

INDEX.

	PAGE
Notice of Appeal and Grounds	1
Summons	2
Complaint	3
Affidavit of Service of Summons and Com- plaint	6
Answer	7
Rule for Judgment	8
Certification of County Clerk	9
Motion for Nonsuit	82

TESTIMONY FOR PLAINTIFF.

Albert Arnn:	
Direct	12
Cross	37
Redirect	54
Charles Dietrich:	
Direct	55
Cross	60
Redirect	61
Recross	61
Charles Arnn:	
Direct	62
Cross	67
Albert T. Gugger:	
Direct	71
James J. Muzzio:	
Direct	76
Cross	79
Redirect	81

EXHIBITS.

	Offered Page	Printed Page
P-1.—Map	12	86
P-2.—Certificate of Tax Sale	14	87
P-3.—Picture of Plaintiff's Property Prior to December, 1925	32	90
P-4.—Picture Showing End of Drain Pipe and Open Ditch ..	33	91
P-5.—Picture Showing Open Ditch.	33	92
P-6.—Picture Showing Property After Rain	33	93
P-7.—Picture Showing Property Be- fore Water Was Diverted	33	94
P-8.—Picture Showing Property Af- ter First Rain	33	95
P-9.—Picture Showing Open Ditch	34	96
P-10.—Ordinance to Provide for Clearing Paris Avenue	76	97

The answer of the Circuit Court of the County of Bergen within named.

The record and proceedings whereof mentioned is within made with all things touching and concerning the same. I do certify and return to the Court of Errors of the State of New Jersey at Trenton at the day and year within contained in a certain schedule annexed. 10

JAMES W. MERCER,
Clerk.

Notice of Appeal and Grounds

(Filed .)

BERGEN COUNTY CIRCUIT COURT. 20

ALBERT ARNN,
Plaintiff,

v.

THE BOROUGH OF NORTHVALE IN THE
COUNTY OF BERGEN,
Defendant.

Action at Law. 30

To FREDERICK W. MATTOCKS, Esq., Attorney of the Defendant or To Whom it May Concern:

PLEASE TAKE NOTICE that the plaintiff in the above entitled cause appeals to the Court of Errors and Appeals in the last resort in all causes in New Jersey from the whole of the judgment entered in this cause on the following ground, to wit: 40

Handwritten note: Printed 12/23/23

Summons.

1. Because the Circuit Court erred in directing a non-suit against the plaintiff in the above entitled cause.

GEORGE W. BABCOCK,
Attorney for the Plaintiff.

10

Summons.

(Filed .)

The State of New Jersey:

To the Borough of Northvale in the County of Bergen:

You are summoned to answer the annexed Complaint of Albert Arnn, in an action at law in the Bergen County Circuit Court. And take notice that unless you file your answer to said complaint with the Clerk of the Bergen County Circuit Court at Hackensack, within twenty days after service upon you of this writ and the annexed complaint, the plaintiff may proceed in the suit and judgment may be entered against you.

20

WITNESS, NEWTON H. PORTER, Judge of the Bergen County Circuit Court, at Hackensack, this 18th day of October, 1926.

30

IRVING T. BRICKELL,
Clerk.

GEORGE W. BABCOCK,
Attorney for the Plaintiff.

40

Complaint.

(Filed November 6, 1926.)

BERGEN COUNTY CIRCUIT COURT.

ALBERT ARNN,
Plaintiff,

10

v.

THE BOROUGH OF NORTHVALE IN THE
COUNTY OF BERGEN,
Defendant.

Action at Law.

Plaintiff, residing in the Borough of Northvale, in the County of Bergen and State of New Jersey, says:

20

1. The defendant is a municipal corporation of the County of Bergen and State of New Jersey.

2. In December, 1925, and for a long time prior thereto and continuing thereafter, plaintiff was the owner of certain lands and premises situated in the Borough of Northvale on the northeasterly side of Paris Avenue and the southeasterly side of Union Street in the Borough of Northvale and more particularly known as lots numbers nine (9) to fifteen (15) inclusive and twenty-five (25) to thirty (30) inclusive in Block #110, as shown on the assessment map of the Borough of Northvale; upon which said premises the plaintiff has maintained for some time, and still maintains, conducts and carries on a manufacturing business and has located thereon certain buildings and machinery wherein and with which to manufacture concrete blocks, tile, septic tanks and a general concrete business.

30

40

Complaint.

3. Prior to December, 1925, the defendant, its agents and servants, caused to be laid and constructed a certain sewer or drain, extending from Paris Avenue northerly or northwesterly along the Northern Railroad of New Jersey in said Borough, from which large quantities of surface water which flowed from the surrounding country from adjoining streets or highways, and the rain which descended thereon, flowed freely down said sewer or drain from a point therein where it intersected Paris Avenue and the Northern Railroad of New Jersey to a point in Pierron Street in the said Borough.

4. It was then and there the duty of the said defendant to allow the said large quantities of water which flowed on said Paris Avenue from adjoining streets and highways and the surrounding country, and the rain water which fell thereon, to flow down the said Paris Avenue in a natural direction of the declivity of said Paris Avenue to the lowlands.

5. Said plaintiff further alleges that the said defendant, contriving and unlawfully and unjustly intending to injure, prejudice and aggrieve the said plaintiff in the possession, use, occupation and enjoyment of his said messuage and premises, and to render the same incommodious, unfit for habitation and of little or no use or value to the said plaintiff while the plaintiff was so seized and possessed thereof and was carrying on and conducting his said business, did, in or about the month of December, 1925, and on divers other days and times afterwards and before the commencement of this suit, wrongfully and unjustly kept and continued and caused to be kept, laid and constructed,

Complaint.

a certain large and long sewer, drain, pipe or culvert extending from the Northern Railroad of New Jersey along Paris Avenue, near to, adjoining and in front of the messuage, lands and premises of the plaintiff, which said sewer, drain, pipe or culvert the said defendant built, constructed and laid and caused to be built, constructed and laid in so unskillful, careless, negligent, unlawful and improper a manner, and kept and continued the same in such unskillful, careless, negligent, unlawful and improper a manner from the day and year last aforesaid, to the day of the commencement of this suit; that by reason thereof large quantities of water and other refuse from a large area of the surrounding country flowing down said Paris Avenue was diverted, ran and flowed into and through said sewer, drain, pipe or culvert, and was collected and concentrated therein, and was thrown with great force and violence down to, over, upon, against and into the said premises of the said plaintiff, and the buildings and grounds surrounding them and which were especially used by the plaintiff in maintaining and carrying on his business aforesaid, were greatly weakened, injured, wetted, washed in, washed out and damaged the said premises of the plaintiff and his business aforesaid, and further, the premises were torn up, displaced and carried away by the force and violence of the said waters, and by reason of the premises the said messuage and premises of the said plaintiff became and were damp, incommodious, insecure and unfit for habitation and the carrying on of plaintiff's business, and also by reason of the premises the plaintiff has lost the benefits, profits, gains and advantages which he otherwise might and would have received by carrying on his said

Affidavit of Service.

business therein, and by reason of the premises the plaintiff will be put to a great expense in improving the said premises and making the same fit for habitation and use, and for repairing, re-making, and replacing of the lands damaged, torn up and washed away by the water aforesaid, and otherwise has been greatly injured and damaged by reason of the negligent acts of the defendant.

WHEREFORE, plaintiff demands as damages the sum of Twenty-five thousand dollars (\$25,000.00).

GEORGE W. BABCOCK,
Attorney for the Plaintiff.

Affidavit of Service.

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

LOUIS TURRO, being duly sworn on his oath, says that he is the Special Deputy Sheriff named in the deputation endorsed and made a part hereof and that on the 28th day of October instant, he served the said summons and complaint upon the defendant therein named The Borough of Northvale in the County of Bergen by serving their Borough Clerk Albert T. Gugger in person at his place of abode, Northvale, N. J. by exhibiting the said summons and complaint to said defendant, and explaining to him the contents thereof, and by delivering to Albert T. Gugger Borough Clerk of the Borough of Northvale in the County of Bergen a true copy of said summons and complaint.

LOUIS TURRO,
Special Deputy Sheriff.

Sworn and subscribed before me this }
29th day of Oct. A. D. 1926. }

Answer.

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

I, GEORGE P. NIMMO, Sheriff of said County, do hereby deputize and appoint Louis Turro to be my Special Deputy, to execute and return the writ according to law.

GEORGE P. NIMMO,
Sheriff.

J. A. W. DONALDSON,
Under Sheriff.

Witness my hand and seal this }
18th day of Oct. A. D. 1926. }

Answer.

(Filed November 17, 1926.)

BERGEN COUNTY CIRCUIT COURT.

ALBERT ARNN,
Plaintiff,

v.

THE BOROUGH OF NORTHVALE IN THE
COUNTY OF BERGEN,
Defendant.

Action at Law.

Defendant, the Borough of Northvale, in the County of Bergen, a corporation organized and existing under and by virtue of the laws of the State of New Jersey says, that:

1. It has no knowledge or information with respect to the allegations contained in the second, third and fourth paragraphs of the complaint

Rule for Judgment.

heretofore filed in the above stated cause sufficient to enable it to form a belief with respect thereto and it therefore neither admits nor denies the same, but leaves the plaintiff to make such proof thereof as he may be advised.

10 2. It denies the allegations contained in the fifth paragraph of the plaintiff's said complaint herein.

WHEREFORE, the defendant, the Borough of Northvale, in the County of Bergen, demands judgment that the plaintiff's complaint be dismissed with the costs and disbursements of this action.

FRED W. MATTOCKS,
Attorney for the Defendant
20 The Borough of Northvale, in the
County of Bergen,
Closter, N. J.

Rule for Judgment

Therefore let a jury come thereupon before the Judge of the Circuit Court on the second Tuesday of December A. D. one thousand nine hundred and twenty-seven by whom &c. and the same day is
30 given to the parties aforesaid at the place aforesaid.

This cause being regularly on the list for trial at the December Term A. D. one thousand nine hundred and twenty-seven and the same being called and both parties appearing and a jury empanelled and sworn and the evidence the respective parties offered and the Court on motion of Counsel for the defendant the Court granted a Non-Suit, and the jury was released of the cause.

40 It is thereupon on this twenty-second day of

County Clerk's Certification.

March A. D. one thousand nine hundred and twenty-eight Ordered that judgment final be entered in favor of the defendant and against the plaintiff Albert Arnn for the sum of Seventy-one dollars and Fifty-five cents costs.

Therefore it is considered that The Borough of Northvale in the County of Bergen do recover
10 against Albert Arnn the sum of Seventy-one dollars and Fifty-five cents (\$71.55) for the costs by the Clerk here taxed in favor of the defendant and with his assent.

Certification

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

I, JAMES W. MERCER, Clerk of the County of Bergen and also Clerk of the Circuit Court in and for said County, do hereby certify that the foregoing is a true record of the above case.

IN TESTIMONY WHEREOF I have hereunto set my hand and affixed the seal of said County and Court at Hackensack this
30 twenty-second day of March A. D. one thousand nine hundred and twenty-eight.

JAMES W. MERCER,
Clerk.

Case.

A Jury was empanelled, accepted and sworn.

The Court: Who is moving for a view, you, Judge Mattocks?

Mr. Mackay: Judge Mattocks.

10 The Court: Of course, you will have to arrange for transportation.

Mr. Mattocks: Yes; that will be all right. We will arrange to pay for it.

The Court: Where is this borough?

Mr. Mattocks: The Borough of Northvale, that is in the northeastern part of the County.

The Court: How far from here?

Mr. Mattocks: I should say about nine miles.

20 The Court: Then, if the jury leave here about quarter of ten, they would get up there—

Mr. Mattocks: And back again by ten o'clock?

The Court: Leave here and make their view, or would you rather open your case tomorrow, and then go up?

Mr. Mattocks: It is immaterial to me.

Mr. Mackay: It does not make any difference to me, your Honor. I think it would take about three-quarters of an hour to go up there.

30 The Court: Three-quarters of an hour, and back?

Mr. Mackay: No. A half to three-quarters of an hour, up there.

Mr. Mattocks: Unless the jurors could meet at Northvale. We want, of course, to have the case opened in the morning first, unless we could open it now.

The Court: You may open the case, and then we will arrange for the view later. Tomorrow morning, at ten o'clock.

40

(Recess.)

Case.

Hackensack, N. J., December 20, 1927.

10:00 A. M.

TRIAL RESUMED.

The Court: I understand there will be an opening, and then the jury will go out to view the premises. 10

Mr. Mattocks: That is the way I understand it.

The Court: Yes.

Mr. Mackay opens the case to the jury on behalf of the plaintiff.

Mr. Mattocks opens the case to the jury on behalf of the defendant.

20 The Court: Members of the jury, the counsel for the defendant has requested that you view the premises, and counsel for the plaintiff has not any objection, so we have arranged that you go out to this land and view it.

You may swear two officers to go with the jury.

Mr. Mackay: May I ask your Honor that the plaintiff be permitted to go with the officers, and counsel to point out?

30 The Court: Well, if you and Judge Mattocks will agree as to what has been pointed out. All right, swear the officers, please.

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

(The jury returned.)

40

Albert Arnn, direct.

ALBERT ARNN, the plaintiff, sworn as a witness on his own behalf, testified as follows:

Mr. Mackay: I would like to have this map put on the board, if your Honor please.

10 (Map placed on board before the jury, and designated Exhibit P-1 in evidence.)

Direct examination by Mr. Mackay:

Q. Where do you live, Mr. Arnn? A. I live at Norwood, New Jersey.

Q. And what is your business? A. I have been in the concrete products business.

20 Q. And how long have you been in that business? A. I have been in the business a number of years. Outside of Bergen County, I have been affiliated with the Eastern Fireproofing Company in the concrete work there.

Q. Were you ever in business in the Borough of Northvale? A. Yes, sir.

Q. In the County of Bergen? A. Yes, sir. Nineteen—

Q. When did you commence business in the Borough of Northvale? A. In nineteen and twenty-two.

30 Q. And in what location in Northvale did you have your business? A. On the north side of Paris Avenue between Union and Charles Street.

Q. And can you refer to the map on the board; is that the picture of your place of business on the upper right-hand corner? A. It is; yes, sir.

Q. And when you started in 1922, just where was it located, on what property? A. In 1922, it was on the—facing on Union Street, lot 15, and so on out.

40 Q. Yes. And how long prior to 1922 had you

Albert Arnn, direct.

been in possession of that property? A. About twenty—let us see. Around eighteen or twenty years at that time.

Q. And under what document or instrument did you go into possession of that property? A. I bought it from the Borough of Northvale. 10

Q. And when? A. In nineteen and four, I think it was.

Q. I show you a certificate of tax sale from D. S. Firenze of the Township of Harrington to Albert Arnn, dated August 20, 1906, and recorded in the Bergen County Clerk's Office on the 29th day of August, 1906, in book 186 of mortgages on page 489, and ask you if that is the instrument under which you went into possession of this property? A. (Referring) It is. 20

Q. Does that instrument cover other property besides the property in which you have your place of business? A. It does.

Q. Will you just refer to the particular lot?

Mr. Mattocks: I object. The instrument speaks for itself, and I think it ought to be introduced in evidence.

The Court: Well, I will permit him to identify the particular property. 30

Mr. Mattocks: But not for the purpose of testifying as to what it contains.

The Court: The instrument speaks for itself.

Q. Will you just refer to that certificate of tax sale, Mr. Arnn, and tell the Court and jury which particular lots your property is located on, your place of business? A. There has been a change. There has been a new assessors' map made, since I have had this property, there has been a change, you see, from block 30 to block 110. 40

Albert Arnn, direct.

Q. Well, referring to that certificate, what block and lot numbers is the property covered by? A. Thirty.

Q. Thirty? A. Yes.

Q. That was on the old assessment map? A. Yes, sir; if I remember; I think I remember rightly.

Q. Now, on the new assessment map, what block number would it be in? A. 110.

Q. Block 110 on the new assessment map? A. Yes, sir.

Mr. Mackay: I offer the certificate in evidence.

Mr. Mattocks: I have no objection, except that it is at variance with the complaint, your Honor. The plaintiff contends that he is the owner of the premises.

The Court: Well, it is his proof.

Mr. Mattocks: I object to this as not proving ownership of the premises.

The Court: Well, we will meet that later on.

Mr. Mattocks: Exception.

The Court: I will allow it for the time being.

(Certificate marked Exhibit P-2 in evidence.)

Q. Now, after receiving that certificate of tax sale, Mr. Arnn, Exhibit P-2, did you continue to pay the taxes on the property? A. Yes, sir.

Q. And have you paid them right down to date? A. I have the 1926 in my grip there.

Q. Yes. And has anyone disturbed you in your possession of that property since 1906? A. No, sir.

Q. Has anyone made any claim of title to the property since 1906? A. No, sir.

Albert Arnn, direct.

Q. Has anyone endeavored in any way to interrupt your possession of the property since 1906? A. No, sir.

Q. And you say in 1922 you commenced business on the property? A. I did.

Q. And what kind of business? A. In clearing up the ground ready to pump sand and to manufacture concrete products.

Q. And was there any particular reason for your locating your business on that particular property? A. Well, it was on the main thoroughfare, and I had laid out plans to work back, as there was—I wanted to work back into the property so that I could keep pumping the sand near where I could get ahold of it and handle it easily.

Q. Now then, from 1902, did you manufacture your concrete products? A. I did; yes, sir.

Mr. Mattocks: May I correct that? I think the certificate is dated 1906, do you mean?

Mr. Mackay: I am talking now from the time he commenced his business on the property, and the certificate is dated 1906.

Q. When you started your manufacturing business in 1902, did you carry— A. 1922.

Q. 1922? A. Yes.

Q. Yes. And did you carry on that business through what part of 1922? A. We started in the latter part of—around March, I guess, or the latter part of April, and we carried on the business through 1922, 1923, 1924, 1925, up through practically all of 1925, up through December.

The Court: 1925?

The Witness: Yes, sir.

The Court: 1926?

Albert Arnn, direct.

Mr. Mackay: No.

The Witness: No, no. Nineteen twenty—December, the first part of December, nineteen and twenty-five, is when we did our last manufacturing.

10 Q. And what was the reason that you discontinued your manufacturing in December, 1925? A. Being flooded out by water from the drain that was laid on the north side of Paris Avenue.

Q. Now, will you just refer to the map and show the jury where that drain begins and where it ends with reference to your property? A. Shall I get up?

20 Q. Yes. Just get up and point it out. A. (The witness stands before the map, Exhibit P-1.) It begins up here at Sharer Street, coming down there and goes across to my property here (indicating).

Q. Where does it end? Where does the drain itself end? A. Right here at—on the—about where this mark is here (indicating).

Q. And, referring to the map, that would be west of your property? A. Yes, sir. It would be about one hundred and—I should judge between one hundred and one hundred and twenty-five feet from where my property is.

30 Q. Now, where is Charles Street on the map? A. Charles Street is right here (indicating).

Q. That would be east of your property? A. East of my property.

Q. Yes. Now, you say you were flooded out in December, 1925? A. Yes, sir.

40 Q. Just tell the Court and jury what you mean by that; in what way were you flooded out? A. In December, going up one morning to go to work, of course,—should I go ahead and lead up to me going up to the property?

Albert Arnn, direct.

Q. Just tell us what happened. A. All right, Sir. In December, nineteen and twenty-five, the Borough of Northvale started in this construction of this drain. They distributed the pipes along in front of my place on the ground, and they was left lay there for quite a number of days. Then they completed, as you see, down to that mark there that I have there, within 125 feet of my property; they completed that end, and then, in turn, they took the pipe that is laying in front of my place some place else; I couldn't say just where they had taken it, but they had taken that away. Then they started in to construct a little open ditch, which I have pictures to show the change by the latest construction in front of my property. I immediately—there is a neighbor who lives across the street from me, and that is the man who lives in the house right near my property by the name of Muzzio; I went over into Muzzio's yard, and there we spoke of this question, and what—what an injustice it was doing to me, and he says—

Q. Never mind. Do not tell us what you said to Mr. Muzzio. A. All right.

Q. Or what he said to you. A. No.

Q. What did you do, now, when you saw this condition in front of your property? What did you do besides going to see Muzzio? A. I left Muzzio and went and—to—got the Mayor, Firenze, at Muzzio's suggestion—

Q. No. Do not tell us that, what anybody suggested. A. No.

Q. What did you do, yourself? You saw the Mayor? A. Yes, sir; and brought the Mayor down with me.

Q. And the Mayor's name was, at that time? A. Dominick Firenze.

Albert Arnn, direct.

Q. Mayor Firenze? A. Yes, sir.

Q. And did you bring him down to your property? A. I did.

10 Q. All right. Then, what else did you do? A. I asked him, then, why it was that, according to the—the plan that they had laid out, why it was that they did not follow that out, the ordinance that they had made; I asked him why they did not follow it out and lay the pipe down by my property.

Q. Yes? A. I also asked him why it was that they diverted this water down on my property. I asked him—

20 Q. Yes. Well, go on. A. —why they diverted this water down on my property. Also, then, I says to him, I says to him, I says, “You are not giving me a square deal. Here I am, a property owner, paying taxes.” I said, “Now, I am paying between two hundred and fifty and three hundred dollars a year taxes on this property. You are going ahead now and going to deprive me of making a living.”

Q. Yes? A. “You are going to take my rights away from me.” I said, “Now,”—

30 Mr. Mattocks: Of course, your Honor, this has nothing to do with the obligation of the Borough of Northvale.

The Court: I am just admitting it because—

Mr. Mattocks: Any statements to an official, of course, are not binding upon the borough.

40 A. (Continuing.) This is just what the—what I said to him.

Albert Arnn, direct.

Q. Never mind. A. To the Mayor. I am saying it was I said this to the Mayor.

Q. Never mind. Wait until you are asked a question, please.

The Court: I will sustain the objection.

10 Q. Did you go before the Mayor and Council at any time after this condition arose? A. Yes, sir; the following meeting night.

Q. And when was that? A. That was the first meeting night of the Council in January, nineteen and twenty-six.

Q. And at the meeting of the Mayor and Council, did you protest about this condition that existed in front of your property? A. I did; yes, sir.

20 Q. And what did you say to them? A. I told them how I had went to Mayor Firenze and how I had plead with him not to divert the water on me, and I told them that I had claimed my constitutional rights which every citizen has. I says—I told him as to what I had told Firenze. I says, “Now, the constitution of the State of New Jersey gives a man rights.”

Q. Did you ask him to remedy the condition for you? A. Yes, sir.

30 Q. Did you ask him to complete the drain or sewer down to Charles Street? A. I asked him the reason why they didn't change it and they wouldn't give me any reason.

Q. They wouldn't give you any reason? A. No, sir.

40 Q. Now, prior to the construction of this drain or sewer from Sharer Street, where did the surface water go from Sharer Street down? Referring to the map, will you show the Court and Jury? A. Down here (indicating).

Albert Arnn, direct.

10 Q. From Sharer Street first, starting there. A. The water come down here, see (indicating)? There was an old drain, as you see here (indicating). One drain already in. Then the water come down to the railroad here (indicating), and then it run due north to the railroad, about eight hundred feet, about, along up, I should judge, here (indicating); then it went under the railroad in the culvert, and then went out towards Sparkill Brook.

Q. Now, at that time, and prior to the construction of this drain, from Sharer, within 125 feet of your property,— A. Yes, sir.

20 Q. —did the surface water come down beyond the railroad and overflow onto your property? A. No, sir.

Q. Did you ever have any trouble prior to that time with surface water overflowing onto your land? A. No, sir.

Q. And after the construction of this sewer or drain to within one hundred and twenty-five feet of your property, in what quantities did the surface water come onto your land? A. Well, it come down in volumes, large quantities of it.

30 Q. And what was the result of that coming onto your land? A. The result was that it washed in the banks on the side of the lake. It washed in the mud, into the lake. It deprived me from manufacturing products in my plant because of the water coming in.

Q. And you speak of a lake on your property. Just describe that lake? Is that a natural lake, or an artificial lake? A. It is an artificial lake.

Q. How did it get on the property? A. I built the—I dug the lake out on this property.

40 Q. And for what purpose did you dig the lake? A. To get the sand.

Albert Arnn, direct.

Q. And what kind of sand was it that you wanted to get? A. I wanted to get the good, clean sand for the manufacturing of concrete products.

Q. Yes. And was it good, clean sand that you got from the lake? A. Yes, sir. I have a specimen with me. 10

Q. And did you use that sand in 1922, 1923, 1924 and 1925 in the manufacture of your products? A. I did.

Q. Were you able to use it after 1925 when this drain was constructed? A. No, sir; I have not.

Q. And why were you not able to use it? A. Because the sand is full of loam. In the lake, there was about, I should judge, from eighteen inches up—I could not tell, I did not make soundings all over, but a number of soundings I made, was from eighteen inches on up. 20

Q. Did you use any of the sand in the lake at all? A. I have not.

Q. You have not used any of it? A. No, sir.

Q. Did you do anything yourself, Mr. Arnn, after December, 1925, to try and reduce the damages that was being done by this water? A. I did; yes, sir.

Q. And what did you do? A. I had at that time in stock a lot of large pipe which I had there, and I laid them all along the front to keep the water from—from coming over so that—in such a manner that it would wash out the property. 30

Q. And what else did you do? A. And on the one side, I put a heavy log, some timbers along the one side, to keep it from coming in the other way. That is, it broke the bank down, it would wash in and would keep washing the bank in. So I tried to avoid that.

Q. And did it remedy the condition at all? A. 40

Albert Arnn, direct.

It helped the banks from falling in; but I still got the water.

Q. You still got the water? A. Yes, sir.

Q. Did you go again, after the meeting in January, 1926, to the Mayor and Council? A. I did; yes, sir.

Q. And when did you go again to them? A. I went in June.

Q. Of what year? A. Of nineteen and twenty-six.

Q. 1926? A. Yes, sir.

Q. And at that meeting, did you then take up with them the condition about the water coming on your property? A. I did. I went and asked them—I said, “Now, let us get together on this and try to be men.” And I asked them personally, I says, “Now, I have come now, I think that I have done my duty. I have come now the third time before the Mayor, and the second time before the Council.” And I said, “Now, I want to find out from you what you are going to do.” I says, “You know—you know how conditions are.” I tried to explain to them how I had been flooded out, and so on, and so I said, “Now, what are you going to do? Are you going to continue this, of this drain down by my property, or what are you going to do? Are you going to divert the water back to its original course?” Councilman Platzer said, “No, we are not going to do anything.” One of the others—I could not say who it was—said something else to the effect that they knew what they was doing. “Well,” I said, “now I am going to give you the data that I have.” I said, “Now, I have come here as a man, as a taxpayer, trying to—asking you for constitutional rights.”

40

Albert Arnn, direct.

Q. And did they do anything? Did they do anything for you? A. No, sir; they did not.

Q. Did they come down to the property after you had been at that meeting at all? A. They did not.

Q. Have they done anything since 1925? A. In April of this year— 10

Q. That is 1927? A. Nineteen and twenty-seven.

Q. Yes? A. They start—they started and put up a big embankment along in front of my property.

Q. What kind of an embankment? A. Well, at the time that they—they put it up, it was around, I should judge—it was sixteen or eighteen inches high, probably more, filled in all along in front of the property; prior to that time, it was all open.

Q. Prior to April of this year,— A. Yes, sir. 20

Q. —it was all open? A. Yes, sir.

Q. And now, do you know the diameter of your lake that you had there? A. I know approximately, it is—it is about running between 65 and 70 in length; on the one end it runs about 65, and tapering off more in width at the other end, and probably between 50 and 55.

Q. And will you tell us approximately how many square yards of sand you would take out of that lake in a year's time? A. Well, the capacity which I could take it out; do you mean that? 30

Q. Yes. A. Is that the question?

Q. Yes. What you can take out in a year's time in carrying on your manufacturing business? A. How much I did take out?

Q. How much could you take out? How much would it produce a year? A. Yes. Well, we produced 100 yards a day.

Q. 100 yards a day? A. Yes, sir.

Q. And do you know, can you tell us, in your 40

Albert Arnn, direct.

opinion, what would be the reasonable value of that sand per yard?

10 Mr. Mattocks: I object, if your Honor please, if this is asked for the purpose of arriving at loss of profits, that no part of the land or sand underneath the lots belonged to this plaintiff, and he has no right to calculate the value of the sand in arriving at any loss of profits in this case.

The Court: Well, I will permit it. It might or might not be. There may be another aspect. I am merely holding by tax title.

Mr. Mattocks: Exception.

20 The Court: Yes. You may renew your motion later to strike it out.

Q. Will you answer that question?

(Question read.)

A. As it was in the lake, or as it is out, do you mean?

The Court: Well, suppose you qualify this man a little more as to his knowledge of values.

30 Mr. Mackay: Yes.

Q. How long did you say you had been in the concrete business, Mr. Arnn? A. I have been in the concrete business in Bergen County here for the last—since 1922.

Q. Yes. And you have been manufacturing concrete products? A. Yes, sir.

Q. And what do you use in the manufacture of concrete products? A. Sand.

40 Q. Sand? A. Gravel.

Albert Arnn, direct.

Q. And have you bought and sold sand of this quality? A. I have.

Q. In the manufacture of concrete products, similar to what was contained in this lake on your property? A. I have.

10 Mr. Mackay: I think he is qualified now, if your Honor, please.

The Court: I will allow it.

Mr. Mattocks: May I just ask a question, your Honor please, with regard to his qualifications?

The Court: Yes.

By Mr. Mattocks:

20 Q. You say this particular sand—you are referring to the sand in this lake? A. I did; yes, sir.

Q. Is this sand anything unusual? A. It is in a sense, yes.

Q. Then you have gotten sand like this in other places, have you? A. Not in this color, no.

Q. This is the only sand that you have got of this kind? A. Of this—

Q. At this particular place, isn't it? A. Yes, of that kind.

30 Q. You never bought or dealt in this kind of sand before? A. Not in the wash sand. I have bought and dealt in the pit sand, but not in the wash sand, the same as I had.

Mr. Mattocks: I admit the witness's qualifications with reference to—

The Court: Well, I understand he sold this sand.

By the Court:

40 Q. How long have you sold this sand, this particular sand? A. For the last four years.

Albert Arnn, direct.

Q. Have you sold much of it? A. Not in no great quantities; no, sir.

10 Mr. Mattocks: Of course, sand generally; I suppose a witness would be qualified to testify to the value of sand generally, not any particular value of this sand.

The Court: Well, he said he dug this sand and he sold it and been selling it for the last three or four years.

Mr. Mattocks: This particular sand?

The Court: Yes. I think that qualifies him as to this.

By Mr. Mackay:

20 Q. Will you answer the question? A. Will you read me that question again?

Mr. Mackay: Will you read him that question? (Question read as follows):

“Q. And do you know, can you tell us, in your opinion, what would be the reasonable value of that sand per yard?” A. \$2.50, delivered in my neighborhood.

30 Q. Now, then, just tell the Court and jury the manner in which you carried on your business, that is, with reference to beginning from the manufacture of the products, and then the disposition of them on the market? A. I manufactured—well, tile blocks, septic tanks, and other—other articles, small articles. I manufactured and sold them and installed a lot of them.

Q. Yes. And in selling them, did you keep any accounts of your sales for the different years? A. I have; yes, sir.

40 Q. And did you keep them personally? A. Sir?

Albert Arnn, direct.

Q. Did you keep them personally? A. No. I did not keep them personally, no.

Q. And what was your method of keeping your records? Just tell the Court and jury how you conducted that? A. My method was of making a slip at the shop; not living near the shop, I made— 10 I had a slip at the shop, and I in turn turned it over to my wife, and she kept the books.

Q. And you have those records with you today? A. I have; yes, sir.

Q. Now, what machinery did you have in your buildings in December, 1925, when this water, as you say, flooded the property? A. I had the complete equipment for a six-inch centrifugal pump; that includes two floats; it includes an A-frame 20 where a chain block is used to—raising and lowering of the suction; it includes about 10 feet of six inch—there is a difference between the hose, between the discharge and the suction, because one is much more expensive than the other. And it includes about six or seven feet of the suction, and I had 20 some feet of the discharge. I had in the neighborhood of 100 feet of six-inch pipe for a discharge into the—into the bin. That requires numbers of lines of ropes to hold the float in its position. I had a concrete mixer which—at the 30 sand bin. I had numerous moulds for making corner blocks. I had cars that was mounted, and dismantled somewhere. I had a tractor for power. I had also a small gas engine for light work that I used. I had moulds for making of pipe, five-foot, five-foot in height, three feet in diameter. I had six or eight of those moulds, and I had some six or eight smaller moulds that made the two-foot in diameter. I had other moulds for making an eight-inch square pipe, and so on down. 40

Albert Arnn, direct.

Q. Yes. A. That is, smaller ones.

Q. And what became of that machinery and equipment? A. Well, it is stored away up there in the shop.

10 Q. Can you make any use of it whatever? A. I cannot as long as the drain is running down on me.

Q. Yes. Could it be put in any condition where by use could be made of it? A. It could; yes, sir.

Q. And have you any idea what would be necessary to be done in order to do that? A. Well, it would be necessary to stop the flow of the drain down on me; it would be necessary to repair them and to get them in order.

20 Q. Have you any idea what it would cost to repair them? A. Yes, sir; I have a list made out what I think would be the costs of repairs.

Mr. Mattocks: I object to that, your Honor please. The witness is not competent to testify.

The Court: Read the question.

(Question read.)

The Court: I sustain the objection.

30 Q. When did you buy this machinery and equipment, Mr. Arnn? A. I bought—in 1922, I bought the pumping outfit.

Q. Where did you buy that? A. I bought a lot of it over in Long Island City from the—known then as the Degman Company.

Q. Was it new or second-hand? A. Some of it was new and some of it second-hand.

40 Q. How much of it was new, and how much was second-hand? A. Well, I should judge about one-half of it had been used.

Albert Arnn, direct.

Q. Can you tell us the articles that you bought new? A. I bought a new six-inch centrifugal pump.

Q. How much did you pay for that? A. That cost in the neighborhood of between four and—around four and five hundred dollars, I think it was. 10

Q. Yes. What else did you buy new? A. I bought two hose; I had a new piece of hose, that was 20 feet, and I had to pay in the neighborhood of—I think it was \$5.00 a foot, I think it was, for that.

Q. How many feet? A. That is twenty, either twenty or twenty-two feet. I forget which it is. Say 20 feet.

Q. And what else? A. I had to buy chain blocks. 20

Mr. Mattocks: I object to all of this testimony upon the general ground that it is not a part of any damages, or cannot be made a part of any damages against this defendant.

The Court: I said I would admit it subject to being stricken out.

Mr. Mattocks: I just want to get my objection. 30

The Court: Yes.

Mr. Mattocks: Entirely too remote.

The Court: What was the last question? (Question read.)

By the Court:

Q. Is that what you used in your business? A. Yes, sir; that is the discharge hose. Then I had to have about—it run between 8 and 10 feet of 40

Albert Arnn, direct.

suction hose, which runs higher than what discharge hose does; it runs about \$7.00 a foot.

By Mr. Mackay:

10 Q. Yes. And your chain blocks, how many of those did you buy? A. I had two. I had to buy two of those.

Q. Two. And what did they cost? A. They come at around—I think one was fifteen and—between fifteen and eighteen dollars, I think it was.

20 Q. Is there anything else that you bought new? A. That was the—that was new, yes, sir; that was the pump and the two—two lines of hose, and the chain blocks; that was new, that outfit. Then I had to buy the—I bought the six-inch pipe, the iron pipe; I bought that second-hand.

Q. Now, in what way did the water damage this machinery and equipment that you had? A. When rubber hose is not used, it deteriorates of its own self faster than what it does when it is—when it is in use.

30 Q. Yes. But how did the water—I am asking you—damage this machinery and equipment? A. Well, the floats, for instance, I had to take them out of the water. I had large floats that this—to install the pump on, and I had to take them out of the water. In taking them out of the water, being built of a double—being a double shell, as we would class it, it seemed to have, as it would—the wood seemed to break away from the water-proofing in between the two—in between the two bodies, and that is the—they are practically a total loss to me.

40 Q. You say you bought them when? A. In nineteen and twenty-three, I think it was.

Albert Arnn, direct.

Q. 1923? A. Yes. I had the pump before I had the floats.

Q. And did you buy the floats new? A. No. I did not buy the floats new.

Q. You did not buy them new? A. No.

10 Q. Now, did you keep a list of your customers who bought from you? A. I have; yes, sir.

Q. From 1922 down to December, 1925? A. Yes, sir.

Q. Did you do any business at all after December, 1925? A. I sold off what products I had. I had quite a few dollars in products. I made a sale the other day down to—I made a sale until around Thanksgiving, I think it was, that I had sold some products that I have on hand.

20 Q. And how much have you sold since 1925 down to date? A. I think it runs four or five or six—let us see. I just cannot recall just the amount, but it runs around \$600, I think.

Q. About \$600? A. Something in that neighborhood.

Q. And are those products you manufactured after 1925 or before? A. No, sir. I manufactured them before December, 1925.

30 Q. Before the water came on the place? A. Yes, sir.

Q. I see. Have you sold any products or manufactured any products and sold them since the water came on the place? A. I have not manufactured any products since December, nineteen and twenty-five.

40 Q. Now, can you tell us the amount of products that you had on hand all manufactured in December, 1925, prior to the time that the water came on there? That is, the value of them, completed products? A. Well, valued, I guess, around seven

Albert Arnn, direct.

or eight hundred dollars, probably; maybe a little more.

Q. Seven or eight hundred dollars? A. Yes, sir.

Q. And you have sold about five or six hundred dollars worth of those? A. Yes, sir; every bit of that.

Q. Up to date? A. Yes, sir.

Q. Is that correct? A. Yes, sir. I think it will run probably, maybe, as high as seven hundred, as I can remember.

Q. Now, did you take pictures of this property? A. I did; yes, sir.

Q. And when did you take the pictures? A. I taken them in December, nineteen and twenty-five.

Q. And did you take any after that? A. I taken some afterward; I taken also prior to that time, a year prior to that time; I also had pictures taken, I think, two years prior, in 1923, I think.

Q. Now, I show you a picture and ask you if that is a correct representation of your property prior to December, 1925? A. (Referring) It is.

Q. And that shows the condition, does it, before the water came onto the property? A. Yes, sir.

Q. And with completed products? A. Yes, sir.

Mr. Mackay: I offer that in evidence, your Honor please.

Mr. Mattocks: No objection.

(Photograph marked Exhibit P-3 in evidence).

Q. Now then, you say, in December, 1925, you also took pictures of your property? A. Yes, sir.

Q. And I show you, first, a picture, and does that show a correct representation of the front of your property prior to the construction of the drain?

A. (Referring) It does; yes, sir.

Albert Arnn, direct.

Q. And the second picture, does that show a correct representation of your property? A. (Referring) It does; yes, sir.

Q. Just a minute. And a correct representation of the open ditch just before the water was—where the water came through on the property? A. It does; yes, sir.

Q. And the third picture. Does that show a correct—is that a correct representation of the condition of your property after the first rain while the ditch was overflowing in December, 1925? A. (Referring) It does.

Mr. Mackay: I offer those in evidence, your Honor, please.

Mr. Mattocks: Let us have them marked in the proper order.

Mr. Mackay: Yes. One, two, three.

(Three photographs marked Exhibits P-4, P-5 and P-6 in evidence).

Q. Now, I show you another picture and ask you if that is a correct representation of your property before the water was diverted into this drain? A. (Referring) Yes, sir.

Q. And another picture. Does that show a correct representation of how the water from the open ditch flooded your property after the first rain? A. It is.

Mr. Mackay: I offer those in evidence.

Mr. Mattocks: No objection.

(Two photographs marked Exhibits P-7 and P-8 in evidence).

Q. Now, you said, Mr. Arnn, that in April, I believe you said, of this year, they built an embankment of some kind along your property? A. I did; yes, sir.

Albert Arnn, direct.

Q. Is that so? A. Yes, sir.

Q. And did you have a picture taken of that condition after the embankment was put there?

A. I do; yes, sir.

10 Q. I show you a picture and ask you if that is a correct representation of the condition of your property in April, 1927? A. (Referring) Yes, sir.

Mr. Mackay: And I offer that in evidence. (Photograph marked Exhibit P-9 in evidence).

The Court: The hour of adjournment has come. A recess until 2 o'clock.

(Recess).

20

—
AFTER RECESS.

2:00 o'clock P. M.

ALBERT ARNN, the plaintiff, recalled for further direct examination, testified as follows:

By Mr. Mackay:

30 Q. Now Mr. Arnn, just at recess I asked you with reference to the picture showing the condition of your property in April, 1927, which was marked P-9. Now, referring again to this map, and running along from Sharer Street down to Charles Street, is there a brook beyond Charles Street? A. Yes, sir.

Q. There is a brook there? A. Yes, sir.

Q. And that is about how far from Charles Street? A. About 600 feet. Maybe a little more.

Q. Are there any other streets between Charles Street and the brook? A. Yes, sir.

40 Q. And do you know the names of them? A. I just cannot recall them now; no, sir.

Albert Arnn, direct.

Q. Well, can you tell us how many there are? Never mind the names. A. There is two streets, and then there is a large plot that runs in that belongs to the—to farm property, that is not listed as streets.

10 Q. I see. Now, have you made an examination of your books with reference to the amount of business that you did during 1922, 1923, 1924 and 1925? A. I have, yes, sir.

Q. Can you tell us, from memory, the amount of business that you did in 1922? A. I could not tell you exactly; no, sir. I have it listed.

Q. Have you made a list of it? A. I have; yes, sir.

Q. From the books? A. Yes, sir.

20 Q. And could you tell us, would that refresh your recollection, if you saw that list? A. It would.

Q. I show you a paper, and ask you what that is? A. (Referring.) That is a list of sales from 1922 to nineteen and twenty-six.

Q. Is that the list you just referred to that you made up from your books? A. It is.

30 Q. Now, refreshing your recollection from that list, will you tell the Court and jury the amount of sales that you made in 1922? A. Five hundred and twenty—

Mr. Mattocks: I object to that, your Honor please; not the proper proof of business done. He says he kept books, and no explanation why those books are not produced, and if this is a statement taken from the books, it certainly is not evidential.

40 Mr. Mackay: I might say that I am going to offer the books later by Mrs. Arnn, whose handwriting the entries were made in, but I want this—

Albert Arnn, direct.

The Court: If that is your only objection, Judge, on the statement of counsel, I will permit him to use this, if that be your only objection.

10 Mr. Mattocks: I object, also, upon the ground that the cause of action here is based upon a loss of profits, and this is not—well, I will withdraw my objection.

The Court: You withdraw your objection?

Mr. Mattocks: Yes.

Q. You may answer the question, Mr. Arnn. A. In nineteen and twenty-two, the sales was \$523.70.

Q. And in 1923?

20 Mr. Mattocks: What did you say 1922 was?

The Witness: Five hundred and twenty-three, seventy.

Mr. Mattocks: Five hundred and twenty-three, seventy?

The Witness: Yes, sir.

The Court: Five hundred and twenty-three?

30 The Witness: Seventy. 1923 were \$3,795.40.

Q. In 1924? A. \$5,431.16.

Q. And 1925? A. \$3,066.45.

Q. Now, does that represent the gross sales? A. It does; yes, sir.

Q. And how much of that would be profit? A. Between 30 and 40 per cent.

Q. Now, were your buildings damaged on the property, Mr. Arnn? A. I beg your pardon?

40 Q. By reason of this water flowing over the land? A. They were; yes, sir.

Albert Arnn, cross.

Q. And to what extent? A. To the extent of between fifty and one hundred dollars, I should judge.

Mr. Mackay: You may cross examine.

Cross examination by Mr. Mattocks:

Q. I show you a—

10

Mr. Mattocks: Have you any objection to this being introduced in evidence, another map?

Mr. Mackay: No.

Mr. Mattocks: No objection to this borough map being introduced in evidence. I will offer this map of the Borough of Northvale, assessment map covering the premises in question.

20

The Court: Is the defendant's exhibit going in as of now?

Mr. Mackay: I have no objection to it, to save time.

The Court: All right.

(Map marked Exhibit D-1 in evidence.)

Q. I show you Defendant's Exhibit Number 1, and ask you if your property is shown upon that map? Is that it, block 110? A. (Referring.) It is; yes, sir, with the exception of the—

30

Q. You are bringing an action in this case for damages to lots numbers nine to fifteen, and twenty-five to twenty-eight, inclusive, in block 110; is that correct? A. I am bringing an action for damages, with the exception of the two lots that the Borough own there; I own the rest of those. This map is laid off—

Q. I am just asking you what you are suing the

40

Albert Arnn, cross.

Borough on. Are you suing the Borough for the damages to lots nine to fifteen? A. Yes, sir.

Q. And twenty-five to twenty-eight, inclusive? Correct? A. I am; yes, sir.

10 Q. Now, do you know who owns lots 29 and 30? A. The Borough of Northvale, I understand.

Q. And the pipe line that you spoke of, coming down Paris Avenue,— A. Yes.

Q. Paris Avenue is shown on this map at that place, is it not; that portion of Paris Avenue shown on this map? A. It is.

Q. After this pipe line was put in, you say that a great deal of water came through this pipe line; is that so? A. It did; yes, sir.

20 Q. And flowed over your property? A. It did. Q. You are now bringing suit for? A. I am.

Q. And it flowed over property, number 29 and 30 lots? A. It did.

Q. It flowed over Charles Street? A. It went down that way. I suppose it flooded it.

Q. Charles Street. And the end of this pipe, where would you say that it ends on this map; can you indicate about where it ends, with this lead pencil? A. I can indicate somewhere near it; yes, sir.

30 Q. About where? A. The pipe line ends about—

Q. This is Union Street (indicating)? A. Yes.

Q. And this is Association Street (indicating)? A. Yes, sir. I will get Association Street, and I will go back 100 feet.

Q. Here is Association, Paris Avenue (indicating)? A. Yes.

40 Q. About halfway between the block, is it not? A. Something like that; yes, sir. About right in there, see (indicating)?

Albert Arnn, cross.

Q. I see. So that, when this water came through there,— A. Yes.

Q. —through this pipe, and it flowed and flooded your premises, it also flooded lots 29 and 30 in block 105, did it? A. I could not say as to so much of that, that it did. It flowed all along my— 10

Mr. Mackay: I object on the ground that that is immaterial. There is no action brought here by the owner of lots 29 and 30.

The Court: I will allow that.

Mr. Mackay: Exception.

Q. Would you say that it flowed over on the south side of Paris Avenue, too; so much water that it flowed all over? A. This spring—

20 Q. No. I am talking about the time in question. A. I am talking—I am telling you when it did do it.

Q. Well, I am talking about when it did do it. When it did do it, did it flood over on the south side of Paris Avenue? A. Up to nineteen and twenty-six—

Q. I ask you to answer my question. When it flooded, did it flood over on the south side of Paris Avenue prior to 1926? A. It did not.

30 Q. Then you mean to say it only just flooded your lots? Were your lots the only ones that were flooded at the time you speak of? A. My lots, and the lots that was below me, naturally, got its dose, also.

Q. Well, you did not own those lots? A. I did not, no.

40 Q. And you did not own Charles Street, did you? A. I owned all the rest of the property on that side of the street with the exception of those two lots.

Albert Arnn, cross.

Q. You did not own Charles Street, did you? A. I owned both sides of the street.

Q. You did not own the street, did you? A. No.

10 Q. And this water flowed over Charles Street, did it? A. I should judge it did, yes.

Q. It certainly did? A. Yes.

Q. And it flooded to the west of you, did it not? A. To the west of me?

Q. To the west of your lots? A. I cannot account for flooding west of me.

Q. There is a street just west of you called Union Street upon that map? A. Yes, sir.

Q. Did it flood over that street? A. It probably did, yes.

20 Q. Well, will you say that it did not? A. Well, I am giving you—saying that it did.

Q. It did? A. Yes, sir.

Q. At the time you speak of, this water flooded over Union Street, at the time; flooded over your property? A. It flooded over Union Street, and then run in on my property.

Q. It flooded over Paris Avenue too, did it not? A. No, it didn't flood over Paris Avenue, no.

30 Q. It flowed over Union Street; is that correct? A. It flowed down Union Street.

Q. And over property of other people than yours? A. No doubt of that.

Q. No doubt of that? A. Yes, sir.

Q. Numbers of other people? A. I do not know about the numbers. I could not say that.

Q. Well, did it flood properties—lots in block 105? A. I could not say. 105 is a little higher than what my property is. I could not say whether it did or not.

40 Q. Well, the end of this pipe was about between

Albert Arnn, cross.

the division line of block 105? A. Yes. But the end of this pipe is much higher grade than what it is down 100 feet away from it.

Q. Well, the lots to the west, on the west side of Union Street, are about on a level with your lots nine to fifteen; isn't that so? A. On the east 10 side of Union Street?

Q. On the east side of Union Street, yes. A. On the east side of Union Street? I am on the east side.

Q. I say, the lots on the west side of Union Street are about on a level with your lots on the east side? A. The lots on the west side is a little higher than mine.

Q. A little higher? A. Yes, sir.

Q. But you wouldn't say that those lots were 20 not flooded at the same time that yours were? A. Well, I will say this: I will say that the water, the most body of the water would come down what you would say Union Street, and there it would break over at Union Street which, if you look at the pictures, you will see where it did break over Union Street, and you can see that it not only broke over Union Street, but it broke over from there down. The body of the water then started to work off. 30

Q. And the water also went along down toward the brook, did it not, when you had heavy rains? A. Well, it went down onto the meadows.

Q. Into the meadows? A. Yes, sir.

Q. To the east of you? A. To the east of me.

Q. And the brook would also overflow, would it not? A. I could not say that the brook would overflow; it would, probably, at times.

Q. Well, did it? A. I have noticed it on the— 40 on the other side of the street to it.

Albert Arnn, cross.

Q. You spoke about Mr. Muzzio owning some land opposite your property on the south side; is that not so? A. I spoke of Mr. Muzzio living on Association Street.

Q. Yes. And you spoke— A. On the—

10 Q. —about him owning some property there, is that so, that he did own some property opposite yours? A. Not—not opposite my place. When I spoke of Mr. Muzzio, in reference to me being at this drain, and Muzzio being in his yard.

Q. Well, did this water that you speak of flow over on Mr. Muzzio's lot, too? A. Not on Mr. Muzzio's property, no.

Q. It did not? A. It did not.

20 Q. I see. So the water did flow over Union Street, over Charles Street, and over other properties beside you, at that time? A. You cannot designate just where those streets are.

Q. Is that so? A. I could not designate Charles Street, only through measurements. Union Street, in front of me, I can designate, and—

Q. Well, how far east of your property is Charles Street? A. Well, it is supposed to be—from Union Street to Charles Street, is 200 feet.

30 Q. And you had a lot facing on Paris Avenue, 100 feet in width, running easterly from Union Street; is that so? A. Running easterly from Union Street; yes, sir.

Q. So that Charles Street was 100 feet farther east? A. Yes.

Q. Now, you know, then, where Charles Street is, don't you? A. I do; yes, sir; I—

40 Q. And you know that the water that you are complaining of flowed over Charles Street— A. Well,—

Albert Arnn, cross.

Q. —at the same time that it flooded yours? A. Sure; a certain amount of it, yes.

Q. Yes. Now, your buildings that you speak of were partly upon lot number 30, is that not so? A. According to your plans, you say—not the main building, but just only a shed and part of the sand bin that I have on the other side. 10

Q. Well, I will show you a sketch and ask you if that is a fair representation of your property, lot number 15, lot number 30, Charles Street and Union Street, and the end of the cobble stone pipe, or the end of the pipe and the cobble stone gutter along the front? A. (Referring.) Yes.

Q. Is that a fair representation? A. That is; yes, sir. That is a fair representation. 20

Mr. Mattocks: I will mark it for identification.

(Sketch marked Exhibit D-2 for identification.)

Q. Now, looking at this map, will you say where your buildings are? A. My buildings is running right along Paris Avenue, right off of Union Street, about right in that section there (indicating).

Q. And isn't it a fact that part of your buildings are on lot number 30, shown upon this sketch? A. None of the permanent buildings. 30

Q. And part of your structures? A. Part of the shed that is over the concrete mixer setting right in there is probably on the Borough property.

Q. And, as a matter of fact, your concrete mixer itself is on Borough property, is it not? A. I never knew it was until you said so this morning.

Q. Will you say it is not? A. I don't say it was not, because I didn't measure it, but I—in fact, I 40

Albert Arnn, cross.

thought that those two lots was included in my property all along; I never knew it until—

Q. Until you started suit, until after you started suit? A. Before I started suit, last year, about in October, of 1926.

10 Q. As a matter of fact, in your complaint you are asking for damages to lots numbers 29 and 30, is that so, in block 30, or block 110? A. I did not ask damages only on the property where I was working on.

Q. And that includes lots 29 and 30? A. I am not asking on this property.

Q. You do not know anything about what your complaint contains? A. My attorney will tell me just what—he has charge of that.

20 Mr. Mackay: In view of Mr. Arnn's statement, I ask to strike out of the complaint lots 29 and 30.

The Court: So ordered.

Mr. Mackay: We make no claim for damages to those particular lots.

The Court: So it is lots 9 to 15, and 25 to 28, inclusive.

30 Q. Now, where you took the sand out of this hole, you deposited it upon lot number 30, did you not? A. According to that plan, I have been using it; yes, sir; part of lot number 30.

Q. You won't say that you did not put it on lot number 30, will you? A. No, I won't say I did not, no, no.

Q. And it was this sand that you dumped on lot number 30 that you used in your business? A. Part of it, yes. My—

40 Q. You had a lake, so to speak, on your property? A. I built a lake on my property; yes, sir.

Albert Arnn, cross.

Q. You built it? A. I dug it out.

Q. How did you build this lake to start with; how did you do it? A. My two sons and I. Shall I go into details of when it was and so on?

Q. Well, there was top soil there, was there not? A. Sir? 10

Mr. Mackay: Answer the question.

A. (Continuing) Yes. I cleaned off the top soil, which was about a foot of black soil.

Q. About a foot of top soil? A. Yes, sir.

Q. And you took that off? A. Then I taken and started with a—just using a small hoe; I had to take a lot of it out by hand.

Q. And then you took out the sand? A. After taking off the top soil, I started in on the sand. 20

Q. You took out the sand? A. Yes, sir.

Q. And you used this sand in the manufacture of your concrete products? A. I did.

Q. And how large a place did you make there? A. I had a hole that was as it is now.

Q. Well, was it any larger than it is now? A. No. But I am saying, each year, naturally, it has made it larger. .

Q. Yes. How large is it now? A. It is running, I think—I just call it on the west side, facing on— 30 on the west side, it is about 65 feet wide, I should judge, running back about 65 or 70 feet, running east.

Q. So that the hole now is about how big, 40 by 60? A. 60 by almost 70, I think, I should judge.

Q. About 60 by 70? A. Yes. That is in the front, but it runs off more—it runs narrower in the back.

Q. Well, the area, will you say, was about 60 by 70, is that correct? A. Well, it might be. 40

Albert Arnn, cross.

Q. And how deep is it? A. Well, I could not say how deep it is now.

Q. How deep was it? A. In some places, it was more than 9 feet.

Q. More than 9 feet? A. Yes, sir.

10 Q. And in some places, it was what, two feet? A. The greater area, that is, over the greater area, it was practically running on the average of say seven—seven feet, I should judge.

Q. About seven feet? A. As a whole.

Q. You would say it averaged about seven feet? A. That was the depth when we last quit pumping sand.

20 Q. Yes. And you say you took out 100 yards a day? A. When we pumped sand, we timed it on the last pumping, my two sons did the pumping themselves, and they timed themselves just to see how fast they could get it out.

Q. I am not talking about how fast you could take it out. A. Well, I am giving you—

The Court: No. We want to know the quantity.

The Witness: The quantity, that time, they taken out 100 yards in less than a day.

30 Q. Well, how long did you work at this place? A. Sir?

Q. How long did you work there? A. How long the work day was?

Q. How long were you working at this place taking out sand? A. Well, we only taken out sand just as we wanted to use it.

Q. Well, you did not work every day? A. Taking out sand, no.

40 Q. And how many days did you work in a year? A. Well,—

Albert Arnn, cross.

Q. In 1922, we will say; how many days did you work? A. I could not tell you the exact number of days, because there was rainy days, and so on, that we could not—we did not work.

10 Q. Well, how many men did you have working there? A. In 1922, I had two men and myself a greater portion of the time, and part of the time I probably had one or two extra at different times.

Q. Well, can you tell us how many cubic yards of sand you took out of that hole altogether? A. I could not, no, sir.

Q. You cannot tell us? A. No, I could not, just how many had been taken out.

20 Q. Well, can you calculate now how many cubic yards you have taken out of that hole, if it is 60 by 70, and 7 feet deep? A. Not off-handed; no, sir.

Q. You could not tell us that? A. No, sir.

Q. Well, you would be surprised to know it was about ten thousand yards? A. It might be.

Q. Cubic feet, I mean. A. Yes.

Q. And how many cubic feet in a yard? A. Twenty-seven, isn't there?

Q. And how many yards would you then have? A. How many yards, what?

30 Q. How many yards would that make, about five hundred yards? A. Well, it would be five times the amount, if you want to work it out.

Q. Wouldn't that be about five hundred yards? A. Well, I will say it is.

Q. So that in three years' work there, you only took out five hundred yards of sand, is that true? A. Well, we are not saying that—that has only been five hundred yards of sand.

40 Q. Well, what would you say that the quantity is? A. Well, because the sand runs in pockets, I

Albert Arnn, cross.

couldn't tell you just exactly how much; there is places where the sand is much deeper than what it is in others. I never give it a thorough measurement. I am just giving you approximate.

10 Q. Well, we are approximating; we are asking your approximation. You say it averaged about seven feet deep by sixty feet long and seventy feet wide? A. Yes.

Q. Now, can you explain to this jury whether there is more than five hundred yards of sand in that capacity, in that space? A. No.

Q. You could not say that, could you? A. If that is—

20 Q. You won't dispute it, say in three years, you only used five hundred yards of sand? A. About that.

Q. As a matter of fact, you discontinued manufacturing your products before December, 1927, or 1925, isn't it so? A. No, sir.

Q. Didn't you tell various people in Norwood or Northvale that you had discontinued manufacturing your products? A. I did not.

30 Q. You never told anybody that you discontinued manufacturing your concrete blocks? A. I told them that—at 1925, that parties wanted some blocks, and I told them, I says, "Now, I am building a house of my own, and I am using all of my concrete blocks, and I am using all of my material that I have on the yard, that is in the block line or something similar to other blocks that I use," I said, "I am using them on my own place; I am building a house in Norwood." Different parties told me, and I says,—I told them that I couldn't—wouldn't make any blocks for nobody then, because I was too busy on my house in Norwood.

40

Albert Arnn, cross.

Q. When was that? A. That was in 1925, along about—let us see. I was working in October.

Q. And that was before this drain was put in? A. Before the drain was put in.

10 Q. That you told somebody in Northvale that you had no blocks for sale? A. I couldn't recall who I told, or anything like that. I might not have told anyone. I couldn't say that.

Q. I am asking you what you did tell somebody? A. Yes, I did; whether in Northvale or not, I couldn't say.

Q. But you did tell somebody or other who came from Norwood or Northvale that you had no more blocks for sale? A. At that time.

Q. In October, 1925? A. At that time.

20 Q. And that was before this drain was put in? A. Yes.

Q. Correct? A. Yes.

Q. And you could have manufactured your products with other sand, couldn't you? A. I could not, no; not at my place of business.

Q. You could not manufacture your products with any other sand? A. Not in my place of business, no.

30 Q. You could not buy sand? A. I could have bought the sand, yes.

Q. And had it delivered there? A. Had it delivered there.

Q. And you could have manufactured your products? A. No, I could not.

Q. You could not? A. No, sir.

Q. Isn't it a fact that the only reason why you stopped manufacturing blocks was because you could not pump any more sand? A. (No response.)

40 Q. What is the matter, can't you answer the question? A. Well, I am just collecting my mind.

Albert Arnn, cross.

Yes, I had to stop because I could not pump any more sand.

Q. You could not pump any more sand? A. Why, certainly.

10 Q. I see. And the water that flowed over your lots was only when they had heavy rains; isn't that so? A. That is where the main trouble was, the heavy rains.

Q. Now, prior to the installation of this drain along the north side of Paris Avenue, isn't it a fact that the water came down Paris Avenue before that? A. Not to any amount.

Q. It did not flood over your property? A. Not to any amount.

20 Q. Not to any amount? A. No, that it would stop me from working. Of course, naturally, there was a little bit of rain water.

Q. Well, the water did not stop you from working, did it? A. It certainly did.

Q. Didn't you work right in this lake? A. I could not manufacture in the like. I manufactured in the sheds and the shop.

30 Q. Do you mean to tell this jury that the water was so extensive after this pipe line was put in that it flooded your buildings away? A. It flooded my buildings, yes, sir, and destroyed property in the buildings.

Q. And how high are your buildings? Are they above Paris Avenue? A. No. They are not above Paris Avenue.

Q. They are not? A. No.

Q. And when the water was so high that it flooded your buildings, it extended all over the swamp, didn't it? A. It did.

40 Q. After the pipe was put in? A. After the pipe was put in.

Albert Arnn, cross.

Q. It flooded all over the whole swamp, didn't it? A. It would have to; yes, sir.

Q. That is, over Charles Street, and Union Street, and dozens of other properties owned by different people? A. I owned all in that section.

10 Q. That is so? You did not own the corner? A. I did not own them two lots, but I owned all the rest of it.

Q. No. But you did not own the property down near the brook? A. I owned within a couple of hundred feet of the brook.

Q. Do you say you had a tax title? A. I had; yes, sir.

Q. You do not own it? A. Well, I have the title; I am holding possession of it.

20 Q. Well, now, prior to this pipe being put in, you say that there was no water, practically, coming down Paris Avenue at all? A. I manufactured right along each year up to 1925 without being bothered with water.

Q. Isn't it a fact that there were two pipes under the railroad carrying this same water under, the pipes under the railroad? A. Not to my knowledge, there wasn't.

30 Q. You do not know whether there was or whether there was not? A. Not to my knowledge; no, sir.

Q. So that there wasn't any water running down Paris Avenue from the railroad, east, prior to the putting in of this pipe? A. I am not familiar with that end of it up there so much as to say that there was.

Q. I said, running east from the railroad. A. Running east from the railroad?

40 Q. Toward your property? A. Sir?

Albert Arnn, cross.

Q. Toward your property? A. The water, a certain amount of it, I guess, was.

Q. Wasn't there water on the south side, running down in the ditch? A. When the ditch was open so you could get out.

10 Q. Doesn't it run there now? A. A certain amount, yes.

Q. Doesn't it flood over the south side of Paris Avenue now? A. Which ditch are you relating to now?

Q. The ditch on the south side of Paris Avenue. A. It runs down Paris Avenue, yes, and it runs—

Q. And it floods the swamp just opposite your property now, doesn't it? A. What comes down there runs in there. I do not know how much
20 comes in there, whether it would be flodded or not.

Q. Before the pipe was put in, didn't the water come down the ditch on the north side, the same as it is now coming down on the south side without a pipe? A. Something similar, I should judge.

Q. Some? A. Yes.

Q. But not enough to flood your property? A. No. Because I could handle it from running into my property, I diverted it around to the far end.

Q. Well, you could manufacture blocks, then, you
30 say, if it had not been for the water interfering with your machinery in your buildings? That is your answer? A. I—not only the machinery, but in making my products I had to make them on the ground. The tile had to be made upon the ground, and when it would flood over, naturally, the water would come in there, and if the tile was just freshly made, it would naturally melt right away; the water would melt them right down.

40 Q. And, of course, your property is not flooded now, is it? A. Not today, it isn't, no.

Albert Arnn, cross.

Q. Well, it has not been? A. It was a few days ago in that heavy rain, the water was—was pretty bad there.

Q. Well, it is only when you have heavy rains that this occurs? A. The worst, yes.

Q. What did you do with your machinery? A. 10 Sir?

Q. What did you do with the machinery that you say was in the building? A. I had it in the other building there.

Q. What have you done with it? It is not there now, is it? A. Yes. It is right in the other building in front there.

Q. Oh, all the machinery you have or had at any time is there now? A. With the exception of a few pieces that I have at home. 20

Q. Just a few pieces that you have at home? A. Yes, sir; and the rest of it is there.

Q. So that your manufacturing plant, as it was, is there now, practically? A. Yes, sir.

Mr. Mattocks: That is all.

By the Court:

Q. Just a minute, Mr. Arnn. A. Yes, sir.

Q. I am interested in knowing about this drain. You spoke of a drain laid by the Borough? A. Yes, 30 sir.

Q. Have you examined that? A. Examined it?

Q. Yes. A. Yes, sir.

Q. Will you describe it? A. I can describe it. It is a 15-inch drain running from Shearer Street down past my property to Charles Street. The drain is a 15-inch vitrified clay pipe, is laid within 125 feet of my property. Then it runs off in a little open ditch, which is a little cobblestone gutter, 40 from there down by my property.

Albert Arnn, redirect.

10 Q. What other property does the water flow over? A. The Borough has the far end of my—on the same block as mine, that is on the—100 feet along Paris Avenue, the Borough owns two lots, where that flows over. But the rest of the property around—pardon me; shall I go on?

Q. That is all right. A. The rest of the property around there, with the exception of those two lots, belongs to me. I am in possession of it.

Q. Well now, whose land other than yours is flooded by this water which comes through the drain? A. Well, I could not say just how far that water reaches over.

20 Q. Well, does it flood the community generally there? A. It takes in all of that section.

Q. All right.

Redirect examination by Mr. Mackay:

Q. And do I understand, Mr. Arnn, that that section is held by you under your certificate, with the exception of these two lots that are owned by the Borough? A. Yes, sir; that is for quite a distance down.

30 Q. To what extent, to what distance? A. I have a four and eight-tenths acre piece of property in there. It joins that, right into this property, see? And then it is cut up in lots.

The Court: Just a minute. You are not setting those areas up as being damaged.

Mr. Mackay: No; no, I am not.

The Witness: Shall I proceed?

40 Q. Yes. A. I owned down to where the Standard Oil Company has—joins on the property on the north side. That is down, say, about—let us see; it must be seven or eight hundred feet along Union

Charles Dietrich, direct.

Street, you see? Then it comes over, way over to—I cannot just recall the street now, but it is about six or eight hundred feet, or probably more, and then comes up and has a little offset in it, at about six hundred—about four hundred feet back of Paris Avenue, there is a little offset, and then it takes in Paris Avenue, with the exception of these two lots. 10

Mr. Mackay: That is all.

CHARLES DIETRICH, sworn as a witness on behalf of the plaintiff, testified as follows:

Direct examination by Mr. Mackay:

Q. Where do you live, Mr. Dietrich? A. Ridgefield Park. 20

Q. And what is your business? A. Concrete business.

Q. And how long have you been in the concrete business? A. The last thirty-five years.

Q. Are you still in the concrete business? A. Yes, sir.

Q. And who are you connected with today? A. With the Walker Cement Products.

Q. Did you ever see the manufacturing plant of Mr. Arnn at Northvale? A. Yes, sir. 30

Q. And when was the first time that you saw that? A. Oh, off and on, I have seen it, when he first started, and—

Q. And have you ever bought and sold sand? A. No. I never bought sand; only I got some sand in and tried it out and see what kind of quality the sand was.

Q. You got sand from Mr. Arnn's place? A. Yes. 40

Q. And you tried it out to see the quality? A. Yes.

Charles Dietrich, direct.

Q. And what have you got to say in your opinion about the quality of it for concrete manufacturing? A. The quality is all right, only you know it was too far of a haul.

10 Q. Well, never mind that. You say the quality is all right? A. Yes.

Q. You say it is good quality or fine quality? A. Yes, sir.

Q. Or how do you grade the qualities of concrete sand? A. Well, you know it is clear, wash sand, the way he pumped it out, you know, and then the loam, or whatever is in there, why, she would run away, and it was just partly near like a wash sand.

20 Q. Yes. And did you say that you saw this sand and took samples of it, or tested it? A. Oh, that was—he had just about started.

Q. Well, with reference to December, 1925, was it before or after December, 1925? A. Before.

Q. Can you tell us about how long before? A. That I could not recall. I did not—

Q. Now, did you ever go there after December, 1925? A. Yes. I used to go, off and on, there.

30 Q. And going back again prior to 1925, did you notice the condition of the land and the sand and the soil there? A. Well, I will tell you. He pumped it up and made a flat bed, see, the sand, see, in order that he could make the blocks, manufacture on there with the moulds, see, and they level it off; that would eliminate pallets or blocks, see, to manufacture blocks.

Q. Yes. A. I had the same thing over here in Little Ferry for the Walker Cement Products, see? I made them all in the yard; level it off, put

40

Charles Dietrich, direct.

sand on; and Mr. Arnn, he started the same way. So I sold him some of the moulds where he manufactures the blocks with.

Q. Now, in the manufacturing of cement products, what is necessary? A. Cement and sand.

10 Q. Yes. Well, with reference to the condition of the place where they are manufactured? A. Yes, sir.

Q. Do you have any particular kind of soil that you have to put them on, or manufacture them on? A. No, sir; you don't have to have—just particular soil. You can use pallets, iron pallets, or wooden pallets, you see?

Q. Yes. A. But the pallets generally cost as much as the machinery and that.

20 Q. Well now, prior to December, 1925, did you notice anything about the condition of the property that would prevent Mr. Arnn from manufacturing concrete products? A. Prior to that?

Q. Prior to December, 1925? A. No.

Q. Was he manufacturing them there, to your knowledge? A. Yes; he was manufacturing.

Q. He was manufacturing them. Now, after 1925, December, 1925, did you have occasion to go to his place of business there? A. Yes.

30 Q. And when? A. I think it was in 1926.

Q. And what would you say about the condition of the property then, at that time? A. I think it was around in April, 1926.

Q. Yes. And what would you say about the condition of the property then? A. It was in good condition, so far.

Q. Was it in good condition sufficient to manufacture and carry on his cement products business? A. Yes.

40 Q. Did you go to it after that time and notice

Charles Dietrich, direct.

anything that would prevent him from manufacturing the concrete products? A. Mr. Arnn called me over to see the condition after it flooded—what the bed he made floated away. I think that was around in May.

10 Q. Of what year? A. 1926.

Q. 1926? A. Yes.

Q. And did you see the condition that existed there— A. Yes.

Q. —after the bed floated away? A. Yes.

Q. Did you? A. Yes, sir.

Q. What was its condition? A. Well, he couldn't go ahead unless he filled it up again.

Q. And in order to fill it up again, what would he have to do? A. He would either have to pump sand, or go and start making his products on pallets and other machinery.

20

The Court: What was that? He would have to what?

The Witness: You know, they manufacture—over here, we have got—we are making all the blocks on pallets, and then we put them in the steam room, you see and he had a different system, see? He dumped them on the ground, which I got photographs of it, which my yard in Little Ferry was—

30

The Court: Never mind that. Tell us what you saw there.

Q. You say he had a different system. What do you mean by a different system? A. You know, he would take the mould and dump them right on the ground and strip it and leave it dry there, see?

40

Q. Was that a proper way to manufacture ce-

Charles Dietrich, direct.

ment products? A. I have done it; and, of course, if you have got a small yard, why, it is more profitable.

Q. It is more profitable? A. Yes, a small yard; but if you want to run it where you manufacture thousands of them, why, it would not pay.

10

Q. With reference to his yard, would you say his was a small yard or a large yard? A. His was a smaller yard.

Q. A small yard. So his method of manufacturing cement products or concrete products you would say was the proper method? A. For a small starter, yes.

Q. Now, what was there that you saw after December of 1925 that prevented him from carrying on his concrete business? A. As I say, he would have to fill up again; if any rain would come, or a flood, why, it would be the same thing again, see?

20

Q. Yes. Well now, do you know what caused that condition there to exist? A. The—from what he showed me, where the water was coming down there.

Q. Could you see that? A. Yes, sir.

Q. You could see that? A. Yes, sir.

Q. Now, when you saw the place prior to December, 1925, was it in that same condition that he could not manufacture his products at any time?

30

Mr. Mattocks: It seems to me, your Honor, this witness is being led considerably in this case.

The Court: Yes. You are leading the witness, Mr. Mackay.

Mr. Mackay: Well, I do not intend to, your Honor please.

40

Charles Dietrich, cross.

Q. Supposing you tell us, then, the condition of his property prior to 1925? I think I have already asked you that question.

The Court: You have covered that.

Mr. Mackay: You may cross examine.

10

Cross examination by Mr. Mattocks:

Q. Where is your place of business? A. I am with the Walker Cement Products now, at Little Ferry, New Jersey.

Q. Little Ferry? A. Yes, sir.

Q. You say you used to buy sand from Mr. Arnn? A. I never bought sand. I got some sand there just to try it, see?

20

Q. Oh, you just went up there to try some of the sand? A. Yes. I got a couple of yards there, and I made some blocks of it.

Q. It did not make any better blocks than any other sand, did it? A. Well, it made a nicer looking block, see?

Q. You couldn't get any more money for it, could you? A. No.

Q. It did not make much difference whether you got the sand here, there or somewhere else, did it? Yes, or no? A. No. It was good sand all over.

30

Q. When you went up there and you saw this place flooded,—you did go there, didn't you? A. Mr. Arnn took me up there—

Q. Yes. A. —to look at it after.

Q. And you say the place was flooded over there, don't you? A. It was not flooded, but it was washed away, what he had before there, see? But there was no water on the place at that time when I was there.

40

Q. Oh, there wasn't any water there when you were there? A. No. But all the bed what he had

Charles Dietrich, redirect-recross.

for to manufacture the blocks, that was washed away.

Q. You did not see any water on the property at all? A. I couldn't say that I seen water there.

Q. You didn't see any water? A. It was all soggy.

10

Q. You did not see any water flooded over the land when you were there? A. No, sir.

Mr. Mattocks: That is all.

Redirect examination by Mr. Mackay:

Q. But you say you did see evidence of—

Mr. Mattocks: I object to the witness being led.

The Court: No. He said he saw it soggy.

20

The Witness: Soggy, the way you walk, it was soggy; it wasn't flooded.

Q. What did you mean, when you said, in answer to Judge Mattocks' question, that the place was washed away? A. Because he filled it up and levelled it off, you see, and when Mr. Arnn asked me to come up and take a look at it, I seen it, it was flooded away, see?

Mr. Mackay: That is all.

30

Recross examination by Mr. Mattocks:

Q. How do you know it was filled up? A. What?

Q. How do you know that it was filled up? A. My God! I was there, and I seen him fill it up, and I can see where a place is filled up, levelled off, and then I can see afterwards it is washed away.

By the Court:

Q. You saw it filled up? A. Sure.

40

Charles Arnn, direct.

By Mr. Mattocks:

Q. You do not know whether he carted the dirt away after he put it in there, do you? A. No. I wasn't no watchman there.

10 Q. He might have carted the dirt away? A. He might have done that. I wouldn't say he did it or not.

Mr. Mattocks: That is all.

Mr. Mackay: That is all, Mr. Dietrich.

CHARLES ARNN, sworn as a witness on behalf of the plaintiff, testified as follows:

Direct examination by Mr. Mackay:

20 Q. Mr. Arnn, are you the son of the plaintiff in this case? A. Yes, sir; I am.

Q. And did you work with your father at his place of business on Paris Avenue in Northvale? A. Yes. My father and I started the place of business.

Q. And when did you start with your father there? A. Why, we started in the latter part of March or the first of April in 1922.

30 Q. And how long did you continue to assist your father in the business? A. I assisted my father until September, 1923, when I went to school.

Q. When you went to school? A. Yes, sir.

Q. And when did you return from school? A. Well, I—that was my first year at college. I worked with my father vacations, all vacations, and I worked with him the following year. I stayed out of school the second year.

Q. You stayed out of school the second year? A. Yes, I did.

40 Q. That would be what year? A. That would be 1924.

Charles Arnn, direct.

Q. 1924. And what kind of work— A. I beg your pardon. That would be 1923.

Q. 1923. And what kind of work did your father do there? A. My father pumped out sand, sold some, and used most of it for manufacturing concrete products.

10 Q. And he was manufacturing concrete products from 1922 on, was he? A. Yes, he was, up until December, 1925.

Q. Now, were you there in part of 1925? A. Yes, I was. I was there the summer of 1925.

Q. The summer of 1925? A. Yes.

Q. And during the time that you were there and assisting your father, was he ever prevented from manufacturing his concrete products by reason of the surface water flowing on the land? A. No. He never was prevented, because we had filled in the place, and there was not any—we were not troubled at all by water.

Q. You had no trouble at all? A. No. Not a bit of trouble.

Q. Now, in manufacturing concrete products, where did your father place them? A. Well, my father manufactured many different types. Most of our business was done—well, I should say, with blocks, at first; we started making blocks at first; and these blocks would have to be dumped over there on the ground, and this yard, of course, had to be level, a level, hard, sand-packed yard.

30 Q. Yes? A. And it was absolutely essential because it was that type of machine.

Q. And was that done while you were there assisting your father? A. Yes. I helped do it.

Q. You helped to do it. Now, did you see your father's place of business after December, 1925? A. Yes. I saw it every time I was home.

Charles Arnn, direct.

Q. You saw it every time you were home. And what would you say, then, in December, 1925, about the condition of the land? A. It was impossible to go on as we had been going on. There was no question about it.

10 Q. Why? A. Why, because—

Q. Yes? A. —the yard had been washed away, and I was up there several times when it was raining, and the water comes in from the open ditch right across the yard, and if you ever filled it in, it would only wash away again.

Q. Do you know of any reason why the water came in after December, 1925, in any greater quantities than it did prior to that time? A. Yes. Prior to that time, the water west of the railroad track, draining the hill, coming down Paris Avenue would—

20 Q. Well, now,— A. —run along—

Q. —when you say west of the railroad tracks, supposing you just step down and point out to the jury on the map from the point that you mean down to the railroad track? A. This is west on this map (indicating), is that right?

Q. Yes; this is west (indicating). A. Yes. This is west (indicating). Why, the water coming here, as I understood it,—

30 Q. What you saw? A. What I saw was this: that the water coming down from the hill, this being a grade—Northvale is on a hill—from the railroad track going west, coming down the hill here, the water would reach the railroad track, and most of it, if not all of it, would go in a northerly direction up this way (indicating), as a matter of fact, along both—along the railroad track at this point, on the western side, there is a drainage ditch.

40 Q. There is a ditch there? A. There is a large

Charles Arnn, direct.

drainage ditch, and that took care of this water. So that when these culverts were put under the track, why, what happened—and this was cut off—what happened was this: you would get an enormous pressure of water from the hill that way, because this would drain this whole hill section, and this enormous pressure would come down through the culvert and out into an open ditch with tremendous force.

10 Q. Now, when you speak of the culvert, what do you mean? A. I mean a 15-inch vitrified pipe.

Q. Well, which culvert are you referring to now? A. I mean the culvert under the—the culvert that drained the hill across from this point on Sharer Street, down to this point here (indicating). No. This point here (indicating), right east of the borough property.

20 Q. That is about how far from your father's place of business? A. That is—well, I should judge a hundred or a hundred and twenty-five feet.

Q. Now, prior to the construction of that drain or culvert, did it come down, all the way down from Sharer Street across the railroad in the same quantity? A. What do you mean?

30 Q. The same quantity of water come down before the construction of that drain? A. I do not quite understand your question.

Q. Well, I will reframe it. I will withdraw that. Prior to the construction of the drain,— A. Yes, sir.

40 Q. —which ended about 125 feet from your father's property, did the same amount of water come down across the railroad track to your father's property? A. Why, there wasn't any noticeable water before that construction; but after

Charles Arnn, direct.

the construction is when the water just gushed down with force, tremendous force, taking about everything it had with it; even the embankment they put in later which, if you were up there, you will notice it has practically disappeared.

10 Q. Now, you say it came down with greater force. And then did it flow on your father's land? A. Yes, it did. It flowed on my father's land, because the ditch—I do not think the ditch was adequate enough to take care of that volume draining the whole hillside.

Q. Do not tell us what you think. The water did flow over onto your father's land, didn't it? A. Yes, it did.

20 Q. Now, do you know whether the Borough did anything to—just listen to my question, now—whether the Borough did anything after they constructed that culvert to protect your father's place of business there? A. Yes. I happened to be home when they did it. It was Easter, my Easter vacation of this year, April. And I happened to go up to the plant one day to look it over, and I noticed a—supposedly Borough contractors—I know they were working for the Borough, with big truck loads of dirt, perhaps,—yes, dirt, and they had begun to construct a bulwark by a mound of dirt on the north side of this open ditch, so that it would, to a certain extent, prevent the water from flowing over my father's place of business; but this was merely a bulwark of just plain earth. It was raised perhaps two feet, maybe not quite so much, above the surface of the open ditch, and it was about four feet wide; but that was just loose earth, and I saw them construct that.

30 Q. And they built what you call a bulwark, is
40

Charles Arnn, cross.

that right? A. I do not know whether that is a good name for that.

Q. Well, I mean, that is what you saw? A. Yes.

Q. That is what they did? A. Yes.

Q. Now, I show you Exhibit P-9, and ask you if that is the bulwark; is that bulwark shown in that exhibit? A. (Referring.) Yes. This is the picture I took showing this bulwark. 10

Q. And is that the bulwark that was constructed by the Borough in—when? A. That was constructed by the Borough, April, 1927.

Q. Yes. A. I saw it being constructed.

Q. That was not there prior to April, 1927, was it? A. No. It was not.

Q. And that bulwark, is that still there today? A. What is left of it. There is not much left, though. 20

Q. There is not much left? A. No, sir.

Q. How high would you say it was in April, 1927? A. I should say that they piled the dirt up two feet, but, of course, that was loose, and the first rain, it would not be two feet.

Q. I see.

Mr. Mackay: Cross examine.

Cross examination by Mr. Mattocks: 30

Q. When you say this water flooded your father's land after the pipe was put in,— A. Yes.

Q. —how much land, how much territory, did it flood beside your father's land? A. Why, of course, I am not as well acquainted there as my father is, but—and I do not know exactly where his boundary lines are.

Q. Well, you know where the end of this pipe line is, don't you? A. Yes. I know where that is. 40

Q. Well, that is not in front of your father's

Charles Arnn, cross.

property, is it? A. No. It is at the end of the Bono property.

Q. And that is about one hundred feet west of your father's property, isn't it? A. Perhaps a little more than one hundred feet.

10 Q. And there is also a street between that and the end of your father's property, is it not? A. I am not—I think there is, but I—

Q. Do you think this will refresh your recollection as to the locality? This (indicating) is about the end of the pipe, is it not? This (indicating) is Union Street. Do you know the name of the streets up there? A. Well, the streets are not there. How can I know the names of them? They are only there on the map.

20 Q. Well, Association Street is there, isn't it? A. Yes; that is there.

Q. And there is a street near Union Street, isn't there? A. Why, I have—I do not know, it is not named.

Q. You do not know? A. There is no street there.

Q. You know where Mr. Buonocore lives? A. No, I do not.

30 Q. You do not know that his house faces Union Street up here? A. No.

Q. You do not know that? A. Why should I?

Q. Well, I am asking you, do you know it? A. I do not know it.

Q. I see. A. I do not know where Union Street is, because I—it is not there.

Q. Don't you know it is a street between your father's property and the end of this pipe? A. I am telling you the only streets I know.

40 Q. You do not know it, do you?

Charles Arnn, cross.

Mr. Mackay: I think he has answered, your Honor please.

The Court: He said the only street he knows—which one is that?

The Witness: Is Association Street. These other streets are not there. They are only map streets. 10

Q. Well, when you saw this flood which you speak of, did it flood over this lot right at the junction, or right at the end of the pipe? A. Not right at the end of the pipe. That drain there is a little higher and—but after, say fifty feet or seventy-five feet after it left the pipe, it started in.

Q. To flood? A. Not much, but as it went down, it flooded more and more.

Q. So that, beginning fifty feet, seventy-five feet, we will say, from the end of that pipe, it started to flood over the land north of Paris Avenue? A. Yes. 20

Q. Is that correct? A. That is right.

Q. And how far east did it flood beyond your father's land? A. Well, there again I do not know the exact boundary of my father's property; of course, I don't.

Q. Well, let us assume that—you know where your father's buildings are? A. Yes; I know where they are. 30

Q. Do you know where the concrete mixer is in the building? A. I know where the concrete mixer is.

Q. Yes. Well, that is at the end of your father's building, the east end, is it not? A. It is at the end of the second building, the east end.

Q. Yes. And you have some sand pits, or sand—places that you keep sand beyond that toward the east? A. Yes. There is a sand bin there. 40

Charles Arnn, cross.

Q. All right. Now, did the water flood out that far? A. Yes. It did. It could not flood where the sand bin was, because at that particular point there were—it is a log bin, and the logs would prevent it, but it flooded—it rushes past there and flooded other property.

10 Q. But it did not flood the sand bin, then? A. It did not necessarily flood it as much as the rest of the property, but water ran into the sand bin, I remember seeing it; there was even ice in there.

Q. In the winter time? A. Yes.

Q. Well, you did not manufacture blocks in the winter time, did you? A. It is entirely possible.

Q. I am asking you whether you did or not? A. Yes. We did one winter there, we manufactured.

20 Q. What winter? A. Practically all winter. I won't say all the coldest weather, we didn't.

Q. The water then extended and ran farther east than it covered—flooded farther east than that still, did it not? A. Some of it did. The majority of it, though, did not.

Q. How far? A. I do not believe it flooded farther than—well, I do not know; I would not say exactly.

30 Q. How far north did it flood? A. It flooded—of course, the lake was lower than the surrounding property and what happened was, it ran from the culvert.

Q. I asked you how far north it flooded? A. Well, the lake is north.

Q. How far? A. It ran from the culvert into the lake, and no farther.

Q. It did not go any farther north? A. No. It ran into the lake.

40 Q. So that your father's lots nine, ten, eleven and

Albert T. Gugger, direct.

twelve were not flooded at all? A. I do not know where nine, ten, eleven and twelve are.

Q. Well, they are beyond the lake, aren't they, further north? A. I—I do not know whether they were flooded.

Mr. Mattocks: That is all. 10

Mr. Mackay: That is all, Mr. Arnn. Is the Borough Clerk here, Mr. Mattocks?

Mr. Mattocks: Yes.

ALBERT T. GUGGER, sworn as a witness on behalf of the plaintiff, testified as follows:

Direct examination by Mr. Mackay:

Q. Where do you live, Mr. Gugger? A. Northvale. 20

Q. And do you hold any position in the Borough of Northvale? A. I do.

Q. And what? A. Borough Clerk.

Q. And how long have you been the Borough Clerk? A. Seven years; going on seven years.

Q. And have you with you the ordinance book of the Borough? A. I have.

Q. For the year 1925? A. I have an official copy of the ordinance in the minute book, not an ordinance book. 30

Q. You have no ordinance book? A. No.

Q. But you have the ordinance in the minute book? A. Yes, sir.

Q. Will you just turn to the ordinance in your minute book to provide for the draining of Paris Avenue from Charles Street to Sharer Street? A. I will. I have it.

Q. And will you just turn to the record of the minutes of when that ordinance was introduced by the Mayor and Council? A. Yes. 40

Albert T. Gugger, direct.

Q. You have it? A. Yes.

Q. Will you read to the Court and Jury, please, from your minutes with reference to the introduction of the ordinance?

10 The Court: Well, you had better get the ordinance in.

The Witness: I have the ordinance here.

The Court: Get the date.

Q. What is the date of the ordinance, Mr. Gugger, when it was introduced? A. September 17th, I believe. September 14th, 1925.

The Court: 1925.

A Juror: Can we hear?

20 The Court: Turn around so the jury can hear.

The Witness: Do you want it read?

The Court: Read the ordinance.

The Witness: (Reading) "An ordinance to provide for the draining of Paris Avenue from Charles Street to Sharer Street in the Borough of Northvale, Bergen County, New Jersey, and appropriation of the costs thereof.

30 Be it ordained by the Mayor and Council of the Borough of Northvale that there shall be constructed in said Paris Avenue the necessary drains and catch basins and their appurtenances for the draining thereof in accordance with the plans and specifications prepared by Hering & Westphal, Borough Engineers, and on file with the Borough Clerk. That this improvement is hereby declared to be a local improvement, and that damages sustained and the benefits conferred upon any lands affected by said im-

40

Albert T. Gugger, direct.

provement shall be assessed in accordance with the statutes in such case made and provided. That there is appropriated the sum of eight thousand dollars, or so much thereof as may be necessary, to pay the cost of the aforesaid improvement, which said sum or sums shall be raised by the issuance and sale from time to time during the course of the improvement as may be necessary of temporary loan notes or temporary bonds to run, with all renewals thereof, for the period of six years from the date of the completion of the aforesaid improvement, with interest not exceeding 6 per cent. per annum.

10

All other matters with respect to the form, issuance and sale of said temporary notes or bonds shall, unless provided for by resolution, be determined by the Mayor and the Borough Treasurer who, together with the Borough Clerk, are hereby authorized to sign the same and affix the corporate seal thereto.

20

In case temporary bonds are issued hereunder, the same may be either registered or coupon bonds, and if coupon bonds the coupons attached thereto shall bear the facsimile signature of the Borough Treasurer.

30

This ordinance shall take effect immediately."

The Court: Does that show when this was passed or read?

The Witness: Do you want the minutes?

The Court: What?

The Witness: Do you want the minutes?

The Court: Yes.

The Witness: (Reading) "The Clerk read

40

Albert T. Gugger, direct.

10 the following ordinance: An ordinance to provide for the draining of Paris Avenue from Charles Street to Sharer Street in the Borough of Northvale, Bergen County, New Jersey, and the appropriation of the cost thereof. Final hearing of same was declared open for comments by Mayor Firenze and, after hearing, all concerned declared this hearing closed. It was then duly moved and seconded that the Clerk give notice of same and, on roll call, all councilmen voted in favor."

Q. What is the date of that meeting, Mr. Gugger?
A. September 14, 1925.

20 Q. And when was the ordinance finally passed?
A. That was the final passage.

Q. On September 14, 1925? A. Yes, sir.

Q. And after the final passage of that ordinance, have you any record in your minutes of Mr. Arnn appearing before the Mayor and Council? A. I have not.

Q. Do you recall him being present at a subsequent meeting of the Mayor and Council? A. I do.

30 Q. And at what meeting? A. I do not just remember.

Q. Can you give us any idea about when it was?
A. I could not.

Q. Would you say it was in October, November, December or January? A. Possibly in October or November; I would not say for sure.

Q. Was it in January? A. I do not know.

40 Q. Do you recall him being present at another meeting of the Mayor and Council in June of 1926? A. I was present at every meeting of the Council.

Albert T. Gugger, direct.

Q. I beg your pardon? A. I am present at every meeting of the Council.

Q. Yes, you were, I understand. A. Yes.

Q. I say, do you recall Mr. Arnn being present at the June meeting of 1926? A. Well, I would not say I recall it. 10

Q. You do not recall it? A. No.

Q. Would you say he was not at a meeting in June? A. I would not say he was not, no.

Q. You would not say he was not? A. No. I would not say he was not.

Q. Have you any record in your minutes of any June meeting in which Mr. Arnn appeared before the Mayor and Council and entered a protest about the condition of his property because of the amount of water that had been flowing on the land? A. No. 20

Q. You have no record of it at all? A. No.

Mr. Mackay: That is all.

Mr. Mattocks: No cross examination.

The Court: That is all.

By Mr. Mackay:

Q. Just a minute, Mr. Gugger. I will ask you one more question. A. Yes, sir. 30

Q. Don't you recall Mr. Arnn asking you to put a record on your minutes that he was present there, objecting? A. I do.

Q. He did say that? A. He did say that.

Q. Now, does that refresh your recollection as to what meeting he was at when he asked you to do that? A. It does not.

Q. It does not refresh your recollection? A. No.

Mr. Mackay: That is all.

Mr. Mattocks: That is all. 40

James J. Muzzio, direct.

Mr. Mackay: The ordinance is in evidence, I assume, your Honor?

The Court: Yes.

Mr. Mackay: I would like permission, if Judge Mattocks will consent to it, to introduce a copy of what the Clerk has read.

10

Mr. Mattocks: Of the ordinance?

Mr. Mackay: Yes.

Mr. Mattocks: No objection.

(Paper marked Exhibit P-10 in evidence.)

JAMES J. MUZZIO, sworn as a witness on behalf of the plaintiff, testified as follows:

Direct examination by Mr. Mackay:

20

Q. Where do you live, Mr. Muzzio? A. Northvale.

Q. And how long have you lived in Northvale? A. Well, 25 or 30 years.

Q. Do you know Mr. Arnn, Albert Arnn, the plaintiff in this case? A. Yes, sir.

Q. How long have you known him? A. Well, on and off, I have known him for about twenty years.

30

Q. About twenty years. Do you know where his place of business was located on Paris Avenue in Northvale? A. Yes, sir.

Q. Are you familiar with the location of that property? A. That is, to a certain extent.

Q. Do you live anywheres near it? A. Yes; I should judge about a distance of say 200 feet, more or less.

Q. 200 feet? A. More or less.

Q. Yes. On what street do you live? A. Association and Paris Avenue.

40

Q. On the corner? A. Yes.

James J. Muzzio, direct.

Q. And how long have you lived on the corner of Association Street and Parish Avenue? A. Well, about—between 25 years.

Q. And during the time that you lived in Northvale, did you see Mr. Arnn go to the property where subsequently he located his business? A. Did I see him? 10

Q. Yes. A. Yes; many a time.

Q. Yes. A. That is, in the past year or so; that is previous to being closed down.

Q. Yes. Did you see him before that? A. Yes. On and off, he used to come up and see me.

Q. And how many years back did you know that he went there to the property?

The Court: How is that material? 20

A. Well, I should judge seven, eight or nine years, something like that. I used to come up on and off to look at his property.

The Court: Just a minute.

The Witness: Sir?

The Court: What is the purpose of this testimony?

Mr. Mackay: On the question of ownership if there should be any question raised as to that, to establish a period of more than twenty years. 30

The Court: You know your title in this case is based upon your evidence; you are claiming title through this tax title.

Mr. Mackay: Yes; that is true.

The Court: You cannot raise adverse possession.

Mr. Mackay: I ask an exception to your Honor's ruling. 40

James J. Muzzio, direct.

Q. Now, during the time, Mr. Muzzio, that you have lived on the corner of Association Street and Paris Avenue, did you notice the condition of Paris Avenue with reference to the surface water flowing down from Sharer Street? A. I do not
10 know if it come down from Sharer Street, but I noticed the condition, yes.

Q. Well, what was the condition of Paris Avenue with reference to surface water before September, 1925? A. Well, it was in passable condition. The water did not flow from one side of the street to the other, what it has done since that pipe has been put in.

Q. Well, then, would you say, after September, 1925, the surface water has increased in volume?
20 A. Yes. Water goes across the street, comes over from the side where Mr. Arnn's place is, over to where I live; that is, on the side of where I live, at least.

Q. Did you ever see it flow over onto Mr. Arnn's property? A. Yes.

Q. And very often? A. Heavy rain, yes, flood the place.

Q. Now, do you remember when the Borough constructed this drain from Sharer Street down Paris Avenue to Charles Street? A. I remember
30 when they constructed the drain, but I did not know it come from Paris—from Sharer Street until I went up there.

Q. You remember the drain? A. Yes.

Q. Does that drain run all the way to Charles Street? A. I couldn't tell you.

Q. You do not know that? A. No.

Q. You have not examined it, have you? A. No.
40 I do not know, really, where Charles Street is. I have been there where it lays, but I do not really know.

James J. Muzzio, cross.

Q. Are you on the same side of Paris Avenue as Mr. Arnn? A. No, sir; on the opposite side.

Q. You are on the opposite side? A. Yes, sir.

Q. Well, did you see the surface water flowing down on the same side as Mr. Arnn? A. Yes.

Q. Yes. Now, would you say that the same amount of surface water flowed down there before this drain was constructed? A. No. 10

Q. No? A. No. It never crossed the road before, to my knowledge, that I can remember.

Q. It never did? A. That is, not at that section of Mr. Arnn's property.

Cross examination by Mr. Mattocks:

Q. Well then, you have said that since the pipe has been put in, that the water goes over on your side of Paris Avenue? A. Yes, it has crossed over. 20

Q. And floods your property? A. Not my property.

Q. Whose property does it flood? A. I do not know whose property it is. It is in back of where I live.

Q. Well, a lot of property in the rear of yours? A. Shoots over a lot of property in the rear of mine.

Q. Yes. A. Naturally. 30

Q. How many acres? A. I could not tell you.

Q. Are there lots there? A. I do not know whether they are lots or acreage, I could not tell you. I know there is a lot there.

Q. Aren't you familiar with the map of the Borough of Northvale? A. To a certain extent.

Q. You are a member of the Borough Council, aren't you? A. Yes. That is, this last year; not when they put that drain there.

Q. Looking at what I have before you, does that 40

James J. Muzzio, cross.

refresh your recollection of whether this is the Borough map of Northvale or not? A. It looks like part of it to me.

10 Q. Do you know where you live on that map, or where your house is on that map? A. Why, I will try to show you.

Q. Well, here is Association Street (indicating). Do you live on Association Street? A. Yes.

Q. Corner? A. Yes.

Q. You live on the corner of Association Street and Paris Avenue? A. Yes.

Q. In Block 104? A. That is what they call it, I believe, now.

20 Q. The end of that pipe line is halfway between Association Street and Union Street, is it not? A. I never really—I believe it is, but I would not say for sure; I believe it is.

Q. Don't you see it every day? A. I know; but I have not taken notice whether it is halfway between; I know it is somewhere near there. I would not take an oath on it.

30 Q. Then since this pipe line was put in, the water spreads all over both sides of Paris Avenue; is that correct? A. Well, it floods Mr. Arnn's place, and when it is a real bad rain, I have seen it go over the road back of my place, that is, I call it—

Q. Does it run over Bono's corner here, these lots (indicating)? A. Not in Bono's, because they are too high to go there.

Q. Well, aren't Bono's lots right there (indicating)? Lots 30, 29 and 30, in 105? A. It cannot go over to Bono's, because he is right—it cannot—

Q. Well, it floods over Charles Street, doesn't it? A. I do not know where Charles Street is, to tell you the truth.

40 Q. Do you know where Mr. Buonocore lives? A. Yes.

James J. Muzzio, redirect.

Q. Doesn't he live on Charles Street? A. I do not know. I know he lives on Association Street.

Q. It floods over both sides of Paris Avenue? A. Yes.

10 Q. These lots in blocks 111, 119, 110 and 120, is that correct? A. Well, I see it flood; it comes down on both sides, that is, when it crosses over, it is—a heavy storm, it crosses from that drain there and goes over to the other side, across the road.

Q. And floods all over the property in the rear? A. The property, what?

20 Q. East of yours? A. I do not suppose it goes all over it. It goes down as far as the drain. I have seen it flood over that way, yes, but I couldn't say it is all pertaining to that drain.

Q. Just answer this question: Does it flood over Paris Avenue? A. Yes, yes.

Mr. Mattocks: That is all.

The Court: That is all.

Redirect examination by Mr. Mackay:

30 Q. Did it flood over Paris Avenue before the drain was there? A. I say I never seen it at that section. I have seen it down by the bridge, but not up at that section; I haven't seen water from one side to the other; I cannot say that I did.

Mr. Mackay: Mrs. Muzzio.

The Court: What is this, cumulative?

Mr. Mackay: Yes.

The Court: I do not know that you need that. You are trying your own case, but if it is cumulative, you have the evidence in; it is nothing more than repetition, is it?

40 Mr. Mackay: Whatever your Honor says.

Motion for Nonsuit.

It is along the same line showing the conditions prior and after the construction of the drain and culvert.

The Court: Well, it is pretty well established, and if it is only cumulative, I cannot see any purpose.

Mr. Mackay: If your Honor does not want it, then I will rest.

The Court: Well, if you insist, of course,—

Mr. Mackay: I do not insist, if your Honor believes it is not necessary.

The Court: Well, it is cumulative; I mean, it is simply repetition of what has been said.

Mr. Mackay: I do not want my client to say to me afterwards I did not use all my witnesses. That is the only thing.

The Court: You may use your own judgment.

Mr. Mackay: I will be guided by your Honor's decision in the matter.

The Court: Well, I think you have established the facts which you hope to establish by three or four witnesses.

Mr. Mackay: I will rest my case, then.

Mr. Mattocks: I move, your Honor please, for a nonsuit on the ground that an action does not lie at the suit of an individual having suffered special damage, even from the neglect of a municipal corporation in the performance of a public duty, and I will refer your Honor to the case of *Waters v. Newark*, in 56 New Jersey Law, 361. That was a case where—do you want me to read the case, your Honor?

Case.

The Court: No. I am familiar with the case, and the later case of *Buckalew*, which cites that.

It seems to me at this time the pleadings ought to conform to your proofs. You charge, Mr. Mackay, in your complaint, ownership; the testimony is, of course, that ownership is by tax title.

Mr. Mackay: Yes; that is correct.

The Court: I think the pleadings should be amended to cover that situation. But you have this further situation: The tax certificate is more than 20 years old, and the right of redemption is barred after 20 years. One of the difficulties you encounter, as the proof now stands, if it gets that far—I have this motion to pass on—it would simply be an ownership by virtue of a tax title. Then, under that, his holdings are in the nature of a mortgage, and the measure of recovery would be an injury to the security. Now, a case wherein a suit was instituted for recovery for trees, the court held there, in a motion on the pleadings, the holder of a piece of property by a tax title is guilty of waste in that he cut trees. Now, by analogy, it seems to me, if the owner of a tax title could not use the trees on the premises, by the same reasoning he would not be entitled to use the sand on the premises. So it makes a considerable difference just as to what is the ownership, what is the nature of the title.

Coming now to the motion at the close of this case, the evidence is in showing that it is a public improvement by virtue of the power of the Borough of Northvale, and there is in evidence, too, the testimony of the water flowing over the plaintiff's property. In addition to that, there is proof, too, that not only is the plaintiff's possession damaged, but the water flows over other places in the sense that, while he has suffered pecuniary or special

Case.

10 damage, still it simply forms part of what might be called a public wrong and, under the circumstances, taking the cases, it seems to me that the plaintiff does come within the rule of the Waters case and the case of *Buckalew v. Board of Free holders in 104 Atlantic.*

Mr. Mackay: Will your Honor hear me?

The Court: I will hear you, yes.

Mr. Mackay: The complaint, if your Honor please, in this case, is drawn under the pleadings in the case of *Kehoe v. Rutherford*, which your Honor is undoubtedly familiar with, which was a very similar situation. There, in the Borough of Rutherford, they constructed artificial drains, and that seems to be the test under the *Kehoe* case whether a municipality in the undertaking of an improvement constructs artificial drains in such a manner so as to divert surface water and take it out of its ordinary course and throw it off in another course in a greater volume.

20 The Court: That is true. That follows the old case of *West Orange v. Fields*, which holds that if the municipality so concentrates the flow as to make the one man's property the recipient of the entire drainage, then the owner can claim compensation from the municipality. However, that does not change the fact in this case that the evidence shows that, not only has this property been overflowed, but other properties, several streets, and other owners; in other words, it is in the nature of a public nuisance. It can be distinguished from *Jersey City v. Kiernan*, and it can be distinguished from *Fields v. West Orange*, and it can be distinguished from the *Jessup v. Bamford* case.

30 Mr. Mackay: If your Honor will bear with me a moment or two longer. I think the defense is—

40

Case.

I appreciate your Honor's reasoning about it being a public improvement—that they installed an artificial drain. Now, they commit an active wrong because they install something artificial. Now, if they had undertaken a public improvement in the nature of grading a street, for instance, and in the grading of that street, which would be a public improvement, they changed the grade so that the surface water comes down with a greater force or volume, that is something which the municipality cannot be held responsible for. But where, as they said in the *Kehoe* case, and as they said in *Dohrmann v. Hudson County*, where they built a system of drains and a culvert, where the water accumulated and came out onto a hotel property that the plaintiff had been leasing there, the distinction was the fact that the municipality, by putting in something artificial and thereby diverting the surface water and causing damage, it took it out of the rule that the municipality could not be held responsible for the undertaking of a public improvement.

The Court: Well, in the *Kehoe* case that point was raised, and the only thing that saved the plaintiff in the *Kehoe* case was that all the property damaged was the property of *Kehoe*, and the Court pointed out that he suffered damage alone, disassociated from his membership with the general public.

Mr. Mackay: But supposing somebody else suffered damage, would it be fair to say, when the Court says if they put something in artificial thereby causing damage, that because it injures fifty people, that one person cannot have a remedy for the injury or wrong that is done to them? Those other fifty people or more may have the

10

20

30

40

Case.

same cause of action against the municipality because of the fact that they put something artificial, something that was not natural, it had nothing to do with the natural condition of the ground and the care of the surface water.

10 The Court: How about a sewer construction? Suppose a sewer construction were put in?

Mr. Mackay: I think they would be responsible in that, too.

The Court: That is precisely the case of *Kiernan v. Jersey City*.

Mr. Mattocks: And *Waters v. Newark*, exactly the same case, constructed a sewer.

20 Mr. Mackay: I think that is the test, your Honor please. In this case in 84 Law, the case against the County of Hudson, they refer again to *Kehoe v. Rutherford*, and they say distinctly in that case that it was the artificial construction of something that caused the damages, and that is our situation. As we show, this water came down to the railroad, took a northerly course by reason of this construction, came under the railroad.

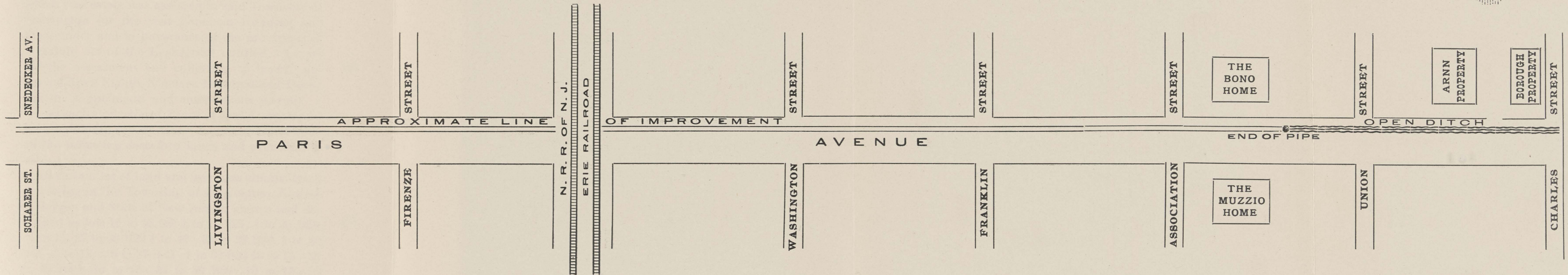
30 The Court: Well, as I see it, the proof does not show that this man's property was the sole sufferer in the sense that there was a concentration of water due to this drain. It comes within the water rule for non-performance or improper performance where the public has been injured; although special damage has come to the plaintiff, he is not entitled to recover. That will be my ruling, and the motion for a nonsuit will be granted.

Mr. Mackay: May I have an exception?

The Court: Yes.

40 Members of the Jury, I have taken the responsibility in this case, and have relieved you of further consideration of it.

EXHIBIT P.-1



APPROXIMATE MAP OF
PROPOSED STORM WATER SEWER
— PARIS AVENUE —
BOROUGH OF NORTHVALE
BERGEN COUNTY, N. J.

July 22nd, 1925

Hering & Westphal, Engineers
Westwood, N. J.

Exhibit P-2.

CERTIFICATE OF TAX SALE.

D S Firenze Collector
to
Albert Aarnn

I, D S Firenze Collector of Taxes of the Town- 10
ship of Harrington, in the County of Bergen, do
hereby certify that at a public auction held at
Northvale in said Township on the Eighteenth day
of August A. D. Nineteen Hundred and Six, for the
purpose of making certain taxes on account of
which real estate was assessed in said Township of
Harrington for the year Nineteen Hundred and
Five, under and in pursuance of the provisions of
a certain act of the Legislature entitled, "An act 20
for the assessment and collection of taxes," ap-
proved April Eighth, Nineteen Hundred and Three,
and the supplements and amendments thereto.

I, as such Collector of Taxes of said Township of
Harrington did sell to Albert Aarnn in fee simple,
all the following described lands and premises, to
wit:—

All certain lot of land and premises situate, lying
and being in the Township of Harrington, County
of Bergen and State of New Jersey, known and de- 30
scribed as lots 16 to 26 B8, 1 to 13 B27, 1 to 30 B28,
12 to 15, 27 to 30 B29 1 to 21—24 to 28 B30, 1 to 30
B31—1 to 12—16 to 27 B32—1 to 30 B34 10 to 15—25
to 30 B36—10 to 15—25 to 30 B39—10 to 15—25
to 30 B40 10 to 15—25 to 30 B41—8 to 15—22 to
30 B42—6 to 15—20 to 30 B43 5 to 15 B44—1 to
30 B45—1 to 30 B46—1 to 30 B47, 1 to 6—16 to
20 B48 1 to 4—16 to 18 B49, 1 to 2 B50, 1 to 35
B53—1 to 26—B54 1 to 40 15 to 22 B55. Saniel

Exhibits.

Map for the sum of Twenty dollars and Eighty Six cents, being the amount of taxes assessed against one Robbins & Aarnn on account of said land, tenements and hereditaments for the year Nineteen Hundred and Five together with the interest thereon and all the costs, fees, charges and expenses touching the same; that is to say:

10

Amount of taxes for 1905.....	\$20.86
Interest for the same from December 20th, A. D., 190 , at 6 per cent. per annum..	.60
Fees of Collector for preparing and publishing notices of sale.....	.25
Selling25
Adjournments	
Fees for making and executing certificate of sale50
Fees for acknowledgment of certificates...	.50
Clerk for recording report.....	.10
Fees of Assessor for assessing.....	.17
Fees of Collector for collecting.....	.17
Fees of Justice for return of delinquents...	.02
Fees of County Clerk for record return of delinquents to Clerk's Office.....	.05
Fees of Collector for returning to Clerk's Office02
Printing and postage.....	2.05

20

30

Total \$25.54

I do further certify that the right of the owner or owners, mortgagee, occupant or persons having either a legal or equitable interest in said real estate to redeem the same will expire on the 18th day of Aug, 1908.

40

IN WITNESS WHEREOF, I have hereunto set my

Exhibits.

hand and seal this 20th day of August, Nineteen Hundred and 6.

D. S. FIRENZE
Collector. (Seal)

D. S. Firenze, *Collector.*
TOWNSHIP OF HARRINGTON
TO
ALBERT AARNN

10

CERTIFICATE OF TAX SALE.

Received in the Clerk's office of Bergen County N J on the 29 day of August 1906 at 3 P M and recorded in Book 186 of Mortgages on pages 489 &c

20

Received payment for taxes on said lots from J H Kelley

Albert Arnn

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

BE IT REMEMBERED that on this 20th day of August Nineteen Hundred and 6 before me a Commissioner of Deeds personally appeared D S Firenze Collector of Taxes of the Township of Harrington in the County of Bergen, and I having first made known to him the contents of the foregoing Certificate of Sale he did thereupon acknowledge that he signed, sealed and delivered the same as his voluntary act and deed for the uses and purposes therein expressed.

30

GARRETT Z DEMAREST JR.

(Seal)

Com. of Deeds
Bergen Co. N. J.

40

Exhibits.

EXHIBIT P-3.

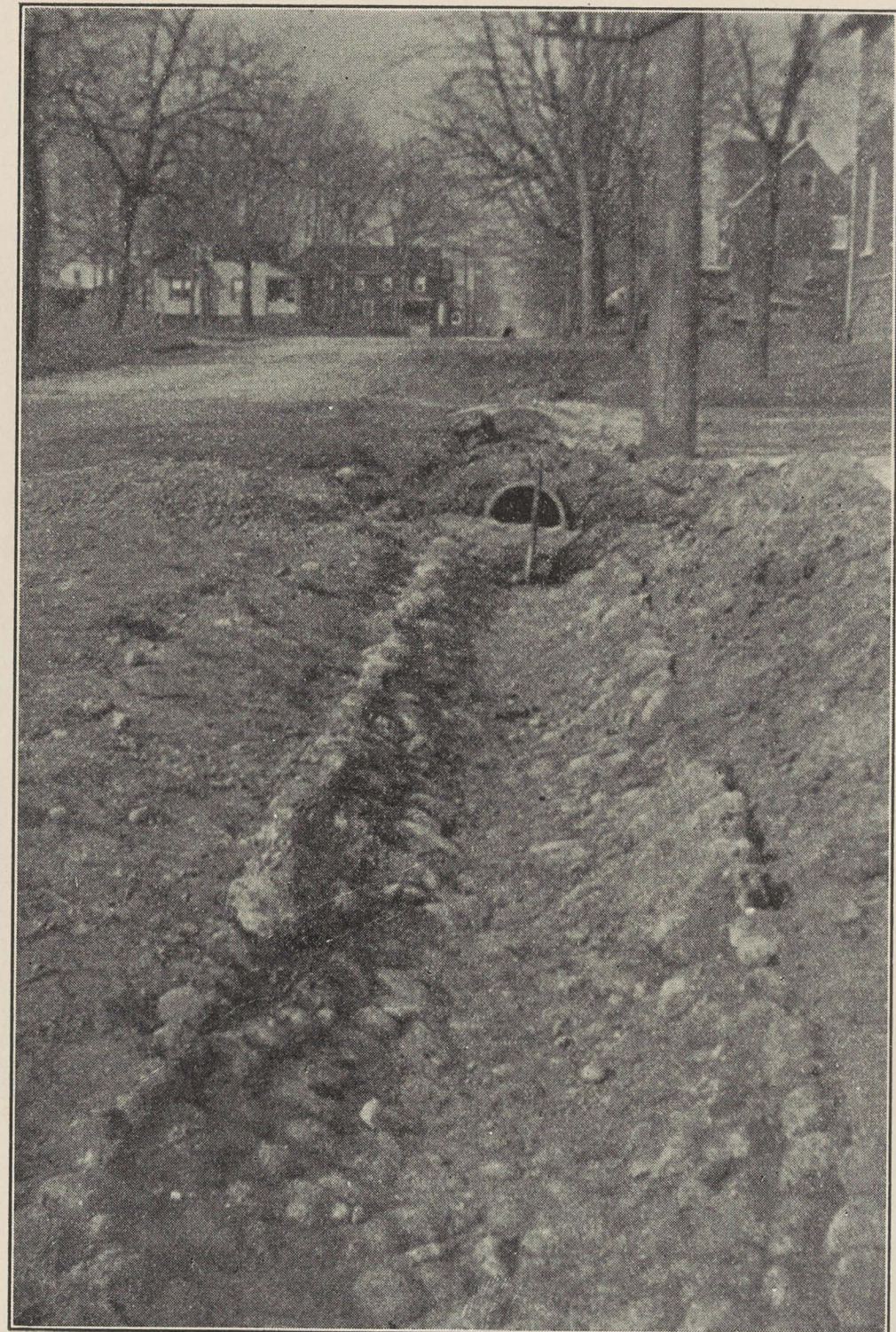
This is an Enlargement from a Picture Taken by Charles Arnn in 1923,
While Manufacturing Concrete Products.



Exhibits.

EXHIBIT P-4.

Picture Showing End of Drain Pipe and the Open Ditch,
in December, 1925.

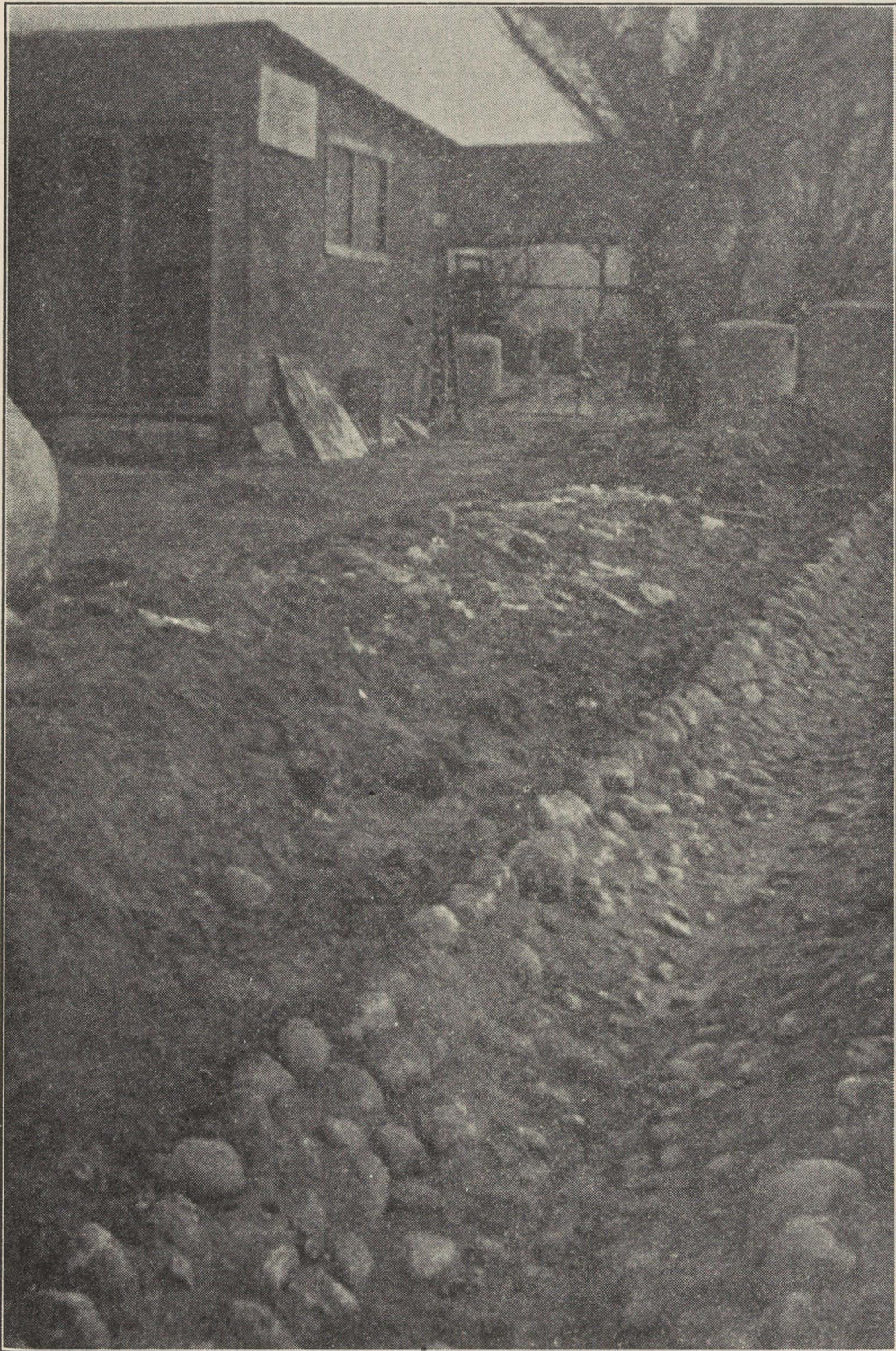


Picture taken by Ruth Arnn, under direction of Albert Arnn;
witnessed by Mr. and Mrs. John Muzzio.

Exhibits.

EXHIBIT P-5.

Picture Showing Open Ditch Just Before the Water Was
Diverted Through this Ditch, in December, 1925.

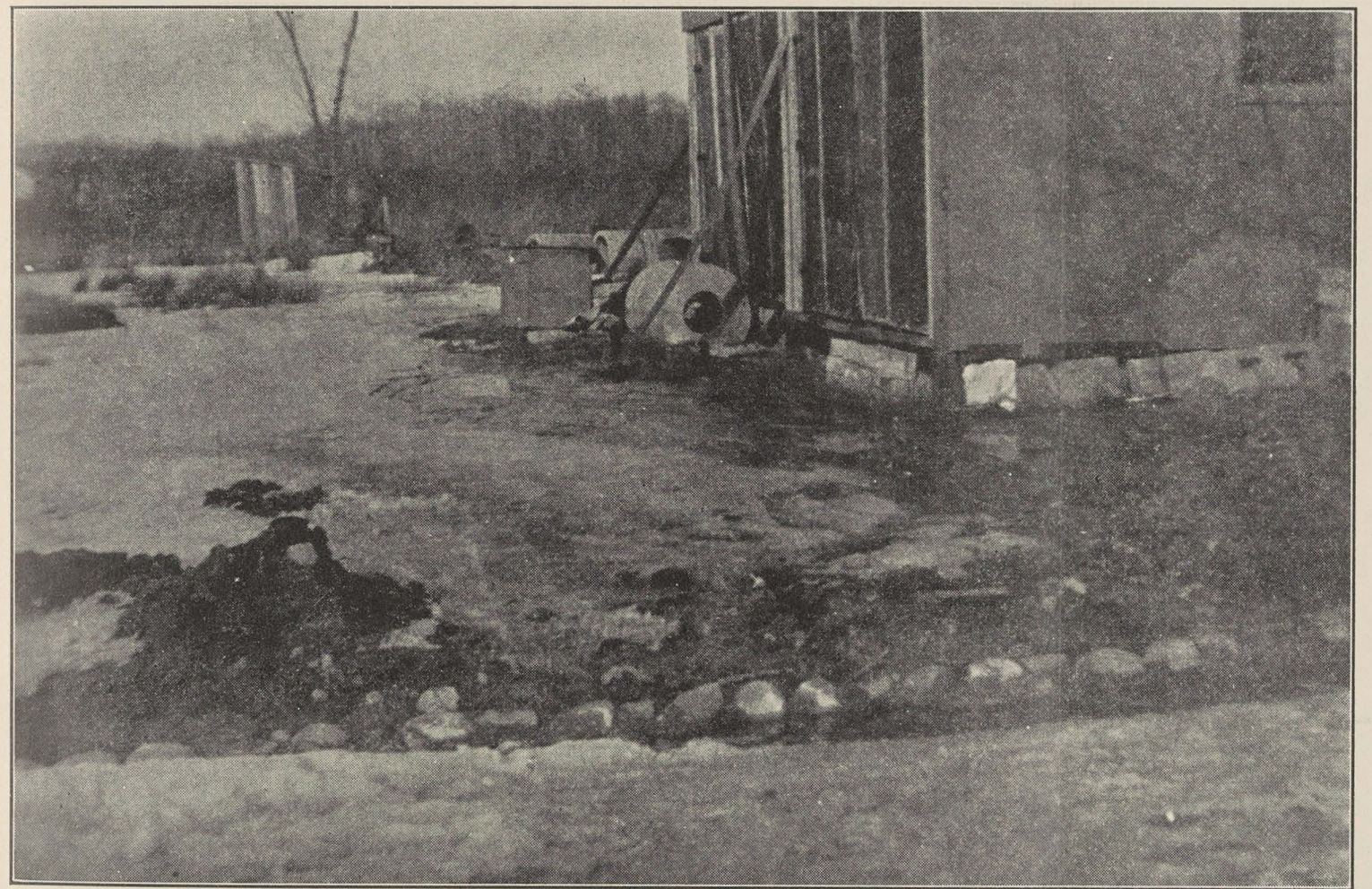


Picture taken by Ruth Arnn, under direction of Albert Arnn;
witnessed by Mr. and Mrs. John Muzzio.

Exhibits.

EXHIBIT P-6.

This Picture Shows the Condition of My Property after the First Rain,
While the Ditch was Overflowing, in December, 1925.

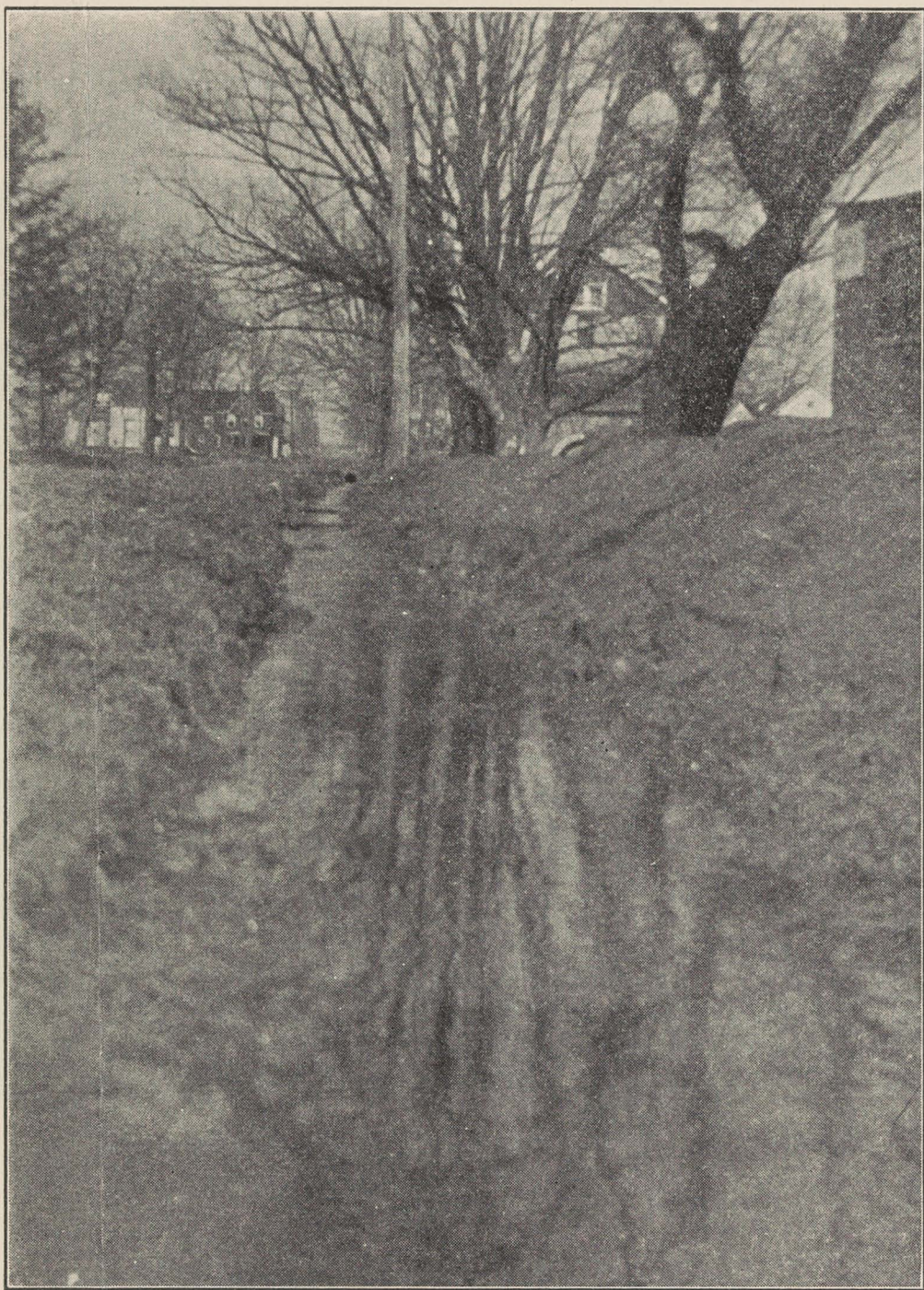


Picture taken by Ruth Arnn, under direction of Albert Arnn;
witnessed by Mr. and Mrs. John Muzzio.

Exhibits.

EXHIBIT P-9.

This Picture Shows How the Borough of Northvale has Never Bridged Over the Open Ditch, Thus not Giving Me a Driveway Into My Property.



This is an enlargement from a picture taken by Charles Arnn, in April, 1927, after the construction of an additional embankment by contractors for the Boroughs of Northvale, Delmonte and Marcason.

Exhibit P-10.

Intr. Aug. 3/25
 Passed Sept. 14
 Approved Sept. 14

An Ordinance to provide for the clearing of Paris Ave. from Charles St. to Scharer St. in the Boro. of Northvale, Bergen County, N. J., to the appropriation and cost thereof.

10

Be it ordained by the Mayor and Council of the Borough of Northvale, that there shall be constructed in said Paris Ave. the necessary drains and catch basins and other appurtenances for the draining thereof in accordance with the plans and specifications prepared by Hering and Westphal, Boro Engineer and on file with the Boro Clerk. That this improvement is hereby declared to be a local improvement, and the damages sustained and benefits conferred upon any lands affected by said improvement shall be assessed in accordance with the statute in such case made and provided. That there is appropriated the sum of \$8,000 or so much thereof as may be necessary to pay the cost of the aforesaid improvement, which said sum or sums shall be raised by the issuance and sale from time to time during the course of the improvement as may be necessary, of temporary loan notes or temporary bonds to run with all renewals thereof, for a period of 6 years from the date of the completion of the aforesaid improvement with interest not exceeding 6% per annum. All other matters with respect to the form, issuance and sale of such temporary notes or bonds shall unless provided by resolution be determined by the Mayor and Boro Treasurer who together with the Boro Clerk, are hereby authorized to sign the same and

20

30

40

Exhibits.

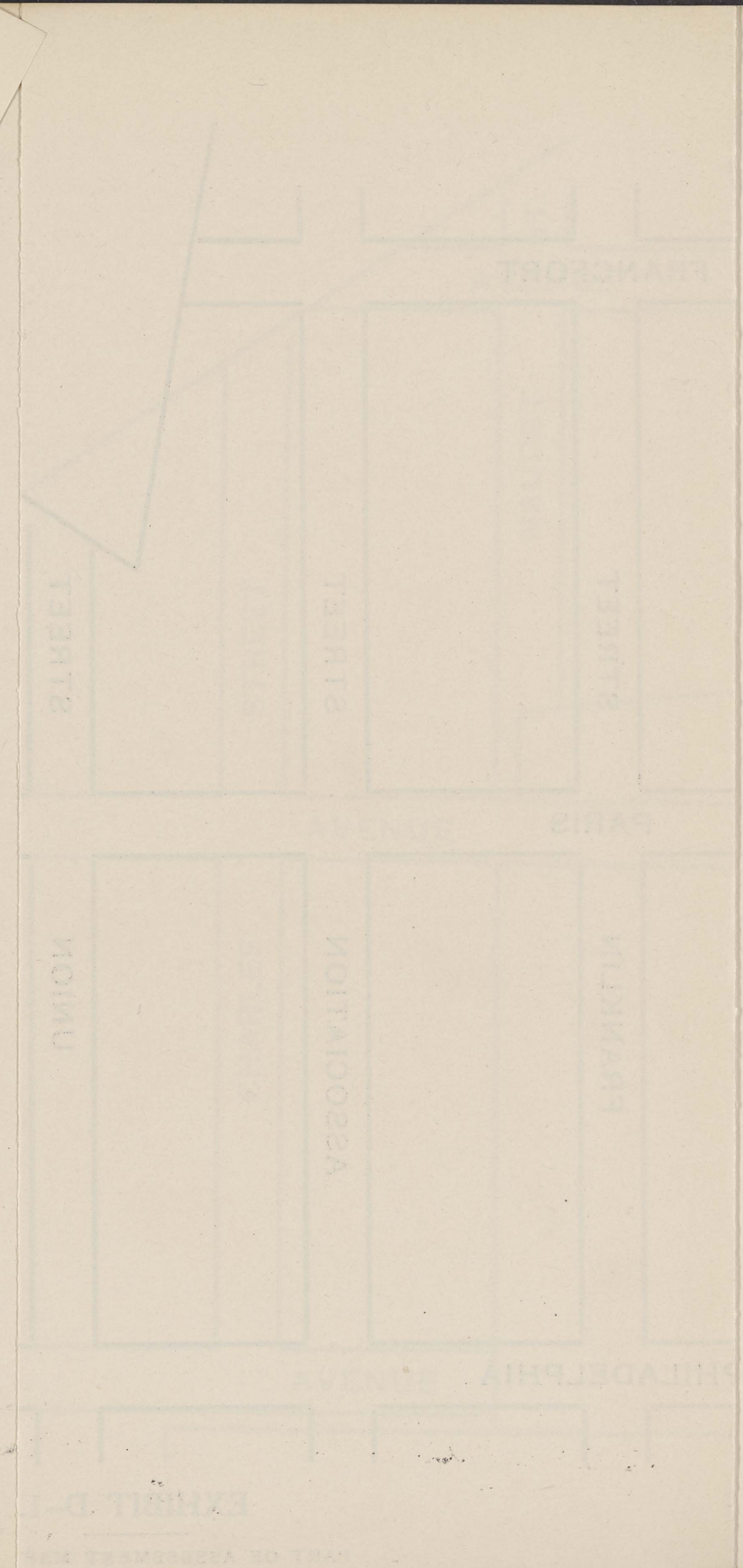
affix the corporate seal thereto. In case temporary bonds are issued hereunder the same may be either registered or coupon bonds and if coupon bonds the coupons attached thereto shall bear the facsimile signature of Boro Treasurer and effectively immediately.

10

20

30

40



NORTHERN RAILROAD OF N. J.

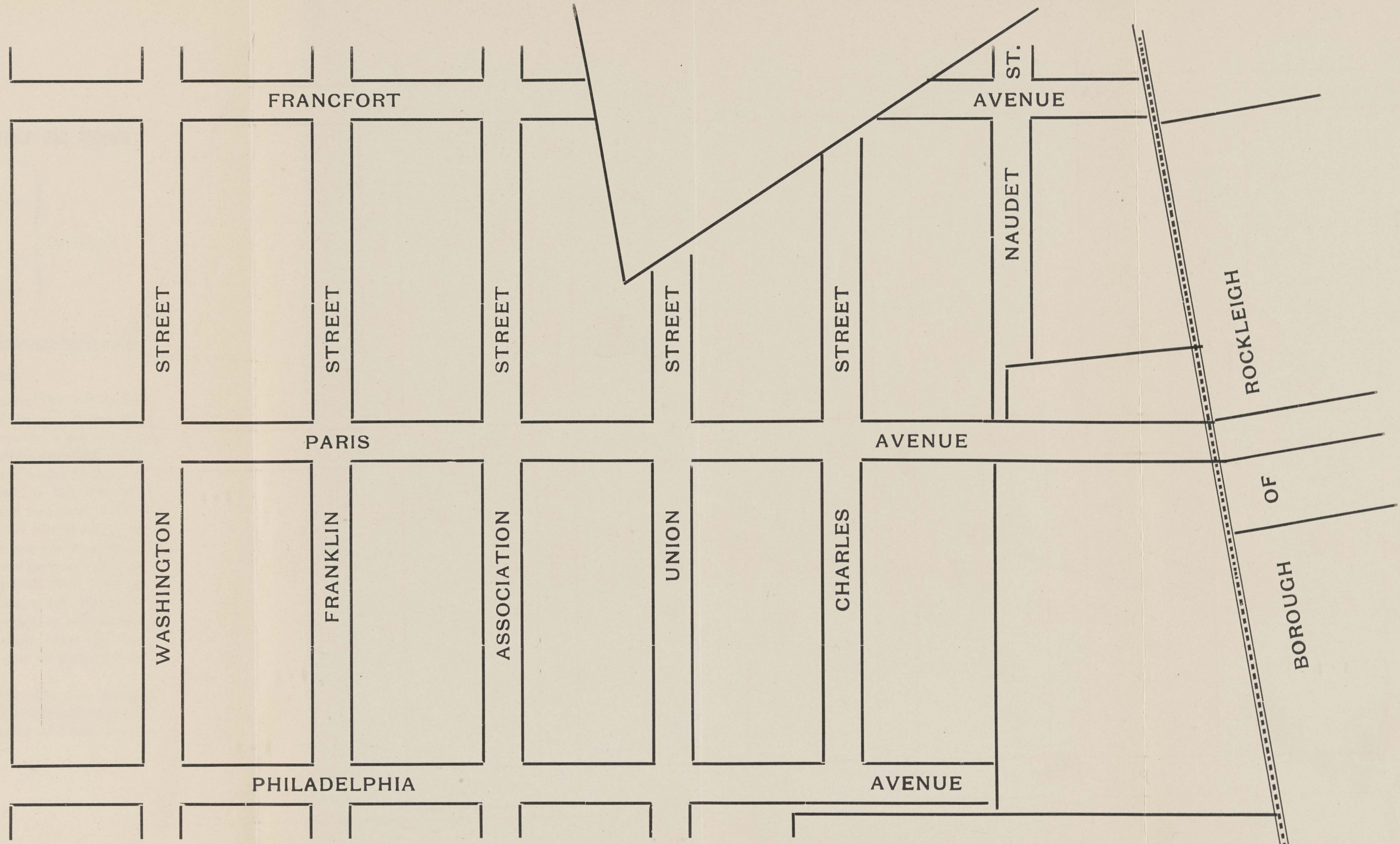


EXHIBIT D-1.

PART OF ASSESSMENT MAP OF THE

39 MAY.T.1928

New Jersey Court of Errors and Appeals

ALBERT ARNN,
Plaintiff-Appellant,

v.

THE BOROUGH OF NORTHVALE, in
the County of Bergen,
Defendant-Respondent.

On Appeal.

BRIEF FOR PLAINTIFF-APPELLANT.

Statement.

This action is brought against The Borough of Northvale in the County of Bergen for alleged damage caused to certain property in the Borough of Northvale which the plaintiff-appellant had acquired the right of possession to under a certificate of tax sale (Exhibit P-2, Case, p. 87), which he acquired August 20th, 1906 and had paid taxes on continuously down to the time of trial (Case, p. 14).

In 1922 he commenced business on the property for the manufacture of concrete products. He carried on said business during 1922, 1923, 1924 and 1925, until December 1925 (Case, p. 15). He discontinued his manufacturing business in 1925 because he was flooded out by the water from the drain that was laid on the north side of Paris Avenue (see Exhibit P-1, Case, p. 87).

In September 1925, an ordinance was adopted by the Mayor and Council of The Borough of Northvale to provide for the clearing of Paris Avenue

from Charles Street to Scharer Street. This ordinance provided for the construction on Paris Avenue of the necessary drains and catch basins and other appurtenances for the draining thereof, in accordance with the plans and specifications prepared by Hering and Westphal, Borough Engineers (see Exhibit P-10, Case, p. 97). The plaintiff-appellant's property was located on the north side of Paris Avenue, between Charles Street and Union Street and known as lots 9 to 15 and 25 to 28 inclusive (see Defendant's Exhibit D-1, Map, Case, p. 98).

That after the construction of the drain, catch basins and other appurtenances for the draining of Paris Avenue, the surface water was diverted in large quantities onto the plaintiff-appellant's land and destroyed his manufacturing business. He complained to the Mayor and Council (Case, p. 19). Prior to the construction of the drain, the surface water went through an old drain down to the railroad and then due north to the railroad about 800 feet and then it went under the railroad in the culvert and then went out toward Sparkill Brook. Prior to the construction of the drain in question, the surface water did not come down beyond the railroad and overflow upon his property. He never had any trouble prior to that time with surface water overflowing onto his land. After the construction of the drain in question, the surface water came down onto his land in volumes, large quantities of it, with the result that it washed in the banks on the side of the lake, it washed the mud into the lake and deprived him from manufacturing products in his plant because of the water coming in (Case, p. 20). He complained again to the Mayor and Council (Case, p. 22), but they would do nothing for him, with the result that he had to give up his manufacturing business and

his machinery and equipment were destroyed (Case, p. 27).

The case was tried before the Bergen Circuit and a judgment of nonsuit entered, from which this appeal was taken (Case, p. 1).

POINT I.

The judgment of nonsuit was erroneous.

The complaint charges the respondent with active wrong-doing, in that it caused to be diverted surface water in the Borough of Northvale from the course which it otherwise would have taken and caused it to flow in great volume upon the lands occupied by the appellant and upon which he was carrying on a manufacturing business, thereby destroying his business, machinery and equipment and lands whereon it was located.

The active wrong-doing upon the part of the defendant-respondent was the installation of drains, catch basins and other appurtenances for the draining of Paris Avenue (see Exhibit P-10, Case, p. 97). Prior to the installation of these artificial drains, the water did not flow down Paris Avenue in any great volume, but took a natural course. Prior to the installation of the drains and appurtenances, it flowed from Scharer Street to the railroad, through an old drain, then along the railroad and then due north to the railroad about 800 feet. Then it went under the railroad in a culvert and then went out toward Sparkill Brook. Prior to that it did not go down beyond the railroad and overflow on the plaintiff's property. He never had any trouble prior to that time with surface water overflowing on his land. But after the construction of the drains and appurtenances under the ordinance (Exhibit P-10) it came down in volumes,

large quantities of it, onto the plaintiff's land (Case, p. 20), causing the damage complained of.

Plaintiff had been in the business of manufacturing concrete products on the property since 1922 until December, 1925, when he was obliged to discontinue because of the great amount of surface water that had been diverted onto the property. He is corroborated in this by the testimony of his son, who worked with him at times (Case, pp. 63, 64, 65, 66). He is also corroborated by the testimony of Charles Dietrich (Case, p. 51). Mr. Muzio, another witness for the plaintiff testified (Case, p. 79):

"Q. Yes. Now, would you say that the same amount of surface water flowed down there before this drain was constructed? A. No.

"Q. No? A. No. It never crossed the road before, to my knowledge, that I can remember.

"Q. It never did? A. That is, not at that section of Mr. Arnn's property."

And on cross examination he was asked:

"Q. Then since this pipe line was put in, the water spreads all over both sides of Paris Avenue; is that correct? A. Well, it floods Mr. Arnn's place, and when it is a real bad rain, I have seen it go over the road back of my place, that is, I call it—

"Q. Does it run over Bono's corner here, these lots (indicating)? A. Not in Bono's, because they are too high to go there."

Plaintiff offered to produce other witnesses to testify to the condition (Case, p. 81).

Counsel for the respondent moved for a nonsuit and relied upon the case of *Waters v. Newark*, 56 N. J. L. 361. We relied upon the case of *Kehoe v. Rutherford*, 74 N. J. L. 659, and other cases.

From the discussion between the Court and counsel on the motion for nonsuit, it appears that the Court was of the opinion that because more

than one man's property was damaged by reason of the diverting of the surface water through artificial drains, no cause of action accrued to the plaintiff.

It is our contention that the case comes clearly within *West Orange v. Field*, 37 Eq. 600; *Kehoe v. Rutherford*, 74 L. 659; *Bailey v. Osborn*, 80 L. 333.

POINT II.

Law.

Waters v. Newark, 56 L. 361, is not contrary to the doctrine laid down in the other cases for the reason that Justice GARRISON in that case, speaking for the Supreme Court, said:

"The courts of this state have said in conclusive form that the neglect of a municipal corporation to perform or its negligence in the performance of a public duty imposed on it by law, is a public wrong to be remedied by indictment, and cannot constitute the basis of a civil action by an individual who has suffered particular damage by reason of such neglect."

(and he cites other cases.)

"The doctrine of these cases is that where the public has been wronged there is but one redress, viz., the public remedy by indictment. Where, however, such public misfeasance has resulted not in the creation of a public nuisance for which an indictment would lie, but solely in the infliction of a private injury to the property of an individual, the remedy therefor is by a civil action by the party damaged." Citing *Jersey City v. Kiernan*, 21 Vroom 246.

The case of *Buckalew v. Freeholders of Middlesex*, 91 L. 517, was for injury received by Buckalew as the result of an accident caused by the automo-

bile which he was driving running into a hole in the road known as the Woodbridge and New Brunswick Turnpike in Middlesex County—a county road, and the theory upon which the judgment of nonsuit was affirmed, was that the plaintiff's injury did not result from any active wrongdoing of the defendant corporation,—simply a neglect to perform. In the present case the complaint alleges active wrong-doing and the evidence bears out the fact that prior to the installation of the artificial drain, the surface water took a different course along the railroad on Paris Avenue and did not reach the plaintiff's property, but by reason of the construction of the artificial drain from the railroad on, down Paris Avenue, the surface water was diverted in great volume, so as to completely destroy the manufacturing plant of the plaintiff, which the plaintiff had been operating without interference for at least three years prior to the construction of the drain in question.

The installation of the drain in question brings it clearly within the case of *West Orange v. Field*, 37 Eq. 600, wherein Justice VAN SYCKEL, speaking for this Court, at page 601, half-way down the page says, referring to the case of *Town of Union ads. Durkes*, 9 Vr. 21:

“As stated in that case, the authorities are quite uniform in holding that no responsibility attaches for damage done by the diversion of surface water by the public authorities, where the diversion is merely incidental to and occasioned by the making or alteration of street grades.

“The injury complained of here is not that consequent upon the alteration of grades, but flows from a scheme put into execution by the municipal authorities, by which the water is prevented from following the grades of the streets. By means of artificial ducts of channels the surface water over a large district is

carried away from where it would otherwise be discharged, and made to pour upon the complainant's lands.”

Kehoe v. Rutherford, 74 L. 659, which has been cited by this Court numerous times and has been recognized as the law wherein the municipality may be held for diverting surface water by artificial drains, makes the distinction quite clear. Justice TRENCHARD speaking for this Court, in that case, lays down three rules of law and on page 661, at the bottom of the page says:

“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.”

The case of *Buckalew v. Freeholders of Middlesex*, relied on by the learned Trial Judge, also refers to the *Kehoe* case, and Chancellor WALKER, speaking for this Court in that case on page 520, said:

“*Kehoe v. Rutherford*, in this court, opinion by Mr. Justice TRENCHARD, is an authority of the same kind, for there the exemption of a municipality from actions by individuals suffering special damage from its neglect to perform, or its negligence in performing, public duties, was expressly recognized and reaffirmed, etc.”

It is well to note that in this language he refers to actions by individuals suffering special damage, meaning more than one; in fact, meaning all persons who suffered special damage by reason of any active wrong-doing on the part of the municipality in diverting surface water through artificial drains.

We gather from the decisions that it is the active wrong-doing of the municipality that makes them liable. This was referred to again by this Court in the case of *Lydecker v. Freeholders of Passaic*, 91 L. 622, in the opinion of Justice BERGEN, on page 629:

"If the complaint had charged, and the proof sustained, the committing of an active wrong and not the negligent omission to perform a public duty, a different question would be presented."

I therefore contend that the complaint (Case, p. 3) in this case, charges, and the proof sustains, active wrong-doing on the part of The Borough of Northvale, in that they constructed an artificial drain and other appurtenances in question along Paris Avenue from Scharer Street (see Map, Case, p. 86) and thereby diverted the surface water which prior to the installation thereof, ran through an old drain to the railroad and thence northerly along the railroad to an open ditch (see testimony of Albert Arnn, Case, p. 20, testimony of Charles Arnn, Case, p. 64, lines 30 to 40).

Annexed to the State of the Case are the several exhibits, P-3 to P-9 inclusive, which show the conditions prior to and after the construction of the artificial drain and appurtenances in question.

I therefore submit that the direction of the verdict of nonsuit is erroneous and may be set aside with costs.

Respectfully submitted,

GEORGE W. BABCOCK,
Of Counsel for the Plaintiff-Appellant.

[8876]

FETZER PRESS, 62 Reade Street, N. Y.

39 MAY.T.1928

New Jersey Court of Errors and Appeals

ALBERT ARNN,

Plaintiff-Appellant,

vs.

THE BOROUGH OF NORTHVALE, in
the County of Bergen,

Defendant-Appellee.

Action at Law
on Appeal.

BRIEF FOR DEFENDANT-APPELLEE

Statement.

This action was tried at the Bergen Circuit on December 19th, 1927, before Judge Caffrey and a jury.

At the close of the testimony introduced at the trial on behalf of the plaintiff, counsel for the defendant moved for a non-suit on the ground that an action does not lie at the suit of an individual having suffered special damage, even from the neglect of a municipal corporation in the performance of a public duty, and several leading cases were cited in support of the defendant's contention. The Court granted the motion for a non-suit. To this ruling an exception was taken and allowed.

This appeal brings into this Court the whole record for review.

The facts in the case at bar are as follows:

The plaintiff, the holder of a certificate of tax sale for which he paid \$25.54 brings this action against the Borough of Northvale for damages to lots 9 to 15 and 25 to 28 inclusive in Block 110 shown on the assessment map of the Borough of Northvale, to the buildings erected thereon and for the loss of profits to his business, a portion of which map, showing the district in question, marked Def. Ex. 1 (Case, p. 99).

It is not disputed that the Borough of Northvale, pursuant to ordinance duly passed constructed a drain pipe underneath the surface and along the northerly side of Paris Avenue in said Borough from Scherer Street on the west to a point 125 feet west of the plaintiff's lots and an open cobble stone ditch from the end of said drain pipe easterly to Charles Street, as shown on said map, defendant's Ex. 1.

After the drain pipe was installed and after a heavy rain, a great deal of water came through the pipe and flowed over the sides of the open ditch and over the plaintiff's lots numbers 9 to 15 and 25 to 28 in Block 110, over lots 29 and 30 not owned by the plaintiff, and the land of other owners, and also over Paris Avenue and Union and Charles Streets.

In the case under review there is no proof that the drain pipe or open ditch was improperly or illegally constructed, or that the municipal authorities had no legal right to construct the same. The gravaman of the plaintiff's action being laid upon the alleged diversion of the surface water coming down Paris Avenue, where it would not otherwise have gone, from whence it flowed upon the land of the plaintiff, causing the damages for which the suit was brought.

With reference to the area flooded, plaintiff testified (Case, p. 39) as follows:

"Q. Were your lots the only ones that were flooded at the time you speak of? A. My lots and the lots that was below me, naturally got its dose also."

"Q. Well did you not own these lots? A. I did not, no."

"Q. And the water flowed over Charles Street, did it? A. It certainly did, yes."

"Q. There is a street just west of you, called Union Street upon that map? A. Yes sir."

"Q. Did it flood over that street? A. It did, yes."

"Q. It flooded over Union Street; is that correct? A. It flowed down Union Street."

"Q. And over the property of other people than yours? A. No doubt of that."

"Q. No doubt of that? A. Yes sir."

The plaintiff also testified (Case, p. 41).

"Q. And the water also went along down toward the brook, did it not, when you had heavy rains? A. Well, it went down into the meadows."

"Q. To the east of you? A. To the east of me."

"Q. And the brook would also overflow, would it not? A. It would at times."

The plaintiff also testified (Case, p. 43).

"Q. And isn't it a fact that part of your buildings are on lot No. 30? A. Part of the shed that is over the concrete mixer is probably on Borough property."

The plaintiff testified (Case, p. 44).

That lots 29 and 30, Block 110 are Borough property.

JAMES J. MUZZIO, Witness for plaintiff testified (Case, p. 78).

"Q. Well, then, would you say, after September 1925, the surface water has increased in volume? A. Yes, the water goes across the street, comes over from the side where Arnn's place is, over where I live."

"Q. Did you see it flow over onto Arnn's property? A. Yes."

"Q. And very often? A. Heavy rains, yes, flooded the place."

(Case, p. 79), continued.

"Q. Are you on the same side of Paris Avenue, as Mr. Arnn? A. No sir, on the opposite side."

"Q. Now would you say that the same amount of surface water flowed down there before the drain was constructed? A. No, it never crossed the road before."

James J. Muzzio, further testified (Case, p. 79 to 81).

"Q. It floods over both sides of Paris Avenue? A. Yes."

From the testimony introduced on behalf of the plaintiff, it unquestionably appears that the plaintiff was not the sole sufferer; that water did not flow on to the plaintiff's property alone, but on the contrary, the water flowed over the properties of other owners and also over Paris Avenue, Union and Charles Streets.

ARGUMENT.

POINT I.

The rule of law applicable to the facts in this case has been well settled by the courts of this State. In a long line of decisions it has been adjudicated in conclusive form that the neglect of a municipal corporation to perform, or its negligence in the performance of, a public duty imposed on it by law, as in the case at bar, is a public wrong, to be remedied by indictment, and cannot constitute the basis of a civil action by an individual who has suffered particular damage by reason of such neglect.

Sussex vs. Strader, 18 N. J. L. 108.

Livermore vs. Freeholders, 29 N. J. L. 245.

Pray vs. Mayor of Jersey City, 32 N. J. L. 394.

Waters vs. Newark, 56 N. J. L. 361; 28 Atl. 717.

Bisbing vs. Asbury Park, 80 N. J. L. 416; 78 Atl. 196.

Buckelew vs. Freeholders, 104 Atl. 308.

It is quite evident from the facts of this case that the public at large was to a greater or less extent subject to the same condition to which the plaintiff refers his special injury. This being so there is no private right of action by the plaintiff against the defendant.

In the case of *Waters v. Newark*, 56 N. J. L. 361, the Court says:

"The plaintiff, in 1875, was the owner of property on the corner of Kinney and Halsey Streets, Newark. A sewer built by the defendant ran through Kinney Street. There was a manhole at the corner of Kinney and Halsey Streets, opposite plaintiff's property. Later in the year 1875, a connection from another

sewer was made into the Kinney Street sewer above the plaintiff's property, causing an increased amount of sewerage to flow through it. Before these new connections were made, the Kinney Street sewer had sufficient capacity to carry off all the drainage that flowed into it. After these connections were made, the Kinney Street sewer did not have sufficient capacity and whenever there was a heavy rain the water backed up from the sewer and flowed out of the manhole and sewer basin, ran across the sidewalk in front of the plaintiff's property and ran into the windows of the plaintiff's house, causing damages."

Justice Garrison speaking for the Court, said:

"The Courts of this State have said in conclusive form that the neglect of a municipal corporation to perform or its negligence in the performance of a public duty imposed on it by law, is a public wrong to be remedied by indictment, and constitute the basis of a civil action by an individual who has suffered particular damage by reason of such neglect.

"The doctrine of these cases is that where the public has been wronged there is but one redress, viz., the public remedy by indictment. Where, however, such public misfeasance has resulted not in the creation of a public nuisance for which an indictment would lie, but solely in the infliction of a private injury to the property of an individual, the remedy therefor is by a civil action by the party damnified. *Jersey City vs. Kiernan*, 21 Vroom 246.

"It follows that, in any given case of special damage, the question as to the right of civil action is narrowed down to the inquiry whether such damage is or is not part of a public wrong for which an indictment would lie.

"An examination of the statement of facts in this case shows that the sewer maintained by the defendants on Kinney Street was not at

all times of sufficient capacity to vent the water that reached it through the transverse sewers, and that in consequence of this neglect the public highway upon which the plaintiff abutted was overflowed. It is evident, therefore, that the condition to which the plaintiff refers her special injury was one to which the public at large was, to a greater or less extent, subjected, and that, upon proof of these facts, an indictment would be sustained."

This being so, there is, upon the authorities above cited, no private right of action in the plaintiff.

The plaintiff-appellant contends that the case at bar is within the doctrine of *Kehoe v. Rutherford* (74 N. J. L. 659) and other similar cases.

Chancellor Walker writing the opinion in *Bucklew v. Freeholders*, 104 Atl., 308 explains the doctrine of *Kehoe v. Rutherford*. He says at page 309:

"*Kehoe v. Rutherford*, in this court, opinion of Mr. Justice Trenchard, is an authority of the same kind for there the exemption of a municipality from actions by individuals suffering special damage from its neglect to perform, or its negligence in performing, public duties, was expressly recognized and reaffirmed, while it was held, on the particular facts of that case, that an action lay for the diversion of surface water by a municipality from the course it would otherwise take, and casting it in a body large enough to do substantial injury on land, where, but for an artificial drain, it would not go. The lands and property damaged were those of the plaintiff, *Kehoe*; they were not public property in any sense, and the damages consequently, was that suffered by the owner alone, dissociated from his membership in the general public."

The distinction between the case of *Kehoe v. Rutherford* and the case at bar is apparent.

In the Kehoe case, it was only Kehoe's lands that were damaged, while in the case at bar, property owners other than the plaintiff and the public generally were injured.

POINT II.

There was no legal proof of damages offered by the plaintiff in the case at bar.

(1) The plaintiff claims damages to lots numbers 9 to 15 and 25 to 28 in Block 110 and the buildings erected thereon.

As the plaintiff is the owner of a certificate of tax sale of the lots in question, for which he paid the sum of \$25.54 (Case, p. 88), which has never been foreclosed, his interest therein is that of a mortgagee and the measure of his damages, if any, is limited to the injury done to his security.

Jackson v. Turrell, 39 N. J. L., 329.
Schalk v. Kingsley, 42 N. J. L., 32.
Elvins v. Del. & Atl. Tel. Co., 63 N. J. L., 243.

There being no proof of any damages to his security no damages to the real estate can be allowed to the plaintiff.

(2) There was no evidence introduced of damages to plaintiff's buildings.

(3) There is no allegation in the complaint of damages to the plaintiff's machinery (Case, p. 5). Any evidence of damages thereto is irrelevant. Such evidence was objected to by defendant (Case, pp. 28 and 29).

(4) Testimony of loss of profits in plaintiff's business, was incompetent, too remote, speculative and uncertain.

As the plaintiff is the holder of a certificate of tax sale of the lots in question he was not entitled to use the sand, dug from the premises in the manufacture of his concrete products.

Brewer v. Ireland, 67 N. J. L., 31.

"The purchaser of a tax title in possession of lands under his certificate of sale is not authorized, by the common law, or by statute, to cut timber trees during his term."

The plaintiff testified (Case, pp. 20 and 21) that for use in the manufacture of his cement products, this sand was dug out by him, leaving a hole in the ground which filled with the water complained of thereby preventing the plaintiff from continuing his said business. It was to get this sand which caused the plaintiff to locate his business at the place in question.

The value of the sand went toward making up the profits claimed by the plaintiff to have been lost through the alleged acts of the defendant.

The profits testified to were uncertain, remote and speculative.

In tort actions, remote, speculative or uncertain profits lost are neither an element of damages nor evidence of damages.

Bates v. Warricks, 76 N. J. L., 108.

For the reasons above stated, the appeal should be dismissed and the judgment affirmed, with costs.

Respectfully submitted,

FREDERICK W. MATTOCKS,
 Attorney for Borough of Northvale,
 in the County of Bergen,

Defendant Respondent.

