object to that.

The Court: How does that make any difference?

Mr. Gourley: Except whether it is a custom of the trade to have it done?

The Court: I do not think it is competent.

Mr. Gourley: Your Honor rules it out?

The Court: Yes.

Mr. Gourley: Will your Honor allow me an exception?

The Court: Certainly.

Mr. Gourley: That is all.

Mr. Mackay: No questions.

JOSEPH W. STAGG, recalled as a witness on behalf of the plaintiff, having been duly sworn, testified as follows:

Direct Examination by Mr. Gourley:

Q. Mr. Stagg, have you looked at the agreement to purchase this property? A. I have, sir.

Q. Which I have here (indicating)? A. I have, sir.

Q. And also the deed, both of which have been offered in evidence? A. I have, sir.

Q. Are you able to tell us whether those descriptions embrace the bond of Mr. Garrison? A. They do, yes, sir.

Mr. Gourley: That is all, Mr. Stagg.

Mr. Mackay: Does your Honor want to consider that question of 1917?

The Court: Yes; if you have anything further to say.

Mr. Mackay: I only have this to say: I do not think the 1912 statute gives any greater right, that is, unless the pleadings set forth facts sufficient to put the defendant upon notice. Now, I have looked carefully at this complaint again, and the last

paragraph apparently that your Honor relies on is, you will further be obliged to expend large sums of money in restoring the lake to its original state of purity. Now, that has nothing to do,—that is one of his elements of damage, as he claims. He says the water is polluted, the lake is polluted. He can't use the ice, he loses the crop, and he will have to clean out the ice pond, which will mean expense. Now, he says nothing about being damaged in the future; it is all really in the past tense.

Now, the case of Albee vs. Weingard in 71 N. J. L., which was decided in 1904, says: when the damages claimed are continuing and cannot be fully ascertained at the time suit is commenced, such damages only as have accrued at the time the suit is instituted, can be recovered in such suit.

The Court: That was undoubtedly the law prior to the passage of the Practice Act of 1912.

Mr. Mackay: I do not think the defendant in this case should be injured by being put to meet something that they were not expecting to meet and not anticipating, and I do not think that the 1912 Act has put them on their inquiry unless they said it was going to be a continuing injury, and then the statute says, where it is alleged and shown to be a continuing injury, the defenddant is put upon notice of continuing injury. Then they are ascertained up to the time of the trial in spite of the fact that the suit is commenced before other damages may accrue.

The Court: Do you mean to say that the plaintiff ought to be compelled to allege in his complaint the damages covering the 1917 and 1918 ice as well?

Mr. Mackay: Yes, or he should use some words to say in the future he will be injured and damaged, just the same as a person alleges in a pleading that they will be permanently injured. They have a right then to produce proof to show the permanency of the injury and the continuance of it in the future, and that brings them down to the day of the trial, because it is something in the future which they allege in their pleadings, to give notice that it is something in the future, or something to look forward to, and then the defendant has notice; whereas, in this case, all they say is, we lost a crop of ice of a certain year. We are prepared to meet that. They say we will be compelled to clean this lake. We are prepared to meet that. Now, they come into Court and they say, well, of course, several months have gone by and another ice crop has come along and we claim that. Now, we filed our answer before, we filed our answer last summer.

We allege Mr. Garrison wasn't the owner; he wasn't. He said he was. He comes in here and practically admits he wasn't the owner. There was an agreement—doesn't become the owner until some time after we started this suit, that he wasn't the owner and he took title to it. I say we are entitled to notice of anything we have to meet. If they are going to claim a continuing injury, then the statute says they may assess

for a continuing injury, but there must be something to give notice. The least we could be entitled to would be time to meet that situation and condition. There are other cases here, of course, from other states, which lay down the same rule.

The Court: Of course, the continuation of the damages will not allow Mr. Garrison to stand in any better position than he did when he brought his suit. Becoming an owner since that time cannot affect it.

Mr. Mackay: Suppose in 1919 and 1920 this continues and he has to start another suit. He couldn't recover that now, could he? He might have to start another suit.

The Court: No, damages up to the present time.

Mr. Mackay: If this suit had been tried in September, he could not have recovered for 1917 and 1918.

The Court: You might be trying another suit now.

Mr. Mackay: I say we are entitled to meet that. We are entitled to have the opportunity to meet that situation. In a Rhode Island case, in the Whitlock case, where there was no allegation of a permanent injury—the courts in Connecticut have a rule which permits recovery of damages that may have accrued provided reasonable notice be given the defendant of the damages intending to be proved. But they must, as I say, allege something to give the defendant notice that they are going to claim for the future. We find assault and battery cases and negligence cases and accident cases, where they say the plaintiff will con-

tinue to suffer great pain and agony in the future; then we come into court, a continuing cause of action, and show that the pleadings have put the defendant upon notice; but to say that this little last paragraph, this last squib, you will further be obliged to expend, something you will have to do, not in the future as a continuing injury, something you will have actually to do to restore it by reason of something that has actually been done, if the pollution does not cease. I say there is no notice to us whatever. The statute must be liberally construed for the benefit of the defendant, to give him a reasonable notice of what he must meet at the trial. That is what law is for, to give the defendant the benefit as well as the plaintiff. Now, I will say, any lawyer who picks up this pleading of July 31, 1917, and has twenty days to answer, and reads that this is a claim only for one crop without any allegation of a continuing injury, is entitled to meet that pleading and not be subjected, in case the case goes over for a term to say, "Well, you should have thought of that." They didn't have to allege it; that wasn't any part of their duty. They didn't have to say a thing about it. They didn't have to allege any future trouble or future injury. You should have surmised that; you should have guess that that was your duty. I should say, your Honor, that would be absurd. If there was a slightest intimation of the future, but the future is never mentioned. In case it ceases pollution, refers to the present, assuming it is polluted, and as soon as the suit is started

will be stopped, and that by reason of being stopped, they will have to expend money to clean this lake. That is the contention.

The Court: Where would you have been any better off if it said, "all future crops of ice"?

Mr. Mackay: We had a right to meet that issue.

The Court: Where would you be in any different position than you are to-day. How are you surprised, if I should allow an amendment? If the parties should simply come in court now and say, "We desire to amend our pleadings by including the 1917 and 1918 crops," how would you be at all surprised?

Mr. Mackay: Well, assuming that the plaintiff has a good cause of action, would have to get the value of the 1917 and 1918 crop.

The Court: Wouldn't you be just as prepared to meet it to-day as you would last July?

Mr. Mackay: I do not say we would, no. I don't know what Mr. Garrison would have done with the 1917 or 1918 crop.

The Court: If he had sued you on the—

Mr. Mackay: The answer to the argument isn't what would we do; it is what rights would we have as defendants.

The Court: I am trying to find out how you say you would be injured by allowing this to go to the jury.

Mr. Mackay: We have prepared on the questions of values of 1916 and 1917 crop, but have done nothing regarding the 1917 and 1918 crops.

Mr. Gourley: The same witnesses can tell.

Mr. Mackay: We don't know that; we haven't gone into it.

Mr. Gourley: Then they are not ice men.

The Court: One minute, I will hear Senator Mackay first.

Mr. Mackay: That's our claim, we would be injured that we are not prepared or haven't taken any notice of the 1917 or 1918 crop, because we haven't expected we had to meet it or gotten expert witnesses. The question of pollution has all been brought in here right down to 1918, but we didn't assume we had anything to do with it, assumed it would be ruled out; we relied on that, because the pleadings said for a certain time. That's where we are injured, and that we haven't had an opportunity to go into it, except perhaps hurriedly since we were forced into it yesterday on the question.

The Court: Now, Mr. Gourley, I will hear anything further you have to say.

Mr. Gourley: Does your Honor want to hear from me?

The Court: Yes, I think there is a good deal to be said on both sides of the question.

Mr. Gourley: Well, the statute says a continuing cause of action, not the difference in time between the two ice crops, but if a continuing cause of action exists, then the statute operates. Now, if the counsel were not familiar with the act, if it is any surprise because the statute escaped their attention, we are not to blame for that. That exists in the case itself. It is a con-

tinuing cause, and wasn't it apparent to the various men or to these gentlemen in the borough that the sewer entering into the common caused the notice? Wasn't there notice inherent in the very subject of the thing? It was not an intermittent thing, but it went on every day continuously. They all say that they knew that and the borough knew it, and they knew the law that you pay the damages. The 1912 Act simplifies it; it brings these various outstanding things together for the purpose of aiding litigants. This man is entitled, with the witnesses he has brought here, to have it go to the jury. How can the counsel say that there was any surprise? What surprise can there be in the case? I said in opening the case that if counsel said there was any surprise, they could amend their pleadings in any way they pleased, and I would gladly meet them. I said yesterday, because it occurred to me on my feet, the case of DeGrado against the Public Service Company. I have just had a large book handed to me. The counsel raised no question, and the Judge immediately said, without any discussion beyond the suggestion, that the statute covered the case, Judge Silzer. What was that case? That was a daily pollution case; in other words, where the seepage from the adjoining property of the Public Service Co. went through the soil and into the soil of the adjoining property owner, and he couldn't use the water in any way. This was a great loss. A year had interposed, these various things were presented, and they admitted under the Act that it was so.

The Court: What was the complaint? What was the allegation of the complaint?

Mr. Gourley: Like all these complaints. No lawyer draws a thing for the future. He draws it up to that time and the statute operates. If it be a continuing one, that ends it. This is continuing. As this sewer was designed, it must continue. As the last witness said, it was designed to overflow. They haven't attempted to correct it, and say they knew the law, that when this case was to be tried, it was to be tried all together. Besides that, suppose your Honor declined to admit that and we sued again and they pleaded the fact that this judgment had been rendered in the cause, and was res adjudicata. Would your Honor say that that judgment would be final against us at this time? It is not what you put in it, but what you might have put in. The estoppel of the judgment goes to the fact that everything must be put in in the case. They cannot try their case in part. As Freeman said, they must try it all together, and when we meet the statute, the counsel says, "Oh, but that is a continuing cause of action." Your Honor would be somewhat embarrassed in view of that plea to ascertain just what your duty was to safeguard the rights of both parties in the case. What does this say? It says it is discharging daily from this sewer. We hoped it would end there. If there is a way of ending it, it should have ended then. Their duty was to end it. Now, if they don't end it, whether 1917 or 1918 was to be included or not, that was for them to say. We couldn't say it

would exist. We didn't know what they would do. They might have done these, so that only the storm water would come in there, which would minimize the danger very much. They haven't done that. Are we to anticipate that the theory of the law is that they will stop the pollution, the theory that they will stop, that what they ought to do they will do? We had a right to assume that they will stop. We do not know that they will continue for another year, but it is our duty to present the case to date, and being a continuing notice, we are not to blame for their absence of knowledge on that subject.

The Court: Your contention is that there is no necessity of alleging in your complaint that you will claim damages in the future?

Mr. Gourley: No, so long as the character of the injury is apparent on the face of the paper. If a mill, for example, had had water washed down to it that polluted the use of the mill, it is continued in that way, if it goes on, then the question of the further damage, the liability is still the same.

The Court: Do you think under that Act of 1912, if you are entitled to your damages up to the time of the trial, you are not obliged to amend your pleadings, so that it clearly appears what damages you are asking?

Mr. Gourley: That is the judgment I take of it. I would very gladly make a suggestion to be amended in that respect.

The Court: It is my conclusion that in

order to protect the defendant in case there is a judgment against him, or protect you in case the judgment goes against you, the record ought to show that it includes the damages to the time of trial, so that if either party puts itself up to judgment as a defense to any future action, that it would appear what was actually tried. Now I will allow that, and the case to proceed, and Mr. Mackay may have his objection to that proceeding noted on the record.

Mr. Mackay: And the question of surprise?

The Court: Yes.

Mr. Mackay: You will allow me an exception?

The Court: Yes, you may take your exception, and you may put anything you desire on the record to protect yourself.

Mr. Mackay: The statement now is that at the close of the plaintiff's case, the plaintiff is now permitted, over the objection of the defendant, to so amend his pleadings—

Mr. Gourley: The Court has stated the point.

Mr. Mackay: I want to get your Honor's permission.

The Court: We have it on record.

Mr. Mackay: May I make this statement?

The Court: Yes; make the statement.

Statement read.

Mr. Mackay: —as to include a claim for damages for the ice crop of this pond for the winter of 1917 and 1918.

The Court: Damages to date.

Mr. Gourley: Damages to the time of trial.

The Court: Damages up to the time of trial.

Mr. Mackay: Meaning up to the day of the trial, 1918?

The Court: I do not say that. I say he may allege damages up to the time of trial.

Mr. Gourley: In the words of the statute?

The Court: I will allow that under the Act of 1912.

Mr. Mackay: And I ask an exception.

The Court: Yes.

Mr. Gourley: Mr. Deghuee is here. May I ask your Honor's indulgence to put him on the stand?

The Court: Yes.

JOSEPH A. DEGHUEE, called as a witness on behalf of the plaintiff, being duly sworn, testified as follows:

Direct Examination by Mr. Gourley:

Q. Mr. Deghuee, what is your profession? A. I am a chemist.

Q. How long have you been a chemist? A. For twenty-seven years.

Q. You are a graduate of any college? A. I am, of Columbia University.

Q. What has been your occupation since that time? A. I graduated from Columbia University after taking the course in chemistry, and for a period of six years I was instructor in chemistry in the College of Physicians and Surgeons, the Medical Department of Columbia University, and for a

period of eight years I was chemist of the New York City Department of Health; for two years of that time I was the chief chemist, and for the past thirteen years I have been acting as consulting chemist in the sanitarium with the Lederle Laboratories in New York City.

Q. You have testified, I think, in a number of important cases? A. I have, in a great many cases.

Q. Did you testify in the DeGrado case? A. I did.

Mr. Mackay: I object.

The Court: I will allow that.

Mr. Mackay: Exception?

The Court: Yes.

Q. Did you testify in the case of DeGrado vs. The Public Service in Paterson? A. I did.

Q. Have you made an examination of some water alleged to be taken from this Crystal Brook? A. I did; I made a number of examinations.

Q. Just identify the water first, if you will? A. These samples (indicating) were received from Mr. Bramley, my associate.

Q. Will you tell us the numbers of them, what you have got? A. There is one marked "Number 1," marked from the spring in the center of the pond site; Number 2 from a branch stream, the point northeast of where it joins the main stream.

Q. What was Number 1? A. The spring in the center of the pond site, the Crystal Lake Brook.

The Court: Now, two?

The Witness: Two was from a branch stream at a point northeast of where it joins the main stream. Number three from main stream where it is joined by the tributary

stream coming in from the northwest. Number four from main stream at a point about five hundred feet below sewage pumping station at Fort Lee; and Number five, effluent from drain discharging into the brook near the pumping station.

Q. Now, when did you receive those parcels? A. Those were received on the 16th of November, 1916.

Q. Well, what did you do with them? A. I made an examination of those.

Q. State what test you submitted them to, and tell us the result of it? A. They were submitted for bacteriological examination, and Number One was found to be pure. Number Two was polluted to some extent. Number Three polluted to a slight extent. Number Four was very much polluted, and Number Five grossly polluted.

Q. Can you tell us the analysis of those pollutions? A. The Number One showed no bacteria, none of any kind; Number Two showed the typical sewage bacteria, that is, the bacteria usually found in sewers.

Q. That means what? A. Using one cubic centimeter of water for the test, I showed a count of 640.

Q. A cubic centimeter would be roughly how many— A. About a quarter of a teaspoonful.

The Court: How many?

The Witness: 640. The Number Three showed the typical sewage bacteria in one-tenth of a cubic centimeter. That is, one-tenth the quantity of the previous one, and showed a total count of 40.

Q. In other words, when you give us the bacteria you give it in a less volume of water? A. Yes,

that is the way the test is made, by using continually smaller amounts of water to see how small an amount of water will give the test.

The Court: Now, comparing that with Sample Number Two, you would have 400 to 640?

The Witness: 40 in one case and 640 in the other. In the Number Two sample the test was obtained for the sewage bacteria by using ten times as much water in order to get the test.

The Court: You got 640?

The Witness: No, that is a separate test; that is a total of all bacteria. The other shows the test for the bacteria which are derived from the intestines of animals.

The Court: What is your difference between 640 and 40? What does that show?

The Witness: Well, that shows the relation of numbers there. It shows the first one to have a materially higher count than Number Two had, but neither of those counts is extremely high. Number Two has a very much higher percentage of bacteria.

The Court: How much greater?

The Witness: Roughly, ten times. Number Four also showed the test for—oh, I might say—may I amend that statement on Number Three, that in Number Three the test was not obtained in all the tenths, which shows that it was not there in every tenth, every tenth of the cubic centimeter, which is not quite as strong as if it were present in all of them. Number Four showed sewage bacteria present in all the tenths. Now, that

doesn't show necessarily exactly how much was present. Of course, the tenth is as low as we go in these examinations in testing waters. We don't test less than that. Of course, if it shows in all the tenths, it shows the water is very bad.

Q. A tenth would be about how much? A. That would be a tenth of a quarter of a teaspoonful; it would be about a fortieth of a teaspoonful.

Q. That would be a few drops of water; do you mean that? A. A tenth of a cubic centimeter is about two drops of water.

Q. And in those two drops of water you found bacilli? A. Not only bacilli but the typical sewage bacilli. The bacteria derived from the intestines of animals; the bacteria that occurs in the intestines of animals.

Q. Is that dangerous to health? A. It may or may not be. It usually is. Of course, if it comes from an animal in a healthy condition, it would not be dangerous, but we never know whether the man or animal from which it comes is in a healthy condition. It is the danger sign.

Q. That is Number Four, is it? A. That is Number Four.

Q. Number Five, what did you find? A. The total count was 20,800, estimated. The count ran so high there that it got beyond the limit of counting accurately, so it was at least 20,800, and probably more.

Q. That is per centimeter? A. Per cubic centimeter.

Q. 20,800 in a quarter of a teaspoonful? A. 20,800 in a quarter of a teaspoonful.

The Court: How does that compare with Number Two and Three.

The Witness: That is far worse, a far greater number of bacteria and shows the typical sewage bacteria in greater quantities; it is very much worse than the other two.

The Court: And the percentage worse, can you give us that?

The Witness: It is very difficult to give these things in percentage. I should say it was one hundred times as bad, at least.

The Court: All right.

Q. Number five also showed the test in a tenth of a cubic centimeter? A. As I say, I cannot compare four and five because it has reached the limit of the test. They both show very bad water, and you cannot compare degrees of badness there.

Q. In other words, four was up to the limit of your computation? A. Yes. Whether five was worse or not, I cannot tell. It is just as bad, and it shows 31,200, also estimated; we counted up to the limit of accuracy.

Q. I should think you did if you did that in two drops of water? A. You couldn't go any further.

Mr. Mackay: I object to Mr. Gourley talking to the jury that way.

The Court: I think that ought to be in the form of question and answer.

Mr. Mackay: That is the second time he has done it.

The Court: Counsel don't discuss matters between themselves.

Q. Could you count any more than two drops of water than that per—

Mr. Mackay: I ask that that previous question as stated by the counsel in which I interrupted and interfered be stricken out.

Mr. Gourley: What is the question? Read the question, Mr. Stenographer.

(Question read.)

The Court: That may be stricken out, the first part of the question.

Q. Now, could you go any further? A. Well, I could by repeating the test on another sample of water, and using smaller amounts of the water. In order to explain that, I will have to explain the procedure. In making these counts, the material which is to be tested is placed in bullion in a meat jelly. It is mixed with a certain quantity of meat jelly and sprayed out on a flat plate, and then the bacteria allowed to grow. Sensitive to jelly, the bacteria cannot move around and each bacterium is fixed in a little point in the jelly, and it develops and splits and multiplies and forms what is called a colony. After a while, after two or three days, that is visible to the naked eye as a little spot in the jelly. That originally was one bacteria. Now, the count is made by counting those spots. Now, if the material is judged to contain a very large number of bacteria, we, instead of taking a small measure, count directly into the jelly. We have to dilute that with distilled water, in other words, we will take one cubic centimeter, mix it with one hundred distilled water, and then take one cubic centimeter of that and then play it out. That gives us one-hundredth of the original. We can do that a second time, of course. Take one cubic centimeter of that first dilution and put it in more distilled water. Then we get it to a thousandth. That means each

little spot we get at the end of the test must be multiplied by ten thousand to get back to the original number per cubic centimeter.

Q. But in this case, doctor, how far do you go with it? A. Only to one hundredth.

Mr. Gourley: That is all; take the witness.

The Witness: That is as far as we ever go with water; testing milk it sometimes runs into the millions.

Cross Examination by Mr. Mackay:

Q. Did you analyze the ice, doctor? A. Yes, before the pollution, I did.

Q. Did you visit the stream yourself? A. No, sir; I never did.

Q. Who gave you the ice? A. The ice was given to me by Mr. Garrison.

Q. How long after you got it did you examine it? A. This was three years ago. I don't know whether I can tell you from the records.

Q. We have it on the record. A. Whether Mr. Garrison gave it to me or whether one of our men collected that himself, I have no recollection; I think at the moment that was delivered by Mr. Garrison.

Q. When? A. On January 29, 1914.

Q. What was the result of that examination? A. That showed the ice to be pure in every respect, to be free from all signs of contamination.

Plaintiff rests.

New Jersey State Library

WILLIAM E. WOOD, called as a witness on behalf of the defendant, being duly sworn, testified as follows:

Direct Examination by Mr. Morrison:

Q. Mr. Wood, where do you live? A. Coytesville, New Jersey.

Q. Is Coytestville part of the Borough of Fort Lee? A. Yes, sir.

Q. Do you know where Mr. Garrison's pond is? A. Yes, sir.

Q. How long have you known that pond? A. Well, ever since I can remember.

Q. Do you know the streams which feed that pond? A. Yes, sir; I think I do.

Q. And where those streams rise and how they flow? A. Yes, sir.

Q. How many times do you suppose in your life time you have been along those streams? A. Well, I—

Q. About how frequently? A. I lived there fifty-seven years, and I have been along them a good many times; I couldn't say how many.

Q. Now, in a general way, what is the shape of the stream or streams that feed this pond? A. Well, they mostly come from marshes.

Q. And from what direction? A. With the exception of one.

Q. Does the stream come into the pond? A. From what direction?

Q. Yes. A. Some come from what I could call the east and then—well, they all run into that one brook that goes into the pond, all these smaller brooks.

Q. About how many of the smaller brooks are there to the one which enters the pond? A. Well,

I know of two that goes into that, and I know of several smaller ones that run into those brooks.

Q. Now, beginning for convenience at the south of the arms of this brook, where would we find the first arm or branch of the brook which feeds Garrison's pond, beginning at the south? A. That runs into the brook that feeds that pond.

Q. Yes. A. It is just east of Jones Road.

Q. Now, I show you an atlas of Bergen County.

Mr. Gourley: One minute; I object to that.

The Court: Why?

Mr. Gourley: That is of no official character that I know of, sir. I do it because my map was objected to.

The Court: Is that an official map?

Mr. Morrison: This is an atlas of Bergen County which is used, and I am going to show that it shows the condition accurately in this neighborhood.

Mr. Gourley: An engineer was not permitted to sketch a map yesterday, and your Honor excluded it.

Mr. Morrison: The rule under which I seek to use this in this way is stated in 17 Cyc. at 412—

The Court: I so understand it to be the rule. You may examine him on it first.

Mr. Morrison: I am about to do that; Mr. Gourley objected.

Mr. Gourley: I did; there was objection to the map yesterday. The judgments as to maps are marvelous between yesterday and to-day.

The Court: If the same condition develops to-day as it did yesterday, the map will not go in.

Q. Now, Mr. Wood, I call your attention first to the page marked "index" and ask you if you know what that page shows?

The Court: It speaks for itself, does it not?

Mr. Gourley: Your Honor will note my objection to the question?

The Court: Yes; the map shows for itself.

Mr. Morrison: Now, the map speaking for itself, shows the territory between the Hudson River—

Mr. Gourley: I object to your making a statement of what it shows.

The Court: The question is whether the brook and its tributaries are shown on this map.

Q. I call your attention to the part of the map which shows the neighborhood in which you have resided all your life, and to these lines which run through that map to this round blue spot, and I ask you if that shows the Garrison pond and the brooks which are tributary to it?

Mr. Gourley: I object to that.

Question read.

The Court: You ought to find out whether that correctly locates and shows the position, the relative position, of the Garrison pond and the brooks tributary.

Q. Mr. Wood, does this map correctly show the position of the Garrison ice pond and the brooks which are tributary to it?

Mr. Gourley: I object; that is improper.

The Court: I will allow that question.

Mr. Gourley: You will allow me an exception?

The Court: Yes; take your exception.

Mr. Gourley: There is no proof that the map is accurate or anything else.

A. This (indicating) is Leonia Borough and this (indicating) is Englewood City, and the pond is down in that neighborhood, but I don't know just where the division lines are between Leonia Borough and Englewood City, but the pond is in that location.

Mr. Gourley: That is very scientific.

Q. Now, as to the brook which feeds the pond? A. I would say it starts in an easterly direction and crosses over to Broad Avenue, and I then call it a northerly direction.

Mr. Gourley: The witness is referring to the map. I object to the question until the map is proven.

The Court: Are you referring to the map?

The Witness: My general knowledge of it.

The Court: I think the witness has not shown enough knowledge of the map to permit that map to be used.

Mr. Morrison: We will close the map, then.

The Court: Yes; close it up.

A. (Continuing) The brook runs then, I would say, in a northerly direction to within one hun-

dred or two hundred feet of Walton Place; then it goes on easterly again and crosses two branches at Jones Road and Walton Place, and the main brook goes on up easterly into Englewood Cliffs and then there is a brook which goes from the marshes from the north in Englewood down and connects into it, and there is one going south which is Jones Brook which goes on down to Fort Lee and Palisade and those places, and these brooks, Jones Brook is fed with a couple of small ones that come down from where I live.

Q. Now, will you name, Mr. Wood, the municipalities or communities in which there are branches of this brook which feed Garrison's pond? A. Well, there is one comes down from where I live.

Q. Which would be Coytesville? A. That is Coytesville; then there is the Jones Brook that runs on through either West Fort Lee and takes West Fort Lee or Taylorville, or whatever they call it and so on down through Palisade and those places.

Q. So much for those branches. Now, what other municipalities through which the other branches go? A. Well, the one running up into Englewood Cliffs is not populated at all; it just goes up through the woods. The one goes up north through the Englewood section, is up along Jones Road there where they had a garbage dump at one time east of Jones Road.

Q. And you also spoke, did you not, of the brook running through parts of Leonia? A. No, I do not know of any brooks—

Q. Did it run through parts of Englewood City proper? A. Why, there is a small brook goes down through and possibly crosses Walton Street and runs into that same brook and feeds the pond.

Q. And where in Englewood is Walton Street?

A. Why, it runs from Grand Avenue to Jones Road.

Q. And how far north or south of the city line? A. Well, I should think—well, I don't know just where the south line is.

Q. Well, how many blocks is it into the City of Englewood from the pond? A. I should think it was five or six blocks; I am not sure about that.

Q. Now, in distance, in miles, Mr. Wood, or in feet if you prefer, how far is it from the southerly end of the brook that goes from Palisade to the northerly end of the branch of the brook which comes from Englewood or Englewood Cliffs—

Mr. Gourley: I rise to inquire what is the object of this testimony?

The Court: I shall allow it.

Mr. Morrison: We propose to show, if the Court please—

The Court: Counsel need not go any further.

Mr. Gourley: I am wholly relevant in my view of the case, sir.

The Court: Proceed.

Q. Answer the question, Mr. Wood. A. How far it is from the south end of the brook to where it feeds into the main brook?

Q. No, the stenographer will read the question. (Question read.) I would think a mile and a half.

Q. And from east to west from the most easterly point drained by this brook to the most westerly point, what is the distance? A. Along that brook, you mean?

Q. No, I mean the distance right straight across it; in other words, what is the leeway of the basin which this brook runs through? Now, you have

given me the distance north and south on that basin, what is the distance east and west? A. Well, I should think about a quarter of a mile each way.

Q. About a half a mile in all? A. Yes.

Q. Now, in that territory which is drained by the brook, are there any sections which are built up with houses or laid out in streets? A. Oh, yes.

Q. And what are those sections, if you please? A. Well, one, Fort Lee is built up on either side of the brook; up on the slope, up on the sides.

Q. Any others? A. No, I don't know of any others only Coytesville, that comes into this brook, and where a settlement was, West Fort Lee, before the recent sewer was built.

Q. How many houses were there, about how many? A. I would think there was one hundred and fifty or two hundred.

Q. Were the streets laid out there? A. Why, they were laid out.

Q. And where did the drainage from that West Fort Lee section go before the sewer was built? A. Why into this hollow, I imagine.

Q. And by the hollow, what drained the hollow? A. The brook.

Q. Now, you say Coytesville also had a brook that drained in? A. Yes.

Q. How large a place was Coytesville before the Fort Lee sewer was built? A. I should think it was four hundred or five hundred houses, but not draining into that brook.

Q. Now, what part of it did drain into this brook? A. One street, about eight or ten houses.

Q. What about this Jones Road section? How large a section is that? A. It wasn't built up there at all.

Q. Are there any houses on Jones Road? A. Yes, a couple on Linden Avenue.

Q. Was there any sewer in there to take it away? A. I do not know whether there was any sewers there or not.

Q. Now, you know Broad Avenue running from Leonia to Englewood, do you not? A. Broad Avenue, yes, sir.

Q. Is that part of Broad Avenue graded to this brook that runs into Garrison's pond? A. There is a small brook there comes down; it comes down on one side of Broad Avenue a way; they have covered it in places now.

Q. But the drainage on the surface of Broad Avenue, is any part of that drained into Garrison's pond or the brook feeding? A. I think not.

Q. What becomes of the drainage from Brook Avenue? A. I couldn't say what becomes of it, but it runs in a position that I don't think it drains much of it into Garrison's pond.

Q. Does any of it drain into it? A. I couldn't say; I couldn't answer that question; I don't know.

Q. Now Mr. Wood, you have been around this brook and pond for a number of years? A. Yes, sir.

Q. You know that the Fort Lee sewer was built recently? A. Yes, sir.

Q. What was the condition of the brook before the Fort Lee sewer was built, as to its cleanliness? A. Well, I wouldn't call it clean.

Q. Why not? A. Because I know of these things, where they started, and all that.

Q. Now, what are the things that you know of? A. Why, the one at Main Street, Fort Lee, is a marsh, and it is just the natural drainage from all the places there. They are all built up on the side hills on either side and it is the natural drainage for them.

Q. And what other things were there that you know of? A. I don't recall anything else.

Q. Do you know of any building between the present pumping station and Main Street which was used for an industrial purpose? A. A small dye place there.

Q. And where did that lie in relation to this brook? A. It lays just a little west, but on a little raise from the brook.

Q. In the swamp which you have described as the head waters of the brook? A. A few feet from it, that is all.

Mr. Morrison: You may take the witness.

Cross Examination by Mr. Gourley:

Q. Whose dye shop is that? A. I couldn't tell you whose it is.

Q. When was it built there, or when did it begin operating? A. Why, as near as I can remember, about two or three years ago.

Q. You do not remember the exact time? A. No, I do not.

Q. You do not know how they drain? A. No, I do not.

Q. This marsh of which you speak, that is simply the surface water? A. Yes.

Q. The head water, the surface? A. Yes, the starting of the brook.

Q. You have spoken about the pond. The water of this brook runs through the Englewood Golf Links before it runs into the pond? A. Yes.

Q. A fine slope of upland all green, close cut grass and all that? A. On the golf course side of it, yes.

Mr. Gourley: That is all.

PETER CELLA, called as a witness on behalf of the defendant, being duly sworn, testified as follows:

Direct Examination by Mr. Morrison:

Q. Mr. Cella, where do you live? A. Fort Lee.

Q. And what part of Fort Lee? A. In the first district of Fort Lee.

Q. What are the streets? We would recognize it better that way, perhaps? A. I live in Whitman Street.

Q. Near what street or avenue? A. Right next to the Central Railroad crossing there.

Q. What is the nearest avenue running north or south? A. Anderson Avenue.

Q. How long have you lived there? A. Sixteen years.

Q. And does any part of the brook which feeds Garrison's pond run through that neighborhood or near it? A. Why, all along Anderson Avenue starting from about what they call Tom Hunter's road. There is a sort of a slope there and all that drainage, why it seems to go down a natural course into that brook.

Q. Now, how large a neighborhood is that, that acts as you have described? A. Why, I would say from Tom Hunter's Road down to Main Street, practically about four blocks, and on a slope there there is in the neighborhood of about twenty five houses on the west side of Anderson Avenue.

Q. You knew that neighborhood before the Fort Lee sewer was built, did you not? A. Oh, yes.

Q. You were quite familiar with it? A. Yes.

Q. Where did the drainage from this neighborhood go before the sewer was built? A. There

were several outlets; there was one right on the corner of Tom Hunter's Road which led down that slope that went down into that gulley and along that brook. Then there was another one down at the—about one hundred and fifty feet from Main Street back of Burdett's grocery store. Burdett had his horses there, three or four horses, and there was an open brook that led right down to that gulley that passed Paul Beyer's property, and when it crossed William Street it ran along the property and emptied right into the brook.

Q. Now, what sort of properties were these? Were they residences or stables, or factories, or what? A. Why, there was a stable, Burdett's stable, all these horses in the back there. The Borough itself had to keep that opened up so it wouldn't be stagnant around there.

Q. But where did it run to? A. Into that brook.

Q. What were the other buildings in that little neighborhood you speak of? A. Why, all along Williams Street, thickly populated there, each one of those houses had a cesspool, but on account of marshy ground and so forth, those cesspools were not water tight.

Q. Where did the drainage or leakage from the cesspools go? A. Into that brook.

Q. And about how many houses of that sort were there in that neighborhood? A. Oh, about twenty or more; twenty-four right in that one section I mean.

Q. Now, you are speaking, or have spoken so far, of the district south of Main Street? A. Yes.

Q. Now, will you direct your attention to the district north of Main Street and along this brook. What buildings, if any, are there in there? A. There is a dye factory there, just about half way between the pumping station and Main Street.

Q. And how long has that been there? A. Why, about five years.

Q. Before the sewer was built, was there any place for the drainage of that dye factory to go? A. No; it would empty into that brook.

Mr. Morrison: You may take the witness.

Cross Examination by Mr. Gourley:

Q. Mr. Cella, are you an officer of the Borough? A. Not at present.

Q. Were you? A. Yes.

Q. What officer? A. Member of the council.

Q. When did you cease to be a councilman? A. Four years ago.

Q. Mr. Wood a member of the— A. He was.

Q. Was at one time? A. Yes.

Q. Now, this drainage of which you speak was the surface drainage of the soil that went into the brook? A. No, the cesspools would overflow.

Q. You say cesspools. You have no cesspool of your own, did you? A. No, not me, no.

Q. Now, you say you know some cesspool that leaked? A. They weren't water tight.

Q. Now, whose cesspool do you know there that leaked? Give me the name of somebody that we can send for if we want to? A. I couldn't mention any particular one.

Q. You can't tell which one? I am asking you a question now; do you know the name of any owner of a cesspool that leaked? A. Not individually, no.

Mr. Morrison: Will you just give Mr. Gourley the names of the people that live in that neighborhood?

Mr. Gourley: Mr. Gourley will take care of his own questions, please.

Mr. Morrison: Will you just give them to me, please?

The Witness: Beyers—

Mr. Gourley: No, no. Come down from the stand and give them. I object to the question.

The Court: I do not think it makes any difference.

Mr. Morrison: It is to meet the situation which Mr. Gourley himself has made.

The Court: Oh, no.

Mr. Morrison: That Mr. Gourley didn't know the names of them.

The Court: That isn't it at all. Mr. Gourley asked him to give the name of a person whose cesspool leaked into this brook.

Re-direct Examination by Mr. Morrison:

Q. Mr. Cella, you have said that certain persons living in this neighborhood had cesspools in the yards which were not water proof and leaked into this brook? A. Yes, sir.

Q. Will you name those persons who had these cesspools that weren't water tight? A. Why, I couldn't say individual ones, but the reason I figure why they weren't water tight—

Mr. Gourley: No, no.

A. (continuing) I know they weren't water tight because the water was green and yellow at the top there; that was what hit me that these cesspools weren't water tight.

JOHN H. MANNIX, called as a witness on behalf of the defendant, being duly sworn, testified as follows:

Direct Examination by Mr. Morrison:

Q. Mr. Mannix, where is your home? A. At Fort lee.

Q. And in what part of Fort Lee in reference to this stream or sewer system? A. It is about a quarter of a mile, I should judge.

Q. You live on Main Street, do you? A. On Main Street.

Q. And east of Edwin Avenue or west of it? A. East.

Q. Are you familiar with the region that Mr. Cella has just described? A. Well, I have a general knowledge of it, not very particular.

Q. There is a brook that runs through Fort Lee that afterwards find its way through tributaries in Garrison's pond, is there not? A. I can only say there is a sort of brook runs through Fort Lee under Main Street. I know very little about it.

Q. On that brook and south of Main Street, what have you to say as to the number of buildings and kind of buildings before the Fort Lee sewer was built? A. Well, there was about twenty houses facing on both sides of the brook.

Mr. Gourley: One minute. This witness doesn't seem to know of the existence of the brook.

The Court: He says it is there. Proceed.

Q. How many houses did you say there were? A. About twenty.

Q. Now, they are along a brook in Fort Lee? A. Well, I can't say where those houses are, but I can recall the brook.

Q. What is it? A. It is a swamp piece of land.

Q. What drains that swamp? A. This brook then comes within about fifty feet of the culvert at Main Street; it forms a sort of a brook and goes through there; below that it is no brook; it is stretched out one hundred feet in width.

Q. Where does that brook run, north or south? A. It runs slightly north.

Q. And along near what street or avenue? A. It goes through Edwin Street on one side and there is no street on the west.

Q. It runs a few hundred feet of Edwin Street to the north? A. Yes.

Cross Examination by Mr. Gourley:

Q. Mr. Mannix, these head waters of the brook been filled up? A. I don't know that it has been filled up. There has been some building done on the south of it recently.

Q. You know where the mouth of this sewer is, the Fort Lee sewer? A. I do not.

Q. You do not know that? A. I do not know that; I know there is a sewer there somewheres.

Mr. Gourley: That is all, Mr. Mannix, I won't keep you any longer.

WATSON G. CLARK, called as a witness on behalf of the defendant, being duly sworn, testified as follows:

Direct Examination by Mr. Morrison:

Q. Mr. Clark, where is your home? A. Tenafly.

Q. And what is your business? A. I am a civil engineer and surveyor.

Q. And what have you done in the way of studying and experience to qualify yourself in that profession? A. I graduated in 1891 from the New York University, a civil engineer, taking the final degree in 1892, and I have carried on a general engineering practice ever since. I was employed in Hoboken under Mr. Brush for four years where we were carrying on sewer and other construction work throughout Hoboken and vicinity. I went into business in 1896, and I have been designing and carrying on a general engineering practice from then until now.

Q. And has your practice been active in Bergen County and Fort Lee and vicinity? A. Yes, I represent a good many municipalities. I practice also in New York.

Q. Were you at one time the Borough Engineer for Fort Lee? A. I was.

Q. And at what time was that? A. I think four or five years prior to 1915.

Q. While you were Borough Engineer for Fort Lee, had you anything to do with the designing of a sewer system, and particularly the Leonia Heights section? A. I designed the Leonia Heights section system of sewerage.

Q. You are familiar, I presume, with the land through which that sewer was designed to be con-

structed? A. I was familiar with it at the time.

Q. Do you know this brook that has been spoken of that runs off to the northwest of Garrison's pond? A. I am.

Q. Now, will you explain to the gentlemen on the jury the general design of your system and with particular reference to its effect, if any, upon this brook? A. Well, the brook rises in the lowlands south of Main Street, this branch of the brook in a swamp The land draining into the brook had a rather rapid rise and was a shallow soil on trap rock. The swamp was—there were from twenty to thirty houses in that immediate vicinity, and the land around these houses sloped to this brook. The brook ran or meandered through the swamp until it reached Main Street, where it passed through the culvert to the north, and then ran northerly in a northwesterly direction crossing under Edwin Avenue, and so running north toward Englewood, eventually running out into the old Overpeck Creek at Nardo. The brook was overgrown with weeds and other obstructions, and the swamp south of Main Street was used largely for dumpage of waste and ashes and other material. The cesspools, due to the shallowness of the soil, frequently overflowed, and I have seen frequently the seepage from at least one cesspool finding its way down toward the brook; and dish water and other material used to work along through the gutters and down toward the brook. Due to the fact that it was some two miles and a half through the City of Englewood to the Overpeck Creek and due to the fact that the Borough of Fort Lee had constructed previously a system of sewerage that emptied into the Hudson River, it was determined to pump the sewage from this district, that is the sanitary

sewage over into the Hudson River. The amount of territory contributing to that sewage south of the present pumping station was about ninety acres. It was decided not to pump the storm water flow.

Mr. Gourley: One minute. Who decides this thing?

The Witness: I decided it.

Mr. Gourley: Very well. You say that?

The Witness: Yes, and the council approved my decision. It was also decided by the State Board of Health.

Mr. Gourley: I object to that statement, your Honor. I ask that that be stricken out.

The Court: Yes; just tell us what you did.

The Witness: I prepared the plans to take care of the sanitary flow and the storm water flow to go as it had previously through the brook. To do that I separated the pipes providing in each street a pipe to carry the storm water and drainage water, and a pipe to carry the sanitary water. The pipe leading from the district south of Main Street was designed on a grade to take care of a population of five, five hundred people. That is the sanitary. The storm water, a main leading from that district was designed to take of sixteen cubic feet of water a second. The sanitary water, the sanitary flow, that is the sewage ran through the smaller pipe to the pump house which was located approximately twelve hundred and fifty feet, from twelve hundred to fifteen hundred feet north of

Main Street. From there, two pumps—in there two pumps were designed to be installed. Each pump was designed, and the specifications required that they have a capacity of two hundred gallons per minute, and the outlet main was designed to carry two hundred gallons per minute against a total head of eighty-seven feet. Two hundred gallons per minute would take care of a population of twelve hundred and fifty, assuming that they used per person two hundred gallons per day. At the time I prepared the plans, the average amount of water consumed by the—per capita in the Borough of Fort Lee was a little over thirty-five gallons, but in order to provide for emergencies, and to take care of the peak of the flow I used the customary two hundred gallons per head. The storm water after entering the storm water main—after entering the catch basins and the storm water main was to run—the plans were designed so it would run practically through the old channel of the brook. Ashes and crushed stone were used to drain out the old meadow and allow this water to pass into the storm water drain. This main was designed to empty just west of the present pump house. Both storm water and sanitary, in some instances, passed through the same manhole. The storm water main was placed below the sanitary main in order to relieve the ground water pressure, and to permit only the minimum of leakage to enter the sanitary sewer as this had to be pumped. The territory lying northwest—

northeast of the pump house was also provided with a double system of sewerage, the sanitary and the storm water in each street. The plan—the sewerage system was designed with the idea that the people would connect their sanitary sewage with the sanitary, and the storm water with the storm water sewers.

Q. Have you with you, Mr. Clark, any drawings or specifications which you have prepared for the construction of this system? A. I have a copy of the specifications, and I have the blueprints with me.

Q. Now, will you tell me where I can get those and hand them to you, so we can show the jury in a general way what your design was?

Mr. Gourley: Where are the original plans? I want them.

Q. Who has those, Mr. Clark? A. The original plans, one copy is filed at Trenton; one copy with the Borough, and I have only the tracings.

Q. Well, whose papers have you brought here to-day? A. My blue-prints are there in the brown paper.

Mr. Gourley: If the Borough has the original plans, I insist that they be produced.

The Court: Why did you not produce your original plans?

Mr. Morrison: Well, if the Court will give us time to send for them—the blueprints are identical with the original; one paper is printed right from the other by

laying them together and letting the sun shine through.

Mr. Gourley: The original plans.

The Court: Produce the original plans.

Mr. Morrison: I will have to take Mr. Clark to another part of the examination then.

The Court: Let him explain the plans when you get them.

Q. Mr. Clark, I wish you would look at the papers which are in that package, please? Just tell me what they are? A. (Referring) They are blue-prints showing the proposed construction of the pump house and the amended plan of the pump house construction on Edwin Avenue.

Q. Do you know, Mr. Clark, that those blue-prints accurately show the pump house and other parts of the sewer that you speak of? A. They show accurately the plans that I designed; I didn't construct the pump house; it wasn't constructed by me.

Mr. Morrison: I ask that these be used now.

The Court: You have the original in your possession. The other side as asked you to produce the original. I think they are entitled to it.

Mr. Gourley: He says the original plans were approved. I want to see the approval on the original plans.

The Court: I will not admit it now unless the originals are gone.

Mr. Morrison: You will allow me an exception?

The Court: Yes.

Q. I show you a paper, Mr. Clark, and ask if you know what it represents? A. It contains—

Q. No, if you know what it represents? A. I did not prepare this map.

Q. Can you tell from your familiarity with the sewer and the region there what it represents? A. This sheet shows the land lying east of Heffley's Lane and south of West Street, west of Linwood Avenue.

Mr. Gourley: I suppose witness is reading from the map? A. (Continuing.) And west of Summit Street.

Q. And what does the next sheet show? A. The sewer line shown on this map, this map shows land lying west of Anderson Avenue and south of Main Street, east of the Bergen Boulevard, with Casper's Lane and Summit Street forming its northerly boundary. There are sewer lines shown on this map.

Q. And does this map show the location of the pumping station, either of those maps? A. North of Main Street and west of Edwin Street there is a pumping station shown here. There is a building shown here.

Q. As it is shown there, is that the place in which, by your design, the pump house was to be put?

Mr. Gourley: I object to that, sir.

The Court: The witness has not testified anything about this map.

Q. We will put it another way. Will you tell us without reference to the map where you designed the pumping house to be put? A. West of Lewis

Street and west of Edwin Avenue; north of Lewis Street, approximately, about one hundred and fifty feet west of Edwin Avenue.

Q. Now, where is Lewis Street in relation to Main Street? A. It is about twelve hundred feet north.

Q. And parallel to it?

Mr. Gourley: Now, you are still looking at the map and using it as a judgment.

Mr. Morrison: Let me take the map.

Q. Mr. Clark, did your design for this sewer system arrange or provide that anything should go into this brook that would not have gone there had the sewer not been built?

Mr. Gourley: I object to the question, sir. I do not know what changes have taken place.

The Court: I will allow it.

A. The design provided that none of the sanitary sewerage should, under any conditions, go into the brook if the system was properly operated.

Q. What would go into the brook in accordance with your design? A. Only the storm water flow and rain, that is, the surface drainage.

Mr. Morrison: Now, if the Court please, I ask leave to have Mr. Clark step aside until I can get those original maps. I will get them during the noon recess. They are in the Borough Clerk's office.

Cross Examination by Mr. Gourley:

Q. Well, Mr. Clark, it was so designed; did it do it? A. I do not know.

Q. Why don't you know? A. I haven't been connected with the borough for two and one-half years.

Mr. Morrison: We propose to show that by other witnesses.

The Court: The question is proper.

Q. Was the sewer system in operation when you left the borough? A. It was not.

Q. How near to completion was it? A. A little more than two-thirds, I should say.

Q. What other engineer succeeded you? A. A Mr. Mason.

Q. Well, you say it was designed so that the sewage would not be mixed with the surface flow. How was that to be avoided with these openings? A. There were no openings if the sewage flowed to the pumping chamber and was there pumped, as designed, into the Hudson River.

Q. But if it did overflow, what was that due to? A. If it did overflow it was due to the fact that the sewage was not removed from the pump chamber fast enough to take care of the flow.

Q. If the sewage was not pumped fast enough, then the natural result would be that the sewage would overflow through these openings, of course? A. Of course.

Q. Your design was that the pumping station would take care of it with such rapidity that that danger would not exist? A. There were two pumps put in for that purpose; in case one broke down, the other could be used.

Q. The pipe, however, was what diameter, from the pumping station toward the Hudson? A. Four inch.

Q. And that, in your judgment, was sufficient diameter to take care of the flow if the pumps worked? A. At that time.

Q. At that time? A. With the population as it was at that time.

Q. With increasing population it would, of course, require increasing aperture of the pipe, increasing diameter of the pipe? A. It would require increased size pumps and an increased size discharge main.

Q. What capacity did these single pumps have? A. The specifications required a pump—

Q. No, no; just what were they? A. I only can testify as to what my design called for. I did not install the pumps.

Q. You did not see them work? A. No.

Q. And don't know anything about that? A. No.

Q. Did you design these openings at the manholes? A. I naturally had an opening into the sanitary sewer for inspection and for ventilation.

Q. Well, was there a direct pipe from the—into the storm sewer, sanitary sewer? A. Absolutely not.

Q. These openings were of what length? A. The width of the manhole as in every manhole.

Q. Well, would you say they were two feet, three feet, four feet? A. Approximately two feet, so a man could put his head in there.

Q. That was the design? A. That was my design and the customary design.

Q. Well, it was the design that you had for this purpose; that was your judgment? A. That was my design for this manhole, yes.

Q. In New Jersey you hadn't constructed anything of that kind, had you? A. With a double manhole?

Q. Such a plant as existed at Fort Lee, had you anywhere in New Jersey constructed such a system? A. A separate system of sewage, yes.

Q. With that character of openings such as they are here? A. No; not with double manholes.

Q. You call these double manholes? A. Yes.

Q. In other words, there is a manhole— A. One manhole for the two systems of sewers.

Q. You say, manholes for that arrangement? A. I say direction and alignment, that is why I do it that way.

Q. It was a cheaper method of doing it? A. No; it was a better method.

Q. Yes; but was it cheaper? A. I do not think so.

Q. You say, manholes? A. It cost more to build the manholes and the work was more difficult.

Q. Did you not consider, Mr. Engineer, that there would be a probability of the pumps sometimes not working? A. I considered there would be a probability of one or the other of the pumps not working, and providing an additional pump.

Q. Did you take into consideration that sometimes both pumps would not work? A. I did not expect both pumps would not work.

Q. Did you take that into consideration, that both pumps would not work? A. I did not.

Q. Did you take into consideration that one pump would always do the work? A. I took into consideration that one pump would do the work under ordinary conditions; in case of breaking down, the other pump could be used.

Q. What do you mean by ordinary conditions?

A. I mean under proper operation one pump would handle the work; when the load was increased the capacity of the pump would be increased to meet the load.

Q. Are there not seasons of the year when the flow increases? A. I provided for that.

Q. What season of the year is the flow greatest? A. The season of the year, the sanitary flow, there would be no difference. The fluctuation of flow would be due to the character of the population of that district. The maximum flow would be in the morning from about 6:30 in that district to about 8 o'clock at the time this plan was designed.

Q. As to the season of the year, I speak of? A. It would not affect the sanitary flow at all except as to the character and habits of the population.

Q. It wouldn't? A. The only flow, the only fluctuation in the sanitary flow would be due to the character and the habits of the population.

Q. Now, if you go there today, for example, and find the sewage flowing over into the storm sewer, what would that be due to? A. If I found the sewage today flowing over, it would be due to the fact that the pumps were not handling the flow sufficiently rapidly to remove the sanitary flow.

Q. But if you found that, what would be the difficulty? Why? A. Why?

Q. Yes. A. Because the flow had increased so materially that the pumps were not able to handle it, or the pumps were not working efficiently.

Q. But you never went back to lift up these manholes and see whether the sewage flowed into the storm sewer yourself, or made any personal investigation? A. It couldn't flow into the storm sewer if the pumps worked.

Q. Did you make any examination? A. I never did.

Q. You say, if the pumps worked? A. If the pumps worked and worked efficiently, the sewage would not flow into the storm sewer.

Q. So every time it overflowed into the storm sewer, it indicated the pumps were not working efficiently, is that it? A. That would be the reason.

Q. No other reason? A. Were not working efficiently, or the flow had increased so that the pumps could not handle the flow.

Q. What in the world need, Mr Clark, was there for these openings at all? A. The same need of a manhole on any sewer. A manhole is placed in sewers to allow for ventilation and to allow the inspection of the effluent passing through the manholes.

Q. Did you take into consideration that obstruction would be caused in this sanitary sewer by rags coming down, lodge up against it like a dam in the brook, and then flow right over at the first chance it got? A. I took that into consideration.

Q. Do you know or don't you know that that exists right now? A. I know it cannot exist on that grade.

Q. Your solution is because the pumps aren't working efficiently? A. The main where this overflow took place is a ten-inch main. It is on a grade of four-tenths in a hundred feet, which gives a velocity of over three feet a second. That will move good-sized gravel. It is an iron pipe with a small invert and the line is straight at that point and nothing could stop that inside the pipe unless the outlet is clogged.

Q. That is your theory? A. I am talking from practice.

Q. You have not seen this sewer of which you are talking as an expert? Were you in Court yesterday

and heard the witnesses testifying about this sewer overflowing day after day?

Mr. Morrison: I object to that.

Q. You were here yesterday, weren't you? A. I was here yesterday.

Q. Then, if that story is true, that is due wholly to the inefficient pumps? A. Inefficient pumps.

Q. Lack of— A. Capacity.

Q. Proper use of the pumps? A. Either ineffiicency or overload and lack of capacity.

Q. Then, all Fort Lee would have to do to have purified this stream would be to put in a different pump? A. The pump was a proper size.

Q. Answer me, please. Answer my question. A. Put in larger pumps?

Q. That is all that Fort Lee would have to do to purify that stream, whether purify it of sewage —I mean all Fort Lee has to do is to put in a larger size pump, is that so? A. Purify the sewage?

Q. To remove the sewage from the brook. All Fort Lee has to do is to put in a larger pump? A. That is all they will have to do.

Mr. Gourley: That is all.

Re-direct Examination by Mr. Morrison:

Q. Mr. Clark, Mr. Gourley has directed your attention to the double manholes which you used in your design at Fort Lee. Was that design original with you? A. No; I had seen it practiced before in other places.

Q. Is it accepted in good practice as a proper way to build manholes in such cities?

Mr. Gourley: I object to "good practice," sir.

The Court: Why?

Mr. Gourley: It gives a wide latitude as to what the practice is.

The Court: I think the question is proper, only it is leading. That is the only objection.

Mr. Gourley: I do not object on that ground.

(Question read.) A. It is.

Q. What was the name, Mr. Clark, of the particular part at Fort Lee, or the particular system of which we are speaking now? There had been several systems or parts of systems built at Fort Lee, is that right? A. I knew it as the Leonia Heights system.

Q. And it was so designated on your drawings? A. It was.

Mr. Gourley: Now, you are putting it in again, you see.

The Witness: I would like to correct my answer as to the pumps. I said it was only necessary to put in new pumps. I would like to add, and increase the delivery main, the iron main, about fifteen hundred feet.

By Mr. Morrison:

Q. In other words, in your judgment, that was all right then, but would not be right now under the increased flowage? A. At that time it was right to take care of twice the population that was then feeding there.

Q. Do I understand you say it is right now? A. I cannot answer except as to the testimony delivered here yesterday.

Q. Do you know, Mr. Clark, if anything has come into Fort Lee in the way of increased population, or other demands on the sewers which you didn't anticipate in your design? A. The moving picture industry.

Q. How large an element is that in the sewage problem? A. It may bring the peak of the load up to trebling the population, making the peak around noon time instead of early in the morning.

Q. At the time you made this design were there moving picture houses in the part of Fort Lee drained by the Leonia Heights section? A. There were none in that section at the time the design was made.

Q. There are now how many? A. I know of two large plants.

Q. So that, in making your design, not knowing that the moving pictures would come, you made no provision for it? A. Except in the mains; the mains are ample.

Q. Did you provide for them in the pumps? A. I did not.

Q. Why not? A. Because I did not want the sewage to lay in the pump house and get sour. I put in an expensive main and expensive pumps. Without them they would only operate once in two or three days and the sewage would become sour and become objectionable.

Q. What is the better practice, that sewage can stand before being pumped? A. It ought to move every three or four hours. Otherwise, septic action will set in.

Mr. Morrison: I will ask that Mr. Clark step aside at this point.

Re-cross Examination by Mr. Gourley:

Q. Mr. Engineer, I asked you about the pipes, whether you designed any pipes to connect the two sewers so as to provide for the overflow of the sanitary sewer pipes? A. No, I didn't provide for that.

Q. That wasn't in your plan? A. No.

Q. Do you know whether at Heffley's Lane there are two pipes there now connecting the two manholes of the two sewers? A. I don't know. That wasn't constructed under me.

Q. Did you see Mr. Eckerson's plan? A. Eckerson's plan?

Q. Yes. A. I saw it at Trenton.

Q. Did you notice that Mr. Eckerson had provided for a ten-inch main for an outflow pipe?

Mr. Morrison: If the Court please, is this proper cross examination?

The Court: I will allow that.

Q. Did you notice Mr. Eckerson's plan providing for a ten-inch pipe from the pumping house? A. I didn't notice that.

Q. You provided for a four-inch pipe? A. At the time, yes.

Q. Whether these pumps worked efficiently or not might depend somewhat, I presume, on the four inch pipe? A. Well, the four-inch pipe and the pump are designed to work in harmony. The pump with the capacity of four-inch main is equivalent to two hundred gallons a minute.

Q. Suppose you had a ten-inch main there. Would you still have the same pump? A. If somebody had put in a ten-inch main and I had put in the same pump, I could pump through it.

Q. There would be more freedom with a ten-inch pipe than with a four-inch pipe? A. There would be less friction.

Q. You could use a larger pump? A. Later?

Q. Yes. A. The pump the capacity—

Q. No, no. I say you could then use a larger pump? A. I could, yes.

Q. With the larger pump, of course, the power of pumping would be increased, the larger pump and larger pipe? A. The power would be increased.

Mr. Gourley: Yes. That is all.

ARTHUR E. KIRWIN, called as a witness on behalf of the defendant, being duly sworn, testified as follows:

Direct Examination by Mr. Morrison:

Q. Mr. Kirwin, you reside in Fort Lee, do you not? A. Yes, sir.

Q. You have lived there some years, have you not? A. Twenty-six.

Q. You have from time to time held official positions in the Borough, have you not? A. Yes.

Q. What position did you hold in the Borough on May 16, 1913? A. Mayor.

Q. And while you were holding that position as Mayor, did you receive the letter which I show you? A. (Referring) I did

Mr. Gourley: It hasn't been offered in evidence yet.

Mr. Morrison: I offer it in evidence.

Mr. Gourley: I object to it, sir.

The Court: I have not seen it yet; I do not know what it is.

Mr. Gourley: They seek to prove a judgment of the Department of Health of the State by a letter. There is a way to prove those things. The object of the letter is to prove a fact, but you cannot do it that way.

The Court: You may mark it for identification. That is as far as you can go now.

Mr. Morrison: I would like to have it marked for identification.

(Marked Exhibit D-1 for Identification.)

Mr. Morrison: Now, I offer the letter in evidence and ask your Honor to rule.

The Court: No; it cannot be admitted.

Mr. Morrison: Your Honor will allow me an exception?

The Court: Yes.

Mr. Morrison: That is all.

Now, if the Court please, I am not prepared to go on with the contractor and the engineers who had to do with the construction of the sewer until we have those contracts here. I ask for a recess at this time until I can get those plans. I have no other witnesses I can use at this time. I suggest, if it doesn't inconvenience the Court, that we have our noon recess here.

The Court: We will take a recess (12:34) until 1:30.

AFTER RECESS.

CHARLES L. HEFT, called as a witness on behalf of the Defendant, being duly sworn, testified as follows:

Direct Examination by Mr. Morrison:

Q. Mr. Heft, you live in Fort Lee, do you not? A. Yes, sir.

Q. And how long have you lived there? A. Sixty years.

Q. And what business are you in? A. Ice business and trucking business.

Q. How long have you been in the ice business? A. About fifteen years.

Q. Do you know Mr. Garrison, the plaintiff in this suit? A. Yes, sir.

Q. Did you ever buy any ice from him? A. Yes, sir.

Q. What was the last ice you bought from him, what year? A. 1916.

Q. How much of his ice did you buy? A. What is that?

Q. How much of Mr. Garrison's ice did you buy? A. Well, we bought all he housed.

Q. You say "we." Whom do you mean by "we?" A. Joseph Hook.

Q. Joseph Hook and yourself? A. Yes, sir.

Q. Who is Mr. Hook? A. Well, he was in the ice business through Leonia and around.

Q. You say that you, Mr. Heft, and Mr. Hook bought Mr. Garrison's entire crop of ice for that year? A. Yes, sir.

Q. And what did you pay him for it? A. Between $3,000 and $3,100.

Mr. Morrison: You may take the witness.

Cross Examination by Mr. Gourley:

Q. What was the quantity of ice, Mr. Heft, how many tons that year? A. I guess he had stored about thirty-six hundred.

Q. There was some complaint about the quality of ice, I think, that year? A. Yes.

Q. Due to the growth of the weeds in the pond affecting the under part of the ice? A. Yes.

Mr. Gourley: That is all.

WATSON G. CLARK, recalled as a witness on behalf of the defendant, having been duly sworn, testified as follows:

Direct Examination by Mr. Morrison:

Q. Mr. Clark, I show you these papers and ask you what those are, if you know? A. (Witness examines papers.)

Q. Would it be more convenient for you, Mr. Clark, to refer to them one by one, or sheet by sheet? A. Those are the original plans, copies of which I filed at Trenton.

Q. For what? A. For the State Board of Health.

Q. And the original plans of what? A. Of the Leonia Heights system of sewerage.

Q. And the Borough of Fort Lee? A. And the Borough of Fort Lee.

Mr. Morrison: I offer these in evidence.

The Court: Yes.

Mr. Morrison: Consisting of seven sheets, the upper sheet being designated, "Plan

showing proposed Leonia Heights system of Sewers, Borough of Fort Lee, Bergen County, New Jersey, prepared by Watson G. Clark, C.E., Borough Engineer."

The Court: It may be marked D-2.

(Marked Exhibit D-2.)

Mr. Morrison: And after Mr. Clark's name, it says, "April 9, 1914."

Q. Now, Mr. Clark, I call your attention to those drawings and ask you whether the design as shown on those drawings, and is, you say, made by you, was such that any of the sewage would flow into the creek which feeds Mr. Garrison's pond. A. If properly operated, none.

Q. What do you mean by the qualification, if properly operated? A. If the effluent was pumped over into the Hudson River, the sewage, effluent was pumped over into the Hudson River sufficiently promptly, none of it would flow in there.

Q. Now, as you designed it, and as these drawings show, the effluent was to be pumped into the Hudson River, was it not? A. It was.

Q. And how did it reach the Hudson River from the sewer pipes? What was the course through which the sewage would go? A. It was pumped about 1,350 feet over an elevation of about 46 feet into a system of sewerage that had been previously constructed connecting by way of Dead Brook and so down into the Hudson River, about a mile and a half north of the Edgewater Ferry.

Q. Then there had been other systems of sewers constructed in Fort Lee prior to this one? A. I constructed one, two sections, and Mr. Earle constructed another section, and there was another section constructed down in Palisade.

Q. That is how many different sections beside this one? A. There is three—four outlets beside this one.

Q. And what in general, what proportionate part of the Borough was this system designed to serve, just this one section? A. Leonia Heights.

Q. Is that a large proportion of the Borough or a small proportion? A. A small proportion.

Q. And in making this design, did you take into account the probable growth of the Borough of Fort Lee? A. Of that section?

Q. What sort of growth did you anticipate in Fort Lee, industrial or residential? A. I designed the sewerage to take care of a population similar to large cities, not including New York or Chicago; population of between thirty and forty people to the acre.

Q. And in your judgment how many years beyond the time when the sewer was to be constructed would that sewer be of service?

Mr. Gourley: I object to that.

The Court: What difference does that make?

Mr. Morrison: I wish to follow that with the question whether it is good practice to plan for a limted number of years.

Mr. Gourley: I would object to it if it is offered.

The Court: What is your objection?

Mr. Gourley: The question is whether this pollution occurred in that way, what difference does it make what the design was, the execution of it?

The Court: What is your theory in this case of liability? What is your theory of liability?

Mr. Gourley: The theory of liability is the pollution of the stream, that the sewer has been constructed there, an open sewer running into it. It doesn't make any difference about the plan of construction after the result of the construction works pollution. It isn't a question of the negligence of the persons who were employed, the agents of the Borough. The Borough has constructed that in that way, and that denies and contradicts any theoretical view of expert testimony.

The Court: Suppose at the time it was sufficient and was sufficient for the immediate future? Would that throw any light on the subject?

Mr. Gourley: Your Honor will recall that the testimony for the plaintiff is in a variety of forms, that whole scope of testimony, this doesn't answer that.

The Court: I think I will allow that testimony.

Mr. Gourley: You will allow me an exception?

The Court: Yes.

(Question read.)

A. With the exception of the pumping plant, it should be practicaly permanent for that location.

Q. And what changes, if any, did design should be made of the pumping station, and when? A. That wasn't designed.

Q. There was no change designed in the pumping station? A. No.

Q. What, in your opinion, were the changes which would have been necessary with the growth of the Borough as you forecast?

Mr. Gourley: The same objection, sir.
The Court: I think that is objectionable.
Mr. Morrison: I will withdraw the question; let me put it in this way.

Q. As you did design the pumping station and pumps, Mr. Clark, for how long a period, the normal growth of the Borough, would that have been of service without change?

Mr. Gourley: I object to that.
The Court: I will allow that.
Mr. Gourley: You will allow me an exception?
The Court: Yes.

A. Until the flow of sewage from the population exceeding 1,200 was entering that pumping station, or until manufacturing wastes were of large amount, were turned in there.

Q. And when the time that you have just indicated should arrive, what changes would be necessary? A. The increasing of the main and pumps.

Q. And the main, which particular main do you mean? A. The iron pipe leading from the pumping station to the other system of sewage emptying into the Hudson River.

Q. That would be the main through which the sewage was— A. Pumped.

Q. Or discharged by the pumps? A. By the pumps, an increased size of pump.

Q. You have been in Fort Lee during the past few months, have you not? A. I have been through it.

Q. Do you know whether the development of this Leonia Heights section of Fort Lee has been such as you anticipated when you made this design?

Mr. Gourley: I object to it, sir, on the same ground.

The Court: Well, how would that make any difference?

Mr. Morrison: How would it make any difference?

The Court: Yes, whether it exceeded what he thought or not?

Mr. Morrison: It shows that the reason of his design did not work out as he designed it. That was the proper thing to do when the design was made. Something unexpected has come up, and I seek to show what that unexpected circumstance was which could not have been foreseen.

The Court: I will allow the question.

Mr. Gourley: Exception?

The Court: Yes.

(Question read.)

A. The increase in the dwellings doesn't at the present time anywhere equal the capacity of the sewer, but the two large plants constructed there for the moving picture industries increases temporarily the population tremendously for short periods.

Q. And do those plants tax the sewer capacity in any other way than by the increase in population? Do they throw any further load on the sewer than that due to the increase in population? A. If they are throwing their wash water into the sanitary sewer, why, they are very much overloading the sanitary sewer.

Q. When you made these plans, Mr. Clark, did you in any way interview the State Board of Health in regard to them? A. I took the plans down to

the State Board of Health for their approval, and after their approval I—

Mr. Gourley: No, I object to that now.

The Court: I suppose you have got to show by the Board their official action.

Q. You took them down to the State Board of Health? A. I took them down to the State Board of Health, and made some slight alterations after discussing the matter with the State Board of Health.

Q. After you had taken them to Trenton and there had been this discussion and these amendments, what led to the amendments, why did you make the amendments in the plans?

Mr. Gourley: Is it important, sir, the discussion with the State Board?

Mr. Morrison: I will withdraw the question.

Q. Did you bring the plans back from Trenton to Fort Lee? A. No; they were sent back to me, I believe.

Q. Did they come back to you? A. My set did.

Q. And this is your set that you have here? A. It is the Borough's set.

Q. Did you see this set when it came back from Trenton? A. Yes; they all came to me, and through me they were delivered to the Borough.

Q. Now, when you took this set of plans to Trenton, was there in the lower right hand corner of the sheets, the writing and endorsement which now appears there when you took them to Trenton? A. Yes.

Q. Was that there when you took them to Trenton? A. Yes; that was approved first by the Mayor and Council of the Borough of Fort Lee.

Q. And that is on each sheet? A. On most of the sheets.

Q. On the sheets that show the plans? A. Yes.

Q. That was there when you took them down? A. I believe so.

Cross Examination by Mr. Gourley:

Q. No State Board stamp on these? A. No.

Q. There is a copy on file in the State Board of Health, you said? A. There was a copy on file there, yes, sir.

Q. Have you any reason to doubt it is there now? A. I have never looked.

Q. You made no inquiry about it? A. Except when I once saw the plans there.

Q. Was that on a subsequent visit? A. That was away back in 1913 some time there, when I was over there.

Q. Was that about the time you left them there? A. It was after they had been on file. I went back and had some occasion to look them up, and I saw them on that occasion.

Q. How long after was it you left them there? A. I should imagine it was early in 1913 or 1914 I was over there and saw them.

Q. Were you present at a meeting of the State Board? A. No; I took it up with their engineers.

Q. You weren't present when the State Board itself met, or you weren't heard before the State Board? A. No.

Q. Nor did you go down there on the day the State Board met? A. I believe not; I couldn't say positively.

Q. Do these plans show manholes? A. Yes.

Q. Which one shows the manholes? Do you know the number of the sheet? A. The manholes are shown on the profiles. The details are shown on the specifications.

Q. Which of these plans, if any shows the— A. The detailed construction? That appears in the specification, I believe; I won't be sure that they are not shown there either.

Q. Well, isn't that the material part of it, this construction of the manhole? A. Yes; they are filed with the specifications.

Q. Therefore, a person approving of these plans wouldn't know, speaking of the plans only, now, what the system was in relation to the manholes? A. I will have to look at the plans.

Q. Yes, of course (handing papers to witness). A. (Referring) They show two sets of sewers going through one manhole. The detail of construction appears in the specifications, which were filed with the plans.

Q. Therefore, on that map, now, there is nothing showing the plan of construction of the manholes? A. Except that one manhole accommodates both system of sewers.

Q. Yes, but many of the manholes would require different construction? A. The only one general construction is the one with two manholes going in and two openings.

Q. Some have two pipes, three, four or five pipes; it would require at least several different— A. Details.

Q. (Continuing) Statements or descriptions of it upon the plans, wouldn't it? A. Well, they appear in the specifications, I believe.

Q. They do not appear there? A. Not upon this

plan, except the two or three going into the one manhole.

Q. The specifications with the State Board of Health? A. They were taken down at the same time.

Q. Do you know whether they are there now or not? A. I do not know.

Q. There is nothing on the specifications describing each manhole separately, for example, manhole number 1 or number 30? A. No, they are typical sections.

Q. Just one description of the manhole? A. There are two or three different manholes, a typical manhole, a single manhole and a drop manhole.

Q. These manholes vary with two or three pipes, or four or five or six pipes? Is there anything in your drawing showing that fact? A. Except that there are that number of pipes in the manhole.

Q. Well, does that show in the plans, is the point I am after? A. The plan shows or indicates the number of pipes passing through any one manhole.

Q. Now, show me what you say on that? A. Taking the manhole at the intersection of Catherine Street and John Street, it shows that two pipes enter the manhole from the west, from the west, one enters it from the north and two pipes leave it to the south.

Q. Show me what you say is pipes entering in? A. A ten-inch vitrified storm, and an eight-inch vitrified sanitary. On the north is an eight-inch vitrified written right on there (indicating) going in, and going out there is an eight-inch vitrified sanitary and a twelve-inch vitrified storm.

Q. Does that show the six pipes? A. There aren't six pipes there. I don't remember more than two, possibly five.

Q. Does that map show five anywhere? A. Wherever that occurred it would show.

Q. Will you kindly point out wherever it was and give us the number of the sheet, so that the jury may have the benefit of it? A. On Sheet Number Two there are—at the intersection of Jane Street and William Street, it shows two pipes entering the manhole from the east, two pipes entering from the north, one pipe entering from the west, and two pipes leaving it; no, one pipe leaving it from the north, and one pipe leaving it toward the west, so there are four pipes entering the manhole and two pipes leaving the manhole.

Q. What number manhole is that? A. It is at Station "Zero," and it is at the intersection of Jane Street and William Street.

Q. Jane and William? A. Jane and William.

Q. How far is that from this pumping station, approximately? A. About 2,500 feet to 3,000 south.

Q. It is away as far as that? A. Yes, sir.

Q. These plans you say were adopted by the Borough Council? A. They were; yes, sir.

Q. Were you present at the meeting? A. I can't state that.

Q. How do you know they were adopted? A. They were filed that way, they were marked that way by the Mayor's signature and that of the Clerk.

Q. But you do not know whether the council ratified or adopted them formally, of course? A. Except for the signature of the Mayor and the Clerk.

Q. Now, what changes have been made in these plans of yours? A. The only two that I recall that were made, material changes, was the fact

that the right of way north of Main Street instead of running along the bed of the old brook followed the bed to Main Street, and then followed along property lines in order to—followed along property lines, emptying the storm sewer in the bed of the old brook again now Lewis Street; that was to obtain rights of way. The other change was a modification of a pumping plant placing the pumps from submerged to exposed in a separate well chamber, so that they could be more readily gotten to. Those are the only two changes.

Q. Were those changes made by you? A. No, the plans were simply prepared by me just prior to my successor taking command of the borough.

Q. I thought you said three-quarters of the sewer had been built when you left? A. No, I said about two-thirds to three-quarters. I am not positive.

Q. About that, two-thirds to three-quarters? A. About that, I should think.

Q. Had any changes, up to the time you left, taken place in the construction of this sewer? A. Except those changes made from time to time due to exigencies of construction provided for in the specifications.

Q. Anything of a material consequence, I mean? A. None that I recall.

Q. Were these pipes, I ask you again, connecting the storm sewer with the sanitary sewer, the two iron pipes down near the pumping station, were they put in according to your plans? A. Which pumping station do you refer to?

Q. The only one near the brooks is the only one we are concerned about. A. I do not exactly know what you refer to, saying two iron pipes.

Q. Very well, you know nothing about two iron pipes connecting the two sewers, absolutely con-

necting with them? A. No, I know nothing about it. If there are two iron pipes connecting the sanitary sewer with the storm water sewer, I know nothing about it.

Q. Did your plan contemplate the connection of those pipes of any kind— A. No, sir.

Q. At the—or near the pump house, that there should be a connection between the two sewers? A. No, sir.

Q. You didn't contemplate that? A. No, sir.

Q. Is there any resultant, as the effect of pumping this water, is there any sediment after the storm water or the sewer water is forced up into this four-inch pipe? Is there any sediment left after the water is pumped? A. Sludge, you mean?

Q. Call it what you like. Sediment or sludge? A. I expected that there would be some sludge at times.

Q. Do you know whether or not any actually exists? A. I have never seen the pumping station since I designed it. I have never been there.

Q. I suppose you have naturally seen pumping stations of other character?

Mr. Morrison: If the Court please, other stations are immaterial.

The Court: I think so.

Q. Do you know of other stations with the same line of pump?

Mr. Morrison: Objection.

The Court: I will allow that.

A. Yes, I have seen others working.

Q. Do they leave sludge behind them?

Mr. Morrison: I object.
The Court: I will sustain your objection.
Mr. Gourley: Exception.
The Court: Yes.

Q. You cannot say, then, whether the operation of these pumps creates a sludge as a result of the pumping of the sewage? A. I cannot say whether these pumps do or not; I have never seen them.

Q. Isn't that simply a perfectly plain engineering fact that they must leave a sludge that is left out there around the house and lies about the pump house before it is taken away? Isn't that so as a result of such pumping, that it must leave sludge? A. It might leave sludge.

Q. Mustn't it do it? A. It might leave sludge.

Q. Don't you know, or do you? A. These pumps might not pump out the entire lot of sewage. It may leave some sludge and it may be carted off and disposed of in the Hudson River.

Q. Is it the ordinary result of such work that it does leave sludge? A. There is usually some waste.

Q. That sludge is left where in this case? A. I do not know.

Q. Do you know whether this pile about the house or not— A. I do not know.

Q. Do you know how far that pump house is from the brook? A. The brook, I should say, in the nearest direction is 50 or 60 feet.

Q. Did you get up the idea, was it yours, of connecting this sewer with the brook? A. I do not think the sewer is connected with the brook.

Q. Some sewer is connected with it, isn't that a fact? A. I do not know of any sewer, except the storm water drain.

Q. You don't call the storm water drain a sewer then? A. No, it simply took the place of the brook, and took the brook into it.

Q. So that this whole area that you have described, how many acres do you say drained that storm sewer? A. About the total area feeding into this brook, but not going through there with the storm water, was about 185 acres.

Q. I am speaking of the number of acres drained now by that storm sewer, sir? A. The two units there, and the unit that goes into the storm water sewer, I should say, the portion of it that feeds into the storm water sewer would be about 150 acres.

Q. 150 acres? A. Yes.

Q. So that that's poured into this brook? A. Always poured into the brook.

Q. What? A. Always ran into it.

Q. Did you know this brook before this sewer was constructed? A. Yes, sir.

Q. Did you know that that brook was a clear stream, its name was Crystal Stream? A. I don't know what they call it. It was not a crystal stream up there, it was a mud puddle.

Q. So that your story is that the brook was simply muddy all the time? I want to get it just as you want to give it. A. The section at that portion south of Main Street was as I describe it, a swamp.

Q. Yes. A. The color of the water was—it was very discolored, and it is of muddy appearance.

Q. And that continued how far down the brook? A. That continued about as far as the pumping station; when it commenced to clarify itself by flow.

Q. You covered that all over to the pumping sta-

tion; I am speaking of the pumping station down, what was the color of the brook before this pumping operation began? A. In dry weather—

Q. What was the color of the brook? A. In dry weather it had one color, and in stormy weather it had another color.

Q. Was it reasonably pure running stream, yes or no? A. Reasonably pure?

Q. Yes. A. At that point I should say, no.

Q. Below that, how far did it become reasonably pure, if you are dividing it in sections? A. I should say about three or four thousand feet; after running over the stones it had cleared up pretty good.

Q. You don't live in the neighborhood, I think? A. No, I live at Tenafly.

Q. Your observation of this brook was in relation to this survey? A. Why, I covered that district all through there.

Q. Do you mean you know the quality of this stream for years before your official association with it? A. I knew for five or six years prior to that.

Q. Now, then, it was your idea (correct me if I am wrong) that you took this storm sewer and put the mouth of it right in this brook near the pumping house? A. My idea was—

Q. One minute please, answer my question. Now, was that your idea or somebody else's? A. Which idea?

Mr. Gourley: Stenographer, kindly repeat the question.

(Question read.)

Q. Was that your idea or somebody else's? A. It was my design.

Q. Your design isn't your idea, then? A. It was my design and idea to stop the storm water sewer where it was stopped.

Q. This plan was yours? A. It was my design.

Q. And you took this area and put it right into the brook as constructed, this pure running stream, or whatever it was? A. I carried—

Q. Where did you go? A. I carried the rain off from this entire territory into the brook and stopped the sewer at the pump house.

Q. Did you think of the people below you there when you did that? Did you believe you had a right to do that with people's propery below? A. I knew I had a right to.

Q. Have you been over the brook lately, or since this was constructed? A. I have not.

Q. Have you seen it at all? A. I have not.

Q. Well, if the stones are slimy, if the water-closet paper floats down, and if these other objectionable things float through that stream from this brook, what is it due to? A. As I said before, to the improper operation of the system.

Q. You say that this is known as the Leonia Heights system? Who gave it that distinguished name? A. Because that section is known as Leonia Heights.

Q. You gave it that name? A. No, it was always known—that was the colloquial name for that part of the town.

Q. Yes, but the system is your name, the Leonia Heights system is the name you gave it? A. I presume I put it on the map.

Q. And so you call it the Leonia Heights system? It means this system that you devised of these open manholes connecting the two sewers? A. It is the system I designed.

Q. I asked you this morning whether there was any place in the State of New Jersey where such a system was in vogue and you said not? A. Pardon me?

Q. I asked you this morning whether there was any place in the State of New Jersey where such a system was in vogue. What do you say to that? A. I do not remember what my answer was then.

Q. I will take it any way you give it to me now? A. I suppose there is a great many systems of separate and combined systems in the State of New Jersey.

Q. Do you know of any system in New Jersey of this character where these manholes lead into two sewers that are open? A. I don't recall any particular system, no.

Q. Do you know any in the State of New York? A. No.

Q. Do you know of any in the world? A. I know that those manholes—

Q. Do you know any in the world? A. I cannot mention any particular place.

Q. So that the Leonia Heights system is your fondling and child? A. I designed it.

Q. You said something about there were 90 acres of ground (correct me if I am wrong), 90 acres of ground, I think, drained, on which there were houses? You will correct me if my figures are not right. A. There were about 95 acres south of Main Street and about 90 acres worth of Main Street that are passing through this—that is the territory comprised by this system of sewers.

Q. You gave me an average, I think, of forty persons to the acre? A. Thirty persons to the acre.

Q. That would be 2,700? We will not disagree about that deduction, will we? A. (No response.)

Re-direct Examination by Mr. Morrison:

Q. Now, Mr. Clark, Mr. Gourley has asked you about the storm water sewer which ran into this brook, and I ask you now whether that storm water sewer as you designed it would have put anything into the brook except what would have gone there had the storm water sewer never been built? A. No.

Mr. Gourley: I object to it, sir; we have had it before.

The Court: I think it is not clear myself whether there was any brook there, or whether this sewer was the beginning of the brook. The witness has said one thing and you have said another. I would like to know whether there was a brook beyond where that sewer began?

The Witness: The brook extended for—extended through the swamp in a meandering way for about one thousand or fifteen hundred feet and stopped where the storm water sewer emptied, and the storm water sewer took the place of the brook for about that distance.

The Court: Then, the storm water sewer was the beginning of the open brook, is that the idea?

The Witness: After it was laid, the storm water sewer was the beginning of the open brook and took the place of the open brook before for about twenty-five hundred feet.

The Court: I would like to know how you arranged the manhole where you had three or four pipes coming into it. What is your internal arrangement?

The Witness: Well, if I remember right, the pipe entering on one side was carried on

a collar around and out on a half of the manhole. The pipe coming in from the opposite side to which the outlet was carried the sanitary in that collar, and on the other side the storm water sewer entered at a lower level, and was carried in the other half through the arrangements.

The Court: I see. Now, something was said by a witness about there being a weir somewhere near the pumping station. Did you put any such thing in?

The Witness: No, sir.

The Court: That is all.

Mr. Morrison: That is all, Mr. Clark.

JOHN McGARRY, called as a witness on behalf of the defendant, being duly sworn, testified as follows:

Direct Examination by Mr. Morrison:

Q. Mr. McCarry, where is your home? A. Edgewater, New Jersey.

Q. And what is your business? A. Contractor.

Q. How long have you been in that business A. Ten years.

Q. What sort of contracting do you do? A. Street sewers and houses.

Q. Did you ever build a sewer in Fort Lee? A. Yes, sir.

Q. I show you this set of drawings (Exhibit D-2) showing the Leonia Heights system as designed by Mr. Clark, and I ask you whether you constructed that Leonia Heights system? A. I did.

Q. And did you construct it in accordance with those drawings? A. Yes, sir.

Q. About how long were you engaged in the performance of that work? A. Two years, or a little more. I guess two and a half years, maybe.

Q. Had you any acquaintance with the neighborhood in which the sewer was built before the construction began? A. Yes, sir.

Q. How long had you known it? A. Oh, since I have been a boy.

Q. And how well had you known it? How often had you been there? A. Well, I had driven over it. I visited it possibly seven or eight times a year.

Q. You know this brook that feeds Mr. Garrison's pond? A. I know the brook, as far as the sewer goes. After it leaves the present storm water sewer in Fort Lee, I don't know nothing about it from there on.

Q. You know the brook that Mr. Clark spoke of that extended south from the present outlet of the sewer under Main Street in Fort Lee and south of the swamp? A. Why, that's the section of Fort Lee that is known as Rouses Hollow.

Q. You know Rouses Hollow before that section was built? A. Yes, sir.

Q. What is the condition of the stream through Rouses Hollow? A. Very swampy.

Q. What was the condition of the water in the stream? A. It wasn't clean.

Q. What sort of dirt had you seen in it? A. I only can talk from the time that I worked in there, that is, from the time we started to excavate there.

Q. What did you see at that time? A. Well, the water wasn't pure. It was yellow and slimy.

Q. What sort of slime was it? A. Well, that I couldn't say.

Q. Well, you constructed the sewer as Mr. Clark has said, I presume, put this storm water sewer in? A. Yes, sir.

Q. Running over to this pumping station? A. Yes, sir.

Q. Well, in a general way, did you construct your sewer system and you constructed a pumping station, too? A. Yes, sir.

Q. Put in the pumps? A. Yes, sir.

Q. Did you construct them in accordance with these drawings? A. I couldn't say that. There was a change in the drawings of the pumping station. There was a change there, and it was tied up maybe for six months or more.

Q. That was the change Mr. Clark has spoken of, changing the pumps from a dry to a wet chamber? A. Yes, that was one, I think; and we had to go deeper to get a better foundation.

Q. And you did go deeper? A. Yes, sir.

Q. In a general way you constructed this system in accordance with these plans? A. No, with those changes—

Mr. Gourley: Let him answer the question.

The Court: You are rather leading.

Q. Now, Mr. McGarry, when you had finished your work on this sewer system, did you observe how it was working? A. Why, for three months before it was finished, I had the pumps working, and then I had a guarantee on the work for a year after.

Q. And during that time did you give this your personal observation? A. Yes, sir.

Q. And during that time what have you to say as to the operation of the system? Did it go as it was designed to go? A. Well, there was no complaint. I always kept a man there night and day.

Q. The pumps were running? A. Yes.

Q. Did the pumps take off the sewage? A. So far as I know.

Q. So far as you know. Was there any sewage went into the stream at that time? A. Not that I know.

Q. You were finally paid at the end of that time your full contract price, or the balance of it?

Mr. Gourley: That is unimportant.

A. I was paid—twenty per cent. held until your contract is finished, and then five per cent. held until—as a guarantee until the end of the year.

Q. That has been paid? A. Yes, sir.

Cross Examination by Mr. Gourley:

Q. Mr. McGarry, this swamp of which you speak is near the present pump house? A. Why, it extended from the pump house fully three-quarters of a mile through that hollow.

Q. So that was all filled in by you? A. No.

Q. Well, you constructed a sewer along there, didn't you? A. Yes; but we didn't fill it in.

Q. Well, the brook begins right close to the mouth of your sewer? A. I don't know where the brook begins.

Q. Do you know where the mouth of the sewer is? A. Yes.

Q. And know where the storm water sewer begins? A. That is west of the pump station.

Q. Well, doesn't it begin there now? A. I don't know. I had no occasion to visit it.

Q. You didn't see the brook at that time? A. I know there was something there. Whether it was a brook, I don't know. We put in a 24-inch pipe.

Q. You saw this discolored water coming out, didn't you? A. At that point?

Q. Yes. A. That I wouldn't be sure of.

Q. Well, didn't you see this change of color, red and green and brown from the film— A. No, there was no connections made at the time.

Q. Of course, you are too important a man to stand there and watch it? You pay somebody for that? A. I don't think the moving picture people were connected up to it at the time.

Q. When were they connected? A. That I do not know.

Q. Who was it you had watching this day and night? A. Why, I had a young man by the name of McCurry in the day time and I forget who it was at night.

Q. Where is McCurry now? A. I think he is in Fort Lee.

Q. And the other man, do you know where he is? A. I don't know.

Q. All you did was watch McCurry? A. I had to see that he was on the job.

Q. To see that he was on the job. That's all you were concerned about? A. Yes.

Q. And he was on the job? A. As a rule.

Q. Now, this plan of the sewer, of course, you had nothing to do with that? You simply executed it? Did you put in these pipes connecting the two sewers down near the pumping station? A. Connecting which two sewers?

Q. The sanitary and the storm? A. No, sir.

Q. Near the pump house? A. No, sir; I don't remember putting in two pipes to connect the sanitary and the storm.

Q. Now, what is your best recollection as to that? You don't know anything about that? A. No.

Q. These film companies you don't know either about, when they were connected at all? A. I haven't the slightest idea.

Mr. Gourley: That is all, Mr. McGarry.

The Court: Now, when you put these pipes in the storm sewer and the sanitary sewer, how far were the pipes laid apart?

The Witness: Two to three feet; sometimes a little bit more.

The Court: But they were separate and distinct pipes?

The Witness: Oh, yes.

The Court: And one above the other?

The Witness: Yes, sir.

The Court: But in the same trench or different trenches?

The Witness: Sometimes they were and sometimes they were not. They pass through the same manhole, as a rule.

The Court: They were not one pipe within another?

The Witness: No, sir.

The Court: Both distinct pipes?

The Witness: Yes, sir.

By Mr. Gourley:

Q. When you reach the manhole, it was open, however? A. As a rule you laid your pipe through before you started to build the manhole.

Q. Taking off the manhole of the storm sewer, you looked down and saw the opening of the sanitary sewer? A. You can see them both.

Q. That was at that point on the side of the storm sewer? A. Yes, sir.

Q. And somewhat near the top of the storm sewer, or was it about midway? A. It all depended on the depth of the manhole. Some were four feet deep, some twenty feet deep.

Q. This sanitary pipe was what diameter? A. Sanitary pipe line? Anywheres from six to twelve inches.

Q. Where was that six inch and where twelve? A. That I couldn't say.

Q. You don't remember? A. No.

Q. Well, then, when at the opening, when you looked down the manhole, was this pipe cut right in two so to speak? A. No, it was built as a rule of concrete.

Q. At that point? A. And hung on the side of the manhole.

Q. The point I make is, was it cut off in the center so that looking down you saw only half of the circle? A. You saw only about three-quarters of the circle.

Q. Was that bevel where the opening occurred down into the storm sewer? What kind of an apron was there? A. It was built like this (indicating) and cut off on the top.

Q. Did that bend downward toward the storm sewer? A. No, just the shape of the pipe, like three-quarters of a circle.

Q. Was the line of the storm sewer at that point straight down from the top? A. It hung over the top of the other sewer.

Mr. Gourley: That is all.

Re-direct Examination by Mr. Morrison:

Q. Mr. McGarry, in some of these manholes—

By Mr. Gourley:

Q. Have you seen this working? A. I saw it work for a year after I was through with it, but I haven't seen it work—

Q. Did you see it working yourself? A. Yes.

Q. Did you have anything to do with furnishing the pumps? A. Oh, yes, that was in my contract.

Q. In accordance with this— A. In accordance with the plans and specifications.

Q. And this four-inch pipe that we have spoken about was in accordance with the plans? A. Yes, sir.

Re-direct Examination by Mr. Morrison (Cont'd):

Q. Mr. McGarry, you have spoken of some of the manholes being much deeper than others. Some you say as deep as 20 feet? A. Yes.

Q. Now, in one of those of extreme depth, how far above the storm sewer was the sanitary sewer? A. Well, it could be six, it could be ten feet above the storm sewer.

Q. And what was the nearest you remember, or the shortest distance, as you remember it, that the sanitary was above the storm sewer? A. About two foot six to three foot.

Q. So that the distance between the storm sewer and the bottom of the hole varied from two feet six to eight or ten feet? A. Yes.

Re-cross Examination by Mr. Gourley:

Q. What distance back did this run; in other words, how many hundred feet from the opening of the sewer? A. I believe there was altogether in the sewer and its different branches around four miles of pipe.

Q. No, speaking of the pipe that runs into this brook that drained into that; what area of that territory is covered by your pipes? A. I think there is fully half a mile, if not more, down in that one section there.

Q. A half a mile? A. Yes.

Q. Now, does that half a mile vary in grade? A. I believe it does; I think it starts around twenty-four inch pipe and winds up with about a twelve.

Q. What was the fall, so to speak, from the beginning of the half mile to the end of it? A. That I couldn't say.

Q. Well, was it uniform or more in places than others? A. I should imagine it was pretty well uniform along there.

Q. Do you know what it was in the upper reaches, in the upper part of the half mile? A. I think we had twelve inch pipe up there.

Q. No, I don't mean that; I mean the slope down from one manhole to another. What was the drop in one hundred feet at the upper end? A. Well, anywheres from three inches to a foot.

Q. In one hundred feet? A. Yes, sir.

By the Court:

Q. Have you manholes in that main storm sewer? A. Yes, sir.

Q. How often? A. At every change of grade. Every two hundred and fifty or three hundred feet.

Q. Did you have trap manholes there? A. In some cases.

Q. How do you work the shelf in the trap manhole? A. You build it of concrete. You carry up your brick work; then you take your boards and build a form around it, and let the concrete set in there, and continue your pipe to the next one.

Q. The trap manholes the same way? A. The same way. The only place you use a trap manhole is where you have sanitary sewage alone.

Q. I am asking you whether you had any of those. A. I am not sure.

L. SEYMOUR LANG, Jr., called as a witness on behalf of the defendant, being duly sworn, testified as follows:

Direct Examination by Mr. Morrison:

Q. Captain, where is your home ? A. Fort Lee.

Q. And except coming up here today, where are you at present? A. Camp Dix.

Q. In the service of the Government? A. Yes, sir.

Q. How long have you been in that service? A. Since June of last year.

Q. And prior to that time what was your occupation? A. Civil engineer and surveyor.

Q. Where were you employed? A. In the Borough of Fort Lee.

Q. How long had you been employed there? A. Since the fall of 1912.

Q. Do you know the Leonia Heights sewer? A. Yes, sir.

Q. What stage of construction had been reached in that sewer when you first were employed there? A. The construction work was not started.

Q. And how long after your employment in the Borough did the construction of that system begin? A. I did not understand your question.

Mr. Morrison: Will the stenographer read the question.

(Question read.)

A. About a year and a half. I am not certain as to the date of the commencement of construction. I think it began some time in 1913.

Q. What, if anything, had you to do with the construction of the sewer. A. I, at that time, was employed by Mr. Clark at the beginning of its construction. The preliminary surveys I made. I had nothing to do with the design work. That is all that I had to do was with the preliminary work and construction. On the construction work, in itself, I furnished to the contractor all lines and grades by means of which he laid out his construction work.

Q. You were personally there, then, practically every day during the construction? A. To a large extent, yes.

Q. How long did you continue? A. I continued in the employ of Mr. Clark and with a changed status with Mr. Mason until the completion of the system.

Q. Mr. Mason was Mr. Clark's successor as Borough Engineer? A. Yes, sir.

Q. And after the completion of the system, you continued in the employ of the Borough Engineer until you left to enter the service? A. During the latter part of my time, I was not in the employ of Mr. Mason.

Q. Were you directly in the employ of the Borough? A. No; I was employed by myself, and Mr. Mason turned over to me under an agreement the Borough work which was given to him by the Borough. I therefore attended to Mr. Mason's interests and represented Mr. Mason to the Borough during that period.

Q. And how long a period was that? A. That was about 19—, I think that was along about the spring of 1916, the early spring of 1916.

Q. Yes. Now, Captain, when you made the preliminary surveys for this sewer, I presume you personally went through the territory to be drained by it? A. I did.

Q. Did you see this brook at that time? A. Yes, sir.

Q. What was the condition of the brook as to the purity of its water? A. From the present location—well, from Main Street for a distance of probably a thousand feet to the north and possibly two thousand to twenty-five hundred feet to the south, it was very impure; for a distance of possibly three hundred feet south of Main Street and about a similar direction to the north, it was flat and marshy. Houses—yes, practically from the source of the stream to a distance of about one thousand feet north of Main Street, drained directly into this hollow. The condition of the water was such as to be very noticeably unpleasant.

Q. When you speak of houses, did you mean houses only, or did some of them have outbuildings? A. I recall no outbuildings.

Q. You recall the stable that some of the other men have spoken of? A. No, I do not, although I know of its existence. I do not know, I did not know of the drainage into the brook.

Q. How far down the stream of the brook did you observe, go at the time you made the preliminary surveys? A. Down about a distance of half a mile north, half to three-quarters of a mile north of Main Street.

Q. Do you know the area which is drained by this brook and its tributaries? I do not ask you what that area is. I ask you do you know it? A. Approximately, I think.

Q. What places or communities are in that drain-

age area? A. Fort Lee; Englewood Cliffs; Englewood; Leonia.

Q. Now, as to Fort Lee; what part of Fort Lee is within that area of the brook drainage? A. Jones Road very well marks on the west the top of a ridge which is the westerly boundary of the drainage area of this section. I would say that Newell Avenue on the east—

Q. And how far to the south? A. As far north as—well, there is Fourth Street, is a continuance in Englewood Cliffs, would very well mark its easterly boundary line. It goes to the south to North Avenue. North Avenue of the Borough of Fort Lee would very well mark the southern extreme of this drainage area.

Q. Now, in that area which you speak of as the drainage area of this brook, and in the Borough of Fort Lee, prior to the construction of this sewer, what became of the surface drainage, the water which would run off of the streets, the lots, the yards? A. Be drained, of course, down into that one stream, which is the only outlet.

Q. When this sewer system was constructed, and particularly the storm drain, was anything more run off into the brook through the storm drain than had always run off there before? A. At what period of its construction?

Q. When it was first constructed? A. (No response.)

Q. During the period that Mr. McGarry has spoken of, when he was operating on it before his deferred payments— A. I am under the impression that the moving picture refuse was turned in there before the entire completion of the work.

Mr. Gourley: I ask that that be stricken out "under the impression."

Mr. Morrison: We have no objection to its being stricken out.

The Court: Yes; it may be stricken out.

Q. After the time in which you say you were in practically daily attendance during the construction of the sewer, what, if anything, had you to do with the operation of the sewer, particularly the pumping station, after that had been built? A. Up until the issuance of the semi-final certificate, that is the completion—or up until the—yes, up until the issuance of the final certificate, which covered the guarantee work for the construction period, the maintenance and supervision of operation of that pumping station was under the supervision of the engineer.

Q. You were the engineer, or his representative, actually in charge of that? A. I personally supervised the operation of that pumping station.

Q. Now, directing your attention particularly, Captain, to that time after the system had been put into operation and before your semi-final and final certificates were given, during the superintendence you have just spoken of, tell us how the system operated? A. Up until the issuance of the semi-final certificate, the system operated, the pumps operated perfectly. They took care, with the exception of a few weeks (I can't be sure of exactly the length of time), with the exception of a few weeks, they took care of all of the effluent which came into the pump chamber.

Q. That means everything that came through the sanitary sewer? A. Everything that came through the sanitary sewer.

Q. And that was up until what time? A. That was up until August, 1916.

Q. How much longer after that date did you continue to superintend or observe the operation of the sewer? A. I didn't continue to superintend until along about the last of November or the first of December of the same year, 1916.

Q. So that during the period from August until the latter part of November or early December, 1916, you were not supervising the operation of the sewer? A. No, sir.

Q. Now, when you again took up the supervision in November of 1916, what condition did you find? A. I found that the pumps were not operating.

Q. Did you find the cause of that? A. Yes; propellors were broken.

Q. And what, if anything, was done to put the pumps into operation? A. Immediately upon securing authorization of the Borough authorities, I had the pumps taken down and put in such shape as to efficiently operate again.

Q. And how long did it require before you had the pumps going again? A. About February or March.

Q. Of 1917? A. Of 1917.

Q. What was the reason that so much time elapsed before the pumps were going again? A. Well, it was considerable of a job. The effluent had filled into the pump stations, and it was necessary to get a pump and pump out the chamber in order to get at the pumps. After that, there was a delay in getting parts.

Q. Where do those parts come from? A. They come from Aurora, Illinois. And there was a delay of several weeks until—in fact, it was even necessary to splice shaft to get them operating as soon as I did.

The Court: Splice shafts, you say?

The Witness: Yes, between the motor and the shaft.

Q. When you made these repairs, did you put the pumps into operation again? A. Yes, sir.

Q. And did they then handle the flow of the sanitary sewer? A. Yes, sir.

Q. How long did you continue after that to observe the operation of the station? A. I observed the operation of that station until I entered the service?

Q. And up to that time what have you to say as to whether it operated as designed? A. At that time the pumps handled all of the sewage that came into the pump station.

Q. Now, turning aside, Captain, from the pump station for a time, may I direct your attention to one or more of the manholes? Did you ever have called to your attention any defects in the manholes in the sewer system in this section of Fort Lee? A. Yes.

Q. And which manholes were those? A. It was the manhole—there were two trap manholes in Main Street right over the trunk line sewer, which is the one that is laid in the brook. The one to the west is a trap manhole in which, both coming in from the west, both the sanitary and storm mains enter the same manhole. There is a wet and a dry weather flow to the storm water main as it enters in from Main Street. During the wet weather, sufficient volume of water will take the wet weather flow, and in falling down the invert, lands in the sanitary invert instead of the storm.

Q. And what would the effect of that be? A. The effect of that would be that the sanitary sewage would be washed over into the storm sewer.

Q. Did you see that that was really occurring at this manhole at that time? A. I did.

Q. What, if anything, was done to remedy that condition? A. I secured the authority of Mr. Shaw, who was then Chairman of the Street Committee, to purchase a frame which covered the invert of the sanitary sewer so that any drippings from the storm sewer coming easterly down Main Street would not be able to wash the sanitary effluent into the storm sewer, nor to add to the amount of effluent which it would be necessary for the pumps to pump.

Q. Now, how much time elapsed between your discovery of this defect and the time when you had it remedied? A. Oh, possibly a month. I do not remember the exact dates, an immaterial—it could be ascertained; I think the casting was bought from a man named Barker, Fred Barker, of Paterson.

Q. Casting made to order of special design? A. Yes, sir. I drew the design. The design was made, and he came up to the office. He made the casting, brought it up and I had it fitted on.

Q. Now, was there another manhole anywere to the pumping station in which a defect developed? A. Yes, the sanitary invert had a change of course about two or three hundred feet north of Main Street right near a little old cemetery plot. The sanitary invert had broken down, with the result that the effluent of the sanitary sewer, instead of continuing through the manhole in the sanitary system, dropped down into the storm system.

Q. When did that first come to your attention? A. At the same time that the defective manhole; I should think along about December or January, or December of 1916, or January of 1917.

Q. During the winter of 1916-1917? A. Yes, sir.

Q. That was the same time that you had this iron frame made for the other manhole? A. Yes, sir. All approximately the same date.

Q. Now, what had you done to remedy this broken invert? The Chairman—I personally did nothing other than to report it. The Chairman of the Street Committee instructed the Street Superinteindent, Mr. New, to immediately repair the invert, and it was done.

Q. Do you know that that was done? A. Yes, sir.

Q. And how was the repair made? A. By simply breaking up the invert.

Q. And was it restored to the original condition? A Yes, sir.

Q. In accordance with the original design? A. Yes, sir.

Q. And about how long, Captain, after the broken invert was discovered was it until it had been repaired? A. Oh, just a matter of a week or so; ten days would amply cover it.

Q. Now, I would like to direct your attention now to the storm drain rather than the sanitary drain of which you have been speaking, and ask you whether you have observed the nature of the effluent from the storm drain from time to time? A. Yes, sir; I have. After December of 1916 I have had occasion to do so.

Q. Now, when you first observed it in December of 1916, what did you see? A. The most apparent aspect was a variation of color.

Q. And about what time in December of 1916 was that seen by you? A. Oh, along the latter part of December, I should say. I do not remember any dates.

Q. Did you do anything to ascertain the cause of

that variation in color? A. My investigations were the result of complaint which had been made to the Borough Council, and referred to me for investigation.

Q. You made an investigation? A. Yes, sir.

Q. Now, what was the investigation? What did you do, and what are the results that the investigation brought forth? A. As to the source of the pollution of Crystal Lake, the results of the investigation brought forth that two film companies—or that, first these two defects of which I have just spoken.

Q. They were in the sanitary? A. In the sanitary, sir, which of course polluted the storm sewer.

Q. Until that had been repaired? A. Until that had been repaired.

Q. Which was done immediately?

Mr. Gourley: Now, now—

Mr. Morrison: Go on, Mr. Lang.

A. I found that two film companies, namely, the Paragon and the Universal, were discharging into the storm water sewer objectionable effluent.

Q. What was the nature of it that you call it objectionable? A. Well, there were some acids, there was tanks of coloring matter, first washes of film, all of which contained substances which created objectionable effluent.

Q. That was discharged, as I understand it, directly in the storm water drain? A. Yes, sir

Q. Now, what, if anything, did you do about it, or do you know was done about it? A. I reported the condition to the Borough Council with the recommendation that the objectionable effluent should be separated from the storm water sewer and turned into the sanitary sewer.

Q. Well, now, what was done about it, if you know? A. The Mayor and Council directed that I should see that the conditions were fulfilled which I had suggested should be carried out.

Mr. Gourley: I move that that be stricken out. The Mayor and Council's conclusion should not be shown on the record.

The Court: Yes.

Q. What was done about it? Did you do it yourself? A. I directed the moving picture companies to discontinue the discharging of the objectionable effluent into the storm water sewer, and that they should turn it into the sanitary sewer.

Q. Now, how many of those moving pictures companies were there involved in this particular flow? A. Two.

Q. And what are the names of them? A. The Paragon Film Company, the Universal Film Company.

Q. And where at Fort Lee are they situated respectively? A. The Paragon Film Company is situated at the south end of John Street to the west of the brook.

Q. Near the brook? A. Within three hundred feet, the nearest. The Universal is situated on Main Street, oh, possibly within a thousand feet.

Q. Now, speaking first of the Paragon Studio, what was done there after you had discovered that they were turning their chemicals into your storm water drain? A. They immediately employed Mr. Ghent, a local plumber, to disconnect the tanks and the drains which I had designated as being objectionable and to connect them with the sanitary sewer.

Q. Did they have any sumps or other places there in which their chemical effluents were stored, or anything of that sort? A. They had one in which they put out the drainage from the precipitant, that had nothing to do with the sewer, that went down another drain.

Q. Part of their drainage went down into the sump? A. A cesspool.

Q. Where is that located, on their property? A. Yes, on their property, on the west edge of their property, and west of their manufacturing plant.

Q. Now, you know then, that the recommendations which you made as to relieving the storm water drain from what you call objectionable effluent were complied with by the Paragon? A. Yes, sir.

Q. How long after you discovered that condition was that change made? A. Well, I will say two months; that will certainly cover it.

Q. Now, directing your attention to the Universal Plant, what did you recommend should be done there? A. The Universal Plant drained all of their objectionable effluent into one sump. They have a cooling system there which necessitated that only pure water should be turned into this other sump; that is all of the water which went into their south sump went through this cooling apparatus, and therefore, could contain nothing but pure water. The objectionable effluent went into a sump which was constructed at such a level as to be impossible of drainage into the Main Street sewer. In the case of the Universal, therefore, it was necessary to extend, to acquire rights of way, and extend the Jane Street sewer from its westerly end across private property until—and so enable them to turn that sump into the sanitary sewer.

Q. In Jane Street? A. In Jane Street.

Q. Now, how far was Jane Street from this sump? A. Oh, it must be six or seven hundred feet.

Q. And what is the nature of the soil through which that sewer had to be built? A. Well, it is rocky, shallow, top soil.

Q. Was it necessary to blast out the trench for any part of the distance? A. Yes.

Q. What proportion of it? A. I couldn't say that, for the construction wasn't far enough along. The trench was stripped so that I saw rock before I left.

Q. And how close to the surface did the rock occur? A. Oh, within six inches.

Q. How deep is the trench designed to be? A. It varied. I should say that they had an average depth of something like six feet.

Q. Now, between the Jane Street sewer and the property of the Universal where the sump was, was there a public street? A. No, sir.

Q. Do you know that the Borough had first to acquire the right of way before this sewer could be built? A. The Universal acquired the right of way.

Q. And how long after you recommended that this sewer should be built was it completed? A. I do not know. It was under process of construction when I entered the service.

Q. How far had the construction progressed at that time? A. Well, it had started laying pipe from the end of Catherine Street, and he had, to a large extent, stripped the trench.

Q. As I understand you, you designed this sewer to take the effluent from that sump to the Jane Street sanitary? A. Yes, sir.

Q. And if we show that it was constructed in ac-

cordance with that design, it would have relieved the condition of which you complained of? A. Yes, sir.

Q. Now, Mr. Lang, you, I presume, were at the pumping station where you could see the effluent of the storm water drain from time to time until you went into the service?

Mr. Gourley: I object.
The Court: That is leading

Q. Well, were you? A. Yes, sir.

Q. What have you to say in a general way as to the operation of the sewer and of the pumping station after the changes were made that you have detailed in your testimony to-day? A. Well, I have never seen it after those changes were made.

Q. After some of the changes were made, some were made before you left, were they? A. The Universal—the Paragon was connected, the manhole at Main Street and the manhole there by the little burial plot, those differences were corrected. At that time, that pump station, the pumps would operate about forty minutes out of every hour.

Q. In so operating, did they handle the flow through the sanitary? A. Otherwise they would have operated continuously.

Q. Why do you say that? A. They are automatically operated.

Q. Can you explain briefly how they were operated? A. The water level, the rising of the water raised the flow which, when it reached a certain level, operated an automatic electric switch which turned the power into the Motors.

Q. And those motors drove the pumps? A. Exactly.

Q. And when they had started what shut them off again? A. As the flood dropped down as the water was pumped out, the flood dropped with it, and that worked as a cut-off and disconnected this switch.

Mr. Morrison: You may take the witness.

Cross Examination by Mr. Gourley:

Q. Did you know the Borough stopped that method because of its expense? A. Repeat the question, please, sir.

Q. (Question read.) A. What method?

Q. The automatic stop and starting? A. No, sir.

Q. You say it didn't? A. No, I say I didn't know it if they have.

Q. Did you know that they burned out two armatures because of the excessive cost of electricity? A. No, sir.

Q. That is new to you, is it? A. Yes, sir.

Q. When did you leave the employ of Fort Lee, Captain? A. In June, 1916, 1917.

Q. 1917, last summer? A. Yes, sir.

Q. Well, have you the date, can you give us the precise date when this connection was made with the film companies? A. No, sir.

Q. Can you give us the precise date when the film companies— A. Which one, sir?

Q. Well, I will take either or both if you can give it to us; stopped discharging effluent in the storm sewer? A. I cannot give you the exact date.

Q. You said it was in the winter of 1916, is that right? A. The Paragon discontinued in—well, I will say fall of 1917.

Q. What— A. That will certainly cover it.

Q. Universal when? A. The Universal I can't say.

Q. After or before that? A. Oh, considerably after, it must have been.

Q. Had the Universal stopped before you left? A. No, sir.

Q. I mean did it stop discharging into the storm sewer before you left? A. No; they were still discharging into the storm sewer.

Q. The Universal, then, has never stopped? A. So far as I know, if that construction work is completed, they have stopped.

Q. No, I am asking what you know, Captain? A. I don't so far as I know, it is still going into the storm sewer.

Q. Now, what quantity of water is used by the Paragon, or was used? A. I do not know.

Q. Would you say one hundred thousand gallons a day? A. I wouldn't say.

Q. Well, would you say it was not, then? A. No, I wouldn't say it was not either.

Q. Well, you heard what Mr. Clark said, this was designed for, I think, about a quarter of a million gallons of effluent per day? A. I do not remember such a statement.

Q. Didn't he say that, or were you here? A. I was here.

Q. Designed to take care of 1,200 people at 200 gallons per day, which would make about 240,000 gallons, that was designed for that purpose. Did you hear him say that, or do you know that? A. No, I don't remember him saying that.

Q. Well, if you turn on another hundred thousand gallons into the sanitary sewer, an overflow must occur? A. We didn't contemplate turning on

one hundred thousand gallons there. The objectionable effluent did not amount to one hundred thousand gallons.

Q. I know, but the water of which it was a part was turned in? A. Well, they were separated. There is probably—assuming that 100,000 gallons of water is used in one of those concerns in a day, 95,000 of it is pure enough to drink. I will drink it.

Q. Ninety-five, yes, if you can get it separated? A. It is separated.

Q. Then, this colored water which you spoke about which is coming out, that wouldn't be, of course, fit to drink? A. Well, they were subsequently mixed together, but it was possible to separate them before their entrance into the sewer.

Q. Was this water from the Universal at any time separated? A. Before it reached the sump, yes.

Q. Well, was it separated before it went into the storm sewer? A. Before it went the storm sewer, yes.

Q. When? A. Before it left the room in which it was used for various purposes.

Q. What was the date, about, if you can give it to us? A. That condition will always be true; it is true now.

Q. Well, but when this change first occurred, you do not inform us? A. You asked me as to whether or not this water and objectionable effluent were ever separated?

Q. Yes, and you said, "Yes," and I asked you when? A. In the rooms to which they were—

Q. I am not asking where, I am asking when? A. Now, always since the construction of the building and the installation of its water system.

Q. Well, you visited there last, when? A. Oh, probably about May of 1917.

Q. That was the last time you were there? A. Yes, sir.

Q. Have you made any study of this question? I mean are you a graduate of a school? A. Yes, sir.

Q. What college? A. Rutgers College.

Q. And took up engineering? A. Yes, sir.

Q. Have you been employed for yourself anywhere? A. Yes, sir.

Q. After you parted with Mr. Mason? A. Yes, sir.

Q. How long before you went to the army? A. That was about 1915; somewhere in that neighborhood.

Q. You never could have built any system of sewerage yourself? A. No, sir.

Q. This was the first system you were on? A. Well, not that work, no; but I did not design it.

Q. The first you have been officially associated with? A. No, the eastern section of Fort Lee I was associated with.

Q. Is that the place where Leonia complained about? A. No; no indeed.

Q. That was another part of Leonia? A. Ever since graduation I have been on Sixth Avenue and on Lexington Avenue.

Q. Not on a system of this kind in New York? A. No, sir.

Q. How long had you known this brook before this sewer was completed, Captain? A. About 1913, when I made a preliminary survey.

Q. Was it by your direction this brook was closed up, the upper part of it? A. It was in accordance with the approved plans and specifications, in accordance with the lines that I gave.

Q. These plans contemplated the closing of the upper part of the brook and having the brook begin at the mouth of the sewer? A. The substitution of the vitrified pipe for the bottom of the brook, yes.

Q. The brook began at the mouth of the sewer after you got done with it? A. Yes, practically.

Q. Now, had you occasion to notice the change in the water of the brook after you began to operate? A. Well, I had occasion to—I have no recollection of ever noticing a change in the—you asked me the volume?

Q. No; will you read the question, Mr. Stenographer, please (question read)? A. With respect to what?

Q. And change or characteristic of any kind? A. I have no recollection of noticing any change—characteristic until it was brought to my attention in investigating this complaint.

Q. It wasn't a part of your duty to look for that? You were not concerned about it? A. No, sir.

Q. Took that for granted; I suppose you had a good deal of work to do, Captain, as all active men do? A. I had considerable at that time.

Q. It was a sewer, it was there, and you did your work? A. Perfectly constructed.

Q. And you say that McGarry did his work? A. Yes, sir.

Q. What the peculiar shade of the water was or what bacilli passed into it, or what contamination passed into it, wasn't your immediate object, was it? A. During the time—

Q. I say it wasn't your immediate purpose at all; you weren't challenged, you had no occasion to make special notice of it? A. Of course it would be during the construction, but not subsequent to that.

Q. Of course, it only began to be operated when it was constructed? A. Exactly.

Q. That was about April, 1916? A. Completed in February, 1916.

Q. It began to be operated about April, 1916; that is right, isn't it? A. It was operated before that.

Q. March, 1916? A. Before that.

Q. Well, when, if you know; tell us? A. About December of 1915 or January of 1916.

Q. No, now you are guessing, you have no data to show that before you? A. I know that the semi-final certificate was issued in February, 1916.

Q. Yes. A. And all work must be completed before that time.

Q. Yes, that's February, 1916? A. That is February, 1916.

Q. Whether the water was turned on or not, or whether the sewer was actually—or effluent pouring through, have you any memorandum showing that? A. No, sir. The pumps were in operation, so I know of my own personal knowledge that effluent was pouring in.

Q. These manholes of which you speak, do I understand you just noticed two of the manholes where the water was flowing over? A. (No response).

Q. That calls for a reply, Captain? A. At that time, that is all.

Q. Well, all right; at that time. When was that time? A. Somewhere in the neighborhood of December, 1916. That's within a few weeks.

Q. Had you occasion to notice the manholes to see whether there was any overflow at any time preceding that? A. I knew that there was overflow in December of 1916.

Q. In November or October, did you notice? A. No, sir; I did not.

Q. It was only when complaint was made you examined it? A. No, I knew before complaint was made that they were overflowing.

Q. How? A. Because of the fact that I had again taken over the supervision of those pump stations along the last of November or the first of December, and I was reasonably certain that that complaint was made after that time. I know the complaint was made after I had taken over the pump station.

Q. Before you took over the pump station, do you know if there was an overflow? A. No, sir.

Q. How long did you say the pumps were out of repair? A. I did not say.

Q. I ask you? A. I do not know.

Q. About? A. I do not know. It must have been some time between August of 1916 and the last of November of 1916.

Q. Well, do you mean for the period of four months in succession, there was no pumping? A. Oh, no.

Q. Well, I want to get you exact— A. To my personal knowledge up until August, 1916, the pumps were operating efficiently. After that time until along the last of November, or the first of December, I have no personal knowledge of the manner in which they operated.

Q. Whether they operated at all or operated fully? A. I know nothing about it.

Q. When did they stop working efficiently to your knowledge when some repairs were necessary? A. The latter part of November or the first of December, 1916.

Q. When they needed repairs, how long were

they not working? A. They were working again along about February, or the last of January.

Q. Was that one pump or both? A. Both.

Q. So that for three months both pumps were idle? A. I am not quite clear on that. I don't remember. I think it was—it may have been six weeks, certainly for six weeks that the pumps were idle.

Q. But the occasion was in the winter of 1917? A. Yes, sir.

Q. And it affected both pumps? A. Yes, sir.

Q. Of course, during that period there was nothing to do but leave the sewage go down the storm sewer? A. Yes, sir.

Q. And it did go down? A. Yes, sir.

Q. For four months? A. No; not for four months.

Q. Now, after that had you occasion to notice the storm sewer? Had you occasion to notice the manhole? A. After?

Q. After the pumps began to work efficiently? A. Had I occasion to notice the manholes?

Q. Yes; did you go about and make any data about the manholes showing whether there was still an overflow? A. No, I made no examination.

Q. Well, do you recall the fact; was it from any memorandum? A. I know there couldn't have been an overflow.

Q. Oh, no. The jury will do all this arguing when they go out. Just tell us the fact. A. That's exactly what I am trying to do.

Q. Do you know; did you see; did you examine? A. I examined the pump chamber to see that the pump took care of all the effluent which came into it. Knowing that, I knew there could be no overflow.

Q. No, answer my question. Did you examine the manholes at any time after the pumps began to work again to see whether there was any overflow? A. Yes; I think I did, with Mr. Nichols.

Q. And you found them overflowing? A. No, sir; I found evidence of overflowing.

Q. The evidence was what? A. Evidence that it had overflowed at a previous time.

Q. Toilet paper lying on the apron, so to speak? A. Yes, sir.

Q. Things of that kind? He called your attention to it, or you called his attention to it? A. Why, he called my attention to it.

Q. Wasn't that so of every manhole, Captain, you opened? A. That he called my attention to?

Q. That you saw evidences of overflow? A. Surely, the manholes that we looked at were all down within a radius of four or five hundred feet of the pump station, and very little difference of elevation.

Q. Every one so far as you went, I do not care how many you saw, that was the result, wasn't it? A. Yes, sir.

Q. Can you tell us the fall in the upper part of this sewer? That is to say, what fall there is in one hundred feet? A. I can tell you exactly if you will let me consult some data.

Q. Of course I will give you anything you like. These plans here? A. That book over there (indicating).

Q. (Handing book to witness). A. The grade from the pump station to its intersection with Jane Street, the intersection of the trunk line—

Q. How many feet is that, Captain? A. In the neighborhood of twelve hundred feet; about twelve hundred feet.

Q. What per cent. grade is that? A. Four-tenths per cent.

Q. And the other part? A. Between Jane Street and Catherine Street, it is two and thirty-two hundredths per cent.

Q. And from Catherine Street? A. Well, there the course of the brook, the pipe and the course of the brook there ends.

Q. What did you say? A. Between Jane and Catherine, two and thirty-two hundredths per cent.

Q. Is that the end? A. The pipe is no longer confined to the old course of the brook. From that point on it takes up all of the water.

Q. To the end of the sewer, just follow up the sanitary sewer to the end? A. It no longer follows the old course of the brook.

Q. I do not care about that, where it goes. You do not know what the grade is? A. I cannot tell you that.

Q. Of the santitary sewer that goes into this pump house? A. Oh, that is to say, the sanitary sewer?

Q. Yes. A. I cannot give it to you.

Q. Well, Mr. McGarry said it was three inches in one hundred feet? A. No, there is nothing less than five inches in one hundred feet.

Q. So that is it, five inches in one hundred feet? A. That is the minimum, that is, from—

Q. That certainly would be the minimum permitted by any engineer, wouldn't it? A. In that size pipe, in all probability, yes.

Q. That's exactly what it was? It was about three or four inches, the upper part? A. Oh, no, five inches is the minimum.

Q. I am asking you what this actually was, do you know? A. Yes, there is nothing under five inches.

Q. Do you remember actually, or can you turn to your books or maps and tell us what is the grade or fall of the upper part of that sanitary sewer? A. No, I cannot. It is not here.

Q. Is it on the maps, these large maps that have been offered in evidence? A. No, it is on file with the Borough Clerk of Fort Lee.

Q. The Borough Clerk has that information? A. I presumed it was in here (indicating), but it is not.

Mr. Gourley: Very well. I think that is all.

Re-direct Examination by Mr. Morrison:

Q. Captain, Mr. Gourley asked you something about every manhole that you and Mr. Nichols examined. How many manholes did you and Mr. Nichols examine? A. Two.

Mr. Morrison: That is all.

JOHN McGLOIN, called as a witness on behalf of the defendant, being duly sworn, testified as follows:

Direct Examination by Mr. Morrison:

Q. Mr. McGloin you reside in Fort Lee, do you not? A. Yes, sir.

Q. In what part of Fort Lee? A. Coytesville.

Q. And are you employed by the borough at present? A. Yes, sir.

Q. In what capacity? A. I look after the pumps.

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Q. How long have you been doing that? A. Since about the 8th or 10th of December.

Q. Of what year? A. Of last year.

Q. 1917? A. Yes.

Q. And when you first went at that employment, what condition did you find the pumps in? A. Why, I found the two pumps in Edwin Avenue station broken; one of them, the shaft in that broke down at the impeller, and the other one the impeller had dropped off the shaft.

Q. When you say the Edwin Avenue station, you mean the one we have been talking about here all day? A. Yes.

Q. What did you have done about that? A. Why, I started in at once to have them fixed.

Q. Did you get them fixed? A. I did, yes.

Q. How long did it take you? A. Well, it took—I don't exactly remember, but I was handicapped because some nights I would work there, and there was no power, and I couldn't work; there was no lights.

Q. What sort of power is used there? A. Electric.

Q. And what is the source of that power? Where does it come from? A. It is furnished by the Public Service.

Q. And when there was no power, why was there no power? A. Well, I don't know; I suppose they didn't furnish it, that is all. They just shut off the power.

Q. Did you have any notice that the power was to be shut off? A. None at all.

Q. How often did that happen? A. Why, that happened quite often.

Q. And whenever they shut off the power, the pump stopped, I presume? A. Oh, yes.

Cross Examination by Mr. Gourley:

Q. Mr. McGloin, are you at this pumping station all day? A. Why, not all day, but I am there a good deal of the time.

Q. Well, how much of the time? A. Well, I make it a point to go there in the morning and then in the afternoon. Generally I leave around five o'clock; some nights I am there at ten o'clock.

Q. Have you a man under you? A. No; it works automatically.

Q. It works automatically now? A. Yes; it continues; it is planned to work automatically.

Q. I see. Did you burn out any armatures there? A. No, sir.

Q. You did not? A. No, sir.

Q. You still work it automatically? A. Yes, sir.

Q. How high does the water rise before the pump works? A. Well, what do you mean? I don't quite get the meaning of your question.

Q. Well, what starts it automatically? A. The water from the sewer flows into the chamber.

Q. How high in the chamber does it rise before it moves the flow? A. I never measured it. I should judge it is about eight foot deep.

Q. Now, how do you account, if it is so, for this overflow of this sewage into the storm sewer if the pumps are working properly?

Mr. Morrison: I object, as outside of cross examination.

The Court: I think it is.

Q. What becomes of the water if the pumps don't work?

Mr. Morrison I object to that for the same reason.

Mr. Gourley: I have a right to inquire his knowledge of the thing.

Mr. Morrison: There is nothing put up showing his having a knowledge of the general operation of the thing.

The Court: Let me hear the question.

Mr. Gourley: Do you want this man who knows about this pump—

The Court: Let me hear the question.

(Question read.)

Mr. Morrison: The question is objected to as outside the scope of the cross examination.

The Court: I sustain the objection.

Mr. Gourley: Exception.

The Court: Yes.

Q. You are there to attend to the pumps? A. Yes, sir.

Q. And if they don't work automatically, do you help them? A. Well, what do you mean? I can't understand your question. Do I aid them?

Q. Do you do anything to the pump? A. If they don't work automatically, the pumps are broke, that is all.

Q. Then you have nothing further to do? A. Yes; I see that they are repaired.

Q. I mean, are you yourself a mechanic? A. I wouldn't say that, no. I am no mechanic. There is nothing complicated about the pumps at all.

Q. They pump up this sewage above the hill? A. Yes.

Q. Then it flows down also automatically down to the river? A. Why it flows—it is pumped up to Linwood Avenue in that sewer.

Q. It goes up automatically? A. No; it is pumped up into Linwood Avenue.

Q. Then it flows into the river down below the hill? A. Then it flows into the Dead Brook sewers, into the Hudson River.

HERMAN H. GHENT, called as a witness on behalf of the defendant, being duly sworn, testified as follows:

Direct Examination by Mr. Morrison:

Q. Mr. Ghent, where is your home? A. Fort Lee.

Q. And what is your business? A. Plumbing and heating contractor.

Q. How long have you been in that business? A. Twenty-three years.

Q. Did you do any work for the Paragon Studio within the last year or two? A. Yes, sir.

Q. And what was it? A. Why, repairs that they had, and different things.

Q. Did you change their pipes from one sewer to the other? A. I did.

Q. And when did you do that? A. I finished the work on March 11, 1917.

Q. Did you make any change at the Universal? A. I did.

Q. And when did you do that? A. Well, that was quite a little through the summer. That was all summer's work. We were busy there until the latter part of October.

Q. And it was completed when? A. The latter part of October.

Cross Examination by Mr. Gourley:

Q. You finished, one time, on October 17th? A. No, around the 28th or 9th.

Q. I mean, was it 1916 or 1917? A. 1917.

Q. Before that the water had emptied in where? What change did you make?

Mr. Morrison: I object to that.

A. Why, I just changed over a line of pipe that come through to one sump, and turned it into—

Q. Well where had water been emptied before you made the change? A. Where had it been emptied?

Q. Yes, what was the pipe for? A. It went off into the sewer.

Q. Well, which sewer was it in before you made the change? A. Well I presume the storm water.

Q. Don't you know? Couldn't you see with what you were connecting? A. I didn't exactly know the termination of it, because those pipes were all put in by somebody else.

Q. Did you put this in yourself or your men? A. Someone else did the work ahead of me.

Q. What change did you make? A. I changed the pipe that came along from one of their wash rooms into a sump, then it run to another sump. I diverted it from this sump into a sanitary sewer according to the plans and Mr. Lang's instructions.

Q. You connected with the sanitary sewer? A. Yes, sir.

Q. And that was so with the Paragon and Universal both, is that so? A. Yes, sir.

Q. Do you know what size pipe that was? A. Why, I laid a ten and an eight-inch.

Q. Which company had the ten-inch? A. Why, there were two.

Q. Two ten-inch? A. Universal, I am referring to now, had a ten-inch and an eight-inch pipe going in there.

Q. And the other company had what? A. Two sixes, or four sixes.

Q. One, ten and eight, and the other four sixes, is that right? A. Yes.

Q. Well, the pipe you put in, what diameter was that? A. In which place?

Q. Either? A. Why ten-inch; ten and an eight-inch in the Universal, and there were four sixes in the Paragon that we changed.

Q. In other words, you put in the same diameter of pipe that you took out, or put back again? A. I simply changed the course, that is all. I continued it on into the sanitary, and disconnected from the storm water.

Q. What space was there between the pipes at that time? A. They were in the building running side by side in the Paragon?

Q. You could see both pipes inside? A. Yes, sir.

Mr. Mackay: If your Honor please, we have no more witnesses except the Chief Clerk of the State Board of Health, we just telephoned about half an hour ago that he would be here at ten o'clock to-morrow morning sharp, with the plans and the proof, and so forth. I do not like to close the case without that.

Mr. Gourley: I think not, so it will be very short; three or four questions, probably. I do not want to close until I see these maps. I have some maps of our own.

The Court: I was wondering if there was anything to put in this afternoon. We will take a recess (4:00 P. M.) until ten o'clock to-morrow morning.

Trial Continued

March 13, 1918, 10:30 A. M.

CHESTER G. WIGLEY, called as a witness on behalf of the defendant, being duly sworn, testified as follows:

Direct Examination by Mr. Morrison:

Q. Mr. Wigley, where is your home? A. In Trenton, New Jersey.

Q. And what is your occupation? A. Chief Engineer of the State Board of Health.

Q. And how long have you held that position? A. I have held that position since 1915.

Q. And in that position do you have the custody of the records of the State Board of Health? A. I have custody of the plans.

Q. Of the plans? A. Yes, sir.

Q. For what sort of work? A. For the sewerage work and water work.

Q. And have you with you a plan of a sewer system for the Leonia Heights section of Fort Lee, produced from those records? A. Yes, sir.

Q. Will you let us see it, please? A. That is the plan (handing paper).

The Court: Show it to Mr. Gourley.

Mr. Morrison: I offer this plan.

Mr. Gourley: I object to that, sir. These are blue prints. They have no significance. Besides, the gentleman wasn't there at the time. He simply finds them in his department.

The Court: I will allow it to be filed. Of course they cannot be marked; they may be offered in evidence. (Designated as Exhibit D-3.)

Mr. Gourley: Your Honor will allow me an exception to the admission of these plans?

The Court: Yes.

Q. Now, Mr. Wigley, have you with you this morning any other records of your office?

The Court: Before you go any further just designate what that is.

Mr. Morrison: This is a set of blue prints, seven in number, entitled, "Plan showing proposed Leonia Heights system of sewers, Borough of Fort Lee, Bergen County, New Jersey," stamped, "Received May 5, 1913, Division Sewerage and Water Supplies."

Q. Have you with you, Mr. Wigley, any other records from the files of your department in reference to the sewer system in question? A. I have nothing but a memorandum of the abstracts of the actions taken by the department.

Q. And by whom was that memorandum made? A. That was made by the clerks in the office.

Q. And how does it come into your possession? A. Why, we abstract the records for ready reference, and these are those abstracts.

Q. Are those abstracts part of the records of your office? A. Yes, sir.

Q. And are used as such in your daily work there? A. Yes, sir.

Q. What are the abstracts which you have in reference to this system?

Mr. Gourley: I object to the statement of what they are.

The Court: Yes, the records ought to be produced.

Mr. Morrison: I have asked the witness whether these are part of the records of his office in a condensed form in daily use, and he has answered "Yes" to that.

The Court: I will allow that question.

Mr. Morrison: You allow the question which is now pending?

The Court: Yes.

Mr. Morrison: I will ask the Stenographer to read it.

(Question read.)

Q. What are these papers which you hold in your hand? A. These are abstracts taken from the minute book making a chronological record with reference to the action taken in reference to the sewers in Fort Lee.

Q. And in your department is such a chronological record prepared for the sewer system?

Mr. Gourley: I object.

The Court: That is immaterial.

Mr. Morrison: Exception.

The Court: Yes.

Q. Have you any personal knowledge as to whether or not this system of sewers in Fort Lee had the approval of the State Board of Health?

Mr. Gourley: I object to it. They must have the records of the Board here to show what approval was made.

The Court: Yes, if the record is going to speak, it must be produced.

Q. You haven't with you the original minutes of the State Board of Health? A. No, they are in the possession of the Chief Clerk.

Q. Is the Chief Clerk here with them? A. He just came in.

CHARLES J. MERRILL, called as a witness on behalf of the defendant, being duly sworn, testified as follows:

Direct Examination by Mr. Morrison:

Q. Mr. Merrell, where is your home? A. My home?

Q. Yes. A. Bound Brook, New Jersey.

Q. And what is your occupation? A. I am Chief Clerk to the State Department of Health, and Chief of the Division of Administration.

Q. And in that occupation do you have the custody of the minutes of the State Board of Health? A. Yes, sir; I do.

Q. Have you them with you this morning? A. Yes, sir.

Q. And that is the book which is in the package which you are now opening? A. Yes.

Q. Will you turn in that book to the minutes, if any, in relation to the Leonia Heights section sewer in Fort Lee? A. I have them right here.

Q. Do they appear on one page or more than one page in that book? A. On one page.

Q. What is the number of the page? A. Page 218.

Q. And what is the title or caption of the book? A. Minutes of the Board of Health, State of New Jersey, Book No. 8.

Q. And of what particular meeting are these the minutes? A. May 13, 1913.

Mr. Gourley: Are these in your handwriting, Mr. Merrell?

The Witness: That is done with a book-typewriter.

Q. The minutes of that meeting are signed. Whose signature is that? A. That's my signature.

Mr. Morrison: I offer in evidence this book and particularly the paragraph on page 218.

Mr. Gourley: What is the object of your offer?

Mr. Morrison: To show the approval of the State Board of Health of this set of plans.

Mr. Gourley: Well, the plans contain the sewer as built, did you say? Do the plans show the sewer as built?

Mr. Morrison: I have not said that. The witnesses have testified to that point. I am not attempting to testify.

The Court: I think it is competent. I will allow it.

Mr. Gourley: If your Honor thinks so—

The Court: I think you had better read

that portion of the minutes. Let the witness read the portion of the minutes that refers to this.

Q. Mr. Merrell, will you read that portion on page—that reference? A. (Reading) Plans for a system of sewers for the Leonia Heights Section of Fort Lee, and for an extension of the Dead Brook sewer of said borough were presented, and the following resolution adopted:

Resolved, that said plans be approved, subject to such conditions of construction and operation as this Board may from time to time require, subject to the submission to the Board of all changes and amendments to the plans before such changes are actually made, subject to the submission of plans of any and all extensions of the system before such extensions are constructed, and subject to the proper construction and operation of said sewers by the municipality, or persons for whom the plans are approved and their agents.

Q. Mr. Merrell, I show you a set of plans which were marked—What is the date of those minutes, please? A. May 13, 1913.

Q. I show you this set of blue prints which were marked in evidence.

The Court: Offered in evidence.

Q. Offered in evidence, I think, as you came in, marked "Received May 5, 1913, The Division of Sewerage and Water Supplies," and ask you whether these are the plans which are referred to in those minutes? A. (Referring) I presume they are from the marking. I cannot testify positively to that. The engineer receives the plans.

Mr. Gourley: No questions.

Mr. Mackay: That is the defendant's case.

CHARLES ECKERSON, recalled as a witness on behalf of the plaintiff, having been duly sworn, testified as follows:

Direct Examination by Mr. Gourley:

Q. Mr. Eckerson, will you look at these blue prints of the State Board as brought here, and tell us whether there is anything upon them that shows a one man-hole opening for these two sewers?

Mr. Morrison: I object to the question on the ground that the blue prints speak for themselves, and that they will go to the jury.

The Court: I think that is a question for the jury. You may ask this witness as an expert though, whether he can tell—

Mr. Gourley: Whether he can tell from those plans or not that this sanitary sewer was to remain open at the manhole?

The Court: I think that question is competent.

Mr. Gourley: That is to say, any expert can elucidate anything in their peculiar trade or occupation.

The Witness: There is nothing on these plans which shows, in the slightest degree, that these two sewers are to run open in the same manhole.

Mr. Gourley: I rest, sir.

Case closed.

Mr. Mackay: If your Honor please, I move for the direction of a verdict, first, because when a public sewer breaks from faulty construction, and private property is thereby damaged, an action will not lie against the borough, founded on such facts.

The Court: Yes.

Mr. Mackay: Second, because there is no evidence in this case that any notice whatsoever was given to the borough of the faulty condition of the sewer or sewers.

Third, because there is no evidence in this case that the plaintiff or anyone for him ever notified the borough of the pollution of the stream or pond.

Fourth, because the defendant is not liable to the grievances complained of until after notice by the plaintiff or by someone for him to the said defendant the Borough of Fort Lee; because there is no evidence in this case showing any active wrong-doing on the part of the defendant.

Sixth, because the condition of the stream and pond of which the plaintiff complains was a public nuisance and not a private nuisance exclusively, and therefore the only remedy is by indictment.

Seventh, because the condition of the stream and pond as we have shown to be the result of the acts of the Paragon and Universal Film Companies, and not of the borough.

Eighth, because there is no evidence fixing the responsibility on the defendant for the use of the sewer and drain by the Paragon and Universal Film Companies.

Ninth, because there is no evidence that these companies had any right to connect with the storm sewer and enter their chemicals therein, and as all the pollution has been shown to be by reason of their acts, the borough is not liable.

Now, I handed up to your Honor, I believe, a memorandum.

The Court: Yes, you handed me a memorandum of several cases. Anything further to be said in addition to that?

Mr. Mackay: I think not, unless Mr. Gourley—

The Court: I certainly want to hear from the other side.

Mr. Gourley: If you desire to argue, I am ready to answer an argument.

The Court: I would like to hear what counsel has to say in support of your—

Mr. Mackay: A case in 50 New Jersey Law, which is the case of Jersey City vs. Kiernan. That's the case I handed you. That is a case where the sewer broke from faulty construction and private property was injured, and the Court held in that case that on those facts alone, an action would not lie.

The Court said, however, that if the city be notified of such break, then it was the duty to the individual injured for the breach of such duty, an action will lie. The foregoing rule applies only when the break in the sewer occasions a private nuisance exclusively, for if a public nuisance be the result, the only remedy is by indictment. In that case, it appeared that the sewer commissioner had some dealings relative to this matter, the matter of repair and so forth, and it said if the sewer commissioner, without authority, in his own way conducts the water of a sewer onto the land of an individual, the city is not responsible for such conduct.

Now, in the case of Kehoe vs. Rutherford, which is a leading case, and seems to be an exception to that rule, the Court there held that where the municipality is guilty of any active wrong-doing,

that is, any intentional wrong-doing or negligent act, that then the question of notice is not applicable. In this State we have the case in addition to the Rutherford case, of the Paterson pollution cases, and in those cases an injunction was sought in equity. I believe the injunction was granted and vacated by the Court of Appeals, and the Court of Appeals held that they would be entitled to have an injunction unless the city agreed to pay compensation. That case, of course, comes within the same ruling and in the same line of cases as the Kehoe case. There they designed a sewer specially and intentionally for a specific purpose to flow into the river, knowing that it would pollute it. Now, in this case, taking the theory on which the plaintiff bases his claim for damages, he alleges the pollution of this stream, not by reason of any active wrong-doing on the part of the municipality, but evidence put in to show a faulty construction, and I believe some evidence showing that the film company, some film companies, were dumping their waste or some of their waste material into this stream. There is no allegation in their pleadings of any notice to the borough, and they have not attempted to rely on the question of notice or made it a part of their case. They have attempted, and perhaps succeeded, if their evidence is true, to show a public nuisance, and if they have succeeded in showing that, why then the only remedy is by indictment. Those are my reasons for the motion.

Mr. Gourley: If the Court please, counsel refers to the Paterson cases. Paterson is now paying damages to-day for polluting the Passaic River, and will pay under the order of the Court, until the trunk sewer connection is made. The reason that suit was brought into the Court of Chancery

was to stop the pollution. One of the arguments in the Court of Chancery was that they had not yet fixed their position at law, but in view of the number of persons affected they would retain jurisdiction of it as soon as it was done, and the damages assessed under the equitable jurisdiction of the Court applying to such cases. Now Paterson, not from the department of health, but Paterson had authority from the Legislature of New Jersey by an act passed before the constitutional amendments of "Seventy-five" authorizing Paterson to construct a sewer system and empty the sewers into the Passaic River, and, although Paterson could not be chargeable for the indictment, because the fact was authorized by the Legislature, that, nevertheless did not bar them from the fact that a person affected by it could sue them for it; and so, in this case, there is no public nuisance here. Persons along the stream can be affected by it, a half a dozen or a dozen; that is not a public nuisance; there must be some way of affecting a large number of people on the highways passing backwards and forwards, and your Honor knows what a public nuisance is. You have to prove the general public are affected by it. Because the stream passes through the back yard of some person and is offensive to them, that is not a public nuisance. Besides the evidence in this case doesn't address to that end. In that case that was largely in the summer time; our complaint is in the winter time, so that, as far as we are concerned, there is no evidence during the winter time that there was any effluvia or vapors rising from it.

The counsel quoted some cases, but has overlooked this fact. This is a case of active wrongdoing, first. There isn't a word on these plans. Look at the amazing situation, if the Court please.

Plans that they brought here from the State Board of Health, plans which their engineer brought here in court; not a line on those plans to indicate this atrocious system that this borough has adopted. Nowhere in New Jersey, nowhere in the world is there a situation like this. If that isn't an active wrong-doing of a municipality, how possibly can language be framed with any degree of soberness. The specifications which the engineer said did show these things is not put in evidence in this case; so, we have this gentleman himself creating a system that never was known anywhere designed to relieve this thing. Mr. Eckerson's statement, our engineer is, this was intended to put the water, the sewage into the storm sewer. That's the purpose of it. This engineer now, in his defense said the design was so and so, that if the engine didn't work, it could not run over. But Eckerson says, and that is a jury question, as to the effect of these plans, the purpose was always to overflow in case the storm sewer, the sanitary sewer got full; not only in one case there is an outlet, but every manhole along this whole system. Isn't that active wrong-doing?

Counsel quotes the Kehoe case. That case was to put a pipe across the street and collect the water that ran across the street. The municipality held responsible for diversion of the water.

The Court: That was on a different principle.

Mr. Gourley: Then we have the weir in the thing. We have the statement—your Honor will probably have followed the evidence closely, of these two pipes, iron pipes that one witness mentioned of connecting the two. You have the confirmation of the apron, so to speak, of these openings between the sanitary sewer and the storm sewer, the overflow running down on the side.

When those things were looked at, they found paper lying there, so that the whole purpose was the relief of this thing. If they had built this all in one sewer, of course, they admit they would be liable; they admit that in the Paterson case, but can they any the less escape liability by making twenty-five or thirty openings and permitting it to be done, too? This was an experiment by an engineer who had never seen anything like it in his life, and he cannot experiment at our expense in this court. Isn't it a singular thing, sir, that during all this period of time, the whole thing was known to the borough officials, during all these months and months of time? The counsel asks that they should go up and hand them a letter stating you are injuring my place. Isn't it notice to somebody when they find those effluvia going out; isn't that sufficient notice? The fact is that they are contaminating the stream and everybody below may have an action against them. That is notice to them; not the paper, the sewage is notice. Again, what further notice is required? The counsel admits that notice was given; they had to correct it in reasonable time. Here for four or five months these pumps were idle. Now, that's an amazing statement. Was that notice? Their engineer was there every day. Was that notice? The counsel on the other side asked the man in charge of the pump two questions and immediately when I proceeded to ask him a little more, he jumped to his feet and didn't dare ask him how long were those pumps idle. That would have settled this side of the case. What are the jury to try from all these deductions? Clark admits that a larger pump would do it. Must we wait after they discover that the pump is not large enough all these years before we can begin suit? Isn't that notice to them

that the pump wasn't adequate, even when it was working? And the evidence shows when the pump was working, it was still flowing over into it. Isn't that notice to them of an insufficient thing? Can they go on charged with a public duty of that kind and say, "We can change this thing," but for months—when is the limit of suffering that a man must wait? If a new pump will do it, let them put it in; we will not complain if that will correct it.

Then again as to notice, this suit was started last summer—

The Court: July.

Mr. Gourley: Yes, July, they had notice then, direct notice from this man in July, and by the summons and complaint served upon them, the cause of the trouble, polluting the stream, and on Sunday, the day before this case was brought before your Honor, on Sunday of this very week, six months, nine months after the suit was begun, they are still polluting the stream, and it was flowing over into it the other day.

Now, the case the counsel speaks about; Chief Justice Beasley was confronted with this peculiar situation in New Jersey that municipalities are not responsible for the negligence of their agents as contrasted with injuries to property. About every state, important states sharply distinguish them. New Jersey originally hadn't; it was a novel case. Massachusetts is rigid in holding municipalities not responsible for the negligence of its servants and just as rigid when it comes to the deprivation of property rights. If the sewer is constructed wrong in Massachusetts, if there is not any defect in the system, Massachusetts rigidly holds the other way; so does the State of New York. Chief Justice Beasley reached the conclusion that that

was a break in a sewer which broke right in front and overflowed the street and persons passing and re-passing, as we used to say, with their horse and wagon in the old indictments, that was a public nuisance.

The Court: That Kiernan case was not a similar case.

Mr. Gourley: Decided in 21st Vroom.

The Court: I think that is where it flowed off on the land and led off by a drain.

Mr. Gourley: When such break occurs, whenever they owe a duty to the individual and put the sewer in proper condition, and for a non-performance, an action will lie. And they took an advanced step in New Jersey to give the individual reparation for those lost rights. Now, Judge Dixon said in the Harrington-Woodbridge case its remedy would have been sustained, but even in that aspect the case is quite different from the present, for if after the private owner has made such connection with the public sewer as its capacity warrants and as it was designed to accommodate, the public goes into that sewer beyond its capacity so that it must empty itself upon a private property, the case is essentially the same as if the sewer were equipped with a common outlet emptying directly on the property. Tremendously strong position and sound position. In such case he is speaking of the general rule the public are held responsible. Now, in the Kehoe case, after quoting the Pray case at Jersey City, they go on and say that it is also a rule of law of equal importance that an exemption of a municipal corporation by individuals suffering special damages from its neglect to perform, or its negligence in performing public duties, does not extend to actions where the extent of wrongdoing is chargeable to the corporation. Now, then, these

film companies, what are we to do with the investigating of whether or not this Borough—the association with the film companies? It was through their pipe and presumably with their assent that this was poured into there. They knew and their own witness, this captain, spoke about the discoloration in the stream. That was done at a season of the year in the winter time when they made this connection. They did not finish until February or so after that. So that all this that went through there was a mis-use of this thing, and they poured it into this brook where the chemicals never could have gone in the world except the Borough collected it through their instrumentality and their properties there connected with it and carried it with this sewer and poured it down upon us to our damage. So there is a line of cases which hold, the case of Miller vs. Morristown, of collecting surface water; it is difficult to say in this case what part is caused by surface water drainage of districts that might pollute this, or not. Of course, it is so polluted that it naturally somewhat controls the situation, but have they a right to collect water from districts where it would go otherwise and pour them—close up this marshy ground of which they speak, which would have taken care of this water, and when it reached the point of outlet had their sewer not been full, have poured it in the stream at that point? Cyclopedia 28, 1314, says that where a plan or system is obviously defective, that is a general rule, where it is obviously defective, the municipality is liable for the resulting damage; and Wisconsin states generally a sound rule: If a plan of sewage is adopted and executed and thereafter proves defective and the difficulty is brought actually or constructively to the knowledge of the municipal officer charged with such

matters, the neglect constitutes an action of negligence in the case of a private property. In the case of Murphy vs. Atlantic Highlands, it was held when a public sewer becomes clogged and private property thereby becomes flooded, it is the duty of the municipality, when notified of the situation, to take the necessary steps to remove the clog with reasonable promptness, and for the breach of such duty an action will lie. Your Honor will remember that not a single witness for them states that he examined these manholes at any time. That is a tremendously strong thing; not a witness. Mr. Nichols spoke to their engineer about it. The State Inspector spoke to the Borough authorities about this thing and the State had information about the thing, and the Borough had information about it. So that on all these lines, upon this daily discharge —your Honor will remember this was a daily discharge, it was not an occasional thing, all the witnesses practically say it is a daily discharge, and it is evident from the evidence in the case now that the whole system was disarranged somehow or other which left it an open sewer. The sewers were connected and the result of that connection is this thing. I respectfully submit on all these lines the case is one for the jury.

The Court: Anything further?

Mr. Mackay: I want to say this: The very last case that counsel cited, Murphy against Atlantic Highlands says there is no liability unless they are notified. That is just the way they have got it. Now, if it comes to the question of the summons being a notice, we are back to the same proposition where I contended at the beginning of this trial that we were injured by any amendment, or by being forced on to trial, because, up to the point we were to meet, up to the time of the filing of the

pleadings and the damage they claim had occurred for the 1916 and 1917 crops, the Borough had received no notice. It isn't necessary, it isn't sufficient to notify a sewer commissioner or an engineer. That is clearly and thoroughly settled in this case. Here was the case of Jersey City vs. Kiernan, where the sewer commissioner, apparently, we would say, had full authority to act and acted, and they said that his acts were without authority so far as the City was concerned; absolutely no bearing on it.

The Court: They would hardly say that, would they, that the city is not liable for his unlawful acts?

Mr. Mackay: That leads to the same answer that a notice to an engineer is not a notice which will bind the municipality; that leads to the same conclusion. We are where we started to argue in the beginning of this case where I said were entitled to fight this case out along the lines of the 1916 and 1917 crop of ice. I cited a New Jersey case where it said that there must be some allegation. Even there the statute simply was following the law, that is all. The statute of 1912 gave no greater right than a man sets out and alleges and claims in his pleadings, so the only actual notice we have had, if the Court considers it a notice, would be the service of a summons in this suit, which was after the date of the damage complained of in this case. Every case that counsel cites, you cannot get away from it, you have got to bring the notice home to the Borough or to the city. They are entitled to know where the claim is, as in this case. He speaks about the weir and about the break in the pipe and about the pumping station failing to work. What has that to do with it? What is his contention, faulty construction? That's what he

says. If it is faulty construction, if it is something that goes wrong, then they are entitled to a notice, and that has got to be given. If they don't give a notice, there is no liability, and the exception to the rule is where the wrongdoing is active, then the liability accrues, and that is the exception to the rule and the settled law of this State. And in the case of Kehoe vs. Rutherford, and in these Paterson cases; what did they do in the City of Paterson? The question of the act of the Legislature did not enter. Vice-Chancellor Pitney laid down the rule there in his argument, in the City of Paterson they deliberately and intentionally built the sewers so as to run into the Passaic River and pollute it, and, of course, they are paying compensation. But here is a storm water sewer; here is a brook that takes in all of this surface drainage. What did the Borough of Fort Lee do? Something for the benefit of the people there, or something to injure them? They built a double sewer for the protection of the people, a double sewer, one to continue to carry off the storm water, and the other to carry off the physical matter. They didn't put in one pumping station; they put in two. They went to the State Board of Health to get approval, and they couldn't have built that sewer unless they obtained the approval, and they couldn't have worked that sewer unless it had been OK'd, and the best proof that they were doing their duty to the people and everybody was the fact that they did those things; and something happens; the pump gets out of order, or a wire breaks or a pipe breaks, and they have a little trouble and the engineer fixes it, and Garrison never said a word to the Borough. You can't find it in this case; not one scintilla of evidence where he said to the Borough authorities, "You are liable; you are polluting my stream." No,

he went to John J. Ferry to find out what it would cost to build an addition; so that he could find out that information for his law suit. Then they say we are not entitled to notice. The Borough did everything in its power to keep things right, and these two film companies connect, and still no notice by Mr. Garrison. He goes to experts, but not to the Borough, and the first legal notice we have had as a notice, would be the summons.

Mr. Gourley: If the Court please, in the absence of the approval by the State Board of Health, there is no authority for the maintenance of this sewer at all.

The Court: It is well settled, I think, in this case, that a municipality is exempt from actions by individuals suffering special damages from its neglect to perform, or its neglect in performing a public duty whereby a public wrong is done for which on indictment would lie, but this rule is held not to extend to actions where the injury is the result of active wrong doing chargeable to the municipal corporation. If the injury of which the plaintiff complains and for which he seeks to recover was the result of negligence whereby a public wrong was done, for which an indictment will lie, there could be no recovery. If the plaintiff's injury for which he asks damages were the result of active wrongdoing chargeable to the defendant, there could be a recovery under certain circumstances.

A jury question is presented, and I think I will have to leave it to the jury, and refuse the motion to direct a verdict.

Mr. Mackay: I ask an exception.

The Court: Yes; you may take an exception.

Mr. Mackay summed up the case to the jury on behalf of the defendant, during which the following objections were made:

Mr. Gourley: Speaking about the poverty of the Borough of Fort Lee, I hardly think that is fair.

The Court: No, I do not think so.

Mr. Mackay also referred to the investment of $30,000.00.

Mr. Gourley: What has that to do with this proposition of damages?

The Court: There was some evidence that the plant cost $30,000.00.

Mr. Gourley: That was brought out on cross examination, but when it went further and he spoke about the taxes, I objected.

The Court: I held that the taxes was not a question of damages. I do not think so.

Mr. Mackay: The only point is this, your Honor, as to the question of whether or not I can argue to this jury as to whether the interest or cost of his investment, his fixed charges, is to be taken into—may be taken into consideration.

Mr. Gourley: It has nothing to do with the case, Senator.

Mr. Mackay: For instance, suppose he has to run that business to get the ice so that it costs him a certain amount of money on his investment. Would that be deducted from the question of profit?

The Court: I think not. I think your question of damages is a question of the costs of gathering and storing and marketing that ice, and the amount he received for it, and the difference of the two would be damages.

Mr. Gourley: If he has to apply it all over this field he will not have much left, but that has nothing to do with the case.

Mr. Gourley summed up the case to the jury on behalf of the plaintiff.

Charge.

CUTLER, J.: Gentlemen of the Jury, on the 30th day of July, 1917, Samuel B. Garrison, the plaintiff in this suit, instituted these proceedings against the Borough of Fort Lee to recover damages which he alleges he had sustained by reason of an ice pond in his possession having been polluted to such a degree by the sewage from that Borough as to render the ice unfit for use. Mr. Garrison was not the owner of the ice pond, but had entered into an agreement with the executors and trustees of the estate of William Walter Phillips to purchase, and previous to the time of his taking title, occupied the land and cut the ice. Since this suit was started, he has taken title to the land, but so far as this action is concerned, his right to recover must relate to the right that he had in this property at the time the suit was started.

The plaintiff contends that previous to the construction and use of the sewer in that part of Fort Lee in which the brook which empties into his pond was located, the water of his pond was clear and the ice pure, but as soon as this sewer system was constructed and operated, the water in the brook that supplied his pond and the pond itself became discolored and offensive to the smell, containing at times sewage matter, and was so contaminated that he was prevented by the Board of Health from cutting ice from this pond in the winter of 1916-1917, and in the winter of 1917-1918.

The plaintiff must prove his case by a preponderance of the evidence. Not only must the evidence show that he has been injured, but in such a way that the defendant is liable to respond in damages.

The Borough of Fort Lee had two sewer systems

in this section of the municipality, a storm water sewer installed to carry away the water which formerly was the brook, and to care for the surface water. According to the engineer who drew the plans for this system, the storm water sewer was constructed to care for the water of the brook, and the storm water only and empty into the brook, or rather the outlet was the beginning of the brook after the sewer was constructed. The sanitary sewer collected the house sewage and carried it to a pumping station where it was pumped through a four-inch main over the hill and into a sewer which eventually emptied into the Hudson River. The engineer testified that each pump (and there were two pumps) and the four-inch main pipe was sufficient to carry away the sewage at this time. After the plant was in operation, a complaint was made to the Borough officials, and they caused an examination of the plant to be made, and found two defects, namely, the storm sewer emptying in a manhole in such a way that it washed sewage from the receptacle used to carry the sewage, and a man-hole where the shelf on which the sewage was run, was broken, and let the sewage matter into the storm water sewer. These defects they claimed were corrected within a reasonable time. But afterwards the pump broke down and while it was broken, sewage matter got into the storm water sewer, and thence into the stream and ran down to the brook. The pump, they claim, was repaired as soon as practicable. Now, you have heard the length of time that the pump was out of commission. Water containing coloring matter from two film plants was discharged into the storm water sewer and the Borough authorities caused the coloring matter to be separated from the water and thrown into the sanitary sewer.

This action is brought against a municipality, and the rule of law governing actions of this character differs from the rule applied to an individual. A municipal corporation is exempt from actions by individuals suffering special damages from its neglect to perform, or its neglect in performing public duties whereby a public wrong is done, for which an indictment will lie. But this rule is held not to extend to actions where the injury is the result of active wrong-doing chargeable to the municipal corporation. The defendant is not responsible for the consequences of a break in the sewer in question per se, even though it be the result of the carelessness of his own agents, for the public is not responsible for such misfeasance of its officers, but where such a break has occurred occasioning a private nuisance exclusively, and the public authorities have been notified of the accident, then they owe a duty to the individual to put the sewer in proper condition, and that for the non-performance of such a duty, an action will lie. But when the injury to the individual results from neglect to perform, or the negligent performance of a public duty, whereby a public wrong is done, the giving of a notice by the individual is of no avail for the injury was, in fact, part of an indictable offense. While it is well settled in this State that an action will not lie on behalf of an individual who has sustained special damages from the neglect of a municipal corporation to perform a public duty, it is also a rule of law that the exemption of a municipal corporation from actions by individuals suffering special damages from its neglect to perform, or neglect in performing public duties whereby a public wrong is done for which an indictment will lie, does not extend to actions where the in-

jury is the result of active wrong doing chargeable to the corporation. If this stream of water or brook which fed the pond of the plaintiff was discolored, filled with sewage, made unfit for use and disagreeable to smell so that it was a nuisance, not only to the plaintiff, but to all persons who lived on or near the brook, and to such an extent that the persons or corporation causing this condition was indictable for it as a public wrong, the plaintiff cannot recover if such condition was the result of neglect to operate or neglect in the operation of the sewer plant by the officials of Fort Lee. If this condition was the result of active wrong doing of the officials of that municipality, then there could be a recovery by the plaintiff. In other words, if, after you have considered all the evidence in this case, you reach the conclusion that the plaintiff has established by a preponderance of the evidence that his injury is the result of a wrongful act or acts of the authorities of Fort Lee, he can recover; but, if his injury was the result of negligence on the part of the officials, and his special damages are part of a public wrong for which an indictment will lie, he cannot recover. If you find under the law there can be no recovery, then your verdict should be for the defendant; if you find there can be a recovery, then you should proceed to determine the amount of damages to which the plaintiff will be entitled. The plaintiff claims damages for the loss of the crop of ice in 1916-1917 and also for the crop of ice in the year 1917-1918. He can recover for both years if you are satisfied that he has an action against the defendant for both years, or for one crop if you are satisfied from the evidence that his action was only for one of the years. The damages would be his loss occa-

sioned by his being prevented from gathering and selling the ice. You will have to determine what it would cost him to gather the ice, what it would cost him to market the ice, the loss by melting and all other expenses that he would have been put to in order to gather the crop. In computing that amount, gentlemen, you will have to consider that it cost him just as much to gather the quantity of ice that melted as it did the ice that remained, so that the cost of gathering the total amount of ice which he put in that particular house should be computed by you, not the cost of gathering the ice that he actually sold. Then determine from the evidence what he would probably have realized from the sale of the ice, and the difference between the amount which he would probably have received from the ice if he had gathered it, and the amount it would probably have cost him to have gathered the crop and marketed it will be the damages to which he will be entitled to receive at your hands, if he is entitled to receive anything.

I have been requested to charge you on certain principles of law, which I will dispose of at this time.

The first request as modified: If you find as a fact that the pollution of the stream which plaintiff claims caused the damage, was the result of the neglect of the defendant to perform a public duty for which an indictment would lie, then I charge you that the law has settled in this State that an action will not lie in behalf of an individual who has sustained special damages from such neglect, and the verdict must be for the defendant.

2. If you find as a fact that the defendant's sewer broke down from faulty construction and that this caused the plaintiff's damage, and if you find as a

further fact that the defendant exercised reasonable diligence in repairing the sewer, then I charge you that your verdict must be for the defendant.

The third request I refuse, except as I have charged.

The fourth request as modified: Unless you find as a fact that the defendant so designed and constructed its sewer that the pollution of this stream and the defendant's pond was a result which could reasonably have been foreseen, and that the plaintiff's injury was caused by this faulty construction, I charge you that your verdict must be for the defendant.

The fifth as modified: Unless you find as a fact that the defendant so designed and constructed its sewer that the pollution of this stream and the defendant's pond must necessarily have resulted from the use of it, and the plaintiff's injury was caused by this defective construction, I charge you that your verdict must be for the defendant.

Sixth, as modified: If you find as a fact that the condition of the stream and pond of which the plaintiff complains was a public nuisance caused by the negligence of the defendant and not a private nuisance exclusively, the only remedy is by indictment, and I charge you that your verdict in this case must be for the defendant.

Seven, as modified: If you find as a fact that the condition of the stream and pond of which plaintiff complains was the result of the use of the sewer by some parties without authority from the defendant, or the knowledge of the defendant, the defendant is not responsible for such conduct, and

I charge you that your verdict will be for the defendant.

Eight, if you find as a fact that the defendant neglected to perform, or was negligent in the performance of a public duty to construct and operate the sewer, this is a public wrong to be remedied by indictment, and cannot constitute the basis for this civil action by the plaintiff as an individual who has suffered particular damages by reason of such neglect, and the circumstance that the plaintiff gave notice to the defendant is of no avail if his injury was in fact part of such an indictable offense. I so charge you.

Nine, the cost of cutting and housing the ice must be deducted from the amount for which the crop could have been sold. I so charge.

Ten, the loss due to shrinkage must be deductible from the amount for which the crop could have been sold. I so charge you.

Eleven, the cost of taking the ice out of the houses to the bridge, where it was sold must be deducted from the amount for which the crop could have been sold. I so charge you.

Twelve, I refuse to charge.

Thirteen, I refuse to charge.

Fourteen, I refuse to charge, except as I have charged.

Take the case, gentlemen, consider it carefully, weigh all the testimony; do not rely on what counsel

may remember the testimony to have been or what the Court may have remembered. You are to be the sole judges of the testimony, and what the witnesses have testified to, and the weight you will give to their testimony, and this case must be decided from the testimony presented here on the stand, applying the rules of law I have laid down for your guidance. The refusal of the Court to direct a verdict is no indication of how you should decide this case. It was the decision of the motion that in the opinion of the Court this is a jury case and not a case to be decided by the Court. Let the jury retire.

Mr. Gourley: I want to ask exception to what your Honor has said about the right in relation to the beginning of the suit, concerning the ownership of the property.

The Court: Yes, take your exception to what I said on that.

Mr. Gourley: And to what your Honor said in the beginning of your charge about the neglect to repair, not taking into consideration the time, whether the time it was out of repair was an element of the liability.

And what your Honor said, that action could be for one crop only.

The Court: I did not say it could be for one crop only.

Mr. Gourley: I gathered the impression—

The Court: Oh, no; I said it might be for one crop alone if they found the condition existed for only one crop.

Mr. Gourley: Well, whatever was said on the subject.

The Court: I said they might find for one.

Mr. Gourley: And to the fourth and fifth requests of the defendant which were charged, and also the seventh request; that one about authority

and knowledge, in connection with the film companies, I think is embraced in that.

Mr. Morrison: The defendant asks exception to the first request, as modified. The refusal to charge the second, except as modified. The Court's refusal to charge the third request; to the Court's refusal to charge the fourth.

The Court: I have changed your order from two to three.

Mr. Morrison: The Court charged the third as requested as we have it in here.

The Court: I charged it as the second.

Mr. Morrison: To the Court's refusal to charge the fourth request, except as modified. The Court's refusal to charge the fifth, except as modified. The Court's refusal to charge the sixth and seventh, except as modified, and to the Court's refusal to charge the twelfth, thirteenth and fourteenth.

The Defendant's Requests to Charge as Originally Submitted to the Court are as follows:

1. If you find as a fact that the pollution of the stream which plaintiff claims caused his damage, was the result of the neglect of the defendant to perform a public duty, then I charge you that the law is settled in this State that an action will not lie on behalf of an individual who has sustained special damage from such neglect, and your verdict must be for the defendant.

2. If you find as a fact that the defendant's sewer broke down from faulty construction and that this caused the plaintiff's damage, I charge you that no

action will lie on such facts against the defendant, and your verdict must be for the defendant.

3. If you find as a fact that the defendant's sewer broke down from faulty construction and that this caused the plaintiff's damage, and if you find as a further fact that the defendant exercised reasonable diligence in repairing the sewer, then I charge you that your verdict must be for the defendant.

4. Unless you find as a fact that the defendant so designed and constructed its sewer that the pollution of this stream and the defendant's pond was a result which could reasonably have been foreseen, I charge you that your verdict must be for the defendant.

5. Unless you find as a fact that the defendant so designed and constructed its sewer that the pollution of this stream and the defendant's pond must necessarily have resulted from the use of it, I charge you that your verdict must be for the defendant.

6. If you find, as a fact, that the condition of the stream and pond of which plaintiff complains, was a public nuisance, and not a private nuisance exclusively, the only remedy is by indictment, and I charge you that your verdict in this case must be for the defendant.

7. If you find as a fact, that the condition of the stream and pond of which the plaintiff complains, was the result of the use of the sewer by some parties, without authority from the defendant, the defendant is not responsible for such conduct, and I charge you that your verdict must be for the defendant.

8. If you find as a fact that the defendant neglected to perform or was negligent in the performance of its public duty to construct and operate this sewer, this is a public wrong to be remedied by indictment, and cannot constitute the basis for this civil action by the plaintiff as an individual who has suffered particular damage by reason of such neglect. And the circumstance that the plaintiff gave notice to the defendant is of no avail if his injury was, in fact, part of such indictable offense.

9. The cost of cutting and housing the ice must be deducted from the amount for which the crop could have been sold.

10. The loss due to shrinkage must be deducted from the amount for which the crop could have been sold.

11. The cost of taking the ice out of the houses to the "bridge" where it was sold, must be deducted from the amount for which the crop could have been sold.

12. The year's interest on the value of plaintiff's plant must be deducted from the amount for which the ice crop could have been sold.

13. The year's taxes on plaintiff's plant must be deducted from the amount for which the ice crop could have been sold.

14. The cost of all work necessarily done during the year by plaintiff upon his pond and ice houses, to enable him to make his crop, under natural conditions is a proper deduction from the amount for which the ice crop could have been sold.

Plaintiff's Exhibit P-1.

AGREEMENT made this seventh day of April in the year 1902, between John J. Phelps, Wm. E. Bond and Thomas R. White, Jr., as Executors and Trustees of the last will and Testament of Wm. Walter Phelps, deceased, late of the Township of Ridgefield, in the County of Bergen and State of New Jersey, parties of the first part and Samuel B. Garrison of the Township of Teaneck in the said County of Bergen and James M. Holden of the City, County and State of New York, parties of the second part in manner following:

The said parties of the first part in consideration of the sum of $11,000 to be paid as hereinafter mentioned, hereby agree to sell unto the said parties of the second part all that certain lot, piece or parcel of land and premises, situate, lying and being in the City of Englewood in said County of Bergen and bounded and described as follows:

Beginning at a point in the Southerly corner of said property in the centre line of Broad Avenue as the same is now laid eighty-two and a half feet wide, and in line of land now or late of Michael R. Vreeland; thence (1) North thirty-eight degrees twelve and one half minutes East along the said centre line of Broad Avenue, seven hundred and eighty-six and forty-one one hundredths (786.41) feet to the southerly line of a proposed new street; thence (2) North forty three degrees thirty five minutes West seven hundred and thirty-three and fifty-eight one hundredths (733.58) feet to a corner; thence (3) South forty-six degrees forty and one half minutes West five hundred and seventy and ninety-two one hundredths (570.92) feet to land now or late of Michael R. Vreeland; thence (4) along land of said Vreeland South seventy three

degrees forty-seven minutes East one hundred and one and ninety-two one hundredths (101.92) feet; thence (5) still along Vreeland's line South four degrees two minutes East One hundred and seventy-four and twenty eight one hundredths (174.28) feet; thence (6) still along Vreeland's land South thirty-two minutes East One hundred and sixty-six and thirty-two one hundredths (166.32) feet; thence (7) still along Vreeland's line South twenty-nine degrees forty-eight minutes East seventy-seven and seventy-eight one hundredths (77.78) feet; thence (8) still along Vreeland's line South thirty-nine degrees three minutes East sixty-six (66) feet thence (9) still along Vreeland's line South forty-one degrees fifty-seven minutes East three hundred and sixty-two and ninety one one hundredths (362.91) feet to the centre line of Broad Avenue the point or place of beginning.

Containing: Thirteen Acres and six hundred and twelve one thousandths of an acre (13-612/1000 Acres) according to a survey made by J. H. Serviss, Civil Engineer, May 1st, 1902.

Together with the ice houses, ice tools and buildings now on or attached to the said premises.

And the said parties of the second part agree to purchase said premises at the said consideration of $11,000 and to pay the same as follows: viz.: $500 on the execution of this agreement, the receipt of which is hereby acknowledged; $334 on July 1st, 1902; $333 on October 1st, 1902; $333 on January 1st, 1903 and $250 every three months thereafter, on the first days of April, July, October and January of each year until the whole consideration is fully paid with interest at the rate of 5% per annum; which interest shall be computed

and liquidated every three months commencing July 1st, 1902.

Provided, however, that should the said parties of the second part be unable to secure an ice crop from the said premises in any one of the first five years of this agreement, for the reason that ice to the thickness of ten inches has not formed on the said premises, then and in the event of such failure of an ice crop, the four installments of principal falling due during the succeeding twelve months after such failure of an ice crop, shall not be required to be paid by the said parties of the second part when due under this agreement, but the payment of said four installments may be deferred and distributed equally among and added to the remaining installments of principal thereafter to become due.

And the said parties of the first part upon receiving such payments at the times and in the manner above mentioned and upon the full performance of all the other covenants herein contained, will at their own proper cost and expense, execute, acknowledge and deliver or cause to be executed, acknowledged and delivered to the said parties of the second part or to their assigns, an executor's deed conveying to them the fee simple of the said premises, free from all incumbrances, which deed shall be delivered on the receipt of the final installment and interest at the office of said Executors in the City of New York.

It is understood and agreed however by the parties hereto that when the consideration due under this agreement shall be reduced to the principal sum of Six thousand Dollars that the said parties of the second part or their legal representatives may request a deed for the said premises in which

event the said parties of the first part hereby agree, provided the other covenants herein contained have all been performed and fullfilled, to deliver the deed to said parties of the second part or their legal representatives for said property upon receiving the joint and several bond and purchase money mortgage of the said parties of the second part, bearing interest at the rate of five per cent. with the usual interest, insurance and tax clauses and payable in three years from its date.

The said parties of the second part for themselves and their legal representatives doth covenant and agree to and with the parties of the first part and their legal representatives as follows: that from the date hereof the said parties of the second part will pay the taxes, assessments and all other expenses against the said property. That they will at their own expense keep the buildings and dam now on the said premises in good and substantial repair and keep the buildings on said premises insured in the sum of at least Thirty-five hundred Dollars against loss by fire, and make the policy or policies of insurance payable to and lodge them with the said parties of the first part; that they shall not at any time hereafter erect or use or cause or permit any building on said premises to be erected or used for the purposes of or as a saloon, market, carpenter shop, paint shop, tanning factory or for any dangerous noxious or offensive purpose whatever without the written consent of the parties of the first part.

And it is further agreed that in case the parties of the second part shall fail to pay the interest, taxes, and other charges herein agreed to be paid by them within ninety days after the same shall become due, or shall fail to perform any other of

the covenants herein contained, then this agreement shall at the option of the parties of the first part become and be void and of no effect and the parties of the first part shall have the right to at once re-enter upon the said premises as fully as if this agreement had never been made.

And it is understood that the stipulations aforesaid are to apply to and bond the heirs, executors, administrators and assigns of the respective parties.

IN WITNESS WHEREOF the parties to these presents have hereunto set their hands and seals the day and year first above written. Executed in duplicate.

JOHN J. PHELPS (L. S.)
WM. E. BOND (L. S.)
THOS. R. WHITE (L. S.)

Executors and Trustees

Signed, sealed and delivered in the presence of
The word "ten" written
over erasure, on page 3
line 5 before delivery.

CHAS. EDGAR MILLS.

State of New York,
City and County of New York, } ss.:

Be it remembered that on this third day of July, A. D. 1902, before me, the subscriber, a commissioner of the State of New Jersey, for taking the acknowledgment and proof of deeds, &c., personal-

ly appeared John J. Phelps, William E. Bond and Thomas R. White, Jr., Executors, &c., who I am satisfied are the grantors in the foregoing instrument named; and I having first made known to them the contents thereof they did each acknowledge that they signed, sealed and delivered the same as their voluntary act and deed for the uses and purposes therein expressed as such executors and trustees. Given under my hand and official seal this July 3, 1902.

CHARLES EDGAR MILLS,
(Seal) Commissioner of Deeds for the
State of New Jersey in New York.

Know all men by these Presents, that I, James M. Holden, of the City of Englewood in the County of Bergen and State of New Jersey, for and in consideration of the sum of One Dollar to me in hand paid by Samuel B. Garrison of the Township of Teaneck, in the County of Bergen and State of New Jersey, the receipt whereof is hereby acknowledged, and I the said party of the first part being therewith fully satisfied, contented and paid, have given, granted, bargained sold, aliened released, enfoeffed, conveyed and confirmed and by these presents do give grant, bargain, sell alien, release, enfoeff, convey and confirm unto the said Samuel B. Garrison party of the second part and to his heirs and assigns forever, all the right, title and interest of whatsoever kind or whatsoever nature, I now have or may hereafter have, or can hereafter have or claim, in and to the premises described in the annexed agreement, or in any share or shares, claims or demand I now have or hereafter may have or might claim, under and through

the annexed agreement, or to any money or profits accuring under or by virtue of the same.

Witness my hand and seal this Seventh day of February, A. D. Nineteen Hundred and three.

JAMES M. HOLDEN (L. S.)

Signed, sealed and delivered
in the presence of
P. W. STAGG.

Between July 14th, 1902, and January 3rd, 1917, more than 60 payments of principal and interest are endorsed on this agreement.

AGREEMENT made this 12th day of May, in the year 1905, between JOHN J. PHELPS, WILLIAM E. BOND and THOMAS R. WHITE, JR., Executors and Trustees of the last Will and Testament of William Walter Phelps, deceased, late of the Township of Ridgefield, County of Bergen and State of New Jersey, parties of the first part and SAMUEL B. GARRISON, of the Township of Teaneck, in said County of Bergen, and State of New Jersey, party of the second part, in manner following:

WHEREAS, the parties of the first part, at the solicitation of the party of the second part, have purchased from Geo. A. Wood for the sum of $1,428.00 a strip of land in the said City of Englewood, Bergen County, New Jersey, containing 1-428/1000 acres.

AND WHEREAS, the parties of the first part have also at the solicitation of the party of the second part, agreed to convey the said strip of land

to the party of the second part at its cost price to them, with interest, upon the conditions hereinafter expressed: and have further agreed to furnish the money necessary to construct a dwelling house upon said strip of land provided that the cost of said land and said dwelling house shall not together exceed the sum of Four thousand five hundred dollars,

NOW THEREFORE, THIS AGREEMENT WITNESSETH: that for and in consideration of the premises and of the sum of Fifty Dollars to the said parties of the first part in hand paid by the said party of the second part, the receipt of which is hereby acknowledged, and of the further payments to be made as herein recited, the said parties of the first part hereby agree to sell unto the party of the second part all that certain lot or parcel of land and premises, situate lying and being in the City of Englewood, County of Bergen and State of New Jersey, described as follows:

BEGINNING in the center of the street known as Sheffield Avenue at the northeasterly corner of the land of the party of the first part and the northwesterly corner of the ice-pond property now or formerly belonging to the Estate of W. W. Phelps, running thence (1) along said property now or formerly of the Phelps Estate, S. 46 degrees 40′ W. 595-7/10 feet to the land of the Estate of Michael Vreeland (2) along said land of the Estate of Michael Vreeland N. 73 degrees 47′ W. 116 feet to the point distant 100 feet from the preceding course at right angles therefrom; thence (3) N. 46 degrees 40′ east and parallel with the first course 649 1/10 feet to the centre of Sheffield Avenue;

thence (4) along the centre of Sheffield Avenue S. 46 degrees 25′ E. 100.15 feet to the point of beginning.

Containing 14-28/100 acres.

And they further agree to furnish to the said party of the second part, sums of money which in the aggregate including the cost of the aforesaid land shall not exceed the sum of $4,500.00, which sums shall be furnished from time to time as the building progresses, for the purpose of constructing a dwelling house on said property on plans to be provided by the said party of the second part and approved by the said parties of the first part, or their agent. The said house is to be constructed under the superintendence of the said parties of the first part, or their agent, and to their or his satisfaction: it being understood that no payments are to be made by the parties of the first part for the construction of said building unless said plans and said construction are first approved by the said parties of the first part, or their agent.

And the said party of the second part agrees to purchase the land above described at the consideration of $1,428.00 and interest at the rate of 5 per cent. per annum from the 15th day of May A. D. 1905, and to erect on or before May 1st, 1906, a dwelling house upon the said land at a cost of about $3,000.00 and to submit the plans and location of said dwelling house to the said parties of the first part for their approval before the construction of the same is begun; the construction itself to be under the supervision and satisfactory to the said parties of the first part, or their agent; and he further agrees that he will, after said dwelling is erected, keep the same in good repair. He also agrees that during their construction and thereafter he will, at his own expense keep the

buildings erected and to be erected upon the said property insured against fire in a sum equal to their cost, and make the policy or policies of insurance payable to and lodge them with the parties of the first, and that he will also promptly pay as they fall due, all taxes, assessments and other expenses that may be charged against the said property. Should the said party of the second part fail to pay any tax, assessment or other charge against the said property within sixty days from the time when the same shall become due and payable, then the said parties of the first part may pay such tax, assessment or other charge and add the amount of the same to the amount due under this contract, and the said party hereby agrees to repay the amount so paid, together with interest, at the rate of 6 per cent. per annum.

And he further agrees, on or before the first day of May, A. D. 1906, to build a barn, at his own expense, on the said property, in rear of said dwelling house, upon plans to be approved by the said parties of the first part, or their agent, said barn to be constructed to the satisfaction of the parties of the first part, or their agent, and to cost not less than Three hundred Dollars.

And he further agrees, on or before the first day of May, A. D. 1906, to improve the value of said land by doing grading and excavating work on the same to the amount of not less than Two hundred Dollars.

And he further agrees to repay the purchase price of the said land and all moneys advanced to him by the said parties of the first part under this agreement at the rate of not less than Two hundred Dollars per year in equal quarterly payments to be made on the first days of January, April, July and October of each year (the first installment to be

paid on April 1st, 1906) until the whole amount advanced under this agreement, including the purchase price of the land, shall be fully repaid with interest at the rate of 5 per cent. per annum, which interest shall be computed and liquidated each three months, commencing July 1st, 1905.

It is understood and agreed that time is of the essence of this contract and if the said party of the second part shall fail to pay the installments, interest, taxes, or any of the payments required by the said agreement at the time when the same are severally due, or shall fail to perform any other of the covenants herein contained, then the parties of the first part may, at their option, terminate this contract, without being liable to pay the said party of the second part any of the moneys previously paid by him, and upon the said termination of the agreement the party of the second part agrees immediately to vacate the said premises.

And the parties of the first part, upon receiving full payment, at the times and in the manner above mentioned and upon the full performance of all the other covenants herein contained, will, at their own proper costs and expenses, execute, acknowledge and deliver, or cause to be executed, acknowledged and delivered to the said party of the second part or to his assigns and executors, deed conveying to him or them the fee simple of the said premises free from all encumbrances, which deed shall be delivered upon the receipt of the final installment and interest at the office of said executors in the City of New York.

This agreement shall be binding upon the said parties hereto and upon their respective heirs, executors, administrators and assigns.

IN WITNESS WHEREOF, the said parties to these presents have hereunto set their respective hands and seals the day and year first herein written. In duplicate.

Estate of WM. WALTER PHELPS.
By THOS. R. WHITE, JR. (L.S.)

Signed and delivered
in the presence of

LEONARD L. WETMORE.

MEMORANDUM OF AGREEMENT made the 31st day of October, 1906, by and between JOHN J. PHELPS, WILLIAM E. BOND and THOMAS R. WHITE, JR., executors and trustees of the estate of WM. WALTER PHELPS, deceased, of the first part, and SAMUEL B. GARRISON, of the Township of Teaneck, County of Bergen and State of New Jersey, party of the second part.

WHEREAS, the party of the second part heretofore entered into a contract with the parties of the first part, dated April 7th, 1902, for the purchase of certain property on the southwest corner of Broad Avenue and Sheffield Avenue, in the City of Englewood, Bergen County, N. J., which property consists of 13-612/1000 acres and includes in its area a pond of water used for the gathering of ice, and

WHEREAS, thereafter, the said party of the second part entered into another contract with the parties of the first part, dated May 12th, 1905, for the purchase and improvement of 1-428/1000 acres adjoining the first tract; and

WHEREAS, the party of the second part desires to further improve the said property and in order to obtain the funds necessary for said improvement is desirous of disposing of the lots fronting on Broad Avenue to the parties of the first part; and

WHEREAS, the parties of the first part are willing to modify their previous contracts by taking over the property fronting on Broad Avenue on the terms and conditions following:

NOW, THEREFORE, THIS AGREEMENT WITNESSETH, that for and in consideration of the sum of One Dollar by each party paid to the other the receipt of which is hereby acknowledged, the said party of the second part agrees as follows:

FIRST.—That he will take down the dam at present at the outlet of the pond and replace it with a concrete dam with an overflow increase of about one-third of its present capacity, said dam to contain an iron outlet gate. That he will dig out the corner of the pond in connection with the enlarged dam and construct a concrete or plank bottom for an overflow to avoid the danger of floods undermining the dam and the side walls. All of said work to be done in a good and workmanlike manner.

SECOND.—That he will remove the ice house at present on the east side of the pond to the west side thereof and near to the brook at the outlet. That he will remove the ice house at present on the west side of the pond to the new location, adjoining the house to be removed from the east side. Said ice houses to be put on solid concrete foundations and fitted with an elevator for hoisting the ice; to be

operated by power, the style of which shall be determined later by mutual agreement.

THIRD.—That he will properly grade the property fronting on Broad Avenue, from Sheffield Street to the South line by first grading the sidewalk to a finished grade on the west road line and then filling and grading the entire front of the property to a level with Broad Avenue as now laid out, from the street line back to a distance of at least twenty feet, and from the said twenty feet line westerly by an easy slope. That after its removal he will fill in and grade that part of the property where the ice house now stands on the east side of the pond including the sluiceway, in a workmanlike manner, and leave the entire property fronting on Broad Avenue, complete and in good shape. All work to be done in a neat and workmanlike manner.

FOURTH.—That he will lay and construct, or arrange to have laid and constructed at his expense, a sewer line in front of all the said lots fronting on Broad Avenue, the sewer pipes for said line to be not over six inches in diameter and to be laid to a depth sufficient to take the sewerage from the basements or cellars of dwellings erected upon said lots. The said basements or cellars to be not over three feet below the present grade of Broad Avenue. The sewer pipe to be laid with Y's each fifty feet in front of each lot so that sewer connection may be made between each lot and said sewer line, and all of the said line to be connected at Sheffield Avenue and Broad Avenue with the present plant of the Englewood Sewerage Company. That said sewer line shall be laid to the satisfaction of and accepted by said sewerage company.

FIFTH.—That he will improve the land between the margin of the pond and Sheffield Avenue by planting trees or shrubbery on said land to be furnished and to be under the direction of the parties of the first part, or of their manager, Mr. William Bennett, so as to produce a parklike effect, but to cost not more than $100 for said embellishment.

SIXTH.—That he will keep the land between the margin of the pond and the rear line of the lots fronting on Broad Avenue and all property belonging to him on Broad Avenue in a neat and presentable condition, so that it shall not in any way mar or damage the value or attractiveness of said lots or become a nuisance to the neighborhood.

SEVENTH.—That he will furnish the parties of the first part vouchers for all expenditures made in connection with said improvements which vouchers are to be filed with the said parties of the first part until this agreement and the agreements of April, 1902, and May, 1905, are all terminated.

In consideration of the foregoing engagements on the part of the said party of the second part, the parties of the first part agree that they will furnish money for the said improvements from time to time as the work progresses, to an amount not exceeding Five thousand Dollars, after due inspection by themselves or by their manager, Mr. William Bennett, and in the latter case upon his statement in writing that the work has been properly done and that the sum called for is reasonably due under the terms of this agreement, which payments as made from time to time shall be added to the amount due under the said contracts of April, 1902, and May, 1905, and shall bear interest at the rate of five per cent. from the date of said payments.

AND THEY FURTHER AGREE that after all of the above improvements are made and completed to their satisfaction they will take over thirteen lots fronting on Broad Avenue each 50 feet by 125 feet at the rate of $500 for each lot and credit the sum of $6,500 as having been received on account of said contracts of April, 1902, and May, 1905.

Should a contract satisfactory to the parties of the first part be entered into by the party of the second part with the Englewood Sewerage Co., containing a clause that the cost of said sewer line will be repaid by said sewer company to the said party of the second part or his assigns, when the said sewer line shall produce from rentals, an income equal to 8% of its cost, then upon the due assignment of said contract to the parties of the first part, they will allow to the party of the second part, a credit upon his contracts of the cost of said sewer line to the extent of not over $400. Any excess over $400 shall be met and paid for by the party of the second part.

IN WITNESS WHEREOF the said parties have hereunto set their respective hands and seals the day and year first herein written. Executed in duplicate.

Est. of WM. WALTER PHELPS.

By THOS. R. WHITE, JR. (L. S.)
S. B. GARRISON. (L. S.)

Plaintiff's Exhibit P-2.

This Indenture made this 1st day of October, One Thousand Nine Hundred and Seventeen Between The Estate of William Walter Phelps a corporation organized under the laws of the State of New Jersey having its principal office in Hackensack in said State party of the first part And Sam-

uel B. Garrison of the Township of Teaneck in the County of Bergen and State of New Jersey party of the second part, Witnesseth that in consideration of the sum of nine thousand five hundred dollars lawful money of the United States the said party of the first part doth grant bargain sell release and convey unto the said party of the second part his heirs and assigns forever.

All that tract or parcel of land and premises hereinafter particularly described situate in the City of Englewood in the County of Bergen and State of New Jersey and being a part of the same property which was conveyed by John J. Phelps Executor and Trustee and others to the party of the first part by their deed dated January 1 1917 and recorded in the Clerk's Office of the said County of Bergen in Book 955 of deeds pages 73 &c. the property hereby conveyed is described as follows: Beginning at a point in the southeasterly corner of the property hereby conveyed and in the line of land now or formerly of Michael R. Vreeland said point being distant one hundred and sixty-eight and seventy three hundredths (168.73) feet on a course of north forty-one degrees and fifty-seven minutes west (N 41° 57′ W) from the center line of Broad Avenue as now laid out and running from said point of beginning (1) north thirty-eight degrees twelve minutes and thirty seconds east (N 38° 12′ 30″ E) two hundred and seventy-eight and thirty-two hundredths (278.32) feet thence (2) south fifty-one degrees forty-seven minutes and thirty seconds east (S 51° 45′ 30″ E) one hundred and twenty-five (125) feet to the westerly line of Broad Avenue thence (3) along the westerly line of Broad Avenue north thirty-eight degrees twelve minutes and thirty seconds east (N 38° 12′ 30″ E) one hundred

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and thirty-five and two-tenths (135.2) feet thence (4) north fifty-one degrees forty-seven minutes and thirty seconds west (N 51° 47′ 30″ W) one hundred and twenty-five (125) feet thence (5) north thirty-eight degrees twelve minutes and thirty seconds east (N 38° 12′ 30″ E) three hundred and sixty-eight and three hundredths (368.03) feet to the southerly line of Sheffield Avenue thence (6) along the southerly line of Sheffeld Avenue north forty-three degrees and thirty-five minutes west (N. 43° 35′ W) five hundred and sixty-five and sixty-one hundredths (565.61) feet more or less to land formerly of George A. Wood thence (7) along said last mentioned land south forty-six degrees forty and one-half minutes west (S 46° 40½′ W) five hundred and seventy and ninety-two hundredths (570.92) feet to land now or formerly of Michael R. Vreeland thence (8) along land now or formerly of Michael R. Vreeland south seventy-three degrees and forty-seven minutes east (S 73° 47′ E) one hundred and one and ninety-two hundredths (101-92) feet; thence (9) still along land now or formerly of said Vreeland south four degrees and two minutes east (S 4° 02′ E) one hundred and seventy-four and twenty-eight hundredths (174.28) feet thence (10) still along land now or formerly of said Vreeland south thirty-two minutes east (S 0° 32′ E) one hundred and sixty-six and thirty-two hundredths (166.32) feet thence (11) still along land now or formerly of said Vreeland south twenty-nine degrees and forty-eight minutes east (S 29° 48′ E) seventy-seven and seventy-eight hundredths (77.78) feet thence (12) still along land now or formerly of said Vreeland south thirty-nine degrees and three minutes east (S 39° 03′ E) sixty-six (66) feet and thence (13) still along land now or formerly

of said Vreeland south forty-one degrees and fifty-seven minutes east (S 41° 57′ E) one hundred and ninety-four and eighteen hundredths (194.18) feet to the point or place of beginning.

To have and to hold said premises with the appurtenances unto the party of the second part his heirs and assigns forever. And the said party of the second part for himself his heirs and assigns covenants and agrees with the said party of the first part its successors and assigns that the party of the second part his heirs or assigns will not at any time hereafter erect or cause or permit to be erected upon the premises above described any building for the purposes of or as a saloon market carpenter shop paint shop tanning factory or for any dangerous noxious or offensive purpose whatever without the written consent of the party of the first part. And the party of the first part doth covenant with the party of the second part his heirs and assigns that it is lawful seized of the said premises in fee simple and has good right to convey the same that the same is free from encumbrances that the party of the second part his heirs and assigns shall quietly enjoy the same and that it will warrant and defend the title to the same against all lawful claims.

In witness whereof the party of the first part has caused these presents to be signed by its vice-president and its corporate seal to be hereto affixed the day and year first above written.

The Estate of
WILLIAM WALTER PHELPS (Seal)
By WILLIAM M. JOHNSON,
Vice-President.

Signed sealed and delivered
in the presence of

Attest SAML. E. HEASLEY
Secretary

State of New York,
County of New York, } ss.:

Be it remembered that on this third day of October Nineteen Hundred and Seventeen before me the subscriber A Foreign Commissioner of Deeds for New Jersey personally appears Samuel E. Heasley duly sworn doth depose and make proof to my satisfaction that he well knows the corporate seal of The Estate of William Walter Phelps the grantor named in the foregoing Deed that the seal thereto affixed is the proper corporate seal of the said grantor that the same was so affixed thereto and the said deed signed and delivered by William M. Johnson who was at the date and execution thereof the Vice President of said grantor in the presence of said deponent as the voluntary act and deed of the said grantor and that said deponent thereupon signed the same as subscribing witness.

SAML. E. HEASLEY.

Sworn to and subscribed before
me the date aforesaid.

GEO. H. COREY (SEAL)
Foreign Commissioner of Deeds for
New Jersey in the State of New York.

Received in the Office and recorded October 4 1917 at 9:45 A. M.

George Van Buskirk, Clerk.

Postea, Filed October 19, 1918.

NEW JERSEY SUPREME COURT,
BERGEN COUNTY.

SAMUEL B. GARRISON		
vs.		Postea.
THE BOROUGH OF FORT LEE.		

This case was tried before Judge Willard W. Cutler with a jury at the Bergen Circuit on March 10, 11, 12 and 13, 1918, the same having been referred to him for trial by Hon. Charles W. Parker, Justice of the Supreme Court, presiding in said Circuit. The cause having been heard and submitted to the jury they rendered a general verdict against the defendant in favor of the plaintiff for Eleven thousand two hundred and ninety dollars ($11,290).

WILLARD W. CUTLER,
Judge.

Judgment, Filed April 26, 1918.

SAMUEL B. GARRISON		
vs.		Action-at-Law.
BOROUGH OF FORT LEE.		

Judgment entered Apr. 26, 1918.

Damages	$11,290.00
Costs Attorney	32.00
Disbursements	50.87
	$11,372.87

ENOCH L. JOHNSON,
Clerk.

Notice of Appeal, Filed May 2, 1918.

NEW JERSEY SUPREME COURT,

BERGEN COUNTY.

SAMUEL B. GARRISON, Plaintiff, vs. THE BOROUGH OF FORT LEE, Defendant.	Action-at-Law.

To

WILLIAM B. GOURLEY, Esq.,
Attorney for Plaintiff,
Paterson, N. J.

Sir:

TAKE NOTICE that the defendant, the Borough of Fort Lee, appeals to the Court of Errors and Appeals of the State of New Jersey, from the whole of the judgment entered in this cause.

WILLIAM M. SEUFERT,
Attorney for Defendant.

Grounds of Appeal, Filed Oct., 1918.

NEW JERSEY COURT OF ERRORS AND APPEALS.

SAMUEL B. GARRISON, Plaintiff-Respondent, vs. BOROUGH OF FORT LEE, Defendant-Appellant.	On Appeal from Supreme Court. Grounds of Appeal.

The appellant states the following grounds of appeal in this cause:

1. Plaintiff, in opening to the jury, stated that plaintiff would offer evidence showing damages to the plaintiff for the loss of his ice crop in the winter of 1917-1918. Defendant objected because these damages, if any, accrued after the present action was begun and were not within the issues raised by the pleadings. Plaintiff was permitted to proceed, subject to the defendant's general objection and the testimony of plaintiff and his witnesses as to the 1917-1918 ice crop was allowed. The trial court later overruled this objection and allowed this testimony to go to the jury.

2. The plaintiff's witness, Applegate, was permitted over defendant's objection to testify to the analysis of certain samples of water taken from said brook on March 5th, 1918.

3. The plaintiff's witness, Nichols, was permitted over defendant's objection to testify to the con-

dition on September 17th, 1917, December 19th, 1917, and March 4th, 1918, of the brook which fed the plaintiff's ice pond.

4. The photographs, Exhibits P-4 P-12 inclusive, made by the witness, Frank M. Wyburn, taken in February, 1918, were offered in evidence by plaintiff. The defendant objected and the objection was overruled and the photographs were admitted.

5. The water in the bottle offered by the plaintiff's witness, Jones, was offered in evidence. The defendant objected and the objection was overruled and the exhibit admitted.

6. Plaintiff's witness, Goglen, was permitted, over defendant's objection, to testify to the color of the water in plaintiff's ice pond on January 21st, 1918.

7. Plaintiff's witness, Eckerson, was permitted, over defendant's objection, to testify to conditions of plaintiff's ice pond observed by him after the beginning of this suit.

8. The agreement for sale of land from the Executors of the Phelps Estate to plaintiff, dated April 7th, 1902, was offered in evidence by plaintiff. The defendant objected and the objection was overruled and the paper admitted.

9. The deed by the Executor of the Phelps Estate to the plaintiff, recorded October 4th, 1917, Book 970 of Deeds for Bergen County, was offered in evidence by plaintiff. The defendant objected and this objection was overruled and the paper admitted.

10. The trial court, over the defendant's objection, permitted the plaintiff to testify to the amount of surplus ice he could have stacked outside, after his ice houses were filled.

11. Plaintiff witness, Holden, was permitted, over defendant's objection, to testify to the price of ice at the time of the trial.

12. The defendant moved for a direction of a verdict against plaintiff on the following grounds:

First, because when a public sewer breaks from faulty construction and private property is thereby damaged an action will not lie against the Borough, founded on such facts. Second, because there is no evidence in this case that any notice whatsoever was given to the Borough of the faulty condition of the sewer or sewers. Third, because there is no evidence in this case that the plaintiff or any one for him ever notified the Borough of the pollution of the stream or pond. Fourth, because the defendant is not liable to the grievances complained of until after notice by the plaintiff or by someone for him to the said defendant, the Borough of Fort Lee; because there is no evidence in this case showing any act of wrong-doing on the part of the defendant. Sixth, because the condition of the stream and pond of which the plaintiff complains was a public nuisance and not a private nuisance exclusively, and therefore the only remedy is by indictment. Seventh, because the condition of the stream and pond as we have shown to be the result of the acts of the Paragon and Universal Film Companies, and not of the Borough. Eighth, because there is no evidence fixing the responsibility on the defendant for the use of the sewer and drain by the Para-

gon and Universal Film Companies. Ninth, because there is no evidence that these companies had any right to connect with the storm sewer and enter their chemicals therein, and as all the pollution had been shown to be reason of their acts, the Borough is not liable .

This motion was refused.

13. The defendant requested the Court to charge the jury:

If you find as a fact that the defendant's sewer broke down from faulty construction and that this caused the plaintiff's damage, I charge you that no action will lie on such facts against the defendant, and your verdict must be for the defendant.

The interest on the value of plaintiff's plant must be deducted from the amount for which the ice crop could have been sold.

Taxes on plaintiff's plant must be deducted from the amount for which the ice crop could have been sold.

The cost of all work necessarily done by plaintiff upon his pond and ice houses to enable him to make his crop, under natural conditions, is a proper deduction from the amount for which the ice crop could have been sold.

These requests were refused.

WILLIAM M. SEUFERT,
Attorney for Defendant-Appellant.

Service of the within grounds of appeal is hereby acknowledged as of time.

WILLIAM B. GOURLEY,
Attorney for Plaintiff-Respondent.

9 4 NOV. T. 1918

New Jersey Court of Errors and Appeals

SAMUEL B. GARRISON, Plaintiff-Respondent, vs. BOROUGH OF FORT LEE, Defendant-Appellant.	On Appeal from the Supreme Court.

BRIEF FOR PLAINTIFF-RESPONDENT.

Statement.

The pollution of Crystal Brook which fed the plaintiff's pond, resulting in the loss of ice crops for two winters, was chiefly due to the openings in the sanitary sewer at every manhole along its line by which the sewage flowed over into the storm sewer which emptied into Crystal Brook and flowed down into the pond of plaintiff. The plaintiff controverts the statement in the appellant's brief which seems to convey the impression that the pollution was due solely to the failure of the sewer system to operate properly. This, too, contaminated the stream, but the daily discharge of the sewage through the openings aforesaid was by far the greater evil.

ARGUMENT.

The plaintiff entered into possession of his property in 1902. From 1905 this possession was under a contract to purchase. He cut ice every year since that time when there was ice suitable to be cut. He constructed a new dam, made a concrete filtering course, with concrete walls and concrete sluiceway 200 feet long, improved buildings and spent a great deal of time and money upon the plant (p. 12). It has cost him $30,000. From Fort Lee Crystal Brook flows about two miles to his pond, which covers an area of six acres. The brook after passing over a hilly country and through the links of the Englewood Golf Club enters his property. At this point it is about twelve feet wide. The source of its southerly branch is at the mouth of the storm water sewer of Fort Lee, which is twenty-four inches in diameter and which opens directly into it (p. 13, etc.). The mouth of the storm sewer is now the beginning of the brook (p. 37). Before the sewer was constructed the brook was "a nice clean white sandy color" (p. 16). "It was named Crystal stream and Crystal Brook, because of its purity and fine quality" (pp. 17, 38). Since that time it is an open sewer (pp. 18, 106), with "lots of paper, toilet paper, rubber bands, feces, tobacco, cigar stumps, pieces of clothing" (p. 18). "It continues that way every day" since the sewer was built (p. 28, etc.)—it killed the fish in the pond (p. 18). Feces, toilet paper, refuse, etc., were found (pp. 52, 56, 59, 65, 78, 98, 114, 117, 119, 121, 139); water was greatly discolored a dark bluish green (p. 63); not a natural color, became purple (p. 80); one hour red and the next blue (p. 108); the bed of the brook was much discolored; the horses wouldn't drink it (pp. 107, 110, 122);

the stones are coated "fully one-eighth of an inch with a slime, and years ago those stones were polished clean and smooth and to-day you couldn't hold one in your fingers; it would slip out of your fingers like jelly to-day" (p. 114), sewage and trash going down the brook all the time" (p. 117), "it is continuous." It was used formerly for all domestic purposes (pp. 111, 112, 124, 136). Because of this condition, the local Board of Health would not grant a permit to cut the ice for sale (p. 12).

The Law.

While the law on this subject is familiar, it may be serviceable to set it out here.

The earliest case in New Jersey touching the liability of municipal corporations to respond in damages for private injuries is the case of *Freeholders of Sussex* v. *Strader,* 18 *N. J. L.* (3 *Harr.*), 108 (1840). It was there held that where a corporate body, whether of a municipal or of a private character, owes a specific duty to an individual, an action will lie for a breach or neglect of that duty, whenever such breach or neglect has occasioned an injury to that individual; but if such corporation owe a duty to the *public* and neglect to perform it, although every individual composing that public is injured some more some less, yet they can have no private remedy at the common law. The precise question presented in this case was whether the county was responsible in damages to a person, whose horse was injured while driving over a bridge, the abutments of which were defective. The question, therefore, directly was whether the municipal-

ity was responsible for neglect of duty. It was said that

> "There has been no charge, so far as I am aware, of any wilfull or fraudulent official neglect upon their part" (p. 120).

This general principle was followed in *Pray* v. *Jersey City,* 32 *N. J. L.* (3 *Vr.*), 394 (1868). This was also an action to recover damages for injury to the plaintiff's horse, because the public authorities neglected to have the street filled in to the proper grade after the construction of a sewer, so that the coping of stone around one of the entrances into the sewer was left projecting and formed the obstacle which occasioned the accident. This case, as well as the cases there cited, that is to say, *Cooley* v. *Freeholders of Essex,* 27 *N. J. L.* (3 *Dutch*), 415; *Livermore* v. *Freeholders of Camden,* 29 *N. J. L.* (5 *Dutch*), 245; aff. 31 *N. J. L.* (2 *Vr.*), 508; *Callahan* v. *Township of Morris,* 30 *N. J. L.* (1 *Vr.*), 161, decided that an action in behalf of an individual who has sustained a particular damage will not lie for the mere neglect of agents of the public.

That the doctrine has limitations is shown in *Jersey City* v. *Kiernan,* 50 *N. J. L.,* 246 (1888). In this case it appeared that a sewer broke through negligent construction, causing sewage to flow over some vacant lots to the land of the plaintiff.

Chief Justice Beasley, speaking for the Supreme Court, said, after quoting *Freeholders of Sussex* v. *Strader* and *Livermore* v. *Freeholders of Camden, supra:*

> "But no case in this train of decisions has gone the length of holding that when by

breach of such public duty a private damage and no public damage has been done, that the person so exclusively damnified is remediless. It is decided that when by such official malfeasance or neglect a public nuisance has resulted, the remedial procedure is a prosecution on the part of the state. The inquiry now is, What is the legal rule when a private nuisance alone has arisen exclusively from such a source? In the principal case referred to, the neglect complained of—that is, the absence of proper care in the construction or reparation of the bridge—was a public evil affecting the body of the people; in this case the defect of the sewer is injurious, apparently, to the plaintiff and one other contiguous landowner alone. Consequently, in the case in hand as the mischief to the community, if any, is not of a magnitude sufficient to justify an indictment while at the same time, it damages the property of an individual, it is obvious that unless such a suit as the present one will lie the wrong cannot be redressed by any method known to the law."

"After careful consideration, my conclusion is that the general rule established by the line of cases referred to is not applicable to the facts present in this instance, and that whenever an indictment will not lie for such a neglect as is here complained of, attended with such consequences as have here ensued, the person thus specially injured may, in order to right the wrong, resort to an action. The injury is altogether private in its character and is capable of being continued in-

definitely, so that under some circumstances the land might, in substance, be applied to the public use without compensation. The injustice done and the necessity for a remedy are alike obvious, and it would be to put to an extreme the doctrine which, under most circumstances, gives immunity to the community in case of the misconduct of public officials."

"Nor have I found any decision which, under circumstances similar in general character to those above stated, has denied the right of the person damnified to an action. It is true that the reasons assigned for allowing such remedy have been various and not altogether accordant, but it is not observed that anywhere such remedy has been refused. And this has been the course sanctioned even in those jurisdictions within which the exemption of the public from responsibility for the neglect of its officers has been maintained with the utmost vigor. This is notably so in the State of Massachusetts. There it has been uniformly laid down that as a general rule no private action is maintainable against municipalities for the breach of any corporate duty, unless under the force of some legislative enactment. Many cases to this effect will be found collected in *Hill* v. *Boston,* 122 *Mass.,* 344, in which decision it was adjudged that a scholar sustaining an injury by reason of the defective condition of a public school house did not become possessed of a right of action against the city. But, notwithstanding the prevalence of this general rule thus strongly

applied, it has been settled by the courts of that commonwealth that in case of neglect in the construction or reparation of a public sewer, and a consequent damage to private property, an action is sustainable in the name of the person thus injured against the municipal corporation. *Child* v. *Boston,* 4 *Allen,* 41; *Emery* v. *Lowell, Id.,* 104. And in New York a similar decision is to be found in the case of *Bailey* v. *Mayor of New York,* 3 *Hill,* 531.

"The conclusion to which this court has finally come is this: That the defendant is not responsible for the consequences of a break in the sewer in question, *per se,* even though it be the result of the carelessness of its own agents, for the public is not responsible for such misfeasances of its officers; but when such break has occurred, occasioning a private nuisance exclusively, and the public authorities have been notified of the accident, we think that then they owe a duty to the individual to put the sewer in a proper condition, and that for the non-performance of such duty that an action will lie."

In *Waters* v. *Newark,* 56 *N. J. L.* (27 *Vr.*), 361 (1894), an increased amount of sewage, for which a sewer did not have sufficient capacity after a heavy rain, flowed out of the manhole, ran across the sidewalk in front of plaintiff's property and into her house. A street commissioner was notified, and also the common council, of the condition and requested to put the sewer in proper condition. This was not done, and the sewage continued to overflow upon plaintiff's property. Upon this state of facts

the Supreme Court held on a case certified that it was evident that the condition to which the plaintiff refers her special injury was one to which the public at large was to a greater or less extent subjected, and that upon proof of these same facts an indictment would be sustained.

> "The Circuit Court should be advised that, in the case before it, a public nuisance was occasioned by flooding the highway, for which an indictment would lie, and that so long as this is the situation, it is the only remedy, and that a notice by the land owner injured does not make the malfeasance actionable in a civil suit."

In the case now before the Court there was no highway flooded or any public nuisance maintained to subject the borough to indictment. Indeed, the question whether the nuisance was a private or a public one was left by the Court to the jury. This restricted view of the law was favorable to the appellant.

In *Hart* v. *Freeholders of Union,* 57 *N. J. L.* (28 *Vr.*), 90 (1894), on demurrer to the declaration, it was held that an allegation that the board wrongfully and illegally made a deep excavation in a public highway under the control of the board, into which the plaintiff, while lawfully passing along the highway, fell and was injured, discloses a cause of action. The language of the syllabus is:

> "The exemption of a municipal corporation from actions by individuals suffering special damage from its neglect to perform or its negligence in performing public duties, whereby a public wrong is done, for

> which an indictment will lie, does not extend to actions where the injury is the result of active wrongdoing, chargeable to the corporation."

Where a municipality so graded its streets as to draw off from a swamp the water from two or more natural water courses and to conduct such water into a public street as a channel for its discharge, was held to be actionable.

> *Town of Union ads. Durkes,* 38 *N. J. L.* (9 *Vr.*), 21 (1875).

In the present case before the Court the municipality by artificial drains collected the sewage from a populous district and discharged great quantities of such sewage into a hitherto pure natural stream of water in which the plaintiff had a property right, to his very serious injury.

This proposition was supported also in the case of *Miller* v. *Morristown,* 47 *N. J. Eq.* (2 *Dick.*), 62; aff. on appeal in 48 *N. J. Eq.* (3 *Dick.*), 645; it was there said by Vice-Chancellor Van Fleet that no responsibility attaches for damages done by the diversion of surface water where the diversion is merely incidental to and occasioned by the making or altering the street grades. But where a municipality puts into execution a scheme of improvement by which surface water collected there and a large area is prevented from following the grades of the street and is carried by artificial means from where it otherwise would be discharged and made to flow on to the land of one person in ease of the lands of others, there an actionable wrong is committed.

In *Harrington* v. *Woodbridge,* 70 *N. J. L.* (41 *Vr.*), 28 (1903), the questions decided were on demurrer to the declaration. The township of Woodbridge constructed a public sewer, consisting of a 12-inch drain pipe in one of the public streets with which the house of plaintiff was connected. For want of proper fall or sufficient capacity the sewer ever since the connection was made caused the cellar of the plaintiff's house to be filled with water and sewage. The committee put a wooden plug in a connecting pipe inside of the cellar wall to prevent the further inflow from the sewer which was ineffective. The defendant was often notified, but the nuisance was not corrected. The Court said that it was not alleged that without connection the sewage could in any way reach the premises of the plaintiff and that the pipe must be deemed the structure of the plaintiff.

Justice Dixon, speaking for the Supreme Court, said:

> "Consequently, the pith of the complaint against the defendant is that it failed to construct the public sewer with such capacity and fall as would enable the plaintiffs safely to connect their cellar with it."

> "This complaint is without legal basis. The general doctrine on this subject is that in devising a plan for the construction of public sewers the public authorities discharge a *quasi* judicial duty, involving the exercise of judgment and discretion with regard to general convenience, and that their wisdom in the performance of that duty is not subject to review in a private suit brought to recover damages because of their error. They owe to no individual the duty of devising such a

plan as will afford to him sufficient drainage. *Child* v. *Boston,* 4 *Allen,* 41; *Mills* v. *Brooklyn,* 32 *N. Y.,* 489; *Johnston* v. *District of Columbia,* 118 *U. S.,* 19; 2 *Dill. Mun. Corp.* (2d ed.), 1046 (801); 20 *Am. & Eng. Encycl. L.* (2d ed.), 1199."

"The present case is plainly distinguishable from those in which private damage results from an obstruction or lack of repair in a public sewer. In such cases, where the public authorities, after notice, have failed to remedy the nuisance, private actions have been maintained. It differs, also, from *Seifert* v. *Brooklyn,* 101 *N. Y.,* 136, where the city, after the incapacity of a main sewer had been demonstrated, continued to build lateral sewers and connect them therewith, and was held responsible to a private suitor for damage caused by the overflow. There the damage seems to have resulted solely from the public structures, without any private drain laid by the plaintiff conducting the sewage to his property. Under similar conditions the right of private action for damages was denied in this state when it appeared that the overflow reached the plaintiff's property over the surface of a public street, thus creating a public as well as a private nuisance. *Waters* v. *Newark,* 27 *Vroom,* 361; *S. C.* on error, 28 *Id.,* 456. From the opinion in the case last cited, it is inferable, but not decided, that if no public nuisance had resulted, the private remedy would have been sustained. But even in that aspect the case is quite different from the present. For if, after a private owner has made such connection with a public sewer as its capac-

> ity warrants and as it was designed to accommodate, the public casts into that sewer sewage beyond its capacity to conduct to the common outlet, so that it must empty itself upon the private property, the case is essentially the same as if a sewer were built with the common outlet emptying directly upon the property. In such cases the public is generally held responsible. But in the present case the whole damage has been occasioned by the fact that the plaintiffs have made with the public sewer a connection which the pitch and capacity of the sewer did not warrant."

In the case now before the Court the sewer was built with many outlets through its whole course connecting the sanitary sewer with the storm sewer, so that the brook was polluted. In effect these openings emptied directly upon the plaintiff's property.

In *Kehoe* v. *Rutherford,* 74 *N. J. L.* (45 *Vr.*), 659 (1906), the Borough of Rutherford erected a stone culvert which received surface water flowing down Park Avenue and discharged it opposite the property of plaintiff, from whence it flowed with great force upon his lands. This diverted the former flow. Justice Trenchard, speaking for the Court of Errors, said:

> "It is a rule of law, of very considerable importance, and which is certainly settled in this state, that an action will not lie in behalf of an individual who has sustained special damage from the neglect of a public corporation to perform a public duty." (Citing cases.)

"But it is also a rule of law of equal importance that the exemption of a municipal corporation from actions by individuals suffering special damage from its neglect to perform or its negligence in performing public duties, whereby a public wrong is done for which an indictment will lie, does not extend to actions where the injury is the result of active wrong-doing chargeable to the corporation."

"It is also the settled law of this state that a municipality has no right, by artificial drains, to divert surface water from the course it would otherwise take and cast it, in a body large enough to do substantial injury, on land where, but for such artificial drains, it would not go." (Citing cases.)

"Reviewing the evidence with these principles in mind, we perceive that it established that the artificial culvert constructed and maintained by the defendant diverted the surface water of a large area from the course which it would otherwise take and cast it, in a body large enough to do substantial injury, on the land of the plaintiff, where, but for such artificial drain, it would not go. We think, therefore, that the nonsuit was erroneous."

In *Murphy* v. *Atlantic Highlands*, 77 *N. J. L.* (48 *Vr.*), p. 492 (1909), the cellar of plaintiff was flooded with sewage as a result of a stoppage in one of the sewer pipes. It was held that the municipality was under duty, when notified of the situation, to remove the clog with reasonable promptness, and that for the breach of such a duty an action would lie.

In *Dohrmann* v. *Freeholders of Union*, 84 *N. J. L.* (55 *Vr.*), 689 (1913), the defendant constructed a viaduct so that it collected surface water from a wide territory which otherwise would flow elsewhere and carried it through a system of pipes and drains and discharged it in a large volume directly into the plaintiff's building. This was held to be an act of wrongdoing for which the county was responsible.

In *Simmons* v. *Paterson*, 60 *N. J. Eq.* (15 *Dick*), p. 385 (1899), this Court held that the City of Paterson, although it had legislative authority to construct its system of sewers, was responsible for discharging their contents into the Passaic River. It was further held that the pollution of the river by sewage constituted the taking of property which the Legislature cannot authorize, except upon just compensation.

After commissioners had done the work of drainage, the defendants cleaned out a ditch that had been dug and threw the refuse upon plaintiff's land. The borough was held liable.

Bailey v. *Osborne*, 80 *N. J. L.* (51 *Vr.*), 333 (1910).

These are the rules which govern the liability of municipalities for injuries to private land. The responsibility of the defendant in this case is shown by an examination of the facts.

A.

Active Wrongdoing.

Counsel in his brief says that in the case of *Kehoe* v. *Rutherford,* 74 *N. J. L.,* 659, it was the evident design of the municipality to cast the water on Kehoe's land. It clearly was. But in the present case the evident design to pollute this stream is still clearer. It is not left to conjecture. It is apparent from the constructed work. The law requires the approval of the State Department of Health to the design. The plan submitted did not on its face disclose that the design was to connect the two systems of sewers by common openings through which the sewage would flow over into the storm sewer. No specifications were put in evidence by the Borough. The engineer, Charles Eckerson, says: "There is nothing on these plans which shows in the slightest degree that these two sewers are to run open in the same manhole" (p. 274). In other words the sewer built was not in accordance with the plans approved. Mr. Eckerson further says: "I found that the system is designed, so that if any possible stoppage can occur, the sewage from the sanitary sewer is bound to go into the storm sewer and so into the brook. That is the design of the system" (p. 144). "These manholes are 250 feet or 300 feet apart" (p. 236). The sanitary sewer runs close to and parallel with the storm sewer and at the manholes is open at the top for some distance.

"Q. Taking off the manhole of the storm sewer you looked down and saw the opening of the sanitary sewer? A. You can see them both" (p. 233). The sanitary pipe was from 6 to 12 inches (p. 234) "and hung on the side of the manhole." The sanitary sewer varied at different places in height above the storm sewer. In a manhole of extreme depth,

"it could be 6, it could be 10 feet above the storm sewer;" the shortest distance was "about 2 feet 6 to 3 feet." At these various openings the sanitary sewer was sloped so as to form an apron on the side toward the storm sewer to *facilitate the passage of sewage and polluted matter into the storm sewer and so into the brook.*

Mr. Eckerson, the engineer, says: "I also found in the manholes some 300 feet south of the pumping station in the Crystal Brook district that there was a regular—it looked like a constructed wier which had been constructed for that purpose so that the sewage would flow directly into the pipe of the storm sewer. It had every appearance of being constructed for the purpose of the sewage overflowing" (p. 150). He made four visits and at every visit the sewage matter was constantly overflowing. "There was a stream 18 inches wide practically and from ½ to ¾ of an inch in depth overflowing this weir into the storm sewer" (p. 151). He examined twenty-two manholes. "I found in every manhole which I examined that the sanitary sewer was placed partially up on the side of the manhole and the storm sewer was placed below. Both sewers were open in every instance. If any stoppage could occur in the sanitary sewer it would immediately overflow in the storm sewer and so into the brook."

He found the sanitary sewer overflowing while the pumps were working. "I got there about 10 minutes past 10 and left at 2.20. The pump was still working at 2.20 and during the entire period the sewage from the sanitary sewer was overflowing into the storm sewer and so into the brook" (p 150). Nothing could be more convincing as to the evident design of the system to have the sewage flow into the storm sewer than the test made by Charles

M. Nicholls, an assistant sanitary engineer in the State Department of Health. He placed a dye which colored the water a bright green, in the toilet of a house upon the southeast corner of Jane and Main Streets, in the Borough of Fort Lee. He went to the manhole near the pumping station and saw the dye appear in the sanitary sewer with the green color and saw it overflow over the concrete apron into the storm sewer. He then went to the outlet of the sewer and saw the green color appear in Crystal Brook (p. 66).

Two iron pipes were inserted at another place so as to connect the two sewers. This aided in the pollution. All this shows manifestly active wrongdoing and fixes the responsibility of the defendant. It should be remembered that the man who devised this extraordinary sewer system did not know a like system anywhere in New Jersey or New York or indeed in the whole world (p. 226). It remains unique.

B.

Notice.

The only time the question of notice was raised by counsel was on a motion to direct a verdict (p. 275). No request was made to charge upon this point. Nor was any exception taken to the charge touching this point. How then could the trial judge direct a verdict for the defendant in view of the facts stated, which make it a jury question? The evidence, too, showed active wrongdoing. It would have been error to have directed a verdict for the defendant. But there was evidence also that notice had been given and, which is equivalent to

notice, that the Borough authorities knew of the existing condition and afforded no relief. They knew the construction of the sewer by its openings was made to overflow and would cause pollution of the stream. Mr. Nicolls, the assistant sanitary engineer of the State Department of Health, notified Mr. Lang, the Borough engineer, of the condition, showed him several manholes where the sanitary sewer was overflowing into the storm sewer and showed him also the conditions at the sewer outlet (p. 59); this was February 27, 1917. Mr. Mason, the sanitary inspector of Englewood, wrote a letter to the Board of Health of the Borough of Fort Lee about the pollution and they replied that they would look into the matter at that time (p. 77). The pollution was a daily affair. The jury had a right to infer from the whole evidence that the Borough had knowledge of the pollution and yet it continued to the day of the trial to pollute the stream (p. 28). From November, 1916, to March, 1917, the pumps were not working (p. 242), and of course during all this time the sewage was of course flowing into the brook, as there was no place else for it to go. It would seem that it would not take a jury very long to determine that there was not much reasonable diligence about this state of affairs since it was allowed to continue for nearly five months. The summons and complaint were served in July, 1917, yet after this notice it was found during the trial in March, 1918, that the sewage was still overflowing (p. 28).

The Borough of Fort Lee is responsible for this damage.

Counsel for appellant in his brief presents four propositions for reversal, the first of which is that an action will not lie against a municipality in a case of this nature. It is alleged that the grounds

of appeal (par. 12, p. 324, lines 16-19-28-30-31-34; par. 13, p. 325, lines 14-18) support this proposition (p. 2 of brief). But three of these four references relate to a motion to direct a verdict for the defendant and the fourth to a request to charge which the Court fully covered. The motion to direct a verdict as referred to above (p. 324, lines 16-19, 28-30 and 31-34) was for the following reasons: First, because when a public sewer breaks from faulty construction and private property is thereby damaged, an action will not lie against the Borough founded on such facts (p. 324, lines 16-19). Because there is no evidence in this case showing any act of wrongdoing on the part of the defendant (p. 324, lines 28-30). Because the condition of the stream and pond of which the plaintiff complains was a public nuisance and not a private nuisance exclusively and therefore the only remedy is by indictment (p. 324, lines 31-34).

The slightest reading of the testimony will show that these last two reasons were controverted all through the evidence in the cause and the first reason had no reference to the facts. The remaining support for this first proposition is in grounds of appeal 13 (p. 325, lines 14-18), which is a request to charge in these words: "If you find as a fact that the defendant's sewer broke down from faulty construction and that this caused the plaintiff's damage, I charge you that no action will lie on such facts against the defendant and your verdict must be for the defendant. The judge charged as follows: "If you find as a fact that the defendant's sewer broke down from faulty construction and that this caused the plaintiff's damage, and if you find as a further fact that the defendant exercised reasonable diligence in repairing the sewer, then I charge you that your verdict must be for the defendant." This

is a more correct exposition of the law than the request for defendant. Therefore, it is respectfully submitted that no error was committed in relation to the first proposition which counsel for defendant seeks to establish in his brief.

It is admitted in the case that the pollution of the brook came from the sewer of defendant. It is sought to escape responsibility on the alleged ground that the pollution was occasioned and continued, and was due to a break in the machinery.

The cause of action was a continuing one, and the damages were properly determined to the time of trial.

The second proposition of the appellant is that the respondent should not have been permitted to recover for damages sustained after his suit was brought. The complaint alleged that *from April 1, 1916, until the commencement* of this suit said Borough had been daily discharging from the said sewer into Crystal Stream noxious, foul, fetid and poisonous effluent matters in large quantities, etc. Defendant denied that the pollution was continuous. Plaintiff in his reply reaffirmed it.

"Where damages are to be determined in respect of any *continuing* cause of action they *shall* be determined to the time of the assessment or trial" (rule 67 of the Practice Act of 1912). Here there seems to be no choice for the plaintiff. He could not allege that the damages would continue in the future, as the defendant might abate the nuisance at any time.

A nuisance is a continuing cause of action—so is an obstruction to a way (note to rule 67, Hartshorne Practice Act).

Ord. XXXVI, r. 58, of the English practice reads:

> "Where damages are to be assessed in respect to any continuing cause of action, they shall be assessed down to the time of the assessment."

A continuing cause of action is held to be one which arises from the repetition of acts or omissions.

> *Crumbie* v. *Wallsend Local Board* (1891), 1 *Q. B.*, 503.

In *Hole* v. *Chard Union* (1894), 1 *Ch.*, 293; 63 *L. J. Ch.*, 469, Lindley, *L. J.*, said:

> "What is a continuing cause of action? Speaking accurately, there is no such thing; but what is called a continuing cause of action is a cause of action which arises from the reception of acts or omissions of the same kind as that for which the action was brought."

We have progressed little in the path of legal reform if, under such circumstances, a defendant is to be harassed again with a new suit and the time of our courts consumed with a repetition of the same evidence.

The cause now before the Court was a continuing one. It is an incident that ice can only be cut in winter. The stream was daily polluted through the whole year.

I cited upon the argument the case of *De Grado against the Public Service Gas Company,* a case which has recently been before the Supreme Court upon other points. In that case at the circuit, the

trial judge, without any question or, indeed, any objection by counsel for the defendant, permitted damages to be determined to the time of trial. It was a case of an artesian well being polluted by percolations from defendant's gas works. Although in the judgment of counsel damages should be assessed in this the present cause on the pleadings to the time of trial, the trial judge suggested an amendment be drawn, which was done and answered by the appellant.

Interest *reipublicae ut sit finis litium.*

The plaintiff in possession had a right to maintain this action.

The third proposition of appellant is that the plaintiff was not the owner of the pond.

The only authority cited in support of this point is the case of *Titus* v. *Gunn,* 69 *N. J. L.* (40 *Vr.*), 410. This was a lien claim case. It simply holds that in an ordinary action commenced by summons the plaintiff in order to succeed must show that his right of action was complete at the time the action was commenced. Obviously this has no relation to an action of trespass or trespass on the case for an injury to the property brought by one in possession.

The complaint alleged that he "was the owner and possessor of certain lands," etc. (p. 1). The evidence disclosed that the plaintiff was in possession of the pond under an agreement to purchase (p. 30). He entered into possession in 1902. The agreement to purchase is dated in 1905. He improved the *property every year thereafter* (p. 12) and interest endorsed upon the agreement to pur- at great expense. His payments upon the principal

chase were 60 in number and so numerous to print that by agreement between counsel they were summarized (p. 306). The deed bears date October 1, 1917 (p. 315).

The action of trespass both as to real and personal property is a possessory action. A party in possession is *prima facie* the owner and may maintain an action for injury thereto.

Todd v. *Jackson,* 26 *N. J. L.* (2 *Dutch*), 525.
Bailey v. *Osborne,* 80 *N. J. L.* (51 *Vr.*), 333 (1910).

A plaintiff in possession need not show his title so long as he can show a possession or right of possession.

Ibid.

Ice forming upon water belongs to the owner of the soil beneath the water.

40 *Cyc.,* 844.
18 *L. R. A.,* 39.

A purchaser in possession of lands under a contract of purchase, whether written or verbal, can maintain an action on the case in the nature of waste for destruction committed while in such possession.

Freeman v. *Headley,* 33 *N. J. L.* (4 *Vr.*), 523.

Possession unsupported by evidence of title is sufficient to maintain trespass against a wrongdoer.

Phillips v. *Kent,* 23 *N. J. L.* (3 *Zab.*), 155.
Rollins v. *Atlantic R. R. Co.,* 70 *N. J. L.* (4 *Vr.*), 664.

There was no error in the admission of evidence.

The fourth proposition advanced by the appellant for reversal is that certain evidence was improperly admitted at the trial. But two instances are cited. The first allegation is that the plaintiff testified to the amount of ice he could have stacked outside his ice-houses and the second allegation is that a witness for plaintiff was asked, "What is ice now a ton?" As to the first objection the answer is that in good seasons icemen harvest large quantities of ice in temporary stacks. The plaintiff went into detail on this subject (pp. 26, 27). The architect did not bring his plans with him about these stacks (p. 105) and the matter was not pressed. It was not referred to in summing up by counsel nor by the judge in his charge. No request was made to the Court about it. There is no exception in the record. This extract is all there is in the testimony.

> "Q. Did you have enough ice on the pond to fill the houses and have a surplus to stack outside? A. Yes, we did.
>
> Q. In this last winter? A. Yes.
>
> Mr. Mackay: I don't think that is an element, your Honor.
>
> The Court: He may proceed on that line if he desires.
>
> Mr. Mackay: I do not think it is admissible. I cannot tell what the answer is going to be.
>
> The Court: I think it is page 26."

Here there is no exception asked nor request made to note an objection upon the record. It would seem as if counsel acquiesced in the ruling of the trial judge.

The witness Holden, to whose testimony counsel refers in his brief, had given the price of ice in July, 1917, as $3.00 per ton and that it had remained at that figure through the year. It had been $2.50 per ton in March, 1917, until May 1, when it became $3.00 a ton, and continued at that figure (p. 139). The trial took place in March, 1918. Manifestly, the question could not be asked what the price would be in the following summer. He was at this particular time paying himself $3.00 per ton. "That is the only price; never mind whether you take one ton or fifty tons, if they deliver it on the dock."

> "Q. I mean, could you sell it to-day? A. Yes, if I had 5,000 tons of ice to-day, I could sell, contract to sell it for $300 a ton" (p. 142).

It is respectfully submitted that there was no error in the record.

WILLIAM B. GOURLEY,
Of Counsel with the Plaintiff-Respondent.

New Jersey Court of Errors and Appeals

SAMUEL B. GARRISON, Plaintiff-Respondent, vs. BOROUGH OF FORT LEE, Defendant-Appellant.	On Appeal from Supreme Court.

BRIEF FOR DEFENDANT-APPELLANT.

Statement.

The appellant is a municipal corporation located on the crest of the Palisades in Bergen County. It constructed a system of sewers and storm water drains in the westerly part of the Borough. There were separate pipes for the sewage and for the storm water, the former being led to a tank from which, when the system operated properly, it was pumped over the Palisades and into the Hudson River; the latter being discharged into a branch of a stream which had theretofore been the natural outlet for the surface drainage of that part of the Borough.

The respondent alleged that he owned a pond in the City of Englewood, near the foot of the westerly slope of the Palisades, from which he gathered ice each winter, to be stored and sold. This pond is formed by a dam in a stream which has several branches rising at widely separated points near the crest of the Palisades flowing down the westerly slope, through the Boroughs of Fort Lee, Leonia, Englewood Cliffs and City of Englewood.

The ice in this pond was polluted by matter which, by reason of the failure of the sewer system to operate properly, escaped from the appellant's sewer and drains at points at or near the outlet of the storm water drain and the sewage tank and pumping station, into one of the branches of the stream several miles from respondent's pond. The respondent brought suit, during the summer of 1917 for the loss of the ice crop of the winter of 1916-1917. At the trial (March 11th, 1918, Bergen Circuit) he was permitted to prove not only the value of this crop but also of the ice crop of the winter of 1917-1918. From a judgment in his favor for $11,372.97 the Borough appeals.

The appellant's grounds of appeal present four propositions, on which a reversal is sought:

1. Because an action will not lie against a municipality in a case of this nature (Grounds of appeal, 12, Case, page 324; lines 16-19, 28-30, 31-34; Grounds of appeal, 13; Case, page 325, lines 14-18.

2. Because the respondent should not have been permitted to recover for damages sustained after his suit was brought (Grounds of appeal 1, 2, 3, 4, 5, 6, 7; Case, page 322, lines 20-40; pages 323, lines 1-26).

3. Because the respondent was not the owner of the pond at the time his suit was brought (Grounds of appeal, 8 and 9; Case, page 323, lines 28-40).

4. Because of the admission of certain evidence as to the amount of his damages (Grounds of appeal, 10 and 11; Case, page 324, lines 1-11).

I.

No action lies against the appellant municipality on the facts in this case.

The facts as shown by the respondent's case are that its sewage and drainage system was designed to keep the sewage and other objectionable matter separate from the storm water drainage and to discharge it, by pumping, into the Hudson River; to keep the storm water drainage separate from the sewage and to discharge it into the brook into which it had always theretofore been discharged; that the system when constructed operated successfully in this way, except when its normal operation was prevented by accidental and unexpected breakage, shutting off of the electric power service, and improper connections made by certain industrial plants; that these defects were removed as promptly as possible after they were discovered. The testimony of the witnesses is as follows: Appellant's witness, Watson G. Clarke, an experienced engineer who designed the sewer and drainage system (Case, page 189, lines 36, 37), testified (Case, page 190, lines 8-40; page 191, lines 1-40; page 192, lines 1-40; page 193, lines 1-10) that it was designed to carry the sewage and storm water in separate pipes, one to carry the sewage to a pump house from

which it was pumped into the Hudson River, the other to carry the storm water into the brook as it had gone before the work was done. That the design provided that none of the sanitary sewage should, under any conditions, go into the brook if the system was properly operated (Case, page 196, lines 25-27); that only the storm water flow and rain, that is the surface drainage, would go into the brook in accordance with the design (Case, page 196, lines 28-31).

These plans were approved by the State Board of Health on May 13th, 1913 (Case, page 273, lines 8-27).

Appellant's witness, John McGarry, who built the sewage and drainage system (Case, page 228, lines 36-40) testified that it was constructed in accordance with the plans prepared by Mr. Clarke (Case, page 229, lines 1, 2), that for three months before completion and for a year after he finished it he had a man there night and day, as he had guaranteed it, and there was no complaint (Case, page 230, lines 30-40).

Captain Lang, a witness for the appellant, testified that he was employed on this work by Mr. Clarke and Mr. Mason (Mr. Clarke's successor as Borough Engineer (Case, page 238, lines 24, 25) from the beginning until the completion of the system (Case, page 238, lines 7-23) and subsequently supervised the operation of the pumping station (Case, page 241, lines 8-22).

He testified that between August and late November or early December, 1916, the pumps were broken (Case, page 242, lines 13-17), that they were repaired and put in operation by February or March, 1917 (Case, page 242, lines 18-40).

That on one of the manholes the wet weather flow was found to be of sufficient volume to cause the sewage to wash into the storm water drain

(Case, page 243, lines 20-40); that this defect was remedied within a month (Case, page 244, lines 16-20).

That in another manhole sewage passed into the storm water drain because of a break in an invert (Case, page 244, lines 26-34), during the same time the other manhole was defective, during December, 1916, or January, 1917 (Case, page 244, lines 35-40); that this defect was remedied within a week or ten days (Case, page 245, lines 21-24).

That in December, 1916 (Case, page 245, lines 30-38), he found that two film companies were discharging into the storm water drain an objectionable effluent containing acid, coloring matter, etc. (Case, page 246, lines 24-34); that these companies were directed to discontinue the discharging of objectionable effluent into the storm water drain (Case, page 247, lines 12-18). That one of the companies immediately employed a plumber to change their pipes from the storm water drain to the sanitary sewer (Case, page 247, lines 32-40); that as to this Company the objectionable condition was removed in two months (Case, page 248, lines 15-22). [Herman Ghent, the plumber, testified that he completed this change on March 11th, 1917 (Case, page 265, lines 29, 30).] That the other company had to build a sewer line six or seven hundred feet over property which had to be acquired from other owners, in order to enable them to empty their objectionable effluent into the sewer instead of into the drain (Case, page 248, lines 22-40); that this work was in progress when the witness left his employment to enter the Army in June, 1917 (Case, page 249, lines 25-35; page 251, lines 27-29). Appellant's witness Ghent testified that this work was completed in October, 1917 (Case, page 265, lines 38, 39).

John McGloin, appellant's witness, testified that he was employed since December, 1917, to look after the pumps (Case, page 261, lines 37-40; page 262, line 17). That both pumps were broken in December, 1917 (Case, page 262, lines 8-16), that he had them fixed (Case, page 262, lines 17-20). That the electric power furnished by the Public Service was sometimes shut off without notice causing the pumps to stop (Case, page 262, lines 20-40).

Respondent's witness, Charles Eckerson, testified that the manholes in the system were designed so that if any stoppage should occur the sewage is bound to go into the storm water drain and so into the brook (Case, page 144, lines 6-11). This is, of course, his opinion, the opinion of one who had designed a plan for this sewer before Mr. Clarke was engaged by the Borough (Case, page 143, lines 22-26). There is nothing in the case to show that the appellant Borough, or any of its employees, ever intended that the brook should be polluted. It cannot be seriously contended that the Borough would have expended the money to construct separate sewage and drainage pipes, to instal the sewage pumps and outlet into the Hudson River, if their intention was to discharge the sewage into this stream.

These facts bring the case within the fully settled rule of law that an action will not lie against a municipal corporation by an individual who has sustained damage in consequence of the neglect of a municipality in the performance of a duty.

Pray vs. Jersey City, 32 N. J. L., 394;
Bisbing vs. Asbury Park, 80 N. J. L., 416;
Buckalew vs. Freeholders of Middlesex, 104 Atl., 308.

This is not a case like Kehoe vs. Rutherford, 74 N. J. L., 659, in which it was the evident design of the Borough to cast the water on Kehoe's land; for in the present case the Borough went to a great expense to avoid polluting this stream, and its failure to accomplish this result at all times is due, not to any active negligence, but to accidental and unforeseen events. It is not a case like those arising out of the pollution of the Passaic River by the Paterson sewer system, for that system was intended to empty sewage into the river.

The most that the respondent's case shows is that his damage resulted from negligence on the part of the Borough in performing its duty to keep the sewer in repair, or proper operation, which like negligence of other municipal corporations in failing to keep roads, bridges, etc., in repair, is no ground for an action for damages caused by the defective condition.

The appellant moved for a direction of a verdict on this ground (Case, page 275, lines 1-8), and this motion was denied.

IT IS RESPECTFULLY SUBMITTED THAT THE JUDGMENT SHOULD BE REVERSED BECAUSE NO ACTION LIES AGAINST THE APPELLANT ON THE EVIDENCE ADDUCED AT THE TRIAL.

II.

The respondent should not have been permitted to adduce evidence of damages sustained by the loss of the 1917-1918 ice crop.

The respondent's complaint filed August 3rd, 1917, alleged, in paragraph 7, that because of the

pollution of the stream, the ice formed on his pond in the winter of 1916-1917 could not be cut and sold (Case, page 2, lines 39, 40; page 3, lines 1-10), and in paragraph 9, that this crop amounted to 4,000 tons and that he would be obliged to expend large sums of money to clean his pond in case the pollution ceased (Case, page 3, lines 19-25).

In his opening at the trial on March 11th, 1918, respondent's counsel stated that damages were also claimed for the loss of the 1917-1918 ice crop. Appellant's counsel objected, and objected to all questions as to damages occurring after the suit was brought. The Court stated that it would not be necessary to object to every such question, but that a general objection to all of this evidence had been made, the evidence allowed, an exception granted, and the question reserved for argument (Case, page 24, lines 28-40; page 25, lines 1-5). The question raised was argued at the close of respondent's case, and the objection was then overruled. Respondent was then permitted, over appellant's objection, to amend his complaint (Case, page 165, lines 21-40), and, after the trial, filed as an amendment adding to paragraph 7 an allegation "and ice formed on said pond thereafter will continue to be dangerous to the public health so long as said pollution continues," and to paragraph 9, "and this being a continuing cause of action the damages shall be claimed to the time of the trial."

This amendment introduced into the case a new cause of action. Damages resulting from time to time to church property adjacent to a railroad, by the passage of trains in a cut, the wall of which was in a defective condition, were held by this Court to create a new cause of action each time damage occurred.

Church of Holy Communion vs. Paterson,
66 N. J. L., 218.

Damages resulting from time to time by pollution of the wells of a brewery by tar products escaping from nearby premises of a gas house, were held by this Court to create a new cause of action each time damage resulted.

Ballentine & Sons vs. Public Service Corporation, 86 N. J. L., 331.

And similarly respondent's damages resulting from time to time by pollution of his ice crop by sewage escaping from appellant's sewer, creates a new cause of action each time the damage occurs.

But this new cause of action for pollution of the crop of the winter of 1917-1918 arose after the suit was started, for the complaint was filed August 3rd, 1917. In actions at law, the plaintiff, in order to succeed must show that his right of action was complete at the time the action was commenced. The adjudication must relate to the status that existed at the beginning of the suit and no claim that matured after the suit was commenced could properly be included in the verdict.

Titus vs. Gunn, 69 N. J. L., 410.
Felt vs. Steigler, 69 N. J. L., 92.
Holzapfel vs. Hoboken Mfrs. R. Co., 104 Atl.. 209.

The Trial Court should not have permitted the introduction of testimony as to the second ice crop. It was clearly outside of the issues raised by the pleadings as originally filed. The respondent, conceding this, has amended his complaint by leave of

the Court, so as to allege damages by the loss of the second ice crop. This amendment should not have been permitted, for while Section 24 of the 1912 Practice Act (P. L., page 382), permits an amendment, upon terms, to a new or different cause of action, this must be construed in conformity with the rule established by the cases cited above, as referring to a new cause of action which was complete at the time the suit was started.

Respondent argued at the trial that Rule 67 of the 1912 Practice Act, now Rule 112 of the Supreme Court, permitted a recovery for this item as damages from a continuing cause of action and his amendment is worded similarly to that rule. It is respectfully submitted that this rule, like Section 24 of the Practice Act, must be construed in conformity with the cases cited above as referring to a cause of action which was complete at the time the suit was started, and which might continue to cause damage until the time of trial.

This Court has held, very recently, that Section 21 of the 1912 Practice Act does not abrogate the substantive law established by the cases cited. In the opinion by Mr. Justice Parker, it is stated that

> "it is going far afield to say that this elemental and sensible rule of substantive common law was intended to be abrogated by a statute relating to practice—to methods of procedure rather than to rights of action."
>
> Holzapfel vs. Hoboken Mfrs. R. Co., 104 Atl., 209.

The amendment was improperly allowed in that it was not made "upon terms" as required by the

statute, but was permitted at the close of respondent's case and filed after the trial, without giving the appellant any opportunity to meet the new situation thus developed. It was improperly allowed because its effect was to permit the respondent to recover in this suit, for a new cause of action which was not complete when the suit was begun.

In Jersey City vs. Kiernan, 50 N. J. L., 246, the Supreme Court held that

> "when a public sewer breaks from faulty construction, and private property is thereby injured, an action will not lie founded on such facts, against the city. But if the city be notified of such break, it then owes a duty to the individual injured, and for the breach of such duty an action will lie."

The duty which appellant owed to respondent in respect to the second ice crop, was to protect this crop from pollution from its sewers, and if respondent had a cause of action for failure to perform this duty, that cause of action arose about nine months after the suit was started, and cannot under the cases above cited, be the basis for a recovery in this suit. The evidence of the conditions of the sewer and stream after the suit was started should, therefore, have been excluded when appellant objected to it.

IT IS RESPECTFULLY SUBMITTED THAT THE JUDGMENT SHOULD BE REVERSED BECAUSE THE RESPONDENT WAS PERMITTED TO PROVE DAMAGES RESULTING FROM A CAUSE OF ACTION WHICH WAS NOT COMPLETE WHEN HIS SUIT WAS BROUGHT.

III.

Respondent's evidence did not support his allegation in his complaint that he owned the ice pond.

The complaint, filed August 3rd, 1917, alleges that the plaintiff-respondent "was the owner and possessor of certain lands," etc. (Case, page 1, lines 30-32). No amendment was made in this allegation.

The evidence shows that the deed by which he became the owner was executed October 1st, 1917 (Plaintiff's Exhibit P-2; Case, page 315, line 35 et seq.).

His right of action as owner was, therefore, not complete when his suit was commenced and defendant's objection to the admission of this deed, should have been sustained.

Titus vs. Gunn, 69 N. J. L., 410.

IV.

Illegal evidence was admitted at the trial.

Respondent was permitted, over appellant's objection, to testify to the amount of ice he could have stacked outside his ice houses (Case, page 26, lines 10-40; page 27, lines 1-40; page 28, lines 1-10). This was purely speculative as the witness testified that when he engaged Mr. Ferry to draw plans for the construction of the stack, the witness knew that the ice had then been polluted and did this only to estimate what his loss would be. He

did not testify that he would have stacked the ice had it been pure, nor that he had done so at this pond at any time before the pollution occurred. This testimony should have been excluded.

Respondent's witness, Holden, on direct examination was asked "What is ice now a ton?" and was allowed to answer over appellant's objection. The price of ice at the time it could have been marketed, not "now" (at the time of the trial), was the price to be considered by the jury in fixing the amount of the loss.

Wolcott vs. Mount, 36 N. J. L., 262, affirmed 38 N. J. L., 496.

It is respectfully submitted that the judgment should be reversed.

WILLIAM J. MORRISON, JR.,
of Counsel for Defendant. Appellant.

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