

New Jersey Court of Errors and Appeals

THEODORE JEROLAMAN,
Plaintiff-Respondent,

vs.

THE TOWN OF BELLEVILLE, in
the County of Essex,
Defendant-Appellant.

Action at Law.

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BRIEF OF APPELLANT.

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POINT I.

The Court should have granted the motion of defendant for a non-suit on the First Count.

The testimony of the plaintiff and the plaintiff's witnesses fails to show that the defendant had *increased* the volume of the flow of water which reached plaintiff's land. The plaintiff's case shows only a change in direction of the flow, which change was incidental to the grading and improving of streets, and which did not increase the volume.

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Even if the volume of water thrown upon the plaintiff's land was increased, the testimony showed that such increase was due entirely to the lawful improvement and grading of streets by the defendant.

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Furthermore, there is nothing in the testimony to show that the defendant did in any manner change or increase the general drainage area or adopt any scheme by which the surface water was prevented from following the natural street grades.

10 The plaintiff's own testimony shows that the floods complained of were caused by unusual storms and by his own testimony of conditions prior to the grading of streets by the defendant, his property would have been similarly flooded during such storms.

In this court, in the case of *Miller vs. Morristown*, 48 Equity, p. 645, it was held as follows:

20 "No doubt can be entertained under the evidence that the quantity of water discharged on the complainant's land since the streets were graded and guttered is much greater than it was before. But this does not show that they have sustained an actionable injury. Such improvements necessarily result in increasing the quantity of water sent to the point of discharge and also the celerity with which it is carried there. They are made in part to effect these purposes. The road bed is made hard and smooth and put in such a form that it
30 will shed water quickly instead of collecting in the depressions, there to remain until absorbed or evaporated; and then paved gutters are constructed on the sides so that all the water falling on the road or finding its way there shall run off at once into the gutters and be by them quickly carried to the point of discharge. It is also true as the proofs show that the quantity of water carried to the complainant's land and there discharged has been
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somewhat increased by an enlargement of the area of drainage, but such enlargement is, it appears, the direct result of making the grade of the streets improved, conform to the grade established by the proper authority. So that it thus very clearly appears that the whole of the increased quantity of water transmitted to the complainant's land is such and such only as is necessarily diverted to their land in carrying out a lawful scheme of local improvement. For injury resulting from such diversion of surface water no action will lie." 10
 (Cites *Town of Union v. Durkes.*)

In this case the court also said:

"No responsibility attaches for damage done by the diversion of surface water, where the diversion is merely incidental to and occasioned by the making or alteration of street grades." 20

"But where a municipality puts into execution a scheme of improvement by which surface water, collected from a large area, is prevented from following the grades of the streets, and is carried by artificial means from where it would otherwise be discharged and made to flow onto the land of one person, in ease of the land of others, there an actionable wrong is committed." 30

"Where the quantity of surface water sent to the point of discharge is increased by an enlargement of the area of drainage, but such enlargement results entirely from making the grade of the streets conform to the grade established by the proper authority, any injury resulting from the increase in the quantity of water discharged at that point is regarded, in law, as *damnum absque injuria.*" 40

“Where a municipality, by means of a basin and culvert, discharges all the surface water carried to a particular point in such manner that the water, by its own force, makes a channel for itself through the land of a citizen, a taking of private property for public use occurs, and if no compensation to the owner be provided, the use of his property by the municipality will be enjoined.”

10 In the above case the defendant, by means of the culvert, collected water which never before flowed upon complainant's land and diverted it to his land, and also by means of the culvert, threw upon the land in question, at one point, water which theretofore had flowed upon the land over a more widely diffused area.

20 In the case of *Field vs. West Orange*, 37 Equity, p. 600, decided by this court, it was held:

“The diversion of surface water by the grading of public streets, done under competent authority, by which the water is cast upon plaintiff's premises, does not constitute an actionable wrong.”

30 “The public authorities have no right by the construction of artificial drains in such streets to divert the water from where it would otherwise flow and thereby collect it and cast it upon complainant's lands.”

40 “The complainant must bear the flowage of surface water cast upon his lands in consequence of the alteration of grades, but a scheme of drainage cannot be put into operation by which the surface water is prevented from following the street grades, to his detriment.”

In the above case the injury complained of flowed from a scheme put into execution by the municipal authorities by which the water was prevented from following the grades of the streets. By means of artificial dikes or channels the surface water over a large district was carried away from where it would otherwise be discharged and made to pour upon complainant's lands. It was upon these facts that the decision in this case was based. 10

The case of *Noonan vs. Albany*, 79 N. Y., 470, which is cited by the case of *West Orange vs. Field*, supra, was one where surface water was collected by the city from a large area by means of artificial structures in the streets, and thrown upon the land of the complainant. Upon that state of facts the court there allowed a recovery. 20

The court in the case of *Field vs. West Orange*, commenting on the case of the *Town of Union ads Durkes*, 38 N. J. L., 21, said: "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 in execution by the municipal authorities by which the water is prevented from following the grades of the streets." 30

In the case of *Township of Hamilton vs. Wainright*, 52 N. J. Equity, 419, the court said, "that all corporate bodies which have control of streets and highways may construct and repair such streets 40

and highways without regard to the consequences to private individuals, resulting from damming up and precipitation of surface water, yet I apprehend that almost every well-considered case disapproves the right of such authorities to pursue a course of construction or repair which will result in the collection of large quantities of mere surface water and especially of water which is used by a private individual in manufacturing his wares and diverting them from the channels or courses in which they would naturally flow and conducting them to the lands of a private individual.”

After citing numerous authorities, the court continued as follows: “None of these authorities are in the slightest degree in conflict with the doctrine first above laid down, that the township has the right to maintain and preserve the flow of the surface water in the same manner and to the same extent for the maintenance and proper repair of the highway that such water would flow in case there was no highway there.”

In this case the bill was dismissed because the town had permitted private individuals to divert water from their plant which would not otherwise have flowed across the defendant’s land.

In the case of *Field vs. West Orange*, the municipality was enjoined because it was about to put into effect a scheme by which surface water from a large area was to be collected and discharged upon the plaintiff’s property.

POINT II.

The court should have granted the motion of defendant for a direction of a verdict for the defendant.

The evidence on the entire case shows that the defendant graded and improved the streets west of Washington Avenue and because of this grading the water which formerly flowed down Jerolaman Street and then north to the brook at Hornblower Avenue, afterwards continued down Jerolaman Street to Washington Avenue and then flowed north to the brook.

Both before and after the grading of the streets the volume of the water finding its way into the brook above the plaintiff's land was not increased, unless by the grading of the streets, some of the surface water, which formerly was absorbed, was carried to the brook. The only change caused by the grading of the streets was to throw the water from Jerolaman Street into the brook at Washington Avenue instead of one block west of Washington Avenue, as it had previously flowed. In either case it entered the stream above the plaintiff's property.

As to the culvert or drain on the east side of Washington Avenue. The testimony clearly indicates that the water on the east side of Washington Avenue, flowing north, still flowed or could have flowed down Jerolaman Street, and furthermore, there is no testimony showing that before the culvert was placed there all of the water flowed east on Jerolaman Street.

In both of the above instances, the testimony shows only that the defendant had, in a lawful manner, improved and graded the streets. There is no evidence tending to show that the defendant had adopted a scheme to divert water from an increased drainage area upon plaintiff's land. The

testimony of witnesses, both for plaintiff and defendant, throughout the entire case, shows conclusively that the injury complained of was due not to any act of defendant, but was caused solely by extraordinary and unprecedented storms which would have caused a similar flood before the grading or improvements made by defendant.

10 It is therefore respectfully submitted that this case is controlled by the decision cited under the previous point, to wit:

Miller vs. Morristown, 48 Equity, p. 645.

West Orange vs. Field, 37 Equity, p. 600.

Town of Union ads Durkes, 38 N. J. L., 21.

20 *Township of Hamilton vs. Wainright*, 52 N. J. Eq., 419.

The plaintiff contended that the construction of a drain by the defendant at Jerolaman Street and Cortlandt Street, where the brook, after passing through plaintiff's land, emerged into Jerolaman Street, was a contributing factor to the injury because of bars or grating placed across the entrance.

30 There is no testimony to show that the drain as then constructed was improper or insufficient for all purposes which could reasonably be anticipated. The defendant was not bound to anticipate extraordinary conditions which arose because of the unprecedented storm which caused the injury complained of by plaintiff.

40 In *Farham on Waters and Water Rights* (Vol. 1-361), the rule governing such circumstances is succinctly stated as follows:

"If a municipal corporation attempts to construct a culvert to carry a stream under a highway it will be liable for *negligently constructing* it of insufficient capacity to carry the water which *naturally* flows in the stream. And even though the channel is originally sufficient the municipality will be liable in case it permits it to be filled up so as to be insufficient to carry the water. *The municipality is, however, not an insurer and if it takes* reasonable precautions to have the passage-way sufficient by the employment of competent engineers it will not be liable for an honest mistake of judgment. It is not bound to anticipate extraordinary floods, but must provide for those which may reasonably be expected to occur."

Johnson vs. White, 65 L. R. A., p. 250. Note, p. 277, sec. vi.

POINT III.

The court erred in allowing, over defendant's objections, testimony of acts of defendant, after the injury complained of by defendant.

Evidence of repairs made or precautions taken after an accident is inadmissible.

This rule is firmly established by the authorities.

In the note found in *12 L. R. A.*, at page 559, reviewing the cases on this point as they existed in 1891, the weight of authority seems to have been that such evidence was inadmissible.

The rule is again referred to in a note found in *20 L. R. A. (N. S.)*, at page 667. The subject, however, is exhaustively treated in a note to *Alcott vs. Public Service Corp.*, *32 L. R. A. (N. S.)*, at page 1127, sec. iv., written in 1909.

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POINT IV.

The court erred in charging the jury as follows:

10 "So, again: 'Second. If the jury find that, at the time complained of, water which, in its natural course, according to the grade of streets and levels of adjacent property, would not have reached plaintiff's land, was artificially collected and di-

20 verted by the town to plaintiff's land, to his damage, it will not excuse the town that the water, years before, by another route, had reached the watercourse that ran through plaintiff's land.' In other words, if on the 11th of November, 1911, and the 12th and 13th of March, 1912, water which would not have come to plaintiff's land in any way was thrown upon it, *the fact that at some prior time it had come upon the plaintiff's land by some*

30 *other course is past history which does not concern the court and jury. I charge that.'*"

If the defendant is liable in this case, its liability arises because it has by its wrongful acts collected and discharged surface water upon plaintiff's property which would not have flowed upon plaintiff's land naturally or as a necessary incident to the grading.

30 By this charge, the court has instructed the jury that they are not concerned with the question whether the same volume of water, from the same sources, prior to the acts of defendant would or would not have reached plaintiff's land by the natural watercourses of the surrounding country. It is respectfully submitted that under the cases cited above, the jury should have been left to determine

40 whether, prior to the acts of defendant, the surface

water complained of would or would not have reached plaintiff's land by the natural drainage courses of that section. If the same floods would have resulted from these extraordinary storms prior to the acts of defendant, certainly the jury should have been concerned with that condition.

It is respectfully submitted that the judgment of the Essex County Circuit Court should be reversed.

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HAROLD A. MILLER,

Attorney for Appellant.

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Essex Circuit Court.

Before—Hon. FREDERIC ADAMS, J., and a Jury.

THEODORE JEROLAMAN

v.

TOWN OF BELLEVILLE.

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Action at Law.

Thursday, February 4, 1915.

For Plaintiffs appears Messrs. PITNEY,
HARDIN & SKINNER; by ALFRED F. SKIN-
NER, Esq.

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For Defendant appear Messrs. DEGRAW
& MURRAY.

A jury is called and sworn.

Defendant's counsel ask that the jury be sent
to view the *locus in quo*.

The Court (after argument): I will take the
matter up later.

A map produced by defendant is placed upon the
wall.

30

Mr. Skinner opens for plaintiff.

Mr. Murray opens for defendant.

THEODORE JEROLAMAN, plaintiff, sworn in
his own behalf.

Direct examination by Mr. Skinner:

Q. Mr. Jerolaman, you live in Belleville, do you
not? A. I do.

40

Q. How long have you lived there? A. Since 1881.

Q. Do you live on the corner of Cortlandt and Jerolaman Streets? A. I have my place of business there.

Q. How long have you had a place of business there? A. Since 1881.

10 Q. What business? A. Lumber and coal, principally.

Q. Anything else? A. Well, yes, I deal in hardware somewhat, and sand and gravel.

Q. Now, is there a watercourse, or ditch, running through your property? A. There is a small spring run, having its origin about 190 feet above the avenue westerly.

Q. Having its origin in what? A. In a spring.

20 Q. That spring that you speak of as lying west of Washington Avenue, I wish you would be good enough to indicate, if you can, here about where it is on this map. A. Where is the property?

30 Q. Here is your property; here is the railroad; and here is Washington Avenue; there you have the corner of Jerolaman Street and Washington Avenue (indicating on map). A. About 190 feet, I think it is; from 180 to 190 feet west of Washington Avenue the spring had its origin (indicating on map).

Q. Do you know a street on the ground called Essex Street? A. I do.

Q. Where is the spring with reference to Essex Street? A. On the north side of it.

Q. On the north side of Essex Street, about 190 feet west of Washington Avenue, is the spring from which flowed down this watercourse; is that right? A. That is right.

40 Q. Now, where is the watercourse with reference to your buildings? Just tell us as if you did not have any map. A. It enters the buildings near the

railroad, on the west side of what I call the lumber yard, west of the railroad; it enters under the buildings, or, rather, under my stable, then runs northerly nearly under the center of my lumber sheds and other buildings down to near my office, and then runs diagonally out from my sheds outside, but right near to it, quite close to it.

Q. Did you build the stables that you speak of, or were they there when you first went to this property? A. I built everything that was there.

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Q. Prior to that time had you experienced any trouble from the overflow of this watercourse? A. I experienced no trouble for about ten years—about 1890 or 1891.

Q. I am asking you whether you experienced any before building? A. No.

Q. When did you build? A. Well, I can't recollect the exact years.

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Q. Well, after you built when was the first trouble that came from this watercourse overflowing? A. The first trouble?

Q. Yes. A. I first began to have trouble in 1891, or something like that.

Q. I did not ask you that. Please listen to my question, because I do not want to waste time. I ask you when, with reference to your building—not what year, but how long after you built or before you built—did you have trouble from the overflow of this watercourse? A. But little trouble before I built.

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Q. And after you built, how soon or how long after you built was it, how many years? A. It might have been two or three or four years; I can't recollect now.

Q. Now, what did you do, if anything, to keep the watercourse from overflowing? A. At first, as I have said, I experienced no difficulty. I used my fence posts laid down on the other side of the

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stream and piled my lumber—rotted off fence posts—first, after several years—

Q. You piled your lumber up. I see. Go ahead.

10 A. —across the stream, using the ground. After I began to experience difficulty with the flooding of my lumber I took away those—the lumber—and built walls on either side once or twice, and finally I widened and enlarged the walls much higher, and after a few years that proved utterly inadequate; the water came down with such tremendous force and volume that it filled the entire channel with rocks and stones and debris of all kinds, and it swept over my lumber and coal yard.

Q. Now, in November, 1911, did you have any special trouble from overflow? A. Very much.

Q. Just describe that, will you, to the jury?

20 A. As I said—

Q. Not only tell us the effect of it, but tell us what happened.

Mr. DeGraw: When was this, Judge?

Mr. Skinner: November, 1911.

30 A. The flood came with such volume that the channel, the walls that I built, was entirely inadequate to control it; in fact, I abandoned trying to control it. It filled the channel with debris and burst out through the yard and spread out over the lumber and coal and scales; it swept over my scales, washing them out, washing out the sides, and also entered, I think, the rear door of my office at that time.

Q. Well, did it do any damage to your property? A. It certainly did.

40 Q. Describe that. A. Damage to the scales and to the lumber particularly, and, if I recollect correctly, it also damaged, perhaps, to some extent, the cement, but I can't recall whether the cement was damaged at that flood or the other. It is some

time since; I can't recall. I know that the cement was greatly damaged at one flood or the other, but I can't particularize.

Q. Then what was the damage to the scale? A. The scale was very badly damaged, washing out the sides, and, in fact, washing the walls and tilting the scales, you might say, washing out, probably, cutting away all the supports on the side.

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Q. Was this scale what they call a platform scale? A. It was a Fairbanks coal scale.

Q. You drive the team on and weigh the load? A. Yes, sir.

Q. And did you have it repaired? A. I did.

Q. What did it cost you to have it repaired? A. Well, the Fairbanks bill for the iron work was \$109.

Q. Have you got that bill? A. I have.

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Q. Will you produce it, please? A. (producing paper): \$109.20.

Mr. Skinner: I offer it in evidence.

Paper shown to defendant's counsel.

Q. Did you have the scale that was damaged repaired, or did you replace it with another, turning in the old scale? A. I think they replaced it with a new scale; that is my recollection, that they put in an entirely new scale—new iron work.

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Bill marked Exhibit P1.

Q. How long had you had that scale that was damaged? A. That was the first scale I had put in.

Q. Well, that does not tell me what I asked you about. A. Since 1881.

Q. Was there any reason why it was replaced with a new scale instead of having repair work done on that particular scale? A. No, I can't tell you,

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except it was in a very rusted condition, a badly rusted condition; it wouldn't weigh true.

Q. What was its condition before the flood? A. Well, I didn't experience any difficulty with it; it was all right.

Q. Well, what was its condition— A. I found when it was not accurate I had to have something done.

10 Q. Before the flood what was its condition of repair? A. Fair.

At one o'clock, P. M., the Court takes a recess of one hour.

After Recess.

20 THEODORE JEROLAMAN, plaintiff, resumes the stand in his own behalf.

Direct examination (continued) by Mr. Skinner:

Q. Mr. Jerolaman, did this first flood damage your property there in any other respect than the scale? A. Lumber, coal; I am not sure as to cement.

Q. How about the lumber, what was the damage? Not the amount of it, but the kind of damage? A. Well, the kind of lumber?

30 Q. No, the kind of damage? A. By reason of water, of course, and the flood, the water and the mud.

Q. Well, did the water come up around the lumber? Just tell us. A. Around a portion of it.

Q. Do you remember what kind of lumber it was? A. You are speaking now of the first flood?

Q. Yes. A. The small flood? We call that the first flood.

40 Q. Yes. A. What kind of lumber?

Q. Yes. A. White pine, cypress.

Q. Any North Carolina pine? A. Some North Carolina.

Q. Did you do anything at all in the way of repairing the damage, repiling the lumber, or anything? A. Oh, we tried to save what we could.

Q. What did you do? A. Repiling it, took off the better lumber and tried to save the other lumber, as far as our ability went.

Q. And what about the condition of your yard when the flood had subsided? A. Why, it was considerably torn up.

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Q. Anything deposited there from outside? A. Mud, earth, stone, gravel, sand.

Q. Now, did you have anybody come there for the purpose of examining the condition of your yard and appraising the damage? A. I did.

Q. Who? A. I think it was Mr. E. J. Mutch and Mr. George Wharton; that is my recollection.

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Q. Now, then, what is the slope of Jerolaman Street going west from Washington Avenue, up or down? A. Up, the grade is up.

Q. What is the slope of Jerolaman Street going east from Washington Avenue? A. That is a still greater descent.

Q. It is down? A. Down.

Q. And going west from Washington Avenue, how far does the upward grade continue? A. Oh, to the top of the hill where the reservoir is situated.

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Q. And where is the reservoir with reference to New Street? A. It is west of New Street.

Q. How far? A. I should say about 400 feet.

Q. This is a scale of a hundred feet to the inch. I suppose somewheres up in there (indicating)? A. A little further, probably; somewheres along there (indicating).

Q. Now, was there any macadamizing of the streets of Belleville at some one time, some particular time, any general macadamizing? A. There

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was no streets macadamized at all until about 1890 or 1891.

Q. And from there on was there considerable macadamizing? A. There was.

Mr. Skinner: I take it that you will not object to my leading a little about these admitted facts.

10 Q. Not until practically all of the streets of the township had been macadamized? A. Nearly all; there are some not macadamized yet.

Q. Well, when did you first come to Belleville? A. 1881.

Q. At that time was Union Avenue macadamized? A. It was not.

Q. Or DeWitt Avenue? A. No.

20 Q. Or Hornblower Avenue? A. No.

Q. Or Jerolaman Street? A. No.

Q. And later were those streets that I have just mentioned all macadamized? A. They were.

Q. As you first knew this section lying west of Washington Avenue and south of Jerolaman Street, was there any portion of it that was flat or practically level? A. Well, if I can explain in my words, there was a dividing ridge from which the water descended from that ridge south to Quarry Street, nearly all of Quarry Street on the north side—

30 Q. Quarry Street is down here below John Street, is it not (indicating)? A. The scheme of drainage—

Q. I do not care about the scheme of drainage. A. The drainage on the south of that ridge drained Quarry Street principally, or nearly all; on the north of that ridge it drained to Jerolaman Street.

40 Q. Listen to my question and answer it, please. I asked you whether there was a level portion, or flat portion, on any portion of this territory that has been described just now? A. No.

Q. Were there any ponds there? A. There was.

Q. What were they? A. There was what was called Hornblower's pond; I believe some called it Stevens' pond; they called the smaller Hornblower's pond. I always called that there south of Holmes Street Hornblowers' pond.

Q. That was south of Holmes Street? A. Yes.

Q. Where was it with reference to DeWitt Avenue? A. Between Holmes and DeWitt.

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Q. That was in here (indicating)? A. Yes.

Q. Was that a skating pond in the Winter? A. Yes, I believe it was.

Q. What was the character of the ground north of Holmes Street between Union Avenue and Hornblower Avenue? A. Descending, or rising, as you might call it.

Q. Was there any collection of water in that ground? A. The water drains from New Street to Union Avenue to the Hornblower's Pond.

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Q. The Hornblower's Pond was south of Holmes Street? A. Yes, sir.

Q. I am asking you about north of Holmes Street. Please listen to the question. A. Yes.

Q. Was there any collection of water north of Holmes Street? A. There was.

Q. Where? A. In the pond lying between Holmes and Jerolaman and between DeWitt and Hornblower Avenues.

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Q. Between DeWitt and Hornblower and between Holmes and Jerolaman? A. Yes.

Q. And what was the character of that territory in that boundary generally, as to whether it was— A. Well, rather low.

Q. Well, was it dry or wet? A. Wet.

Q. Aside from the pond, outside of the pond itself? A. Outside of the pond it wasn't—I wouldn't call it exactly dry and I wouldn't call it wet outside of the pond.

40

Q. Was there anything done by the township in connection with the macadamizing of these streets, anything done to the grade of the streets, any grading done? A. On both DeWitt Avenue and Hornblower Avenue.

10 Q. And after that macadamizing and such grading as you remember, was there any effect upon the water that had before that and still continued to fall on this flat surface up there? A. It ran north to Jerolaman Street.

Q. Well, do you mean that that was in any way affected by the work of the town? A. Well, they cut the ridge, the dividing of the ridge, between that and John Street, and threw the water that went to Quarry Street—they threw that back to Jerolaman Street by reason of filling in DeWitt Avenue several feet.

20 Q. Was there anything of the same kind on any other street? A. Only a slight amount of that on Jerolaman Street near the reservoir.

Q. Was there anything in the way of pipe? Did they put in any pipe at all to take off any of the water from Jerolaman Street to other property? A. They put a pipe under there; the town put a pipe there, but the owners of the property on that street filled in and built a house there, and that stopped the water.

30 Q. Put a pipe where? A. Under Jerolaman Street.

Q. Tell us where. A. Between Linden, or near Linden Avenue; I can't say just exactly; it was very near Linden Avenue, or Hornblower Avenue, rather. Linden is a continuation with a jog.

Q. Now, after heavy rains would there be any water thrown through this pipe? A. After heavy rains, surely.

40 Q. And onto this vacant land? A. Into the lower land on the north.

Q. What would become of it there? A. It would there collect and run down and get into the channel where the stream—where the brook was.

Q. Was there any place there where it collected and did not run away, just dried up, or evaporated—a pond, I mean? A. Yes, there was a pond that did evaporate, to a certain extent, but after it got a small amount of water it then ran away.

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Q. The overflow? A. The overflow.

Q. Have you seen the water coming down Jerolaman Street after heavy rains and reaching Washington Avenue? A. I have, yes; I have seen it coming down all along when—

Q. Just answer the question. You have seen it coming down Jerolaman Street to Washington Avenue? A. Yes.

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Q. I am speaking now of the times after heavy rains. How would it go when it reached Washington Avenue? A. When it was unobstructed—it struck the avenue when unobstructed, and it would turn north until the gutter became filled with debris, and then the water would go over.

Q. What do you mean by that? A. Go over the avenue, and then straight on down Jerolaman Street.

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Q. It would cross Washington Avenue and go straight down Jerolaman Street? A. Yes.

Mr. DeGraw: Could you fix this time? Is this last year, or when he came to Belleville, or just what time?

Mr. Skinner: I will try to bring it out. We cannot do it all at once.

Q. You say unobstructed it would go down and do this. What do you mean by that? A. Well, until they had built ditches, cleaned out the cul-

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verts and put in—cleaned out the channel and put in culverts to take it the other way.

10 Q. Never mind. Before any culverts were built, in the earlier state of things, water came down after a storm, you say, and ran across Jerolaman Street. When was that? A. That was before they built up Jeroloman Street; it was while Washington Avenue was a macadamized road, before they had raised the crown of Jerolaman Street the second time.

Q. Did this water running across Washington Avenue and down Jerolaman Street have any effect upon the roadway? A. Cut it in great gullies.

Q. Did that happen more than once? A. Oh, yes, a number of times; I couldn't say how many.

Q. Did it happen more than one year? A. I think it did, several years.

20 Q. And when was that, generally speaking? A. It was after they had almost concluded the grading and macadamizing of all these streets to the west, about 1897, 1898 or 1899.

30 Q. When you say "after they had concluded the grading and macadamizing of these streets," what streets do you refer to? A. Hornblower Avenue, DeWitt Avenue, Linden Avenue, Oak Street, Academy Street, the upper part of Academy, not the lower part, a little, small portion of Academy.

Q. And other streets? A. And Van Houten Place, a small part of Rutgers.

Mr. Murray: I would like Mr. Jerolaman to tell what he means by that. He speaks sometimes of grading the streets. If he speaks of the town, I do not think that is the proper way to prove it.

40 Mr. Skinner: I do not know that I am positive about it. I understood him to say that the town did it. It was in my question.

I asked him whether the work of macadamizing including any grading, or whether the town did along with it any grading, and he said yes.

Mr. Murray: Then I object to this form of proving the grading of the streets. I think the town records are the best evidence. It is secondary evidence, at best.

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Mr. Skinner: I submit, sir, that the town records could not possibly prove physical work of grading; that that is a matter of work, not of resolution, that the town did the work of grading.

The Court: I will let the testimony stand as it is. If it becomes proper to prove formal corporate action, the opportunity will be given to do it, of course.

Defendant's counsel object to this ruling of the Court.

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Objection noted as ground of appeal.

Q. Now, Mr. Jerolaman, pardon me if I cut you short. I am trying to keep this down and get it through within the time that the Court has. You have said that the water came down Jerolaman Street and, crossing Washington Avenue, damaged the street. What street do you mean? A. Jerolaman Street.

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Q. Where? A. The east side of the avenue.

Q. East of the avenue? A. East of the avenue.

Q. That is, east of Washington Avenue? A. East of Washington Avenue.

Q. And that that went on through several years? A. Yes.

Q. Was there any work done that changed the course of the water so as to divert it from crossing Washington Avenue and down Jerolaman Street? Was there anything done? A. There was.

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Q. Now, just tell us what was done to divert the water that I am speaking of. A. The crown of Jerolaman Street was raised up, I should say, above the avenue a couple of feet more than it was before, about 2 feet more than it had been previously raised.

By the Court:

10 Q. What street was that? A. Jerolaman Street east of Washington Avenue.

By Mr. Skinner:

Q. (indicating): Here is Washington Avenue and here is Jerolaman Street. Just indicate with the pointer where the raising of that crown of Jerolaman Street was. A. (indicating): From
20 near the railroad to and including the sidewalk on Washington Avenue.

Q. The east side of Washington Avenue? A. The east side.

Q. Who did that? A. Done by the town.

Q. How do you know? A. Well, I saw the town men working on the street, and I don't think there was ever any question about it.

Q. And by "the town men" what do you mean? A. Well, men employed by the town.

30 Q. Well, had you seen those men doing other work around the town streets, and so on? A. Yes.

Q. And was there a force of men out working on different streets of the town? A. There was.

Q. Doing the work of the town? A. Doing the work of the town.

40 Q. Was there anything else done besides raising the crown of Jerolaman Street? A. Somewheres along in 1900 or 1902—I can't tell you the exact time—the gutters were concreted. First, I think the gutters were concreted to the top of the curbs to stop the water from going down, down Jerola-

man Street; concreted the south side of Jerolaman Street, the gutter, to the top, or even with the bluestone curb; on the north side it was concreted to within about one inch of the top of the bluestone curb, and later, or just at that time, there was the culvert cleaned and fixed and arranged for iron top covers to carry it across Jerolaman Street running north.

Q. You say a culvert fixed for iron top gutters. Were any iron top gutters put in? A. They were covered with iron covers.

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Q. And what was the effect of this concreting and guttering and iron covering, and all, upon the water that theretofore had come down or that thereafter came down Jerolaman Street from the west toward Washington Avenue? A. There was no further damage to the street.

Q. I did not ask you that. A. No water except—

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Q. I did not ask you what effect upon the street; I say what was the effect upon the water? A. There was no water that came down except what dropped from the sky.

Q. Do you mean that after they put the gutter down no water came down Jerolaman Street? A. From Washington Avenue.

Q. I am not talking about to Washington Avenue; I am talking about the west. I am asking you whether there was any effect at all on the water coming down Jerolaman Street from the west to Washington Avenue, not from it? A. It came down in great volumes.

30

Q. What became of it? What did these gutters do with the water? A. They turned the water north. I thought you were talking of the east side.

Q. The water came down and was taken by these gutters? A. Yes, sir.

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Q. And by this concreting? A. Yes.

Q. Who did that work? A. The town.

Q. And when it was taken north where did it go? A. It went to culverts established by the county at the time the road was built into this brook, or spring run.

Q. Culverts that had taken the water from where? A. To the culverts—

10 Q. From where? You say culverts established by the county. Culverts that had taken the water from where? A. That had taken the water from the stream; they were culverts that took that water from the brook.

Q. Well, did the water get into this watercourse and come through your property? A. It certainly did; it had to. There was no other way. May I also add that that culvert took the water on Washington Avenue from Jerolaman Street, and perhaps a little further west, to the higher place on Washington Avenue on the north, previous to the macadamizing of these roads?

Q. Now, you have told of the town's raising the crown of Jerolaman Street here at the east side of Washington Avenue. How high was that crown with reference to Washington Avenue? A. That would be difficult for me to say, but it raised it sufficient to form a gutter on Washington Avenue that would carry the water north.

30 Q. Well, as the water came across Washington Avenue down Jerolaman Street and reached this crown, would the crown in any way obstruct the flow of water down Jerolaman Street? A. The crown of Washington Avenue?

Q. No. You have said that they raised the crown of Jerolaman Street. A. On the east side.

40 Q. Now, I am asking you whether this raising of the crown would be any obstruction to the water coming down Jerolaman Street and across Washington Avenue? A. Surely; that is what it was put there for.

Q. And being that obstructed by this raised crown, where would that water go? A. North to the culvert.

Q. Before that was done where had the water that flowed north on Washington Avenue gone when it reached the corner of Jerolaman Street on the east side of Washington Avenue? Water reaching the corner of Jerolaman Street flowed where? A. Turned the corner and went down Jerolaman Street.

10

Q. And did the water running down that way occasion any damage to the gutter or road? A. That, in connection with all the other water, cut the gutter—the street and the sidewalk.

Q. Now, did it do anything to prevent that water turning down the corner of Jerolaman Street and going across—did this raising of the crown have anything to do with that? A. It did.

20

Q. What did it have to do with it? A. Turned it north.

Q. Kept it from running down there? A. Sure; it was done for that purpose.

Q. Now, later, in March, I think, 1912, did you have another flood in your property? A. A very large flood.

Q. Before that flood had there been any new work in and about this water course? A. There had.

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Mr. Skinner: I now call for the production of a contract between James T. Boylan and the Town of Belleville, dated August 29, 1911, and counsel for the defendant produces the original contract and specifications, and I offer it in evidence.

Marked Exhibit P2.

Mr. Skinner: I am just going to read portions of this, without reading it all. It

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is dated August 29, 1911, between the Town Council of the Town of Belleville and James T. Boylan (reading).

Q. Now, that contract is dated August 29th, and says in the specifications that the work is to be completed on or before September 15, 1911. Did you see any of that work done? A. I saw it done.

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Q. And as a part of that work was there any storm sewer pipe laid across Jerolaman Street, to your property? A. There was, what we call a Y, what I would term a Y.

Q. A Y from some point to another point, I suppose? A. Yes, sir.

Q. From what point? A. To the end—

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Q. From what point? A. From the point near my office to the center—to the east side of Cortlandt Street, a short distance from a point near my office.

Q. From a point near your office, on the west side of Cortlandt Street? A. Yes.

Q. To the east side of Cortlandt Street? A. Yes.

Q. That is across the street? A. Diagonally.

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Q. And where was the westerly end of that Y with reference to your property? A. A few feet, perhaps 10 feet, 8 feet.

The Court: Which is Cortlandt Street?

Mr. Skinner indicates on map.

The Court: That was on the corner of Cortlandt and Jerolaman Streets?

Witness: Yes.

Q. Now, you say perhaps 10 feet from where?

A. Near the corner, I said.

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Q. Perhaps 10 feet from where? A. From my office.

Q. I did not ask you that. I asked you how far it was from your property, not from some particular building. A. That would be about 10 feet.

Q. Was there a fence there? A. No.

Q. Where was it with reference to the sidewalk?
A. Right at the edge of the sidewalk.

Q. Which edge? A. The inside edge, the western edge.

Q. So that it ran to the westerly edge of the sidewalk on the westerly side of Cortlandt Street?
A. That is right.

10

Q. Did it connect with this old watercourse that ran through your property? A. The new Y?

Q. Yes. A. No, it connected with a new culvert, a new sewer, recently established by Mr. Boylan.

Q. Well, it had two ends, did it not? A. One end—

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Q. One end connected with the sewer established by Mr. Boylan? A. Yes, sir.

Q. What did the other end connect with? A. Why, the stream that ran through my property.

Q. That is what I asked you, if it connected with the watercourse, and you said no, it did not.
A. I did not understand you, then. I beg your pardon.

Q. Perhaps I am trying to go too fast, but I do not want to hurry you so that you do not understand my questions. Just try to listen intently. So that the westerly end of this Y, as you call it, connected with the watercourse through your property? A. Yes.

30

Q. And then the water thereafter that came down this watercourse would run into this Y, as this pipe was called? A. A cement pipe about thirty inches in diameter.

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Q. Now, was there anything done to the opening, the mouth of that pipe, to cover it over or obstruct it?

10 Mr. Murray: I object to this, if your Honor please. Our contention is that there were no obstructions put in by any duly authorized agents or servants of the town. I think it is incumbent upon the plaintiff to establish this by the proper means and by the best evidence. I do not think that Mr. Jerolaman's testimony on that point is competent.

The Court: All that Mr. Jerolaman has been asked to say is whether anything was put there, not who put it there.

Mr. Murray: I have no objection to that.

Mr. Skinner: Now, answer the question.

A. There was two iron bars put in across the pipe, under the direction—

20 Q. Never mind that. I don't want you to get in anything that is not responsive to the question. That might be objectionable. There were two iron bars put across the opening? A. Yes, sir.

Q. When was it done with reference to the time when the Y was put down? A. At that time.

By the Court:

30 Q. Now, tell us how these bars ran, up and down, or crosswise? A. Crosswise.

Q. And how far apart? A. About eight or nine or possibly ten inches apart.

By Mr. Skinner:

Q. How big, or thick, were they? A. About an inch in diameter, perhaps.

40 Q. About how wide was the opening, the mouth of this Y, this sewer pipe? A. There was an opening above the pipe, what we call a basin above the pipe; the pipe lay below; there was a receptacle, what I call it.

Q. I did not ask you that. How wide was the mouth of that pipe? A. The diameter of the pipe was thirty inches about.

Q. Now, after that— A. Please excuse me! I want to explain. The bars were not put in the pipe; they were put in this basin or receptacle above the pipe.

Q. Then when you say "above the pipe," do you mean above it vertically or above it running west, up the hill? A. Vertically. 10

Q. So that above the pipe there was some kind of a basin, was there? A. Yes, sir.

Q. Was it a catch-basin? A. What I call a catch-basin.

Q. Where was it with reference to the mouth of the pipe, was it east or west of it? A. West.

Q. West of it? A. Yes.

Q. How much west of it? A. Well, immediately—almost immediately west of it. 20

Q. Then when you say above the top of the pipe, do you not mean above it in the sense that it was further up the course of the stream? A. I mean both perpendicular as well as west.

Q. Then you mean it was higher than the top of the pipe, but was situated west of it? A. Correct.

Q. In other words, the water as it came down the stream first collected in a catch-basin? A. Yes, sir. 30

Q. And across the mouth of that catch-basin was it covered with any cement or any cover of any kind, any walls of any kind? A. It was covered; the top of it was covered.

Q. And that had an opening, did it? A. An opening on the west side.

Q. The water went in there? A. Yes, sir.

Q. Did not the water get out of it at all? Did it stay there? A. From there it dropped into the— 40

Q. Then it had an opening on the other side, too, did it not? A. Sure, on the east side.

Q. Then there was an opening on the east side?
A. Yes.

Q. And were these bars across the east or west opening? A. Across the catch-basin, the west opening.

10 Q. Across the west opening? A. Yes.

Q. So that as the stream came into the catch-basin on the west side of the catch-basin there were bars put across the place where the water would come in? A. Correct.

Q. Then from that catch-basin the water ran out of it on the east side? A. Yes.

Q. And, as I understand you, fell to a lower level? A. Yes.

20 Q. A few inches? A. A few feet, yes.

Q. What? A. Well, it was about the distance of the pipe, the concrete sewer pipe.

Q. About the distance of it? A. Yes. Practically two drops to the water; one drop was about even with the top of the concrete pipe, the thirty-inch pipe, and then there was still another drop which took it to the bottom of the thirty-inch concrete pipe.

30 Q. At any rate, it dropped to it, and ran through the Y that you have described? A. To the main, yes.

Q. Now, was there any way provided for the watercourse, or stream, to get to this Y, or storm sewer, except first passing through this catchbasin? A. There was none after they had taken up the middle drain across Cortlandt Street; they had closed that up.

40 Q. That was across Cortlandt Street? A. Yes.

Q. Where was this catch-basin, on your property or— A. Immediately near it, about 10 feet from it.

Q. Was it in the sidewalk or under it, or where?

A. Partly under the sidewalk, yes.

Q. That is, on the westerly side of Cortlandt Street? A. Yes.

Q. Now, after that was there a flood? A. Yes.

Q. I think that you said you had a flood in March, 1912? A. Yes.

Q. Was this work under the Boylan contract with the Town of Belleville done before that flood or after? A. It was done before that flood.

10

Q. And, therefore, before these bars were put in? A. The flood?

Q. Before these bars were put in? A. No.

Q. The flood was after the bars were put in? A. Oh, yes.

Q. Now, tell us about that flood just in a few words.

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Mr. DeGraw: Is this the first or the second flood?

Mr. Skinner: The second.

A. It was along in the night, I think, somewhere along midnight, and there was a very heavy rain. I got up very much worried about my property, as I had told several that those bars were going to be a very dangerous thing—

Q. Well, never mind that. A. Well, I got up and went down to the yard. I went through the center of my yard, and the water was nearly to my waist, and I nearly fell in the flood getting to my office, and I found it running over the—high up over my scales and into my office. I could do nothing; it was entirely too late for me to do anything; I couldn't do anything, so I went back home.

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Q. Well, that was that night, was it? A. Yes.

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Q. Now, the next morning, tell us what you

saw. A. The next morning my yard, the front, was in a deplorable condition.

Q. Tell us what it was. A. Why, the lumber had been covered to—well, 2 or 3 feet with water and mud; my scales were washed out again, and the office was flooded, the hardware was damaged, and the yard was cut full of gullies and the cement that was put up on the platform in the yard was greatly damaged, the coal was filled with mud and water, and some of it at that time washed wherever the rain had—

10 Q. Now, had any refuse, or debris, collected against these bars, caught on the bars? A. I found that they were entirely stopped up. It had filled away up to nearly the top of the receptacle with sticks, stones, grass and branches of trees, common debris that comes down through a flooded district, ordinary debris.

20 Q. And was the effect of this to entirely stop up the Y, or only partially? A. Entirely, entirely stopped up the Y.

Q. Now, had there been any heavy rains before that, a storm of any kind? A. Immediately before, you mean?

Q. Well, at all before, anything that might have any connection with this flood? A. No.

30 Q. There had not been any storm? A. There was one after this, two days after this.

Q. Well, how do you account for this flood without any storm, then? A. I understood you if there was another storm.

Q. No, I asked you if there had been any storm before this flood, anything that caused the flood, the flood that you have been telling us about. A. It was the storm, of course, that caused the last flood.

40 Q. Well, can't you tell us about it? I asked you if there had been any storm. A. A very heavy

storm. I am telling you, it worried me. I heard the rain coming down, and it worried me so that I got up.

Q. How low was the bottom of this watercourse as it went through your property, below the level of the banks or adjoining property? What was the depth of the watercourse? A. Well, that would be difficult for me to say, because with every storm the whole channel that I had built, the walls that I had built on each side, were filled up, choked up.

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Q. Well, I do not see how that would make it difficult for you to say how deep it was. A. Well, the bottom perhaps 2 feet below that, below the debris that was in there.

Q. Well, was the bottom of the watercourse of the same level as the adjoining property, or was it lower? A. Lower.

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Q. How much lower? A. Well, it probably was 2 feet, or maybe 3 feet, in most places. In some places it was deeper than others.

Q. And how high were the walls or masonry that you had built alongside of this watercourse? A. Well, I think in most places I built up altogether about 3 feet, first, probably a foot or more than that; I don't know which I built most of; probably built 3 feet altogether in most of the places.

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Q. 3 feet above the banks, above the level of the banks? A. No, I mean from the bottom of the creek, or the brook, from the bottom, from the bed of the stream up.

Q. So that the total height of these walls was about 3 feet? A. I think that would be about it, as near as I can tell.

Q. Had the walls had any effect of increasing the height of the bank or the depth of the watercourse? A. The walls would naturally—if not

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filled with debris, the tendency would be to clean it out, by putting up the walls the tendency would be to force out the debris, but it didn't do it.

10 Q. Well, that is not what I asked you at all. I asked you whether the walls had made the watercourse any deeper than before? A. I don't know that it did particularly, unless it might in some places; it might possibly be deeper.

Q. Did you widen the watercourse at all? A. Yes, I did at first.

Q. How much all together? A. I think I widened it—oh, I got it to five or six—at least 6 feet wide, at last, I think.

Q. I did not ask you that. How much did you widen it? A. Well, now, I can't—

20 Q. How much did you increase its width? A. I think at the end there was from the first wall—I think I increased the width from the first wall I put up.

Q. Well, did you have anybody examine this yard of yours after this second flood with a view of appraising the damages? A. I did.

Q. The same men? A. The same men, with the addition of Mr. George Walters.

30 Q. Did you present any claim for these several damages to the town authorities? A. No, I can't say that I did in writing; I don't recollect it.

Q. I did not ask you whether you did in writing. Did you through your attorney? A. Through my attorney, surely.

40 Q. Did you have any conversation with any member of the Township Committee of the Township of Belleville before or after the changes that you have described at Jerolaman Street and Washington Avenue? A. Yes.

Q. I will call your attention to the individual. I refer to Mr. Percy Jackson. A. Not only with

Mr. Jackson, but others, I think. Of course, I can't recall all. I met Mr. Jackson—

Q. I did not ask you that. Did you have any such conversation? A. I did.

Q. When was it with reference to the changes at Jerolaman Street and Washington Avenue— I mean the raising of the crown and putting in the culvert—before or after? A. I think it was just before.

10

Q. Did you have any warning or idea then that the town was going to make any changes? A. No.

Q. Did you talk with Mr. Jackson at all on the subject of disposing of the water that came down Jerolaman Street and across Washington Avenue? A. I did.

Q. What position did he then hold? A. He was on the town committee, one of the town committee, the Belleville town committee.

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Mr. Skinner: That will be admitted, will it not?

Mr. DeGraw: No, I do not know that Percy Jackson was ever on the town committee.

If your Honor please, I would like to object to the witness going into any conversation he had with one Percy Jackson, unless they first show how and in what manner Percy Jackson could bind the town by what was said at that time and what he said.

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Question withdrawn for the present.

Cross examination by Mr. Murray:

Q. Mr. Jerolaman, when did you have your first flood in your Cortlandt Street property? A. The first flood to do me any great damage—

Q. I mean what was the occasion—when did the stream first overflow its banks after you had located there? A. I can't give you the exact year.

40

Q. About? A. I should say probably 1895 or 1896, somewhere along there; possibly 1894; I couldn't remember the exact date.

By the Court:

Q. Do you mean 1894 or 1904? A. No, 1894.

By Mr. Murray:

10 Q. And when was the next occasion? A. Oh, there were several occasions—none serious until about 1901, none very serious. Of course, if I may be allowed to explain, so as to make it clear, in as few words as possible—

The Court: No, you were asked when the next one was.

Q. You say none very serious until about 1901?

20 A. Yes.

Q. There were many floods previous to that? A. Yes.

Q. This flood in 1901 was quite serious, was it? A. Very serious.

Q. As serious as the one in March, of which you complain? A. Not so serious as that in some respects.

Q. Well, in what respects was it not so serious?

30 A. In damage to material, lumber and cement, and so forth.

Q. Well, how did it compare with regard to the amount of water in your yard? A. Much more water in the recent flood.

Q. In the recent flood—you refer to March? A. Yes, the last flood.

Q. Well, do you remember the circumstances surrounding the flood in 1901? A. I remember, yes, very well.

40 Q. What time of year was it? A. Well, I couldn't remember—

Mr. Skinner: I do not want to interpose any unnecessary objection, but there are several floods, as we have seen. This that counsel is questioning about is not involved in this suit; we are not claiming anything for it; and it seems to me it might well be treated as outside of the scope of the examination.

The Court: It occurs to me that the history of that earlier flood might perhaps throw some light on the causes of the later floods. The question would be whether the same conditions were present. I think I will not interfere with the examination.

10

Q. What time of the year was the flood in 1901?

A. I wouldn't be able to say now.

Q. Summer or Winter? A. That I cannot possibly say; I should think in the Summer, but I wouldn't state positively what months.

20

Q. In the Summer? A. Yes.

Q. Was it an unusual storm that caused it? A. Yes.

Q. Do you remember how that storm compared with the storm preceding the flood in March, 1912? A. What is that?

Q. Do you remember how the storm that caused the flood in 1901, compared with the water falling in the flood in 1912, in March? A. The water—well, the volume might have been nearly the same coming through, but the difference between the two was that the stoppage of these iron bars choking up the culverts raised the water in my place to a much greater height, causing much more damage.

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Q. What about the difference in the quantity of water that fell, so far as you can remember? A. I couldn't tell you.

40

Q. At what time in the March flood did you get to your place of business, to your lumber yard?

A. I think I went down in the night, about one o'clock.

Q. About one o'clock? A. Somewheres along in the night; I couldn't say exactly the hour.

Q. And I understood you to say that the water was waist deep? A. It nearly was that deep. It nearly took me off my feet; I nearly fell trying to cross my yard.

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Q. Nearly in the center of the yard, that was? A. Nearly in the center of the yard.

Q. The center of the east side? A. The east side.

Q. About half-way back from Cortlandt Street? A. About 30 or 35 feet west from my office, back of my office.

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Q. That would be about half-way back in the yard, would it not, approximately? A. Pretty near.

Q. And how did you get back there, did you open the gate? There is a gate in the fence across the Cortlandt Street front of your property, is there not? A. Yes.

Q. Was the gate closed up that night? A. Yes, the gate was closed, the lattice gate.

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Q. Was that a solid board fence, a close board fence? A. From the gate, from the gate it is a solid board fence running north.

Q. What kind of a gate is it, is it a solid board gate? A. No, it is a lattice gate with a frame around the lattice work.

Q. It comes down close to the ground, does it? A. It comes down close to the ground.

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Q. How did you get back in the rear part of your yard, did you go through the gate, or your office door, or how? A. I think I opened the office

door, and, if I did, I closed it and went back through the yard and went home.

Q. This was in March. It was pretty cold weather, was it not? It was pretty cold weather, was it not? A. Well, I can't say; I don't remember.

Q. Did you wade away back in your yard? A. I did.

Q. And you say the water almost swept you off your feet? A. It did. 10

Q. Which way did the water seem to be flowing? A. Flowing from west to east across through my scales and through the fence.

Q. From west to east? A. From west to east.

Q. That would be from the rear part of your yard to the front of your yard (indicating on map)? A. Ran right through here (indicating).

Q. A stream almost strong enough to take you off your feet, as you expressed it? A. It was, yes. 20

By the Court:

Q. You are speaking now of the storm of March, 1912, as I understand? A. Yes, sir.

By Mr. Murray:

Q. How long did you stay there that night? A. I didn't stay but a few minutes.

Q. Your stable is the building which is furthest west of your buildings which are built over the stream, is it not, Mr. Jerolaman? A. Yes. 30

Q. In other words, the stream starts to go under your buildings immediately under the stable, does it not? A. It does.

Q. What do you do when you clean out your stable? Where do you put the stable sweepings? A. We have a pit.

Q. Where is the pit? A. It is about—alongside one of the sheds, one of the lumber sheds, on the west of the lumber shed and in front of the stable. 40

Q. That is pretty close to the stream, is it not?
A. No.

Q. Well, with reference to the front stable entrance, where is it? A. In the yard, the lumber yard, on the north side.

10 Q. No, answer the question. With reference to the entrance to your stable, where is the pit in which you place the stable sweepings? A. I say immediately in front of it, to the north.

Q. In front of it, to the north? A. Yes.

Q. How far in front? A. 15 or 20 feet, I should say—15 feet; I didn't measure.

Q. How would you say that the flood of November compared with the flood in 1901 as to the water that was in your yard? A. The flood previous to the heavy flood?

20 Q. Yes. A. Well, the damage was not so great?
By the Court:

Q. What damage was not so great? A. The damage to the lumber and to the—

Mr. Murray. No, that is not what I asked you.

30 I ask that that be stricken out. It is not responsive. The question was, how did the flood of 1901 compare in quantity, or compare with regard to the amount of rainfall, or the amount of water which was thrown into your yard, compare with the flood of November, 1911, of which you complained here?

40 The Witness: Well, they were both very heavy. I couldn't say as to the exact difference in regard to the rainfall; I only know in regard to the depth of water in my yard.

By Mr. Murray:

Q. Well, how did they compare? A. Oh, well this last was much deeper.

Q. I am not speaking of the March flood; I am speaking of the November flood, as compared with the 1901 flood. A. That smaller flood?

Q. Yes. A. Oh, that was much less; that was a smaller flood.

10

Q. What can you say, if anything, Mr. Jerolaman, with regard to the direction of the fall within the area between Jerolaman Street and Overlook Avenue since 1880 and 1881, with reference to the water? Did it or did it not flow into your brook? A. Do you have reference to the entire drainage area? I want to understand you. The entire drainage area?

Q. No, I am speaking of this area between Jerolaman Street on the south and Overlook Avenue on the north, bounded west by Forest Street or Adelaide Avenue. A. There was a large fish pond, called Miller's pond, east of Overlook and north of Jerolaman Street.

20

Q. You do not mean east of Overlook? A. I mean south of Overlook and north of Jerolaman Street, called Miller's pond. I don't know that I can locate it.

Q. With reference to DeWitt Avenue where was that located? A. It was a bit west of DeWitt Avenue.

30

Q. And about how far, half-way between Jerolaman Street and Overlook Avenue? A. I wouldn't say, but my impression is that was west of DeWitt Avenue. It may be—

Q. How far south from Overlook Avenue and north from Jerolaman Street? A. About half-way between.

40

Q. About midway between? A. Yes, sir.

Q. Do you know where the water came from that formed that pond? A. It came from the surrounding lands on all sides, as near as I can recall.

Q. Now, you are speaking of what time? A. Before the grading and macadamizing of the streets.

Q. When you first moved there, was it not? A. When I first moved there yes.

10 Q. And where did the contents of that pond—where was the outlet? A. Well, I don't think it had much outlet, to my recollection. There was fish in it.

Q. Well, it had some outlet, did it not? A. What is that?

Q. It had some inlet, did it not? A. Yes, sir. It soaked away, a good deal of it. I don't remember any outlet.

20 Q. Well, it soaked away? A. Yes, sir.

Q. It had no defined outlet? A. Yes.

Q. Is the land between Forest Street and Cortlandt Street and between Jerolaman Street and Overlook Avenue level, or is it on an incline? A. I think it is not level entirely; I think there is a grade.

Q. And which way is the grade? A. Some parts of it in one direction and some in another.

30 Q. I am speaking of the general grade? A. Oh, the general grade would be sloping to the east.

Q. In other words, there is a steady fall, or I mean a general fall, from Forest Avenue almost down to the Passaic River, is there not? A. Yes.

Q. Several hundred feet below your property? A. Correct.

Q. So that you are virtually on the side of a hill here? A. My property?

Q. Yes. A. No, I am on the flat below the—

40 Q. At the foot of the hill? A. At the foot of the hill.

Q. Now, Mr. Jerolaman, do you know whether the water which fell on the area between Overlook Avenue and Jerolaman Street drained into your brook or not when you first moved there? Do you know that? A. Before the streets were—

Q. Yes. A. I don't know that I can give you any intelligent information as to that before the streets were graded and macadamized.

Q. Where did the surface water go that fell on that territory? A. Pretty much all of it went into the ponds and depressions.

Q. Whereabouts? A. Different depressions. Miller's pond was the principal one.

Q. Did it reach Washington Avenue? Did it flow east and reach Washington Avenue? A. Not very much so.

Q. Did it flow south and reach your brook? A. Some of it undoubtedly did; I think so.

Q. And from how far north did that water flow into your brook? A. Before—

Q. Yes, before the streets were graded? A. Very little.

Q. Some of it did? A. Yes, very little.

Q. How far is it from the brook to Overlook Avenue?

The Court: What is the scale of your map, 1 inch to 100 feet [measuring on map]? About 15 inches and $\frac{3}{4}$ —1575 feet.

Mr. Murray: Approximately 1575 feet.

Q. Then the water which fell on the area which lies directly west and is north of your brook for a distance of 1500 feet drained into your brook, is that right? A. No, it is not.

Q. Where did it drain? A. I think the large part of it drained in Miller's pond.

Q. Well, that is west of DeWitt Avenue, is it not? A. I think it is.

Q. How about the water which fell on the area east of DeWitt Avenue, where did that go? That did not go into Miller's pond, did it? A. East of DeWitt Avenue?

Q. Yes, the water which fell on this area east (indicating). A. Well, until this—

10 Q. (Question read). A. Well, I don't think there was much water that drained in any direction east of that, except a portion of it near around, we will say, Malone Avenue, if you know where that is, and perhaps some from Little Street drained from towards that pond. There was some small area there.

Q. The question is where it drained. A. It drained from this lower ground; it drained from there to this here (indicating).

20 By the Court:

Q. Where did the water that fell on the east of DeWitt Avenue go? A. Before the streets were graded and macadamized there was very little that went anywhere, except to soak in the ground, unless it would be a portion, as I have said, there near Malone Avenue, near Washington Street, a small portion of that land. The rest, I don't think, went much of anywhere, because it sloped to Malone Avenue. I mean outside of Miller's pond, I don't think much went before they were macadamized, except this one portion here (indicating). That is my memory.

30 Q. Now, where did that portion go? A. The natural tendency was towards this little stream, but the descent was so slight that there was no great volume of water coming down there.

40 Q. Was New Street opened when you first moved to Belleville? A. It was opened, but not graded or macadamized.

Q. The street was there? A. I believe so; I think it was there, to the best of my memory.

Q. How about Union Avenue? I am speaking now of the portion south of Jerolaman Street. A. That, I think, was entirely opened after I moved there.

Q. Union Avenue? A. The entire street.

Q. Do you know whom that was opened by? A. The principal part of it was opened—

Q. I am speaking of this portion south here (indicating)? A. That was opened by the town, graded by the town and macadamized by the town. I don't know who had to do with laying it out; I couldn't say that.

10

Q. Is not that a county road? A. Union Avenue?

Q. Yes. A. Only recently. My understanding is that it is a county road north from Jerolaman Street, but I won't say positively.

20

Q. How about DeWitt Avenue, was that opened when you moved to Belleville? A. I think it was; that is, that part of it.

Q. As a matter of fact, Mr. Jerolaman, was not that a part of what was known as the Coddington tract? A. The Coddington tract was there (indicating).

Q. That was all laid out, was it not? The portion bounded north by Jerolaman Street and east by Hornblower Avenue, on the west by New Street, constituted what was known as the Coddington tract, did it not? A. A large part of it.

30

Q. Practically all laid out when you moved to Belleville? A. No, I don't think so. Most of it—a good deal of it has been laid out since.

By the Court:

Q. Is the spring of this brook that you speak of in existence now? A. The spring? The spring has been covered up; the spring has been covered, inclosed or filled in.

40

Q. Covered with what? A. Earth and stones. But a pipe has been laid from the spring extending down into the avenue. It takes the spring, whatever there is left of it, not so very much.

Q. When was it covered? A. Well, quite recently, within a year or a year and a half, to the best of my recollection; I think within a year.

10 Q. When it was an open spring were you familiar with it at the time? A. Sure.

Q. What was it? A. A very fine spring.

Q. Was it a boiling spring? A. Well, it might be called a boiling spring. The water came up from the rock. It was a shell rock spring.

Q. That came up through white sand? A. No.

Q. That is what I call a boiling spring. A. No.

By Mr. Murray:

20 Q. Mr. Jerolaman, I understood you to say on your direct examination that you had two or more parties—I have forgotten their names—come in and examine the property for the purpose of seeing what damage had been done. They are here in Court, are they? A. I believe they are; they are here, I think.

Q. Mr. Jerolaman, did you not have some trouble with the accuracy of your scale at one time?

30 A. When?

Q. I mean prior to November, 1911. A. I think I had those scales repaired once.

Q. Did you have any trouble with it because it weighed inaccurately? A. Not after I had it repaired, that I can recollect.

Redirect examination by Mr. Skinner:

40 Q. Mr. Jerolaman, there is something that I, perhaps, overlooked. Before the township work of grading and macadamizing, that you have spoken of, on these streets south of Jerolaman Street, were

there any culverts laid at street intersections, or did that come later? A. At what time that was—

Q. Well, now, just listen. Before the work of grading and macadamizing were there culverts at street intersections, or did that come later? A. It came later.

Q. For example, where DeWitt Avenue intersected Holmes Street, were there culverts there before the grading and macadamizing? A. There was a very slight, small earthen pipe, I understood, a very small earthen pipe, put down by Hugh Holmes.

10

Q. But how about Holmes Street and DeWitt Avenue, and how about Union and Holmes Street, were there any culverts put down there? A. Not before.

Q. But afterwards? A. That I can't say.

Q. Do you know whether as a part of the grading and macadamizing on this scheme of improvement here culverts were put in on DeWitt Avenue or Hornblower or Union Avenue carrying the water across Holmes Street? A. I remember one at Hornblower Avenue crossing Holmes Street; after grading and macadamizing they put a culvert in there.

20

Q. Who did? A. The town.

Q. Before that time, without any culvert to carry water across Holmes Street on Hornblower Avenue, where had the water gone? A. To Hornblower's pond.

30

Q. It stayed on the south side of Holmes Street? A. Yes.

Q. And the putting in of the culverts carried it across Holmes Street? A. Until they enlarged the culvert at Holmes Street and the pipe was enlarged, that street had become obstructed.

Q. You speak of somebody enlarging that pipe at the corner of DeWitt Avenue and Holmes Street. Who did that? A. The Town.

40

Q. And then where did that carry the water? A. North toward Jerolaman Street.

Q. Do you know of any other work of that kind that was done, culvert laying, that carried the water northerly, instead of letting it lie where it had fallen? A. I can recollect two now at Hornblower and DeWitt.

10 Q. After the grading and macadamizing improvements and the culvert put down what became of Hornblower's pond? A. After they had put in that pipe it became practically dry, practically dry; there may be some water occasionally there yet.

20 Q. Did the grading and macadamizing and laying of culverts have any effect upon the swampy, wet portion of territory between DeWitt and Hornblower Avenues and between Holmes Street and Jerolaman Street? Was that drained at all? A. Why, I think it was. The tendency was to drain it, I should say, to the best of my knowledge.

EDWARD J. MUTCH, sworn in behalf of plaintiff.

Direct examination by Mr. Skinner:

30 Q. Mr. Mutch, where do you live? A. Belleville.

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

Q. In your business as a building contractor do you have to do with lumber and mason's materials, cement, and so on? A. Yes.

Q. How many years have you been dealing with those? A. About eight years.

Q. And in the course of that experience have you had to buy material of that kind? A. Yes.

40 Q. In November, 1911, did you go to the premises of Mr. Jerolaman, on the corner of Jerolaman and

Cortlandt Streets, Belleville, and inspect them? A. I did.

Q. Did you make some observation there as to the damage that had been done? A. I did.

Q. What did you see? First, not the dollars and cents, but what did you see of damage? A. Why, the driveway in the yard was excavated by the water and the lumber covered with mud and coal dust and other rubbish.

10

Q. Well, what sort of a business was Mr. Jerolaman carrying on there then? A. General building material business.

Q. Was there lumber there? A. Yes.

Q. Did you see those premises while they were flooded, or was it after the flood? A. Yes, after.

Q. Well, what could you see of the work of the flood? A. There was some pools of water still standing in different parts of the yard, but the water in the brook had mostly subsided.

20

Q. When you say "subsided," was there still water in the watercourse, but within the banks? A. Yes, sir.

Q. In the ordinary appearance of a brook, then, not overflowing? A. Yes, sir.

Q. How about the lumber, did that show any marks of flood? A. It did.

Q. What? A. As I said before, it showed mud and coal dust and wet up probably a distance of about a foot or eighteen inches.

30

By Mr. Skinner:

Q. Where do you measure your foot or eighteen inches? A. From the bottom of the lumber piles.

By Mr. Skinner:

Q. Then you mean that the water had come up on the lumber to a height of eighteen inches? A.

40

I should say about a foot or eighteen inches. It varied in different parts of the yard.

Q. Well, now, what kind of lumber was there and how much of it that was affected at all by the flood? A. It was mostly finishing lumber, white pine, cypress and North Carolina pine flooring and ceiling.

10 Q. Would that wetting or soaking with the flood damage it or leave it unaffected? A. It would damage it.

Q. What did you do in the way of measurement or observation of the extent of the damage? A. Why, we tried to get an approximate figure of the amount of the lumber damaged.

Q. Whom do you mean by "we"? A. The other appraisers and myself.

20 Q. And what did you do in that direction towards getting an approximate idea, how did you go about it? A. Well, we took the number of bins and figured about the amount of lumber in each bin damaged, and estimated what we thought was a fair price.

30 Q. That is, the fair price for what, for the lumber that had been damaged, or how? Just give us some idea. A. For the lumber that was damaged. We figured the retail price, as near as we could get it.

Q. Did you count anything for salvage value for the lumber that had been wet? Did you make an allowance for that, or how did you figure? A. I don't quite understand the question.

40 Q. Was the lumber that had been wet so damaged that it could not be used again, and was therefore worthless, or was there something of value to it still? A. Well, I shouldn't say it would be worthless; there would be some value to it.

Q. Did you try to make allowance for that? A. We did.

Q. How did you figure it, what was your method? A. As near as I recall, we took what we thought was the total damage, and then figured about two-thirds of that total the loss.

Q. Did you measure up the bins? A. We did.

Q. Well, do you remember what their dimensions were? A. I cannot tell exactly now.

Q. Have you got any notes that you made at that time? A. Well, we gave Mr. Jerolaman a little paper at the time, I believe. I haven't seen it in some time.

Q. Well, do you remember the size of the bins? A. I think they were 18 feet deep and about 10 feet wide. I am not positive on that point.

Q. Well, still I do not understand—

Mr. Murray: If your Honor please, I think that, inasmuch as this witness has reduced this to writing, the writing supporting this evidence is the best evidence of the damage here, and should be produced or its absence accounted for in some way.

Mr. Skinner: I can account for it. I asked Mr. Jerolaman if he had it. He has not got it. He has for the second flood and has not for the first flood.

The Court: I do not get your idea.

Mr. Murray: The witness said that he made a memorandum at the time he made the appraisal, which memorandum he delivered to Mr. Jerolaman, for whom he made the appraisal. It seems to me that the memorandum is the best evidence of what the witness saw at that time, inas-

much as he cannot recollect exactly. The memorandum ought to be produced.

The Court: Well, yes, if it is available; but I would not take the witness off the stand if he could not find it.

10 Mr. Skinner: Well, I understand that a memorandum of that kind is not evidential at all; it is only to be used to refresh memory. I have asked Mr. Jerolaman if he has it, and he says he has not. He has a memorandum of the second flood, but not of the first.

The Court: See what he remembers about it.

20 Q. Can you tell us, Mr. Mutch, anything at all about the method by which you arrived at the damage? A. We took the height of where the flood had come on these piles, and got about the cubic contents of the pile that was damaged, and then reduced it to board measure by multiplying by twelve. Board measure is figured 1 inch thick. And then we took the different prices of the material, which runs from three cents a foot, probably, up to seven cents a foot, and took an average of that, about five cents a foot; we
30 averaged the damaged material about five cents a foot.

Q. That is very good. Let us see if we have that clear. You took the surface dimensions of the piles of lumber? A. The cubic contents of the damaged part. Say it was 10 by 16; we took it 10 by 16, 2 feet deep, and reduced it to board measure.

40 Q. That is, if the pile was 16 by 10 and the water damage came up to 2 feet, you took the damaged portion, multiplied 10 by 16, and then by 2? A. Yes.

Q. You got the cubic contents of the damaged portion, and then reduced that to board measure, as you say? A. Yes, sir.

Q. And that was done carpenter fashion, was it? A. Yes. That is the way lumber is sold.

Q. Now, after you got the board measure statement of the lumber that had been damaged, did you then consider the kind of lumber that it was, whether it was trim or finishing, white pine, or what? A. Yes, sir.

10

Q. And then the market price of each? A. Yes, sir.

Q. And you say you fixed an average which ran from three to seven cents? A. Yes.

Q. What was it that was three cents? A. Flooring, North Carolina.

Q. And what were the other prices for different stuff? A. There was white pine; that would average about five cents; and some inch and a quarter cypress; that would run six or six and a half; and some clear pine; that would be worth, I should say, about eight cents. There wasn't very much of that.

20

Q. Now, this average of five cents that you used for convenience, tell me whether that, in your opinion, was an overestimate or an underestimate of the value? A. Why, we considered that a very fair estimate of the value.

30

Q. So, having thus ascertained the market value of the contents of the damaged part of the bins at this average price of five cents, then did you allow something from that for salvage? A. We did, yes.

Q. And was it one-third? A. About that.

Q. Did you consider at all the condition of the yard? A. Yes, we took that into consideration, also.

Q. And from what point of view, what did you figure about that? A. That it would have to be filled in again and regraded.

40

Q. And was that because it had been washed out by the water? A. Yes, sir.

Q. Had you had experience before that in filling excavations? A. Very little.

Q. How did you estimate the damage of that kind, how much? A. Well, we figured so much a cubic yard for that work.

10 Q. Do you remember how much a yard? A. I don't quite remember now. The other gentleman that was doing the appraising had more to do with that than I did, being more in his line.

Q. That was Mr. Wharton? A. Mr. Wharton.

Q. Do you remember the total amount of your—

20 Mr. Murray: I object to that. I think the witness should say the amount of these various kinds of lumber. It is not for the witness to state in the manner in which he computed it, and then state a lump total. That is entirely unfair to the defendant. I think the defendant is entitled to know what particular kinds and how much each kind was damaged.

30 Q. Have you any idea of how many feet of one-inch sound knotted white pine there was? A. I can't remember at this time. It is quite awhile ago since this took place.

Q. Do you remember whether you took into consideration at all anything of the cost of repiling lumber? A. As I remember it, there was some piles of rough lumber in the yard that would have to be repiled. I think we allowed something for that.

Q. Do you remember anything further of the details of your estimate or appraisal? A. No.

40 Q. Now, then, if you have given us all that you can of the details, tell us, if you can, if you remember, what your estimate of the damage was.

Mr. Murray: I make the same objection to that, if your Honor please. I do not think it is a fair way to get at the damage, because it does not give the defendant any information as to how it was made up. I think that the jury is entitled to have and should have before them the exact data on which Mr. Mutch based his conclusions.

10

The Court (after argument): I understand your position, I think, but I think your argument is directed, not to the competency of the testimony, but to its value and weight, and that, even though the memory of the witness may not be complete as to the details of the process which he has given us in outline and in some detail, yet, if he has a recollection of the result, he may state it. Subject to whatever disparagement there ought to be made because it is not complete in all its details, I will receive the testimony, subject to your objection. I do not know whether the witness has any recollection or not; he has not told us.

20

Defendant's counsel object to this ruling of the Court.

Objection noted as ground of appeal.

Mr. Skinner: Of course, I am as anxious as Mr. Murray to get all of Mr. Mutch's memory, and I will ask Mr. Mutch this:

30

Q. Do you remember, Mr. Mutch, what the average depth, or height, of the water on the lumber piles was, as you figured it? A. The storm of 1911 this is, isn't it?

Q. Yes, the first one. A. About one foot.

Q. And you mean by that the average, or was it the same at all points? A. No, that was the average.

40

Q. Do you remember how many bins there were where the water had come up and damaged the lumber? A. I think there were ten bins.

Q. You mean ten bins where the water had come up? A. Yes, sir.

Q. Not the total number of bins? A. No.

10 Q. You have not any recollection of the quantity of the three different kinds of lumber that you mentioned, how much one and how much the other? A. No, I haven't any definite recollection of that. The only thing, we estimated that five cents a foot would be the average price, taking them all into consideration.

Q. Taking the prices and quantities of all into consideration? A. Yes.

20 Q. Now, what was the amount of the appraisal of damage?

Mr. Murray: I wish to make the same objection at this time.

The Court: I make the same ruling.

Defendant's counsel object to this ruling of the Court.

Objection noted as ground of appeal.

A. I can't remember the amount of the appraisal on the November, 1911, storm.

30 Q. Well, did you go there again, Mr. Mutch?
A. I did.

Q. When was that? A. I think it was the following Spring.

Q. The year 1912, was it? A. Yes, sir.

Q. Was it March, 1912, do you think? A. Yes.

Q. Had there been another flood? A. There had, yes.

40 Q. Did you see any signs of flood when you got there? A. Yes.

Q. Who was with you? A. Mr. Wharton and Mr. Walters.

Q. What sign of flood did you see there? A. The same as the previous storm, only worse.

Q. By the way, did you make that little sketch or not (paper shown to witness)? A. No, I did not.

Q. Well, could you tell anything about whether the flood had been recent or not—whether there were marks of flood there? A. It had been recent.

Q. How could you tell? A. Why, the water was still there in the yard at the time.

Q. You say it was worse. Worse in what respect? A. The lumber had been damaged higher; more lumber had been damaged; the yard had been washed out to a greater degree; the coal had been filled with a good deal of mud, and also washed down the yard, and the cement shed, or the cement in the shed, had been damaged.

Q. Damaged by water? A. Yes. Also some of the rough lumber had been damaged, more of the rough lumber than before.

Q. How about the coal? A. I said the coal had been damaged by the mud and also washed down the yard.

Q. Any in the street? A. I didn't notice any in the street.

Q. Did you go through the same processes, or methods, of appraising the damage as before? A. About the same, yes.

Q. Measuring the bins and the height of the water? A. Yes.

Q. And averaging them? A. Yes, sir.

Q. I show you a pencil memorandum dated March 12, 1912 (paper shown to witness). Have you ever seen that before? Look at it, the bottom of it. I call your attention to the signature.

A. Yes, that is a memorandum that was made at the time.

10

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30

40

Q. And is that your signature, "E. J. Mutch"?

A. Yes, it is.

Q. And when was this? A. March—I forget the date, March, 1912.

Q. Well, the date at the top here is March 12, 1913, or 1915; I can't make out which. Was that the time? A. That is correct, yes.

10 Mr. Murray: Does that refer to the time of the flood or does it refer to the time that this memorandum was made out?

Mr. Skinner: Those dates?

Witness: I should think it referred to both.

By Mr. Murray:

20 Q. Do you remember, Mr. Mutch, making this memorandum out at the time of the flood or shortly after the flood? A. I didn't make the memorandum.

Q. Who made it? A. I believe Mr. Wharton made that. I signed my name to it when we had it fixed up.

Q. How long afterwards did you sign your name to it? A. That same day, the day we appraised the damage.

30 Q. How did you come to sign your name to it? A. That was our appraisal of the damage.

Q. Did you see what was on that memorandum when you signed it? A. Certainly.

Q. You read it over? A. Yes.

By Mr. Skinner:

40 Q. Using this memorandum, Mr. Mutch, to refresh your memory, can you tell us about how many feet of lumber there were that were damaged? A. We figured 50,000 feet of lumber was damaged.

Q. And did that include the shingles? A. No, that did not include the shingles.

Q. And how much do you say now was the damage to the lumber?

Mr. Murray: I think, if your Honor please, he should fix the kind of lumber a little more definitely than he has done.

Q. Have you any way of figuring the kind of lumber than the memorandum? A. No.

Q. Can you from memory? A. It was the same kind as in the previous storm. 10

Q. White pine and cypress and North Carolina pine? A. Yes.

Q. Do you remember the different kinds of white pine? A. Yes, there was inch white pine, and inch and a quarter, and also inch and a quarter white pine clear, and inch and a quarter cypress, seven-eighths cypress, North Carolina flooring and ceiling, and white pine ceiling, as near as I can recollect. 20

Q. And can you tell anything at all about the quantity of cement? Is there anything there in the memorandum which helps you to tell the damaged cement, how much? A. We have here \$50 worth of cement damaged.

Q. That does not tell you how much cement there was? A. Why, Mr. Wharton, that being more in his line, he had more to do with that than I did. 30

Q. Do you remember anything at all about the coal? I think you said it was washed over. A. The coal was washed out in the yard, and that in the bins, there was a lot of mud and sand in it; some of it washed away entirely.

Q. Well, did you attempt to make any estimate of the number of tons or the cost per ton of cleaning it? A. Why, we did, yes; we averaged that up and figured about what it would cost to screen it. 40

Q. Did you find any damage at all to the office?

A. Yes, the water had been in the office; the floor was covered with mud, and also the piers under the office seemed to be settled.

Q. Did that make the floor an uneven level? A. Yes.

10 Q. Was the building shifted or twisted at all with the force of the flood so that it would have to be straightened? A. It seemed to be sagged down so that it would have to be jacked up.

Q. What is the effect of water striking cement in a bag? A. It ruins it.

Q. Do you remember what was the condition of the shingles? A. Why, the shingles were covered with mud, some of them, the lower bunches.

20 Q. Just give us some idea of how thoroughly you inspected this situation. Did you stand in one place and just take a look at it, or did you go around? A. Moved around in different parts of the yard where there was any signs of damage.

Q. Did you cover all of it? A. I think we did.

Q. Now, you think you made a memorandum at the time of the first flood of November, 1911? A. I think we did, yes.

Adjourned until tomorrow, Friday, February 5, 1915, at 10 o'clock A. M.

30

SECOND DAY.

Friday, February 5, 1915.

Met pursuant to adjournment.

Present—Counsel as before stated.

EDWARD J. MUTCH resumes the stand in behalf of plaintiff.

Direct examination continued by Mr. Skinner:

40

Q. Mr. Mutch, give us your best recollection of the damage, as you saw it, at the time of the flood

of 1911, November, 1911. I mean now the dollars and cents damage to the lumber.

Mr. Murray: If your Honor please, I would like to interpose the same objection to this that I interposed yesterday to the same question.

The Court: What is that?

Mr. Murray: Allowing the witness to state the amount of the damage without stating the data with which he arrived at it. 10

The Court (after argument): I remarked that there seemed to be two elements that would be essential to a full statement of the data on which he worked, which at the time when I made the remark the witness had not supplied; that was the number of bins and the average height of the water level upon the piles. The witness afterwards supplied, somewhat loosely, those statements. He said he thought there were ten bins, and his recollection was that the average was 2 feet, if I remember his testimony. So that I see no objection to the witness stating what he now remembers and can now figure out from the elements and calculation to be the injury. 20 30

Defendant's counsel: I object to this ruling of the Court.

Objection noted as ground of appeal.

Mr. Skinner: I should say this. Your Honor will recall that I asked practically the same question yesterday, and, to our surprise and a little amusement, Mr. Mutch was unable to remember, after all the sparring we had been over as to whether 40

the testimony should be admitted; he said that he did not remember. I am asking purposely the same question this morning, in the hope that over night he may have refreshed his memory and may recall something about it. If not, he can say so.

10 Q. Now, Mr. Mutch, do you recall anything at all about that? A. The water had washed through the yard, as I said before, and washed gullies in the driveway, and washed mud and other rubbish up against the lumber piles.

20 Q. Yes. Now, as to the extent of the damage. The number of bins, for instance, which were submerged or partially submerged; take that. A. There were ten bins, as I recollect, that had been affected by the water, but the three on the lower end were the worst, and we did not take into consideration the other seven, to any extent, because the damage was so slight on those.

Q. Well, now, then, as to the three that were the worst and the only ones that you considered, have you any recollection as to the amount of the damage in dollars and cents? A. Why, the water came up there a little over a foot on those three bins, to my recollection.

30 Q. Well, can you figure that out? A. The way I figured that, approximately five or six thousand feet of lumber had been damaged in those bins.

Q. Were there different kinds of lumber? A. There were, yes.

Q. As you mentioned yesterday? A. Yes.

40 Q. And then you applied the average, I think you said? A. The average of about—five cents a foot is what we averaged this lumber at.

Q. And at five cents a foot, 5,000 feet would be \$250, would it not? A. Yes.

Q. And I think you said that you allowed one-third salvage? A. That was our method, yes.

Q. And in that way, I suppose, you reached the two-thirds of \$250, did you not? A. Yes.

By the Court:

Q. What did you say about \$250? A. Counsel asked me if that amount—if \$250 was the amount, and I said yes.

10

Mr. Skinner: Not quite as leading as that, if your Honor please. I asked him if five cents multiplied by 5,000—he had given 5,000 as the number of feet and five cents as the price—did not amount to \$250—a mere computation that any of us could make—and he said yes.

The Court: I did not catch that.

20

Q. That would be the sum from which one-third is to be subtracted? A. Yes.

By Mr. Skinner:

Q. Now, have you any recollection at all about your estimate of the other damage in that first flood? A. (No response.)

Q. The damage to the yard. Have you any memory as to how much you estimated the cost of filling or excavating would be? A. We estimated at the rate of about fifty cents a yard.

30

Q. And about how many yards? A. I think it was somewhere around a hundred yards.

Mr. Skinner: Well, we can make our own computation of that.

By the Court:

Q. What would that be, filling or excavating or levelling, or what? A. Why, both, some filling and some removal of dirt.

40

By Mr. Skinner:

Q. Did you see the scale? A. I did.

Q. In what condition was that? A. Why, the pit that the platform works in was full of water and mud right up to the top.

Q. Where is the mechanism part of the scale? A. As far as I know, it is underneath in that pit.

10 Q. What were the appearances that were there as to water? Had the water been over it? A. It apparently had.

Q. Did you make any calculation at all of the cost of cleaning or repiling the lumber? A. Yes, we made a calculation of that also.

20 Q. Do you remember how that was done? A. Why, we figured it would take two men a day to repile one of those piles. If I remember rightly, there were about twelve piles.

Q. And do you remember, then, how much per day you figured for the men? A. \$2 a day for each man.

Q. So that was two men, at \$2 a day, taking one day for each of twelve piles, or twelve days all together? A. Yes.

Q. That would be twelve days, at a total wage of \$4 a day, would it not? A. Yes, sir.

30 Q. Or \$48. Now, I think you referred to some memorandum of the damages of the second flood. Referring to that memorandum, Mr. Mutch, using it to refresh your memory, what did you then figure the damage to the lumber at the time of the second flood—the lumber and shingles (paper shown to witness)? A. \$2,500.

40 Q. And what did you figure the damage to the yard by the need for removal of debris, and so on, and the raising of the building where it was too low? A. Why, we figured that in connection with raising the building and building the new piers un-

der that would be necessary—we figured that at about \$1,000.

By the Court:

Q. Just what did that cover, raising the building and putting new piers under? A. And filling in the yard and removing other material from other places where it had collected.

10

By Mr. Skinner:

Q. How badly had it collected? Give us some idea of that. A. I can't hardly express just how it had collected. It was piled up around the office and around the lumber piles.

Q. What was piled up? A. Mud, coal dust, leaves and rubbish.

Q. Well, was there anything to tell whether or not that had been there before as a part of the condition of the grounds, or whether it had been brought there by a flood? A. Why, from the appearance of it you would think that it had been brought there by a flood.

20

Q. How about the coal piles, did you see them? A. Yes.

Q. Was there any deposit on or about them? A. There was.

Q. Tell us about them. A. The same material, and some of the coal was washed down the driveway in the direction of the office.

30

Q. Do you take into consideration at all in this \$1,000 the cleaning—the getting of that coal back in the pile? A. We did.

Q. Cleaning it and so on? A. Yes.

Q. Who assisted you in doing this figuring at the second flood? A. Mr. George Wharton and Mr. George K. Walters.

40

Q. Mr. Mutch, was this memorandum, or this estimate, that you have referred to here an at-

tempt on your part to make an exact ascertainment, or was it a rough estimate? A. Why, we tried to get at the damage in a rough and ready way, the best we could in the time. We were there probably two hours and a half or three hours; I don't just remember.

10 Q. Can you give us any idea of the amount of coal that there was washed away off the pile? A. We figured up the damage to the coal at the rate of 36 cubic feet to the ton, which is I believe, approximately the number of cubic feet in a ton, and we figured there was about fifty tons of coal that was damaged and washed away down the yard.

Q. Well, then, did you figure that that was a total loss or that there was some salvage to it? A. We figured a little salvage on that also.

20 Q. Was it in a condition as you saw it that it could be sold? A. Not in the condition it was then.

Q. Why? A. Well, it was all full of stones and mud.

Q. Would it have to be put through some cleaning process to make it salable? A. Yes.

Q. And do you remember what you estimated, then, the total dollars and cents damage by reason of the coal in the condition that you have described?

30 A. \$200.

Q. Was there any damage done to the scale in that second flood? A. The scales was filled up in the same way as they were at the first flood, filled up with water and sand, and so forth.

Q. What was the effect of that on the scale, did it help it or hurt it? A. Hurt it.

Q. How much?

40 Objected to on the ground that it has not been shown that the witness is qualified to answer the question.

The Court (after argument): It would

be quite possible to say whether a machine was injured or not, and the man that might say it was injured might be incompetent to say what it would cost to repair or replace it. That might involve the knowledge of machinery. I do not think the witness has yet shown any qualification.

Q. Mr. Mutch, did you and Mr. Wharton attempt to measure in dollars and cents the damage to the scale? Just yes or no. A. No, sir. 10

Q. I think you said there was cement. Referring to your memorandum, what did you then estimate the damage to the cement? A. \$50.

By the Court:

Q. Do you remember how many bags were damaged? A. The cement was piled in a shed, raised above the ground about six or eight inches, and this bottom layer had been affected by the water, and part of the second layer. 20

By Mr. Skinner:

Q. All of the bottom layer and part of the second? A. Yes.

Q. Now, perhaps we can get some idea, now, of the number of bags. Do you know the size of the bin? A. I did know the size of the bin at the time. We measured it up. I don't recollect the size now. We figured there were 200 bags damaged. 30

Q. 200 bags damaged? A. Yes, bags of cement.

Q. Well, how did the measurement of the size of the bin enter into that? A. That is how we got the number of bags.

Q. How? Just tell us that. A. So many bags on the first layer and so many on the second. 40

Q. Did you count them? A. Well, we measured

so many rows and so many bags in a row. You can't get away from it very much.

Q. Well, then, you figured how many there were in a row and how many rows, and multiplied one by the other? A. That is the idea, yes.

Q. Did you count this cement on the bottom row as a total loss? A. Yes, sir.

10 Q. Did you count the cement bags where the water had come up half-way as a total loss? A. No.

Q. How much of a loss did you count that? A. About fifty per cent.

Q. Were there a hundred bags on each layer? A. I can't tell exactly about that. We figured that there were 200 bags damaged.

20 Q. Do you remember the price of cement per bag at that time? A. We figured that at the rate of \$1.75 a barrel; that is, four bags to the barrel.

By the Court:

Q. That is the price in the market? A. Yes, sir.

Q. For good cement? A. Yes, sir.

By Mr. Skinner:

30 Q. Well, then, 200 bags would be 50 barrels? A. Yes.

Q. And 50 barrels, at \$1.75 a barrel, would be nearly \$100, instead of fifty, as you had it on that memorandum. How about that? A. Well, we allowed something for some of it to be saved from that.

Cross examination by Mr. Murray:

40 Q. Mr. Mutch, referring to the November flood, did you make any memorandum at the time this appraisal was made? A. I think we did make a memorandum.

Q. Are you sure? A. Yes, we made a memorandum.

Q. When did you make that memorandum? A. At the time we were called there to appraise the damage.

Q. And when was that? A. Why, November, 1911; I don't remember the date; the day after the flood.

Q. If you made a memorandum at all, did you not make that memorandum this year? A. No.

Q. Have you had any conversations with Mr. Jerolaman in regard to the damage done by this first flood since you made the appraisement? A. Why, I suppose we have; I don't remember distinctly. We talked the thing over occasionally.

Q. Have you had any this year? A. With Mr. Jerolaman?

Q. Yes, prior to the commencement of the trial of this suit? A. No.

Q. You have not had any conversation with Mr. Jerolaman? A. No.

Q. Did Mr. Jerolaman come to you last Summer with regard to this matter? A. He has talked to me about this matter, yes.

Q. Then you did have some conversation with him last Summer? A. Yes, but not as to figures.

Q. What was the conversation about? A. We had a number of conversations; I can't tell any particular one.

Q. With reference to the damage done by the November flood, did you have any conversation with him this year? A. No.

Q. Mr. Jerolaman did not come to you, then, and speak to you along last Summer, or this Fall, this last Fall, regarding the details of the damage done in the November flood? A. No.

Q. You are positive of that? A. Well, I don't quite understand the question.

10

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40

Q. Did Mr. Jerolaman talk with you this last Summer or this last Fall with regard to the details of the damage done by the November, 1911, flood? A. I don't remember about that.

Q. You do not remember? A. No.

10 Q. Well, you would remember it, would you not? A. Well, I will tell you; I am in this office quite often. It is hard to tell just what we talk about. I go there on business, and he sometimes—these things crop up. I couldn't say positively whether we did or not.

Q. Do you remember him asking you to give him a detailed statement? A. Of the March flood.

20 Q. How about the November flood? A. I don't remember any detailed statement of the November flood.

Q. Do you remember whether he asked you for one or not? A. I don't remember.

Q. Did he ask you for one for the March flood? A. Yes.

Q. When did he ask that? A. Why, I think it was probably six months ago; I can't tell the date exactly.

30 Q. And did he not ask you for a detailed statement of the November flood at the same time? A. I don't remember whether he did or not.

Q. Did you give him one? A. I didn't give him one, no.

Q. Did you ever have a detailed statement of this damage by the first flood? A. We made a detailed statement—I made one at Judge Skinner's office.

Q. That was in regard to the first flood? A. Yes.

40 Q. And when was that? A. I can't remember that; it was in the last year.

Q. During this last year? A. Yes.

Q. And was that the memorandum that you referred to a moment ago, that you referred to as having been lost or mislaid? A. No.

Q. Then the memorandum that you made in Judge Skinner's office was not the one that you referred to yesterday as having been lost or mislaid? A. No.

Q. Now, you said there was certain lumber damaged by the November, 1911, flood. Just where was that lumber, Mr. Mutch, in what part of the yard? A. In the bins on the left side of the drive as you go up the yard. 10

Q. On the left side of the driveway? A. Yes.

Q. (Referring to the map.) Do you remember, Mr. Mutch, that these buildings are located directly over the stream running (indicating)— A. One line of sheds are over the stream; the other line of sheds are opposite. 20

Q. Opposite the stream, towards the door? A. Yes, sir.

Q. The driveway runs up this way (indicating); is that correct? A. Yes.

Q. Now, the lumber that you saw was in the buildings which were directly over the stream; is that right? A. Well, I wouldn't say it was directly over the stream.

Q. Well, the buildings that are built over the stream, then? A. Yes, on that side (indicating). 30

Q. On the left-hand side of the driveway? A. Yes.

Q. All the lumber that was damaged was in that— A. In that side.

Q. What was the nature of that lumber, the character of it, the kind of it, and the sizes? A. There was white pine flooring, and dressed white pine, and North Carolina, North Carolina pine ceiling and flooring. 40

Q. Now, how much North Carolina pine ceiling

was there? A. The ceiling and flooring, 2,000 feet, about, approximately.

Q. Ceiling and flooring, 2,000 feet? A. Yes.

Q. This is the first flood that I am referring to. A. Yes.

Q. How much flooring was there? A. I said ceiling and flooring.

Q. Together? A. Yes.

10 Q. And what other lumber was there there? A. There was inch and a quarter white pine flooring.

Q. Inch and a quarter white pine flooring? A. Yes.

Q. And how much was there of that? A. We figured there were about 2,000 feet damaged there.

Q. I did not ask you that. How much was there altogether? A. In the whole yard?

20 Q. In these buildings? A. I can't tell you that; I didn't measure it.

By the Court:

Q. When you gave the amount of 2,000 feet before as the amount of North Carolina ceiling and flooring, did you mean the amount damaged or the total amount? A. Yes, sir; the amount damaged.

By Mr. Murray:

30 Q. What other lumber was there? A. Damaged, do you mean?

Q. Yes, besides this flooring and ceiling and inch and a quarter flooring. A. There was white pine in planed boards, eight inch, six inch, twelve inch.

Q. Clear white pine boards? A. No, not clear. Some were clear, but not all of them; there were some clear and some sound knot; what we call sound knot.

40 Q. How much of that was there altogether? A. I figured about three or four thousand feet was damaged of that material.

Q. How much was there altogether? A. In the yard?

Q. In those buildings. A. I can't tell.

Q. What other lumber was there? A. That was all that was damaged at that time, as far as my recollection goes.

Q. How was this lumber piled? A. It was piled under the sheds.

Q. Under the sheds? A. Yes. 10

Q. Directly on the ground, or was there something underneath it? A. There was something underneath it.

Q. What was there underneath? A. Timber of some description; I forget the size; probably 4 by 6, something like that.

Q. How high from the ground was it? A. Why, some of it was directly on the ground; it was raised about six inches. 20

Q. Most of it about six inches from the ground? A. Yes, not over that.

Q. It was piled just one board on top of another, was it not? A. Yes, sir.

Q. Close together? A. Close together.

Q. And the piles of boards were close together? A. Close together.

Q. Or were they spaced between? A. No, close together. 30

Q. Suppose they wanted to get some lumber out to sell it, how would they get it? A. Take it right off the top.

Q. And how high was the lumber piled in the shed? A. The piles varied; some piles four or five feet, others would run eight or nine feet; different heights, according to the way it is used.

Q. In what manner did you say this lumber was damaged? A. Damaged by the water and mud, coal dust, and so forth, on it. 40

Q. Now, you said that these piles were piled close together, did you not? A. Yes, one on the top of the other.

Q. Then only the end would be covered by the water and mud and coal dust, would it not? A. The water gets in between.

10 Q. But this mud and coal dust, that would not get in between, would it? A. We examined some of them and we found it there.

Q. How did you examine them? A. We pulled some of the boards out.

Q. Did you remove the entire pile? A. Some of the piles that were not so high, we turned them over to see how far it had gone.

Q. Those piles that were more or less loose? A. Yes, sir; low piles, some piles not more than 4 or 5 feet high.

20 Q. Now, as I understood your method of computation, it was to estimate approximately the number of board feet affected by the water, and to allow one-third salvage; is that correct? A. Yes.

Q. Why one-third instead of four-ninths or five-tenths, or any other fraction? A. Well, it was our idea that one-third was about the fair thing.

30 Q. What was your idea based on? A. Well, just our general experience in that line, using lumber, and so forth.

Q. Do you often use lumber damaged that way? A. No.

Q. Then what experience had you had? A. Well, we figured that if it was sold it would have to be sold at reduced rates.

Q. You did not take into consideration whether it could be cleaned or not, did you? A. That was part of it, too, the cost of cleaning.

40 Q. Well, you do not say that the water really damaged the lumber any more than the appearance

of it, do you? A. Some of it more than the appearance.

Q. In what way was that damaged? A. Take the North Carolina flooring and ceiling; it is practically useless when it has been under water.

Q. Why is that? A. Because it is used in its natural state; it does not get painted.

Q. Well, if it was cleaned it would be just as good, would it not? A. I don't know how to clean it.

10

Q. Well, if it could be cleaned? A. If it could be cleaned the same as it was before the flood, it would be all right.

Q. Suppose you sand papered it by hand, would it not be just as good? A. You couldn't clean it sandpapering it by hand.

Q. Why not? A. Because you would rub the dirt right into it; you would have to plane it.

20

Q. Well, you admit that if it could be cleaned it would be just as good as it was before, do you not? A. If it could be cleaned until it was just as good as it was before.

Q. Now, what about these six, eight and ten inch clear white pine boards? A. I don't understand you.

Q. Would they be permanently injured, other than in appearance? A. Well, they would not be injured as the North Carolina would.

30

Q. Suppose you ran them through a planing machine, would they not be just as good as they were before? A. They would be just as good, but they would be thinner.

Q. How much thinner? A. A sixteenth of an inch, probably.

Q. What difference would that make in the selling price? A. It would make some difference.

40

Q. How much in a thousand feet, taking eight inch boards, 16 feet long—how much difference in

price would the fact that it was a sixteenth of an inch thinner make? A. The fact that it would be a sixteenth of an inch thinner would make it unsalable. There are certain thicknesses of lumber, and where you get it where it is neither one thing or the other it is no good at all.

Q. You testified, Mr. Mutch, as I remember, that it would cost about \$48.00 to repile this lumber?

10 A. We figured that it would take two men a couple of days, or a day, to repile a pile.

Q. That is, a big pile? A. Well, average piles; that is, the rough lumber in the yard, not in the sheds.

Q. You did not take into consideration any repiling of the lumber in those buildings? A. No, we didn't, not in the buildings.

20 Q. Now, was this \$48.00 for this repiling that you speak of in connection with the first or second flood? A. The first flood.

Q. I thought you said that all the lumber that was damaged was in those buildings? A. Well, the rough lumber was not damaged; it doesn't hurt it to have the water run over it; it is piled out in the rain.

Q. Then all there is to that is to repile it? A. Repile it and clean it, clean the mud off.

30 Q. How did you estimate the piling, what means of calculation did you use? A. Why, no particular means. We would just look at a pile and size it up, and say it would take a couple of men so long to do it. That is the only way we had of getting at it.

40 Q. How high were the watermarks—how high did the watermarks reach on the lumber piled in the sheds in the first flood? A. It would average probably a foot in the lower shed. Some of the sheds were lower on one end than the other.

Q. That is, the Cortlandt Street end— A. That end is the lowest.

Q. That end is lower than the railroad end of the shed? A. Yes.

Q. And how high were the watermarks on the railroad end of the sheds? A. There were no watermarks at all on the railroad end of the sheds.

Q. On the lumber, I mean. A. On the lumber there were no marks on that end of the sheds at all in the November flood. 10

Q. Then I understand that the watermark must have been practically level. Where did it run out? It must have started at a foot at the Cortlandt Street side and ran out to nothing at the other end?

A. About half-way up, I should say.

Q. About half-way up? A. Probably.

Q. So that only the lumber in the easterly half of the lumber shed was damaged at all? A. That is all, three or four bins. 20

Q. And the most westerly part of that half was damaged one inch and the most easterly end of that half was damaged one foot; is that correct? A. About that, yes.

Q. I understand that the yard was washed out and the dirt piled up in one end of the yard; is that correct? A. Mostly in one end.

Q. More excavated in one part and a pile heaped up in the other? A. Yes, sir. 30

Q. Where was it excavated, what portion of the yard? A. The whole length of the yard from up near the coal bins to down towards the center.

Q. And the coal bins are where? A. By the railroad.

Q. Down near the railroad? A. Yes.

Q. So that the yard was washed out in the westerly portion, near the railroad, and filled in in the easterly portion? A. It was filled in around the 40

office, around the fence, around the lumber piles, in front of the Cortlandt Street end of the yard.

Q. How deep was this dirt at the deepest part, which, I understand, would be on the Cortlandt Street side? A. In some places it was 3 feet high.

Q. 3 feet deep? A. 3 feet deep, yes.

10 Q. And did that condition extend the entire width of the yard, north and south, or just around the office? A. Mostly around the office and on the right of the office as you go in.

Q. How far north of the driveway was the dirt piled up? A. Oh, 30 or 35 feet, something like that.

Q. You mean, that is, from the office or from the drive? A. From the drive.

Q. How wide is the drive? A. I should say it was 10 feet, 12 feet.

20 Q. Fifty feet, then? A. Yes.

Q. And how far back was the dirt piled up, how far west? A. Well, that varied; I couldn't say positively.

Q. Half-way? A. No, I wouldn't say it was half-way.

Q. About how far in feet? A. Oh, probably 25 feet.

Q. 25 feet? A. Yes.

30 Q. 25 feet one way by 50 the other, 3 feet deep on one side, and how deep on the westerly side? A. Well, that would be nothing.

Q. And you figured that to be how many yards? A. We didn't figure that that way; we figured the yards of dirt that would have to be brought in to fill up the driveway.

40 Q. Brought in from where? A. Anywhere you could get it. A lot of it had washed down the brook; not all of it was piled up there against the fence.

Q. Well, was not all that was necessary to do to

take the earth which had been washed in the Cortlandt Street side of the yard and take it up and fill in the excavation in the west part of the yard? A. Well, it was not the right kind of material to make a driveway out of.

Q. Where did this material come from, so far as you could see? A. The water takes it out from under the driveway in different parts of the yard.

Q. If it was there originally, why would it not be suitable material to put back again? A. There was other material on top of that.

Q. Did I understand you to give the number of yards that you figured on? A. Yes, I think you did.

Q. What was it? A. We figured fifty cents a yard. I don't know how many yards exactly there was there.

Q. You said a hundred yards awhile ago. How did you fix on that figure? A. Yes, I guess a hundred yards would be a fair estimate of that, I should judge.

Q. How did you come to strike that hundred yards. A. We took measurements around the yard and took the depth at the lowest point.

Q. Now, this second flood, Mr. Mutch, I understood you to say that the damage was \$2,500, in your estimation? A. On the lumber.

Q. Where is your memorandum? A. (Witness hands paper to counsel.)

Q. Did you make a detailed examination of this damage? A. When?

Q. At the time you made the memorandum. A. No, I did not.

Q. Did you know what you were making this appraisalment for? A. No, I did not. We were asked to make an appraisalment of the damage done by the storm.

Q. Well, where was the lumber that was damaged here in this second flood? A. This second flood, there were sixteen sheds that were more or less damaged.

10 Q. Sixteen sheds. Where were they? A. On both sides of the driveway this time. One shed was over the brook and the other shed was across from that, opposite.

Q. And about how long is this shed on the righthand side of the brook?

The Court: On which side?

Mr. Murray: I mean on the righthand side of the driveway.

A. The righthand side, I would say about 60 feet, probably 70 feet.

20 The Court: As you go toward the railroad?

Mr. Murray: Yes, I understand the shed runs paralalled with the brook.

The Court: You can go two ways. You say "the righthand side." I wanted to know which way you were going.

Mr. Murray: Going towards the west.

Q. About 60 feet? A. About 70 feet.

30 Q. Where was the cement? A. The cement was in a shed back of that.

Q. Was this shed on the righthand side of the drive as you go west used entirely for lumber? A. Yes.

Q. For no other purpose? A. No. Well, the upstairs part—

Q. No, I mean the lower floor. A. The lower floor is all lumber.

40 Q. Completely filled, was it? A. No, it was the same condition as the other sheds; some piles was higher than others.

Q. The entire floor space was filled up, was it?
A. No, I don't think it was.

Q. Well, how much floor space did that occupy in that shed? A. I think there was one compartment at the bottom that was not filled with lumber.

Q. How much floor space was occupied by this pile of lumber in the right-hand shed? A. About 60 feet, 60 lineal feet; that is, in length.

10

Q. And how wide do you say the building was?
A. About 70 feet.

Q. And how high were the water marks on the easterly end of this pile of lumber in this shed on the right-hand side of the driveway as you go west? A. About a foot.

Q. That is, on the right-hand side? A. On the right-hand side.

Q. I mean on the easterly end? A. On the easterly end?

20

Q. Yes, the easterly end of the right-hand shed.
A. There it would be probably 2 feet 6 inches.

Q. Now, you are speaking from the ground or from the bottom of the lumber to the water mark? A. From the bottom of the lumber to the water mark.

Q. The lumber was raised from the ground somewhat, was it not? A. Yes, to a certain extent.

30

Q. How much? A. About six inches.

Q. And that would bring the water mark, then, 3 feet from the ground? A. Yes, on that end.

Q. And how much was it on the westerly end? How high was it on the westerly end? A. About 1 foot.

Q. And what kind of lumber was there in that shed? A. There was white pine and cypress, North Carolina pine.

40

Q. Any rough lumber in there? A. No.

Q. No rough lumber there at all? A. No.

Q. The same condition existed in regard to this lumber that existed in regard to the lumber in the previous flood regarding the character of the damage done? A. The same thing, only worse.

10 Q. In what way worse? A. More water there and more mud and a lot of coal dust; more coal dust seemed to be there than before.

Q. Now, this coal that you spoke about, where was that piled? A. That was up against the railroad near—under some sheds there.

Q. In the westerly portion of the yard? A. Yes.

Q. Do you mean to say that the mud had been washed into that coal there? A. Yes.

20 Q. Or had the coal been washed out? A. Some coal had been washed out.

Q. And how far had that coal been washed out from the shed? A. Some of it brought down near to the office.

Q. Some of it washed away down to the office? A. Yes, some of it.

Q. Some 75 or 80 feet? A. Yes.

30 Q. How did you estimate the number of tons of coal there, how did you arrive at it? A. The coal there was full of dirt, and we kind of cubed it by taking the height and breadth and depth of it that was full of it, and figured at the rate of 36 cubic feet to the ton.

Q. And how wide is the coal shed? A. The coal sheds are probably 65 or 70 feet wide, probably more, even 80 feet.

40 Q. Was the floor space entirely filled with coal? A. Some places had more than others in, some bins.

Q. Now, how could you tell, Mr. Mutch, whether this lumber that you saw in the second flood was

not the same lumber which had been damaged in the first flood? A. Well, the first flood there was only three bins damaged at all; this was the entire side of the yard.

Q. Well, how could you tell that the lumber that you found in the sheds on the left-hand side of the driveway as you go in was not the same lumber that had been damaged in the November flood? A. Well, we couldn't tell positively.

10

Q. You could not tell? A. No.

Q. So that that might have been the same damage, so far as you know? A. It might have been.

Q. It might be the same lumber damaged twice? A. It might be.

Q. You do not know whether anything was done to that lumber afterwards to fix it up? A. I don't know.

20

Q. You do not know anything about it? A. No.

Q. Now, you estimate the raising of this office building, I understand. Now, what was the condition of that office building when you found it in March? A. It had settled on the northwest corner; it was down.

Q. The northwest corner? A. Yes.

Q. How deep is the pier, how far does it extend into the ground? A. That I couldn't tell. The office is right down on the ground all around; you could only see the top of it.

30

Q. Then how could you estimate the cost of repairing it, if you did not know how deep it was? A. We could tell what would have to be done. You would have to jack the office up and put new piers under it; I couldn't tell how many piers, probably—

Q. Could you give any idea as to how old those piers were? A. No.

40

Q. They might have been thirty years old, for all you know? A. They might have been.

Q. How about the building? A. I don't know anything about the age of it.

10 Q. Then you do not know whether this damage that you speak of here was caused by one of these floods or some other flood during the last thirty years, do you? A. Well, the damage was done to the office, because we noticed it.

Q. You did not examine the office particularly, did you? A. Yes, we noticed it.

Q. Did you examine the piers? Could you tell whether they were sunk down or not? A. The building was sunk down.

Q. How much was it sunk down in March when you saw it? A. Well, I would say that corner was down about eight inches.

20 Q. Then all that was necessary was to jack up the building and put new piers under, was it not? A. Well, the other piers were tipped over.

Q. How many piers? A. Four piers.

Q. The building would have to be jacked up and four piers built up eight inches? A. Yes, sir.

Q. How much would it cost to put the piers down? A. I don't know exactly—

30 Q. Then how do you arrive at \$1,000, then? A. We figured that we would have to shore the office up, block it up, and in order to get in under to get at the piers—there is no cellar under it; you can't get under it unless you excavate out.

Q. How large is that office building? A. I should say 20 by 25 or 26 feet, something like that.

Q. You are not sure it is not 15 by 20? A. I don't think so; I think it is more than that.

Q. A one-story building? A. Two stories.

40 Q. Sure? A. Yes, sir.

Q. And how high is the building? A. Probably

from the ground to the peak—it is probably 20 feet to the peak of the roof.

Q. Just a light frame building, is it not? A. Just a light frame building.

Q. Mr. Mutch, you do business with Mr. Jerolaman, do you not? A. Yes.

Q. Quite a customer of his, are you not? A. Yes.

Q. You get credit from Mr. Jerolaman for the stuff that you buy, do you not? A. Yes. 10

Q. You have right along for how many years? A. Oh, eight years.

Q. Are you still indebted to Mr. Jerolaman in some amount? A. Nothing overdue.

Q. I did not mean that; I mean that you still have credit with Mr. Jerolaman? A. Oh, yes.

Redirect examination by Mr. Skinner:

Q. Are you a friend of the Town of Belleville, too, Mr. Mutch? A. Yes. 20

Q. A citizen there? A. Yes.

Q. A taxpayer? A. Yes.

Q. Now, Mr. Mutch, you said that was a rough and ready estimate. Perhaps you can give us just a little more detail. Take the second flood only. Do you remember how much there was of clear white pine? A. Why, we went over that afterwards and figured up in detail. 30

Q. How much was there of the white pine? A. We figured about 5,000 feet of clear white pine, inch and a quarter and one inch.

Q. What was that worth in the market? A. We figured that was worth about eight cents a square foot.

Q. Do you mean that there was that much that was damaged? A. Yes.

Q. And was it a total damage or was there a salvage value there? A. I wouldn't say that was 40

total damage; there was that much damaged, though.

Q. Well, what would the salvage value be? A. Well, we took the salvage value as about one-third.

Q. Do you remember how many feet of sound knotted white pine there was? A. There was, I should say, 20,000 feet.

10 Q. Do you remember what that was—do you remember what price you took that at—the market price? A. We took the inch and a quarter at six cents a foot.

Q. And the same amount of salvage as to that? A. Yes.

Q. How many feet were there of one inch sound knotted white pine? A. About 12,000 feet of that.

20 Q. What was that worth? A. We estimated on that at five cents a square foot.

Q. And the same reduction from that for salvage? A. Yes, sir.

Q. And the cypress? A. About 2,500 feet, according to my recollection.

Q. How much damage? A. Damaged to the same extent.

Q. The price at which you figured that? A. Six cents a foot.

30 Q. Any North Carolina pine? A. Yes, there was a lot of that.

Q. About how much? A. Oh, I would say there was—well, about 34,000 feet.

Q. And how much a foot did you figure that at? A. Three and a half cents.

Q. The same reduction from that for salvage? A. Yes.

40 Q. Were those prices the market prices at that time? A. I think they were.

Recross examination by Mr. Murray:

Q. Do you know whether that office building was ever repaired? A. I don't know anything about it; I don't know that it was.

Q. You have never noticed it since, have you? A. Well, yes, I have been in it.

Q. Well, has it been repaired or has it not? A. I don't think it has.

10

Q. You do not think it has? A. Not to any extent; there may have little things been done on it.

GEORGE W. WHARTON, sworn in behalf of plaintiff.

Direct examination by Mr. Skinner:

Q. Mr. Wharton, where do you live? A. Belleville. 20

Q. How long have you lived there? A. Nearly all my life, fifty-nine years.

Q. What is your business? A. Contractor, building contractor.

Q. How long have you been in that business? A. Thirty-seven years.

Q. Are you familiar with the value of building materials? A. Yes, sir. 30

Q. Lumber? A. Yes, sir.

Q. Cement, and so on? A. Yes, sir.

Q. And have you had experience in the digging of excavations and filling up of holes, and so on? A. Yes, sir.

Q. During this business experience of yours? A. Yes.

Q. Did you go to the lumber yard of Theodore Jerolaman at any time in November, 1911? A. Yes. 40

Q. Did you make an appraisal of some conditions that you found there? A. I did.

Q. What were the conditions that you found?
A. We found some of the lumber had been damaged by water, and washed out in the driveway, and also washed in on his scales and tore it to pieces, piled up mud on some of his dimension lumber.

10

Q. Was Mr. Mutch with you? A. Yes, sir.

Q. Do you remember how you estimated the damage—your methods, I mean? A. Why, we figured the lumber as high as we could see the water up on it, and put it into board measure, and the quality of that lumber was figured by the prices we knew it was at the time.

20

Q. And then did you estimate the lumber that had been thus covered by water as a total loss or with some salvage? A. Some salvage.

Q. How much? A. About a third of it.

Q. Do you remember the amount that you reached by this method as the damage to the lumber at the first flood? A. I do not. Mr. Mutch did the—I measured it while Mr. Mutch calculated the amount.

30

Q. Well, then, have you forgotten what it was?
A. I think it was something like 5,000 feet of the finished lumber, only three bins.

Q. Did you take each kind of lumber at a given price, or did you average? A. No, each kind of lumber at a price.

Q. Do you remember how much it came to when you got all through—I mean the lumber? A. About \$250.

40

Q. Did you estimate any other damage by reason of the conditions you described in the yard, the earth piled up, and so on? A. We figured it would cost a certain amount to replace the earth where it washed out the driveway.

Q. And do you remember how much? A. I think \$100.

Q. And do you remember any other damage that you estimated? A. On the scales.

Q. How did you estimate them? A. They were filled up. We had to approximate that. We didn't know, when he took the stone and dirt out and cleared out the scales, whether the mechanism of it would be injured or not. We estimated that.

10

Q. How much was it?

Objected to.

Question withdrawn.

Q. Can you give us any idea as to how much it would take to get the dirt out of it that had been put in it and clean it? A. About \$75.

Q. Now, take the second flood, which was in March, 1913. Were you there again? A. Yes, sir.

20

Q. With Mr. Mutch? A. Yes, sir.

Q. Did you make the same kind of appraisal? A. Yes, sir.

Q. What did you observe that time? A. The water had flooded clear back in the yard at that time, and in coming down the ditch had backed up and rolled over the ends of the lumber and washed mud and water through it, some as high as 3 feet, others about a foot.

30

Q. Did you estimate how many different kinds of lumber there were? A. We did.

Q. Can you tell us now from memory about how many feet there were?

Mr. DeGraw: Which shed?

Mr. Skinner: I did not specify the shed.

Mr. DeGraw: Well, on both sides, you say?

Mr. Skinner: I am asking you not by the location of the sheds, but by the kind of the lumber.

40

A. We roughly estimated about 50,000 feet.

Q. Well, of all kinds, you mean, or any one kind?

A. All kinds.

Q. By the way, did that include the rough lumber? A. No, sir.

Q. Just go back to that first flood again. Was there any damage to rough lumber outside of sheds?

10 A. The earth was washed all over, and it would have to be repiled to save it.

Q. Did you estimate the time it would take and the cost of repiling? A. We did.

Q. Well, how much? A. Something like \$4 a pile.

Q. How many piles? A. Twelve.

20 Q. Now, then, we will go back again to the second flood. 50,000 feet altogether, not including the rough lumber; that is what you said, I think? A. The second flood?

Q. Yes, the second flood. A. About 50,000 feet.

Q. Can you tell us from memory about how much there was of clear white pine? A. I think about 5,000 feet.

Q. What was the price at which you figured that? A. Eight cents.

30 Q. And how much was there of inch and a quarter sound knotted white pine? A. I think 10,000 feet.

Q. And how much did you figure that at? A. It was figured at six cents a foot.

Q. Do you remember how much there was, if any, of one inch sound white knotted pine? A. I don't remember the amount.

Q. Do you remember the price? A. I think we figured on that at six cents.

40 Q. Was there any cypress, do you remember? A. Yes, sir.

Q. About how much? A. Not a large quantity—3,000 or 4,000 feet.

Q. How much did you figure that at? A. Six cents a foot.

Q. Any North Carolina pine? A. Yes, sir; a quantity of that.

Q. What do you mean by that? A. Over 30,000 feet.

Q. What did you figure it at? A. Three and a half cents.

Q. A foot? A. A foot.

10

Q. Now, when you say there were so many feet, do you mean that there were so many feet of each kind in a pile or that that was the measurement of the portion of the pile that the water had damaged—and the mud? A. A portion of the pile, the lower part.

Q. Did you estimate that part of it that had been damaged by the mud and water as a total loss, or did you figure the salvage? A. Figured about a third salvage.

20

Q. And was there any cement? A. Yes, sir.

Q. Was it damaged? A. Yes, sir.

Q. How? A. Water had destroyed entirely the first tier in the bin and part of the second pier was wet, so that we called the first two piers damaged entirely.

Q. Did you figure up how many bags? A. Counted up the bags, 200 bags. We estimated that in barrels, as we always do, four bags to the barrel, \$1.75 a barrel.

30

Q. What did it come to altogether, do you know, as near as you can remember? A. \$75 or \$80, I think.

Q. Was there any coal damaged? A. Yes, sir.

Q. How was it damaged? A. Back water put the mud in it and washed it away on the edges down in the driveway.

40

Q. How did you figure that? A. Averaged it

up in cubic feet in the lower part of the bins—36 cubic feet to the ton—making it about 40 tons lost.

Q. And what price did you figure that? A. The retail price at that time was six and a half.

Q. What did you figure it at? A. I think we figured the retail price.

Q. Then you figured the total loss? A. We did that much.

10 Q. Was that the amount that there was, or did you take that as an average, or as the amount that would be total loss? A. We figured that as the total loss, about forty tons.

Q. I mean to say when you figured up the amount of coal that was out there and got the dimensions of it, and all—you said 36 cubic feet to the ton—you must have tried to figure what commercial damage there was to it, did you not?
20 A. We did.

Q. Did you figure there was forty tons all together, or, taking what there was, it was equal to about forty tons total loss? A. We figured equal to forty tons total loss.

Q. Then was there more or less than forty tons actually in the piles that was scattered around and damaged? A. Oh, some hundreds of tons.

30 By the Court:

Q. Hundred or hundreds? A. Hundreds, I should say.

Q. More than 100? A. Yes. There was six bins.

By Mr. Skinner:

40 Q. What was there, if anything, of damage to the yard and building in this second flood? A. The water backed up and it washed out the foundations of the piers; at least, they were all standing every which way; and we supposed that the

water had weakened the foundations, and we made an estimate of how much it would cost to raise the building and replace the piers and straighten up the building.

Q. And what was the condition of the yard itself? A. The north part of the driveway had been washed out and the earth carried down in the front of the yard on the scales and on the dimension lumber.

10

Q. To what depth was this earth piled up that had been deposited in some part of the yard? A. I should say from eighteen inches to two feet in the front part.

Q. Deposits of mud and earth? A. Yes, sir.

Q. And what did you estimate as the cost of removing the deposits and the straightening of the buildings and filling up of the washout in the driveway, and so on? A. A thousand dollars.

20

Q. Did you make a memorandum at the time? A. We did.

Q. Look at that paper in front of you, please (paper shown to witness). Is that the memorandum you made? A. Yes, sir.

Q. Refreshing your memory by that memorandum, tell us what you then estimated the damage to the lumber and shingles? A. \$2,500.

Q. And what did you then estimate the damage to the yard and buildings? A. \$1,000.

30

Q. And what did you then estimate the damage to the cement? A. \$200.

Q. Take another look at that. A. (putting on eye-glasses and referring to paper): \$200—no, \$50, cement.

Q. And what did you figure was the damage to the coal? A. \$200.

Q. And to the scale? A. \$75.

40

Q. How is it damaged? A. Well, the damage composed of the earth and debris that was there

which had to be removed from it, and we approximated it would cost that much to clean out the scale driveway and the scale pit.

Q. Did you know that was the same old scale that had been damaged by the first flood? A. We knew it was in the same place.

10 Q. And it might have been that same scale?
A. Yes, sir.

Cross examination by Mr. Murray:

Q. I understood you to say, Mr. Wharton, that you appraised the damage to the lumber, excepting the rough lumber, at 50,000 feet? A. Yes.

The Court: I doubt whether the jury hear you.

20 Q. I understood you appraised the damaged lumber, except the rough lumber, at 50,000 feet; is that correct? A. That is, in the second flood.

Q. In the second flood, in March. A. Yes.

Q. And where was that lumber placed? A. On each side of the driveway west from Cortlandt Street, on each side of the driveway, ten bins on one side and six on the other.

Q. And how wide were those bins? A. They were about 12 feet wide.

30 Q. And how many feet deep? A. They run about 18 feet, but we didn't estimate the lumber only by length; we had to climb over the lumber and get the length of it and average it.

Q. How did you figure it? A. Sixty feet; most of it was 60 feet long.

Q. Then you can say that the bins were 12 feet wide and possibly 60 feet long? A. Yes.

40 Q. How high would the bins average? A. I should say 10 feet high; but the lumber was not as high as that in some of them.

Q. What was the average height of the lumber?
A. I should say about 7 feet.

Q. Then it was 12 by 60 by 7? A. Yes.

Q. And there were how many of them? A. Sixteen.

Q. Now, referring to the sheds on the south side of the driveway, how high was the water line on the lumber on the most easterly end of the easterly bin? A. I should say about 2 feet or 3. It varied on account of the water boiling from below where it stopped.

10

Mr. Murray: I move to strike that out as not responsive, the last part.

The Court: You asked him as to the height of the water line, and he said that it varied. Perhaps it was not responsive. Strike it out.

Q. How high was the waterline on the most easterly end? A. According to my recollection, about 18 inches or 2 feet.

20

Q. And how far did the water mark extend back? Did it run off to nothing? I mean was the lumber damaged all the way back to the westerly end of the shed, or only part way? A. All the way through, but not that high.

Q. Well, how high was it at the westerly end? A. I guess about one foot.

Q. Well, you heard Mr. Mutch testify, did you not? A. Yes.

30

Q. That it ran about half-way back? A. Well, that is my recollection.

Mr. Skinner: Pardon me. I think that was the first flood.

Q. Well, about one foot in the rear on the westerly end? A. That is my recollection.

Q. And the same situation as to the height of the waterline on the northerly bins? A. No, about

40

the same level there. The easterly end is further back than the bins on the other side.

Q. Then taking the northerly bins, how high was the waterline on them? A. I should say a foot or eighteen inches, according to my recollection.

Q. And how high on the westerly end? A. Five or six inches less, probably.

10 Q. Five or six inches less? A. That would be about one foot.

Q. And what was the average? A. Of all the lumber?

Q. Not the lumber damaged, but all the lumber piles in the bins on the north side of the drive. A. I can't recall that.

Q. What? A. Some of the bins were filled; I suppose 6 or 7 feet high some were filled, and some were low.

20 Q. I understood that those sixteen bins that you mentioned included both those on the north and south side? A. Yes.

MARGARET H. KAY, sworn in behalf of plaintiff.

Direct examination by Mr. Skinner:

30 Q. Mrs. Kay, where do you live? A. Belleville, 69 Linden Avenue.

Q. How long have you lived in Belleville? A. Born there—all my life.

Q. Then you were living there in the 'eighties and 'nineties? A. I moved there in 1880.

Q. And what was your occupation from 1880 on for a number of years? A. I was a school teacher.

40 Q. In the Belleville schools? A. For seventeen years.

Q. Where is your present home on Linden Avenue with reference to the corner of Washington

Avenue and Jerolaman Street? A. Oh, it is about—I could walk it in five minutes.

Q. Well, is it west of that corner? A. West of the corner; yes, sir.

Q. And how long have you lived at that place? A. Since September of 1880.

Q. Now, let us see if we cannot find it on the map here. No. 59? A. No. 69, on the corner of Linden and Tappan Avenue.

10

Q. I am showing you here on the map (indicating). You see Tappan Avenue? A. It runs east and west.

Q. It runs east and west from Washington Avenue? A. Yes.

Q. And there is Linden Avenue, running north and south (indicating)? A. Yes, sir.

Q. And you are right on the corner of those two streets, are you? A. Yes, sir.

20

Q. And the public school that you were one of the staff of was where? A. On Cortlandt Street and Stephens Street.

Q. Cortlandt and Stephens? A. I taught in the old school building.

Q. That is down near Academy Street, is it not? A. Yes, sir.

Q. Here is Academy Street on the map, and there is Cortlandt (indicating)? A. Yes.

30

Q. Did you walk back and forth? A. Every day.

Q. And did your route take you down Jerolaman Street at all east of Washington Avenue? A. Yes, it took me down Jerolaman Street to the railroad, and then I came along the railroad to Academy Street, and from there to the school.

Q. And you were then in a position to watch the condition of each street as you looked west from Washington Avenue and as you looked east from Washington Avenue? A. Yes, sir.

40

The Court: Where is the railroad?

Mr. Skinner: The railroad is on Isaac Street, we will agree, I think, or on what is here shown—it runs down here in the street itself, and up here it continues, although I am not sure that Isaac Street is opened (indicating on map).

10 Q. It is what would be a continuation of Isaac Street, is it not? A. It is opened up to the Essex station.

Q. And the Essex station is right up by Mr. Jerolaman's lumber yard, is it not? A. Yes, sir.

Q. Now, you say you went there in 1880? A. 1880; yes, sir.

Q. Well, take it through the 'nineties. After a storm would water come down Jerolaman Street? A. Yes, sir; it did.

20 Q. What is the slope on Washington Avenue west of Jerolaman Street, up or down? A. Down towards Washington Avenue—

Q. No. What is the slope on Jerolaman Street from Washington Avenue west? A. Oh, it isn't down; it is an up slope.

30 Q. And after you get up a little ways does it get flat again for a little while—almost flat? A. A little while, and then it raises very abruptly up to the reservoir.

Q. Now, would not the water go down Jerolaman Street after a heavy shower or a protracted storm? A. Yes, sir.

Q. Did you ever see it do any damage to the roads there? A. Yes, sir.

Q. Where did it come from? A. It came mostly from what they call Hornblower's pond.

40 Q. By what route did it get to Washington Avenue, by what road? Did it come down any street? A. Jerolaman Street.

Q. Now, when it came down Jerolaman Street and reached Washington Avenue did it stop there?

A. No, sir.

Q. Where did it go? A. Well, part of it continued its journey on down Jerolaman Street across the railroad.

Q. It would cross Washington Avenue there?

A. It crossed Washington Avenue.

Q. And go down Jerolaman Street? A. Yes, sir.

Q. Did you see it do any damage? A. I did.

Q. What, generally? A. Well, one morning I was trying to get to school, and I got almost knee deep where it had crossed, and it pulled up not only the curbing, but three pieces of flagging, and that remained in a terrible condition for quite a few years. I passed that path every day from 1880 to 1891.

Q. Is that east of Washington Avenue? A. That is east of Washington Avenue.

Q. Did it do other damage at other times? A. It done a good deal of damage.

Q. Now, do you know whether any culverts were put in at Washington Avenue and Jerolaman Street, or a culvert? A. At Washington Avenue and Jerolaman Street?

Q. Yes. A. Yes, that led the water on to the county culvert.

Q. Did that take any of this water that would in time of storm come down Jerolaman Street? A. It did.

Q. In what direction did it carry it? A. Carried it north to the ditch, to what we call the ditch, or the spring.

Q. Was there more than one culvert? A. There was one culvert right across from Dr. Cypher's; I saw them putting it in.

Q. Whom did you see putting it in? A. I forget who I saw put it in.

Q. Do you know who was superintendent? A. Mr. McCoy.

Q. Patrick J. McCoy? A. Patrick J. McCoy.

Q. The gentleman sitting over there in the front seat? A. Yes.

10 Q. Do you know what part of the town government Mr. McCoy was, if any? A. I don't understand the question.

Q. Was he an officer of the town government, or have any employment under the town? A. Why, he was superintendent of streets at that time.

Q. And you saw him superintending the putting in of a culvert? A. I did, and I saw him banking it up, too.

20 Q. Banking up what? A. Banking up where the water crossed across Washington Avenue, where it rushed on down to the railroad. There was a turn there where the trolley car used to stop, and I saw him come there one evening, or late in the afternoon, with four or five employees, and they made a good job; they filled it up right good.

30 Q. What did they do? A. I don't know what they did do, but they worked like trojans. I noticed it because my property was in danger, but they made a good job.

Q. Where was your property? A. On the corner of Jerolaman Street and Washington Avenue, directly across from Mr. Jerolaman's office.

Q. Where? A. The corner of Jerolaman Street and Cortlandt Street, directly across from Mr. Jerolaman's office.

40 Q. You say your property was in danger? A. Indeed it was. It got the whole wash from Mr. Jerolaman's yard, coal and lumber and everything else there was there inside.

Q. Well, I am only asking you about putting in

the culverts. You say Mr. McCoy raised something. What is that? A. Like a bank. There was a natural slide down Jerolaman Street, and the water naturally went down that side, and he went to work and filled that all up, so that the water couldn't go down Jerolaman Street, but flowed on northerly to the county culvert, and that took it to the ditch.

Q. And that took it down through what? A. That took it down through the ditch, through Mr. Jerolaman's property and on to my property.

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Q. Do you remember when you saw Mr. McCoy working? A. Well, it was at the time, I think—I think just about the time Mr. Jerolaman sued the town first; I think it was about that time.

Q. Have you any way of fixing the year? A. No, sir; I can't.

Q. Well, was it before or after 1911? A. Oh, before 1911.

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Q. That is enough. A. I lost all interest in it since I got my own property fixed.

Q. Did you see any work done on a storm water sewer connecting with this watercourse as it came through Mr. Jerolaman's property? A. Do you mean the storm sewer that is now laid in Jerolaman Street and goes up to his property there?

Q. Yes. A. Yes, I saw them laying those pipes.

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Q. Did you see them laying the portion of it that crossed Cortlandt Street and connected with the watercourse at Mr. Jerolaman's— A. Yes, I saw that it was much narrower than the other pipes; it was like a Y.

Cross examination by Mr. Murray:

Q. Mrs. Kay you mentioned something about some lumber and debris washing out of Mr. Jerolaman's yard across the street from your property. A. It did.

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Q. When was that? A. The first storm that we had. At that time my ground was low, and he caught it all, and then after the storm was over I got a chance, and I filled it up, and since then I have had no further trouble.

Q. You are speaking of the flood in 1911, in November? A. No, I am not. It was warm weather. I was picking flowers when the storm came.

10 Q. What year was it? A. I don't know what year it was.

Mr. Skinner: I object. What is the use of going into the damage of Mr. Jerolaman in the other storms? It is no part of my testimony on the direct examination, except that Mrs. Kay incidentally referred to it as fixing some time.

20 Mr. Murray: It seems to me you should have it stricken out, then.

The Court: I understand it was for the purpose of fixing the date, nothing else, but it is evidently outside of this case.

Q. What year was that? A. I can't tell you just exactly what year.

Q. About? A. But it was in the 'nineties.

30 Q. The early 'nineties, or late 'nineties? A. Oh, not early 'nineties. I think the first storm came along, I think it was a summer afternoon.

Q. Was that before or after this change was made in the culvert across Jerolaman Street? A. Before.

Q. Before? A. Before.

Redirect examination by Mr. Skinner:

40 Q. You said the 'nineties. Just let us get back. Was that the 'nineties? Have you not misspoken yourself, Mrs. Kay? A. The first storm, it was in the middle of Summer, but I can't tell what year it was in.

Q. No. Was it the 'nineties or the nineteen hundreds? A. Oh, no, it wasn't the nineteen hundreds, the first storm didn't occur. I am not at all interested in what happened after the first storm; I didn't make any date of it.

Q. At any rate, it was fifteen or twenty years before 1911? A. Yes—well, not quite as much as that, I don't think.

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STEPHEN D. KINGSLAND, sworn in behalf of plaintiff.

Direct examination by Mr. Skinner:

Q. Mr. Kingsland, where do you live? A. Belleville.

Q. And how long have you lived there? A. About seventy-four years.

Q. And what part of Belleville do you live in now? A. I live in the upper part of Belleville, up towards Eastwood's works there—Main Street.

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Q. Well, anywhere near Jerolaman Street? A. Well, yes, about three blocks, I suppose, this side—not three blocks, but three houses.

Q. Three houses? A. Yes.

Q. South of Jerolaman Street? A. Yes.

Q. And have you lived there long? A. Well, I have lived there about thirty-two years.

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Q. Did you ever experience any trouble from water coming down Jerolaman Street from west of Washington Avenue? A. Yes, sir; my garden used to be filled, and the neighbors' and all, filled every little rain we had, till at one time it stopped, and I couldn't tell what was the reason then, and when I got up Jerolaman Street I examined it, and I went up there and examined, and I found—

Q. Where did you go? A. Up Jerolaman Street, up to Washington Street.

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Q. Washington Avenue? A. Yes. And I found

that they had raised the culvert, or whatever you call it, so high that the water couldn't get down Jerolaman Street, and that is what stopped it from coming in my garden.

Q. Well, you say "culvert, or whatever you call it." A. Yes.

10 Q. What was it, then? A. The culvert. The water would come down and strike this culvert and go through and go up Washington Avenue instead of coming down Jerolaman Street.

Q. Well, had anything been done to the street itself, Jerolaman Street, do you remember? A. Oh, I don't know much about that at all; all I know, that water did at one time come down Jerolaman Street.

20 Q. Well, they did something that cured it? A. Yes, that culvert, that would send it up the avenue, and then it would go in this spring right down at Jerolaman's lumber yard.

Q. When was that? A. Oh, I don't know as I can tell you when it was.

Q. Do you remember any time in 1911 when Mr. Jerolaman's lumber yard was flooded? A. Oh, I heard about it, you know, but I never went over to see it.

30 Q. I am only referring to it to fix a time. A. Yes.

Q. Do you remember a flood in 1911? A. I remember there was a flood in 1911—a thunderstorm.

Q. Do you remember the time? A. I can't say the time.

40 Q. Do you remember hearing of any flood and damage to Mr. Jerolaman's yard in 1912, the Spring of 1912? A. I heard of the damage, but I couldn't give you the year.

Q. Well, this is 1915. A. Yes, it must have been along in 1912, somewheres along there.

Q. All right. That is the flood. Now, remembering that this is 1915, can you tell us about how many years ago it is that you went up and found that they had done something to send the water north? A. Oh, well, it must have been before 1912, because it changed the course.

Cross Examination Waived.

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GEORGE F. SANDFORD, sworn in behalf of plaintiff.

Direct examination by Mr. Skinner:

Q. Mr. Sandford, you live in Belleville? A. Yes, sir.

Q. How long have you lived there? A. Seventy-four years.

Q. What part of the town? A. Around Washington Avenue, between Jerolaman Street and Holmes Street; I live nearer to Holmes Street. 20

Q. Did you ever see water coming down Jerolaman Street to Washington Avenue after a shower or storm? A. Yes, sir.

Q. Where did it used to go? A. Went down Jerolaman Street.

Q. Did it cross Washington Avenue? A. Yes.

Q. And go on down Jerolaman Street? A. Yes. 30

Q. Did it do any damage? A. Washed the road out, washed the roadbed out.

Q. More than once? A. No, not all in one place; in spots, you know; but it damaged it.

Q. Did that happen in different years or only one year? A. Well, one year it was worse than others. It happened more than one year, but about three years ago, I think, about that time—no, a little before that—about along that time it was worse. 40

Q. Was anything done at Washington Avenue

and Jerolaman Street to remedy that? A. Yes, sir; someone put up ahead of Jerolaman Street at the junction of Washington Avenue—they raised the street up, Jerolaman Street. We used to call it a water break; that is what we called them—on a side hill—go over the hill—but they put in a culvert across the other side of the street, and then it saved the lower part of Jerolaman Street.

10 Q. And where did the water go then? A. Went north over to this brook.

Q. This same water that used to go across Washington Avenue and down in Jerolaman Street? A. Yes.

Q. Do you remember about when that was done? A. Oh, about three years ago, I guess, in the neighborhood of three years ago. You mean the work?

20 Q. Yes. A. Oh, that work was done—I don't know when it was done; quite some time, maybe eight or ten years ago.

Q. Eight or ten years ago? A. Yes, sir.

Cross examination by Mr. Murray:

Q. Mr. Sandford, you are not sure that it was not twenty years ago that that work was done? A. Twenty years ago?

30 Q. Yes. Was it as long ago as that? A. No—You mean the culvert put in?

Q. Yes, and the street raised. A. I don't think it was twenty years ago.

Q. Have you any way of fixing the time more definitely? A. No, sir; I have got no particular way of fixing it, and I don't know who did it; I know it was done.

40 Q. For the purpose of fixing the time, do you remember whether there was a big storm in 1901? A. That was the first storm, yes.

Q. You remember that, do you? A. Yes. We

have had several storms, don't you know, and I can't place them just on the years.

Q. Will you say this work that you speak of was done before or after the storm of 1901? A. No, I can't tell you anything about that.

Q. You couldn't say whether it was before or after? A. It was about three years ago when that storm was that went across into the brook—so much water came down and went across into the brook and filled the brook up, three years ago.

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Q. That is what you call the big storm? A. Yes. Then some years before that, some ten or fifteen years before that, for all I know, they had a big storm, but I don't know just how many years.

PETER D. ACKERMAN, sworn in behalf of plaintiff.

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Direct examination by Mr. Skinner:

Q. Mr. Ackerman, where do you live now? A. Belleville.

Q. And how long have you lived there? A. About forty-four years.

Q. Have you at any time had any place in the town government there? A. Yes, sir.

Q. Were you on the Town Committee? A. Yes, sir.

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Q. Chairman of the Town Committee at one time? A. Yes, sir.

Q. Do you remember in your experience as a member of the Town Committee having anything to do with the placing of a culvert at Washington Avenue and Jerolaman Street? A. A little louder.

Q. Do you remember having anything to do with the placing of a culvert at Jerolaman Street and Washington Avenue? A. I think there was a culvert—culverts put across those streets there in

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about the year 1902, somewhere around that, if I remember rightly.

Q. And you are not definite, then, as to that time?

A. No.

Q. Were you a member of the Town Committee in 1902? A. Yes, sir.

Q. And were you a member of the Town Committee in 1901? A. Yes, sir.

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Q. 1900? A. Yes, sir.

Q. 1903? A. Yes, sir.

Q. Four years, then? A. Well, it took in part of each one of the first and last years.

Q. Now, you say in some one of those years, you thought it was 1902, a culvert was put in. Did you know about it and superintend it at all? A. Yes. We had difficulty in getting the water down there, and it used to rush across the avenue, and we put the culverts in there to stop that.

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Q. It used to wash across the avenue as it came down Jerolaman Street, did it not? A. Yes, sir.

Q. And then, going down over Washington Avenue down Jerolaman Street, it used to do damage, did it not? A. Yes, sir.

Q. Damaged the roadway? A. Yes, sir.

Q. Ever wash out the gutters? A. Yes, sir.

Q. Paved gutters? A. Yes, sir.

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Q. Wash out the macadam? A. Yes, sir.

Q. In a pretty heavy storm at times, would it not? A. Yes, sir.

Q. Now, you put culverts in to divert that water, did you not? A. Yes, sir.

Q. Which way did you send it? A. Turned it north on Jerolaman Street.

Q. And then where did it go? A. Down in the brook.

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Q. You say you turned it north on Jerolaman Street. Do you mean that? A. Coming down Jerolaman Street, the culverts were put in to

divert the water north on Washington Avenue to get to the basin.

Q. And then did it get into the brook? A. What?

Q. Get into the watercourse then? A. Yes, sir.

Q. Down through Jerolaman's property? A. Yes, sir.

Q. Was that the object of the culverts? A. Yes, sir.

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Q. Was it done by the town? A. Yes, sir.

Q. Was there anything done to raise the crown of Jerolaman Street and block the water at the same time? A. I can't say how much the street was raised at that time; I don't remember that; but I know the water coming down in a storm would rush across Washington Avenue and would continue on down Jerolaman Street until it got down to the brook on the north side of Jerolaman Street, and there it would run east in the brook, and then into Cortlandt Street, and so on down.

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Q. This brook that you speak of was on Jerolaman Street, was it not? A. Yes, sir.

Q. Was it the same brook that ran through this Jerolaman property? A. Yes, sir.

Q. And it got into the brook at a point below Mr. Jerolaman's property? A. Yes, sir.

Q. Nearer the river? A. Yes, sir.

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Q. And what the town did was to divert it so that it got into the brook west of his property? A. Yes, sir.

Q. And ran on down through his property; is that it? A. Yes, sir.

Cross examination by Mr. DeGraw:

Q. Washington Avenue was a county road, was it not? A. Yes, sir.

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Q. And was the permission of the county obtained when Washington Avenue was dug up for

the purpose of putting in the culverts? A. What is that?

Q. Was the permission of the county obtained when you dug up the county road for the purpose of placing this culvert in? A. I presume it was, because I remember Mr. Owen being on the ground at the time when that work was done there.

10 Q. Now, how much a stream was that that came down generally? You spoke about a stream there. A. That came down Jerolaman Street?

Q. Yes. A. Well, it was more than the gutter would carry in a storm; it couldn't commence to carry it.

Q. Does that same stream come down yet? A. Well, in a—I don't know recently; I can't tell what has taken place recently.

20 Q. As a matter of fact, was there any stream there except in the time of rains? A. At what time?

Q. Except in the time of a storm? A. No, nothing more than natural drainage from the streets.

Q. Drainage from Jerolaman Street? A. There wasn't any water coming down there of any account, only the natural—the same as there is always except in stormy weather.

30 Mr. Skinner: Now, I want to use some of the Township Committee reports. Of course, I do not want to offer the whole report in evidence, but only certain portions that I would read into the record.

Mr. Murray, will you require that there should be formal proof by calling members of the Town Committees of each year to prove these reports, or can I read from the report?

40 Mr. DeGraw: I think if you have the original report you can read it.

Mr. Skinner: Then, let us understand it. You mean that you are going to insist that we must get the original written report from which these printed reports are made?

After further discussion, the offer is withdrawn.

Plaintiff Rests.

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Mr. Murray: We move for a nonsuit, if your Honor please, as to the first count, because the facts proven by the plaintiff established, if anything, an increased flow of water which is merely incidental to the grading and improving of streets of the town. There is no scheme shown to divert the water into Mr. Jerolaman's yard, but these acts which have been proved by the plaintiff were a series of single acts extending over a period of something like thirty-four years. A street would be opened, and it would be resurveyed, the grades smoothed out. The water would collect on that street and in the gutters of the street, and instead of sinking away as it did when the land was farm land and unimproved, it would run down the street and eventually reach Mr. Jerolaman's yard.

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The Court: Well, let us assume that that was so, and the result was a larger torrent of water on the Jerolaman Street hill than there would otherwise have been. I understand that what the plaintiff complains of is not that a torrent ran down Jerolaman Street, but that that torrent was diverted so as to come on him. Am I right about that?

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Mr. Skinner: Yes, sir. We do not rest our action at all on the responsibility of

the town for the grading and improvements of Union, Linden and DeWitt Avenues and all those streets up there, and its consequent casting of water on Jerolaman Street. We rest it upon the fact that, having done that, that water that would have then naturally, by the natural grade, come down Washington Avenue, as it did for years, in order to save the town streets from damage was artificially diverted to Mr. Jerolaman's land, and at one place was diverted by a culvert.

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Mr. Murray: The town is obliged by the necessity of things to provide gutters in its streets. I do not see how the fact that the water had increased in flow would obligate the town in any way or make it liable. It seems to me that the diversion of the stream, if such was the case, was entirely incidental to the improvement of the streets. Furthermore, it does not seem to me that they have shown conclusively, or even *prima facie*, that this increase which they claim was in fact the cause of the flooding of Mr. Jerolaman's property. This is not the first flood that Mr. Jerolaman has had. His testimony and that of a number of his witnesses shows that he has had floods since 1895 at numerous intervals, and had one in 1901, and then in 1907, before this improvement of which he complains was ever installed. It is shown that the raising of the grade of Jerolaman Street was done in 1902. Mrs. Kay said there was a large flood there in the 'nineties, or 1895. Mr. Jerolaman himself said he began to have floods in 1895. Mrs. Kay remembered distinctly, and I believe it was Mr. Kingsland

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who remembered a big flood in 1901—all before this diversion took place.

Now, if the plaintiff complains that the sole cause of the damage was the guttering of the streets in 1901, how can he explain the fact that these floods took place prior to that, without that being done? He had floods anyway. He does not show that the floods afterwards were any larger than the floods before, considering the variance in the amount of rainfall. He does not show what the cause of these particular floods is. He does not show that the diversion of this water is responsible for it. The fact that he had floods, and just as large floods, before that negatives that idea, or makes it ambiguous—an ambiguity which he is bound to overcome. It seems to me that on his *prima facie* case he must show, if he is going to show it by circumstances, that it was caused in fact by this act of the town, and I do not think that showing that he had floods before and since, without any comparison as to the increase, if any, or the cause of the storm, shows it at all. He cannot tell whether this caused it or not.

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The Court: I was going to ask you if you did not think this was a question for the jury?

Mr. Murray: I do not think there is anything that they can base an opinion on. It would be only a guess, because there is no testimony comparing the amount of the water before and the amount of the water after the improvement, taking into consideration the difference in the rainfall. They do not know what the rainfall was. The rainfall might have been larger in the floods

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of which he complains. And then what did the damage? Not the improvement of which he complains. The mere fact of the increase of the flow does not establish a *prima facie* case.

10 The Court: It shows that it came down a different way. As long as the water stayed on Jerolaman Street it would be innocuous, but if the same water came down in another way that would be injurious to him, it would not make so much difference whether it was more or less, if its access to his property was facilitated by the change.

20 Mr. Murray: On that point I would ask permission to read a quotation from the opinion of the Court of Errors and Appeals in the case of *Miller v. Morristown*, 47 New Jersey Equity, page 62, affirmed by the Court of Errors and Appeals in 48 New Jersey Equity, 645. This was a bill for an injunction to enjoin Morristown from discharging water on the plaintiff's lands. In that case the Court said: "No doubt can be entertained under the evidence that the quantity of water discharged on the complainants' land, since the streets were graded and guttered, is much greater than it was before. But this does not show that they have sustained an actionable injury. Such improvements necessarily result in increasing the quantity of water sent to the point of discharge and also the celerity with which it is carried there. They are made in part to effect these purposes. The road-bed is made hard and smooth and put in such a form that it will shed water quickly, instead of collecting in the depressions, there to remain until absorbed or evapo-

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rated; and then paved gutters are constructed on the sides, so that all the water falling on the road, or finding its way there, shall run off at once into the gutters and be by them quickly carried to the point of discharge. It is also true, as the proofs show, that the quantity of water carried to the complainants' land, and there discharged, has been somewhat increased by an enlargement of the area of drainage, but such enlargement is, it appears, the direct result of making the grade of the streets improved conform to the grade established by the proper authority. So that it thus very clearly appears that the whole of the increased quantity of water transmitted to the complainants' land, is such, and such only, as is necessarily diverted to their land in carrying out a lawful scheme of local improvement. For injury resulting from such a diversion of surface water no action will lie." A number of cases are cited. That seems to be the rule, as I understand it. The case, I believe, held that the town had no right to institute or to construct a system of sewers or drains and draw the water from a large area, an unnatural area, and discharge it at one point on the plaintiff's land. But that is a very different thing from saying that the municipality has not a right to put in one gutter across a street to protect a county road for its own road.

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It seems to me that this case comes within the rule laid down as to incidentals arising from public improvements.

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Counsel argue.

At one o'clock P. M. the Court takes a recess of one hour.

AFTER RECESS.

Mr. Murray: If your Honor please, at this time I would like to renew my motion for a view of the premises by the jury, as I stated before.

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The Court (after discussion): We will take up the matter later, on Monday. If the jury desires it, the Court will order it.

I shall deny the motion to nonsuit. I have had no time to look at these cases, although I used to be familiar with some of them.

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My recollection of the law is substantially this. It is not the law that no one, whether individual or corporation, can interfere with the flow of surface water. Chief Justice Beasley, in a case that I recall, says that surface water is the common enemy; everybody fights against it. Therefore, if it was the rule that nobody could ever deflect any surface water, a man could never plow a furrow across his own field.

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I speak with reservation, for I have not looked at the recent cases, but I believe it is also the rule that, while the law is as I have thus far stated it, it is also true that no one, either a corporation or an individual, may artificially accumulate water and throw it in a mass, in volume, on the land of another, unless that person is prepared to pay damages for a wrong. That question of law is in the case, and will receive further attention.

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There is a question of fact in the case, which I could not take from the jury, if I

were prepared now to express my views definitely as to the law, and that is the question whether the defendant, the Town of Belleville, did artificially divert water which otherwise would have gone elsewhere, and cast it upon the land of the plaintiff. I am not in a position yet to make a comparison between the conditions before and after.

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I think, taking the plaintiff's case now as we find it—and there is certainly evidence tending to show that that was the case—that is enough to carry the case to the jury as against a motion to non-suit. I therefore deny the motion to non-suit.

Defendant's counsel object to this ruling of the Court.

Objection noted as ground of appeal.

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PATRICK W. MCCOY, sworn in behalf of defendant.

Direct examination by Mr. Murray:

Q. Mr. McCoy, where do you live? A. Belleville.

Q. How long have you lived there? A. About sixty-three years.

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Q. Were you ever connected with the town in any capacity? A. I was.

Q. In what capacity? A. I was inspector on the original roads there when the Telford roads were first laid.

Q. About what time was that? A. It commenced in the year 1889.

Q. And extended how long? A. Well, until they were mostly all finished, and even afterwards. There was three different contracts that were carried out.

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Q. About what year? A. Oh, I couldn't say; up until about ten or twelve years ago.

By the Court:

Q. What position did you say you occupied? A. I was inspector of the building of the roads, the first improved roads we had in the town there.

10 By Mr. Murray:

Q. What roads do you refer to? A. Well, most all of them, with the exception of about two or three streets, most all of the roads that were built in the town.

Q. Were you familiar with the conditions as to grade of Jerolaman Street and Washington Avenue where they intersect? A. Yes, sir.

20 Q. Now, Mr. McCoy, there is a hill, I understand, on Jerolaman Street from Washington Avenue running west; is that right? There is a rising grade as you go west, is there not? A. Yes.

Q. In time of storms where did the water go which fell on Jerolaman Street on that hill?

The Court: At what time?

Mr. Murray: Well, at the time that you were first familiar with it, which was what year?

30 Witness: Well, you mean previous to those roads being improved?

Mr. Murray: Yes.

Witness: Previous or afterwards?

Mr. Murray: After Washington Avenue was opened.

Mr. Skinner: When is that with reference to the improvement of the roads?

40 Witness: Well, I can't understand the question, whether he means the water came down Jerolaman Street previous to the roads being improved or since they were improved.

Mr. Murray: Yes, previous to their being improved.

A. Previous to their being improved it ran down across Jerolaman Street. There is a culvert opened, say, a hundred feet below Washington Avenue. They took it down to the county culvert.

Q. Just show us on the map, will you, what you mean? Here is Jerolaman Street (indicating)? A. This doesn't show this county culvert there, does it? It doesn't show the county culvert on Washington Avenue. 10

Q. Can you indicate on the map the approximate location of the county culvert? A. It would be about here (indicating).

Q. Did it end there or— A. It went clean down to Jerolaman Street; it followed the street across over what they call—cut through there, now Linden Avenue; it ran north after it crossed Jerolaman Street, and then turned and ran down alongside of what used to be called Barrack Lane before it was called Jerolaman Street. 20

Q. Did the water ever run down Jerolaman Street from Linden Avenue east towards Washington Avenue? A. Sure, it ran down east.

Q. Where did it go? A. It ran down Washington Avenue to the county culvert. 30

Q. What do you mean by that? A. It ran north.

Q. It ran north on Washington Avenue? A. On Washington Avenue.

Q. Did it run on down across Washington Avenue and go on down Jerolaman Street east of Washington Avenue? A. No.

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

Q. Then it turned, I understand— A. Turned on the west side of Washington Avenue in the culvert. 40

Q. And went into the county culvert? A. Went into the county culvert.

Q. And from there where? A. From there on down to the river, and there was another county culvert on Main Street. It ran directly east to the river.

By the Court:

10 Q. Will you point out to us where on Washington Avenue the county culvert was? A. Well, as near as I could say—

Q. Describe it with reference to some street; do not say "here." A. This is about it here (indicating).

Q. What street is that? A. This is called Essex Street now. That has been filled in. It has been always a running stream there about to Essex Street; it has been always a running stream there for years.

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By Mr. Murray:

Q. That is very close to the brook, is it not? A. Well, that is the brook.

Q. That is a brook? A. It is a stream. There has been a stream there for years.

Q. The water turned north on Washington Avenue and ran into the brook? A. Turned north on Washington Avenue and ran into the county culvert.

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Q. Was the end of Jerolaman Street where it joins the east side of Washington Avenue raised at any time? A. No, sir.

Q. It was not? A. It has never been raised since the grade was established. Of course, those grades are a matter of record, and if it was raised it can be found out easily even at this time; but I don't think you will find any change in it the least bit.

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Q. How long has Jerolaman Street on the east side of Washington Avenue been in its present condition? A. I think that grade was established in 1889; the road was built in 1889 or 1890.

By the Court:

Q. What road? A. Jerolaman Street, first running east from Washington Avenue to Main Street.

Q. You say a road was built in 1889 or 1890?

A. Yes, sir.

Q. Jerolaman Street? A. Jerolaman Street.

By Mr. Skinner:

Q. Was not Jerolaman Street built in 1889? A. The grade was established and built; yes, sir; at the time it was improved. 10

Cross examination by Mr. Skinner:

Q. Mr. McCoy, the water, you say, did not run across Washington Avenue as it came down Jerolaman Street? A. No, sir.

Q. Never did? A. Well, I couldn't say. There might be such a thing as being obstructed, or something, that it might—that is hard to tell. Sometimes the rain or the water from Washington Avenue, the gutter being blocked, a certain amount might flow down, but the water, any natural stream, any heavy stream of water would flow down Washington Avenue as soon as it struck the west side. There was a paved gutter put in there by the county that would take care of it. 20

Q. But you said that the water did not run across Washington Avenue? A. No, sir. 30

Q. Do you mean to say that that was so all the time? A. From the time it was improved.

Q. From what time was that? A. The time it was macadamized.

Q. Jerolaman Street? A. Jerolaman Street.

Q. That was when, in 1889, about? A. From 1889.

Q. At that time the water never went down Washington Avenue and Jerolaman Street? A. Not unless it was blocked. 40

Q. You mean to say that that water ran over Washington Avenue easier when it was blocked than when it was not blocked? A. I don't say that it did run across at all; I say in a heavy storm, with the gutters free; I don't say that no water ran over there. I know some water would have to go over, but the natural flow of water did not go.

10 Q. But in heavy storms the natural flow of water did go, did it not? A. I couldn't say it did.

Q. Well, you could not say it did not, could you? A. No.

Q. Did you go to the corner of Jerolaman Street and Washington Avenue and raise the crown? A. No, sir.

Q. You heard Mrs. Kay's testimony? A. I know.

20 Q. She imagined that, did she? A. She imagined it; but it is very easy to send a surveyor over there and find if there has been any difference. That grade was established and a matter of record.

Q. Well, if you went down there and raised the crown there one night, as Mrs. Kay described, that would not get in the record, would it? A. No, but it would show it if it was raised, wouldn't it—the original grade?

Q. Well, let us get your answer. Do you say that you did not go there? A. No.

30 Q. And do anything to raise the crown of Jerolaman Street? A. Never did anything to raise the crown of that road. It would put it out of shape.

Q. Did the town ever suffer any damage from water running across Washington Avenue and down Jerolaman Street? A. What do you mean, the road?

40 Q. Yes. A. You must recollect that that road was only, I think, about 14 feet wide. Now, between that and the curb previous to its being curbed and flagged there was nothing there but clay. The heavy rain might naturally gully that

out some; but that would happen from the flow of water on that street alone, without any flow from the outside. That road was not macadamized from curb to curb—about a seventy foot street there; it was only macadamized about 14 feet originally.

Q. Do you say that washouts of the macadam would happen from the ordinary flow of water on that street without anything from outside? A. I didn't say that the width of the macadam; I said between the macadam and the curb it might gully some there, but not the macadam.

10

Q. Just from the ordinary flow on Jerolaman Street, without anything on the outside? A. On the dirt road.

Q. Where did that water come from that did that? A. From the heavens.

Q. Well, when it struck the earth do you mean that it landed on Jerolaman Street east of Washington Avenue, falling from the heavens? A. Yes, sir.

20

Q. Well, there were washouts right up at the corner of Washington Avenue and Jerolaman Street, were there not? A. Very little, that I can remember.

Q. Do you not remember when there was a wash-out big enough for a horse and wagon to get into it? A. Never—on the west side, not on the east.

30

Q. On the east side, I am talking about. A. No.

Q. Do you remember when the old car line stopped at Jerolaman Street? A. Yes.

Q. Don't you remember how the water used to turn the corner there and wash out around the corner? A. No, sir; when Jerolaman Street was macadamized there was a paved gutter put in on Washington Avenue.

Q. No trouble after that? A. No trouble after that.

40

Q. Nor any washouts? A. Not to my knowledge, never.

10 Q. So that the problem of carrying the surface water that came down Jerolaman Street was solved by just the paved gutters and the macadam, the hard road; is that right? A. The water that came down that west side of Jerolaman Street went north on Washington Avenue, and all the water that went down on the east side of Jerolaman Street from Washington Avenue was what fell on the road.

20 Q. Now, let us see what you mean. I do not want any possibility of your being misunderstood. (Indicating on map.) Here on the corner of Washington Avenue and Jerolaman Street all the water that came down to Jerolaman Street from the west ran north to this old watercourse; is that right? A. Yes.

Q. And all the water that fell east of Washington Avenue on Jerolaman Street ran down Jerolaman Street (indicating)? A. Yes.

Q. And none of the water that came down Jerolaman Street from the west went across Washington Avenue and down Jerolaman Street? A. Not to my knowledge.

30 Q. Then there were washouts east of Washington Avenue on Jerolaman Street, between Washington Avenue and the railroad, were there not? A. Not of any consequence. As I say, it might be formed in the ruts, but there was never any deep depression or any hole, or anything.

Q. Anything at all that you fixed up as road supervisor? A. No, sir.

40 Q. You never had a gang working there? A. Oh, I might have a gang there cleaning out the gutters.

Q. I mean after a storm. A. Filling up ruts. I mean between the macadam and the curb.

Q. After storms did you not have to do some little fixing up there? A. No, sir.

Q. Not a bit? A. Oh, no, not a bit, of course—

Q. Isn't that the reason the gutters were paved?

A. They were paved to save the roads.

Q. Weren't they all paved? A. All streets?

Q. Yes. A. It depended on the street. A flat grade, it didn't need it.

Q. But Jerolaman Street did? A. Yes, sir.

Q. Was it paved up to Washington Avenue? A. Yes.

Q. And the gutter between the south side of Washington Avenue and the railroad, there was not any use of that gutter to take water except the water that dropped from the heavens on the street right there east of Washington Avenue?

A. Yes, sir; that is all.

Q. Do you not know that the town has got all that water that used to go down Jerolaman Street in those gutters carried into this storm sewer? A. Which sewer?

Q. A storm sewer that was built two or three years ago. A. Well, that I don't know anything about.

Q. Well, were you supervisor of roads while Mr. Ackerman was Chairman of the Township Committee? A. Yes, sir.

Q. You heard his testimony, did you not? A. I heard some of it.

Q. You heard him say that there was a culvert put in up there, did you not, at Washington Avenue and Jerolaman Street? A. There was iron gratings put down there.

Q. Just iron gratings? A. Iron gratings.

Q. Why were they put on? A. To prevent the depression. There was iron gratings put in all the streets, pretty near, in the Town of Belleville at that time.

Q. Why were those iron gratings put on at Washington Avenue and Jerolaman Street? A. Because in driving across there there was quite a heavy jolt, and they were put there not only, but put in 'most all the streets in the town where there was a deep depression in the gutter to prevent the jolt, to make it easy of access.

10 Q. Were not the culverts put in there to carry the water north that came down Jerolaman Street? A. There was no culverts; there was iron gratings put in there.

Q. Well, iron gratings over the culverts, were there not? A. You can call it a culvert, if you want to. In 1889 or 1890, when the road was built there, they paved that gutter on Washington Avenue, and the people complained, the depression was so steep from the sidewalk to the gutter. They
20 put in iron gratings to prevent that jolt when people drove over. It wasn't to carry any water.

Q. Do you not remember a culvert being put at Rossmore Place and Washington Avenue? A. That is the same; it is not a culvert; it is iron gratings.

Q. There wasn't anything done, then, within your knowledge, at the corner of Jerolaman Street and Washington Avenue to make the water that
30 came down Jerolaman Street from the west run north to the brook instead of running across Washington Avenue? A. No, sir.

Q. Nothing of that kind done? A. No.

Q. Well, Mr. McCoy, how about the water on the east side of Washington Avenue north of Holmes Street, did that run to Jerolaman Street—run northerly to Jerolaman Street? A. The water
40 ran down Jerolaman Street to Cortlandt Street across and down beyond a lot there where he built his factory there, and it was carried through to

Stephens Street and then back to Jerolaman Street again.

Q. You are speaking of the water that fell on the east side of Jerolaman Street? A. Yes, sir.

Q. It went down Jerolaman Street and— A. Down to Cortlandt Street, to Stephens Street, and back to Jerolaman Street.

Q. Then to get down to Jerolaman Street it has to turn the corner of Washington Avenue and Jerolaman Street, does it not? A. No, I am speaking about the water that fell on the east side of Jerolaman Street from Washington. 10

Q. Listen to me. You know that Jerolaman Street runs east and west and has not got any east side, do you not? A. Well, the north side.

Q. I asked you about North Washington Avenue, and you know all these streets? A. Yes. 20

Q. Now, you say you were talking about some water running down Jerolaman Street? A. Running down Jerolaman Street.

Q. I asked you about the water on the east side of Washington Avenue from Holmes Street north. A. Well, it ran to the culvert. I misunderstood the question.

Q. It ran to Jerolaman Street, did it not? A. No, sir; it ran to that culvert north of Jerolaman Street. 30

Q. North of Jerolaman Street? A. North of Jerolaman Street.

Q. Well, do you not know that it was made to run to the culvert north of Jerolaman Street by putting in culverts where Washington Avenue crossed Jerolaman Street? A. No, sir.

Q. Don't you know that it used to go around the corner into Jerolaman Street? A. No, sir.

Q. So that whatever washouts there were on Jerolaman Street between Washington Avenue and Isaac Street, or the railroad, were just from the water that fell on that space? A. Yes, sir. 40

Q. And it is a distance of about 200 feet? A. About.

Q. About a city block? A. Yes, sir.

Q. Are you connected with the town government now? A. No, sir.

Q. Mr. McCoy, when the street improvements were made in 1889 and thereafter, among the streets improved were DeWitt Avenue? A. Yes.

10 Q. Linden Avenue? A. Yes, sir.

Q. Union Avenue? A. Yes, sir.

Q. New Street? A. Yes, sir.

Q. Hornblower Avenue? A. Yes, sir.

Q. Practically all the streets lying south of Jerolaman Street? A. Yes, sir.

Q. And north of John and west of Washington Avenue and east of New Street were improved by the town, were they not? A. Yes, sir.

20 Q. In two or three years? A. Well, no, it ran on—there were three different contracts for the different years.

Q. Well, four or five or six years? A. Well, it might be longer than that.

Q. But it was one continued plan of improvement? Belleville was waking up, was it not? A. Sometimes.

30 Q. Now, these streets were macadamized as a part of that improvement, were they not? A. Yes, sir.

Q. You superintended a part of it? A. Yes, sir.

Q. And the gutters were cleaned out, were they not? A. When they needed it and had the means to do it with.

40 Q. I do not mean to say that you wasted the money. And there was some grading done, was there not? A. The streets had to be graded before they were macadamized.

Q. Do you remember Hornblower's pond? A. I do.

Q. It is not there now, is it? A. Part of it, at times.

Q. Well, very little compared with what there used to be when you and I were boys? A. Yes. We used to skate there.

Q. Did you know the swampy land and the pond that lay between Holmes Street and Hornblower Avenue? A. Yes, sir.

Q. It is gone, is it not? A. It has been getting filled in. 10

Q. It has been getting filled in for some time, has it not? A. Yes, sir.

Q. And the grading of all these streets and the cleaning of the gutters and the paving of the streets all had a tendency to drain that section a great deal better, did it not? A. Yes, sir.

Q. And they put gutters in on DeWitt Avenue crossing Holmes Street, did they not? A. No. 20

Q. Nothing of that kind? A. It was ten years before they ever improved those streets that culvert was put in.

Q. Was there not one put at Hornblower Avenue crossing Holmes Street? A. Yes.

Q. And that carried water across Holmes Street that before that used to stop south of it? A. It couldn't stop south of it; the grade was not that way. 30

Q. I know, but Holmes Street had a little crown to it, did it not? A. A big crown.

Q. Of course, that blocked water that was on Hornblower Avenue, did it not? A. No, sir.

Q. Until the culvert was put through? A. No, sir.

Q. Wasn't that what the culvert was for? A. No.

Q. What was it for? A. As I said before, culverts were put all through the town to prevent 40

the jolting of wagons or carriages; it made an even surface, and preventing the depression.

Q. Was there a gutter on Holmes Street? A. Yes, sir.

Q. And did that gutter run across Hornblower Avenue? A. Yes.

10 Q. And the water that came down Holmes Street passed right across Hornblower Avenue and on down, did it not? A. It ran down.

Q. And Hornblower Avenue did not obstruct the water that came from the west on Holmes Street, did it? A. Obstruct it?

Q. Yes, prevent its running on down? A. No.

Q. But Holmes Street did obstruct the water on Hornblower Avenue from crossing Holmes Street, did it not? A. Yes.

20 Q. Each street crossed the other, did it not? A. Yes, it intersected and crossed there.

Q. Mr. McCoy, was there anything to prevent the water on the east side of Washington Avenue on Jerolaman Street from going down Jerolaman Street? A. Nothing that I know of.

30 Q. Then it went down Jerolaman Street, did it not? A. It went down very often. Sometimes in a rapid, heavy flow the gutter might not be large enough to take the flow; it might not go over; that was all. It was the intention to go that way.

Q. Which way? A. North on Washington Avenue.

Q. You mean it was the intention of the town? A. Yes. There would have to be a terrible large flow of water—

By the Court:

40 Q. Do you mean north on Jerolaman Street? A. I mean north on Washington Avenue.

By Mr. Skinner:

Q. It was the intention of the town to have the water on Washintgon Avenue run north to the brook on Mr. Jerolaman's property? A. No, it was not the intention to have the water go on Washington Avenue at all.

Q. Why? A. Because it was a county road.

Q. Do you mean to say that the town never had any intentions about that matter because it was a county road? A. Well, all they had to do with grading Washington Avenue—they had nothing to do with the county road. 10

Q. Did not the town have anything to do with the county road on Washington Avenue? A. Not to my knowledge.

Q. Did they not lay sidewalks on Washington Avenue? A. Well, yes, but what I mean to say, they had no jurisdiction over Washington Avenue. 20

Q. Did they not put down culverts on Washington Avenue? A. The town?

Q. Yes. A. Not under my supervision.

Q. Well, did they not, to your knowledge? A. Put culverts?

Q. Yes. A. I guess they did on the southern end.

Q. Right up there at Rossmore place, where we were talking about a minute ago? A. No. 30

Q. Did not the town do that? A. As I was stating, that is not a culvert; those are iron gratings.

Q. Do you not remember a man named Burton that lived on the north side of Jerolaman Street? A. I did; yes, sir.

Q. And his house was right on the north side of Jerolaman Street between Washington Avenue and Isaac Street, or the railroad, was it not? A. Yes.

Q. It was just south of the Essex station? A. Yes, sir. 40

Q. Did not his place get all flooded and washed out by water that ran down Jerolaman Street from Washington Avenue? A. I couldn't say that.

10 Q. You could not? A. No. That was all low ground back there. There was no sidewalks then. I am speaking about the roads now. That was before there was any curbs or flagging put on Jerolaman Street. Of course, there was very low ground below his place there.

Q. Mr. McCoy, were you supervisor in 1899? A. 1899?

Q. Yes. A. I couldn't say.

Q. Well, there were not many years that you were not supervisor were there? A. Well, I know. It might be, but as far as the dates are concerned, I don't know. Tell me what you want to get at; I can get at it better.

20 Q. Did you no superintend the laying of cobble gutters from Washington Avenue east on Jerolaman Street in 1900? A. I supervised them when they were laid; I couldn't exactly remember the year.

Q. Well, did not the town have to repair the sidewalk on the south side of Jerolaman Street between Washington Avenue and the Erie Railroad in 1903? A. What do you mean by "the sidewalk?"

30 Q. Well, I do not mean the place between the macadam and the paved gutter, or just the dirt; I mean the sidewalk. A. The flagging?

Q. Yes. A. I don't know anything about the flagging. Of course, the sidewalks are different. That doesn't come under the head of roads.

Q. Well, did Jerolaman Street ever get washed out west of Washington Avenue? A. Yes.

40 Q. It was this water that was coming down Jerolaman Street after a storm, was it not? A. No, sir.

Q. Well, what was it? A. A leak.

Q. From the heavens? A. No, sir; a water pipe.

Q. When was that? A. Well, about the time of that washout, I think. I supposed that there was a leak there; I didn't know; and there was a man that had charge of the gates, and after the stream had been running there, I guess, for a month I told him to go up there and shut off those gates at the intersection of DeWitt Avenue and Holmes Street, and if there was a leak in the pipe it would show, and he told me he had done it and the flow didn't decrease. The following Spring there was a depression there; the ground sank. I was so confident of what this man told me that the —East Jersey had a main right alongside of it, and I sent word to the East Jersey that their main had busted, and they came down there and took it up, and we found it was our own pipe that had bust.

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Q. You know the annual reports of the Township Committee when you see them, do you not? A. Yes.

20

Q. Is that a copy of the report for 1903 (shown to witness)? A. Yes.

Q. I just want to refer you to something there and see if it does not refresh your recollection. Page 5: "Your committee would recommend the repairing of Holmes Street from DeWitt Avenue to New Street, and the repairing of Jerolaman Street from Hornblower to Washington Avenue." Was not that because there had been washouts? A. No, not necessarily.

30

Q. No, but was it not actually? A. Of course, those roads ain't going to last without repairs.

Q. I don't want to argue with you about that, but have you any recollection about it? A. Sure, it was recommended; they needed it, and they need it worse today than they ever did.

40

DANIEL MELLIS, sworn in behalf of defendant.

Direct examination by Mr. Murray:

Q. Where do you live, Mr. Mellis? A. Corner of Rossmore Place and Washington Avenue, Belleville.

10 Q. How long have you lived there? A. About seventeen or eighteen years.

Q. Did you live in Belleville before you lived at that place? A. Yes, sir.

Q. How long have you lived in Belleville all together? A. On and off for about twenty-seven years.

Q. Are you familiar with what has been called Hornblower's pond? A. Yes, sir; I am part owner of it.

20 Q. How long have you owned it? A. Oh, probably twelve or fourteen years.

Q. And is there more or less water there now, or was there in 1911 or 1912, than there was when you first bought it? A. It depends entirely on the kind of seasons. There was some years that there would be no water there. There is no or very little water there just now.

30 Q. Did you have the same storms as fourteen years ago? A. Well, I think I misunderstood your question. It is a good deal filled in now, and if the rain was heavy there wouldn't quite so much lie as there did at that time that you speak of.

Q. Then there is less water now in Hornblower's pond because it has been partly filled in? A. Partly filled in, yes.

40 Q. When you first owned it what was the character of the land there? Was it built up, or what was the situation? A. Practically no houses on it whatever.

Q. What was it, woods or fields or— A. Well,

yes, there was a good many trees, and it was scrubby and boggy.

Q. And what is its condition now? A. Well, we have been filling it in in the last six or eight years, and there is several houses built on it, probably ten or twelve houses built on it; there is a street cut through the center of it. Rossmore Place has been extended through from Hornblower Avenue to DeWitt Avenue, dividing it.

10

Q. Now, Mr. Mellis, there has been spoken of here a number of times a pipe which ran across Jerolaman Street into that section now covered by Essex Street. Do you know where that pipe is? A. Yes, sir.

Q. Do you know the location of it? A. Yes, sir.

Q. Is it in use now? A. No, sir.

Q. When was its use discontinued? A. I can't remember the exact date, but it was somewhere about—it was somewhere about fifteen or sixteen years ago; I would say about sixteen years ago. I know when it was done; it was when the ground was developed on the north side of Jerolaman Street by the Shipman people.

20

Q. You notice on this map the words "Shipman" and "Effinger" (indicating); is that what you mean? A. Yes, sir.

Q. Will you say approximately the boundaries of the tract opened by Shipman and Effinger? A. Well, I thought that it extended further. I think that it came from Union Avenue to Linden Avenue, from Union Avenue on the west to Linden Avenue on the east, and from Jerolaman Street to Division Street.

30

Q. What was the reason, do you know, for discontinuing the use of that pipe? A. I think it was probably filled in, the end that was nearest the brook. I think that in grading the ground it interfered with the sale of lots, because it seemed to

40

spread out a little toward the brook, and that was on the north side of Jerolaman Street.

10 Q. Do you know anything about the direction which water which flowed down Jerolaman Street took when it struck Washington Avenue, say fifteen years ago? A. Well, as I say, I have lived right on the spot for probably eighteen years. I have never known the grade of Jerolaman Street changed. As far as I remember, it has always run north. I have seen in a very, very heavy storm the water run over the crown of Washington Avenue, but I have no recollection of their ever being any provision for it going over Washington Avenue. It has run north from Jerolaman Street as long as I can remember.

20 Q. Do you remember these gradings being placed across on the east and west side of Washington Avenue on Jerolaman Street? A. I remember just the coverings and I remember about the time, but I can't remember seeing them put there.

Q. What was the condition before those gratings were placed there? A. Just as it was at almost every cross street. It was hollowed out—that is, the crown of Washington Avenue—and then as you come down Jerolaman Street it dipped a little to form the gutter. That condition is in lots of streets yet.

30 Q. You mean there was a depression there? A. Yes.

Q. And before those gratings were placed on Washington Avenue which way did the water go which came down Jerolaman Street? A. It came down Jerolaman Street to Washington Avenue and it flowed north.

40 Q. And how did it flow after the gradings were placed there? A. It was not changed in any way.

Q. It did not change the flow in any way? A. No, sir.

Q. Mr. Mellis, what is your business? A. Building contractor and lumber dealer.

Q. You have a mill, I believe, have you not? A. Yes.

Q. A planing shop in Belleville? A. Yes, sir.

Q. How long have you been in the lumber business? A. Probably eight or ten years, something like that, about eight or ten.

Q. Are you familiar with the buying and selling and handling of pine, knot pine and clear white pine and North Carolina pine? A. Yes, sir.

Q. And cypress? A. Yes, sir.

Q. And pine ceiling and flooring? A. Yes sir.

Q. Now, you are also familiar, are you, with computing the board feet in a pile of lumber? A. Yes, sir.

Mr. Murray: Do you want to cross examine on Mr. Mellis's qualification?

Mr. Skinner: Oh, no, I know Mr. Mellis's qualification. I do not question it in the least.

Q. Mr. Mellis, it has been testified to that on the second flood—that is, the March, 1912, flood—there were sixteen bins of lumber in Mr. Jerolaman's yard; that they averaged 12 feet wide and were 12 feet deep—

Mr. Skinner: 12 by 16, I think it was.

Q. 16 feet deep; and that the average piles of lumber were 7 feet high, Can you give, or estimate the approximate number of board feet? A. Yes, sir. 16 feet long.

Q. 16 feet long. A. (Witness figures on paper.) 258,048 feet.

Q. Now, that, then, is the total amount of lumber which Mr. Jerolaman had in the two sheds at the time of the second flood, as testified to by Mr.

Mutch and Mr. Wharton. Now, Mr. Mellis, it has been testified to that the water covered the bins to the extent of 18 inches on one end and one foot on the other. That would be an average of approximately 15 inches, would it not? Is that a fair figure? A. Yes. (Witness figures on paper.) About 43,000 feet.

10 Q. Now, Mr. Mellis, is it possible to clean lumber of the character mentioned a moment ago when water stained? A. I don't think I heard you correctly.

Q. I say is it possible to clean lumber that has been water stained or— A. That would depend. On the good interior lumber the water stain would be a serious defect; it would be difficult to get rid of that; but with ordinary kind of lumber it wouldn't make much difference whether it was
20 stained or not.

Q. Is there any process for cleaning lumber in any way? A. If it was just wet in the ordinary way, the drying of it, I say, the stain would be removed from the ordinary lumber, spruce or hemlock or—

Q. Suppose the edges were stained with mud and coal dust and the inside of the board was simply wet, could that be remedied in any way? A. The
30 edges are usually either planed or ripped off to the desired width anyway. I know of no other process. The simplest way would be to wash them off.

Q. Can they be washed off so that they could be servicable to be used? A. Yes.

Q. After they went through that process what would be the difference in price, if any? A. Well, for ordinary lumber it wouldn't make any difference. You would have the labor of doing it. It
40 can be washed off in common lumber; you couldn't tell that it had ever existed.

Q. What do you mean by "common lumber"? A.

Well, if it is lumber that is to be painted outside, exterior lumber, cheap grades of lumber, if it were hemlock or spruce, or anything of that kind, that would be used for that kind of purpose, you would never see the stain, because it would be painted over. If it was oak or chestnut, or anything of that kind, that was to be used for interior work, then wetting it or getting it soiled with coal dust or mud, or anything of that kind, would be a serious defect.

10

Q. Now, what is North Carolina pine used for?

A. Well, stair building, or flooring in ordinary houses—an ordinary house—North Carolina pine—and, as I say, stair building.

Q. Well, for that purpose is it injured any by wetting? A. Well, it is not quite so easily worked. If it was mere wetting— That is what you asked?

20

Q. Yes. A. —and it had time to dry, then it would not be injured. It is a little more difficult to work. A builder would not care to use it at the same price as ordinary material, because it is a little more difficult. The tongue of the flooring swells a little and the groove swells a little, and it is a little harder to put together.

Q. Well, what difference would there be in the price? A. Well, for that kind of lumber, I would say twenty-five per cent. off something like that. That is just an opinion; I don't know.

30

Q. That does not apply to the rough lumber; that only applies to the interior finish? A. Yes. Rough lumber, it doesn't make any particular difference; I don't know that it would be anything more than the inconvenience of drying it again and the cost of drying. It is all to be painted.

Q. Well, would that lumber after it had been wet be suitable for rough work? A. Well, in a new building without any covering for it through all the rain, for cornice or any exterior work.

40

Q. How much would that sell for? Is five cents a foot a fair average price for that character of lumber, in your opinion? A. I heard the list of the lumber read off. I think that is a fair price, averaging it up, some of it less and some of it more.

10 Q. Taking it in bulk that way, if you come to sell it what would be the best price you could get for it a foot for any purpose? A. You mean after it had been damaged by the water.

Q. Yes, after it had been wet one night, a one night storm. A. I have never thought of that proposition. If you asked me a per cent., I would say that I wouldn't consider the taking off of anything at all. I don't think a customer of mine would ever know that it had been wet after I got through with it. I hardly think you would think of selling 20 lumber in that way; I just think you would fix it up so that a customer would never know it had been wet. It gets wet many a time.

Q. How do you pile lumber, one board on top of another, without any space between? A. No space between that kind of lumber if it is piled in the shed.

30 Q. What would be the effect of water rising around it, if it was so piled, and standing, say, for a period of four or five hours or possibly six hours? What effect would that have on it? A. It would penetrate quite a distance, possibly an inch or two in every direction through the board. If the piles were as high as I heard 7 feet and pressure on it, it would get in two or three inches into the solid bins. It would be necessary, to prevent that lumber from rotting, to clean it and pile it again, putting little strips in between.

40 Q. So that there would be an air space? A. Yes, sir.

Q. Then do I understand it would be stained only two or three inches around the edge? A. It

wouldn't show the stain except on the edge where the mud had been. If there was any pressure on it, there would be only water on the inside, and water would get out, but the mud on the edge it would show.

Q. Well, owing to the way it was piled, that would only strike the edges, would it not? A. Yes, sir.

Q. If that was cleaned what would be the value of it, taking five cents a foot as a reasonable price? 10

A. That is a question of mathematics. If you took off quarter of an inch or half an inch or an eighth of an inch, it would be just in proportion to the width of the board.

Q. It would be very trifling, would it not? A. Yes, sir.

Q. How much would it cost to trim up and clean 43,000 feet of lumber? A. Well, that work is done by the foot, and handling that would probably cost half a cent a foot. 20

Q. And that would amount to how much, about—\$215.00, would it not? A. (After figuring on paper.) Yes, sir.

Cross examination by Mr. Skinner:

Q. Mr. Mellis, to get the dimensions, now, just let us see how you figure. If the pine is 12 by 16, you multiply those two together, and that gives you 192 square feet? A. Yes, sir; or multiply the 12 by 12 and it gives you the board feet. 30

Q. Well, just do it my way. If it is not right, correct me. 12 by 16 would be 192 square feet, would it not? Take my figures. A. Yes, sir.

Q. Assume that 12 by 16 is 192 square feet. A. Yes, sir.

Q. Then you would multiply that by 12 inches, would you not? A. Yes, sir. 40

Q. And assuming that that is 2304—that is, taking the flat surface of a bin—and assuming that

the lumber is piled a foot deep, in board measure that would be 2304 feet of lumber, would it not?
A. Yes.

Q. Now, if it is 2 feet deep, it would be 4608, would it not? A. Yes.

Q. So that in this pile of lumber the damaged lumber in one bin would measure 4608 square feet, would it not? A. Yes, sir.

10 Q. And in sixteen bins it would be sixteen times that, would it not? A. Yes, sir. That is not what I was giving, you know.

Q. Yes, I understand that. In the first place, a good quality of lumber you try to keep from the rain, do you not? A. Yes, sir.

Q. It is protected by coverings of some kind? A. Yes, sir.

Q. Kept in a closed shed? A. Yes, sir.

20 Q. That is true of clear white pine? A. Yes, sir.

Q. And sound knotted white pine? A. Yes, sir.

Q. And North Carolina flooring and ceiling? A. Yes, sir.

Q. That is because to get it wet would damage it, would it not? A. Yes, and would stain it, and it would be unsalable.

Q. And when you have got stuff on your hands that is unsalable you do not go through much of a fine mathematical calculation to find out how much it would cost to clean it, do you? A. No.

30 Q. And you do not bother much to clean it? A. No.

Q. And you sell it for what you can get? A. Yes, sir.

Q. And if you got one-third or half would you be content? A. No.

40 Q. More than that—three-quarters? A. There is just a certain cost to run it through the mill again, and then it is—

Q. Suppose you have not got any mill? A. Well, that is another question.

Q. And your idea would be to have a mill and fix it up so that the customer would not know? A. No, I would protect it, and then it wouldn't have to go through the mill.

Q. But if it happened you would put it through the mill and dry it, and the customer would never know it? A. Yes, sir. 10

Q. Now, of course, if instead of just clear rain water this had been mud and a dirty stream lying and settling with sediment of all kinds around the lumber, it would be different, would it not? It would be a good deal worse? A. Yes, sir.

Q. And if there was sand it would make it worse, too, would it not? A. Yes, sir.

Q. You would not do much planing with boards that were covered with sand and mud, would you? You would not use your tools on it, would you? A. No, not if that is the description of it. 20

Q. And whether the lumber gets stained or not depends a good deal on the amount of mud and sand and dirt that there is in the water, does it not? A. Yes, sir.

Q. And it also depends a good deal on the amount of mud and sand and dirt that there is in the water, does it not? A. Yes, sir. 30

Q. And it also depends a good deal upon how long the water is around it? A. Yes, sir.

Q. And if it is there for a day it would be worse stained than if it had been just wet for a few minutes, would it not? A. Yes, naturally.

Q. And the stain would be harder to get out; it would sink in deeper in the fibre of the wood, would it not? A. I don't think the stain would penetrate in the fibre of the wood. If the lumber is piled closely together, you will get nothing, but it would be marked. 40

Q. Suppose the lumber is not piled closely together? A. Seven feet high it was.

Q. But do not little things get in between the boards? A. It is finished lumber, smooth.

Q. Sometimes there will be a little slant to a plank? A. Yes, sir.

Q. And one will be a little crooked, on an angle? A. Yes, sir.

10

Q. And that makes the next one elevated a little? A. Yes, sir.

Q. You do not lay them like checkers on a board? A. No.

Q. And there will be spaces between the boards in the ordinary lumber in a lumber yard? A. Yes.

Q. And you would not want to have water come in on your lumber with the ordinary way of piling, would you? A. No, sir.

20

Q. And if it was a muddy flood you would like it less? A. Yes, sir.

Q. And some of that lumber which had been exposed to the muddy flood for a number of hours you would say would be practically unsalable, would you not? A. No. I have a mill to run it through, at fifty cents a hundred feet.

Q. And you would do it at that price for another man? A. That is about the ordinary price for milling.

30

Q. To get it to your mill he would have to take it down off the pile and take it to you and take it back and pile it again. It would all cost money, would it not? A. Yes.

Q. Would it not be better to sell it right out of the pile for what you can get? A. No.

Q. You could not sell it at all right off, could you? Would you not have to let it season again? You could not work it green, could you? A. Well, I don't understand. I told you in the beginning that the lumber dries after a little while again,

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except a little marked on the edge, which is no detriment—

Q. Well, if that happened to you, you would dry it first, would you not? A. Yes, sir.

Q. That means that you would have men go there and repile it? A. Yes, sir.

Q. With little spaces between each two boards? A. Yes, sir.

Q. And it would have to be done carefully, would it not? A. Yes.

Q. And after that had been done, and the wind and sun had worked on it for a little while, or the air, at least, and it was fairly dry, it would take some weeks, would it not? A. It would depend, as I say, how long it had been in the water, and it would depend on whether it is a thoroughly kiln dried lumber or not. There is no particular objection to a little water in it if it is outside lumber.

Q. No, I am talking about inside lumber, white pine? A. Knotted isn't used inside.

Q. Well, it is good lumber, is it not? A. No, that is the cheapest white pine used.

Q. But the cheapest white pine is a whole lot better than a whole lot of other lumber, is it not? A. No.

Q. Is not white pine pretty nearly extinct, a good deal more than it used to be? A. Yes, sir.

Q. And some of these other woods have come in to take its place? A. Hemlock and spruce are about the same price.

Q. Now, when you have got your lumber all piled up, with the little plugs in between, would you take it down and let it dry after it is cleaned? A. If some was knotted lumber, and the purpose for which it is to be used, there would be no need of it; it would depend on how it was dried out.

Q. If it was stained with the deposit of mud and dirt and filth that may have been in the water

to which it was subjected for hours, would you have it cleaned? A. It depends. If I could sell it at the cost of the cleaning or less, I would sell it that way.

Q. And if you could not you would clean it? A. Yes, sir.

Q. And then you would take it to the mill? A. Yes, sir.

10

Q. And then you would take it back to the pile? A. Yes, sir.

Q. Now, cypress is a pretty fair quality of lumber? A. A pretty fair quality of cypress.

Q. Well, clear cypress. How does it compare with white pine? A. Clear cypress is a little bit more costly than some knotted white pine—

Q. Now, you said you owned Hornblower's pond? A. I said a portion of it.

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Q. Do you mean the pond that lay north of Holmes Street? A. No, between Holmes Street and Jerolaman Street, south of Jerolaman Street.

Q. You mean the section that is bounded on the west by DeWitt Avenue, do you not? A. Bounded on the west by DeWitt Avenue and on the east by Hornblower Avenue and the south by Jerolaman Street and north by Holmes Street.

30

Q. Right in there, a portion of that (indicating)? A. Yes, sir.

Q. Now, you did not mean this pond up here south of Holmes Street, did you (indicating)? A. No, I don't think that goes by the name of Hornblower's pond.

Q. Well, don't you know that it used to? A. Well, in speaking of it to-day they speak of this as Hornblower's (indicating).

40

Q. Now, you have been there twenty-seven years? A. Twenty-seven years.

Q. Well, compared with Mr. George Sandford

and compared with me you are a comparatively newcomer to Belleville, are you not? A. Yes, sir.

Q. Have you not heard of Hornblower's pond as down here (indicating)? A. No, I can't say that I have. I know that as to breaking through there would be two Hornblower's ponds, separated by Holmes Street.

Q. Perhaps with the same water filling both or running in under the street? A. Yes. 10

Q. This pipe on Jerolaman Street running north, was that a 12-inch pipe? A. No.

Q. 10-inch? A. Smaller than that, I think.

Q. Probably 6-inch? A. Probably 6-inch.

Redirect examination by Mr. Murray:

Q. How much would it have cost Mr. Jerolaman to have repiled the lumber—taken it to your lumber yard and have had it milled and returned and repiled, 43,000 feet of it? A. Mr. Jerolaman has a mill. 20

Q. He has a mill? A. Yes, sir.

Q. Well, how much would it have cost him in his own mill? A. To move it and bring it back again?

Q. What would it cost to put it through the mill and pile it again as it was before? A. Well, we say that lumber is worth about fifty cents a thousand to pile. You can have it unloaded from the car and piled in the yard for that rate. Then about fifty cents to run it, or about half a cent a foot, and the same thing to mill it. That would be about a cent a foot all together. 30

Q. About a cent a foot all together? A. Yes, sir.

Q. Are you familiar with Mr. Jerolaman's office building? A. Yes, sir. 40

Q. You have been there a good many times, have you not? A. Yes, sir.

Q. Have you ever noticed the character of the foundation of that building? A. Not particularly; no, sir.

Q. Did you see the building immediately after or before the flood in 1912? A. No, sir.

Q. Did you see it afterwards? A. I have seen it almost every day, but I never paid much attention to it.

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Q. Did you see it after the flood? A. Yes, sir.

Q. How soon after? A. Well, I say I see it nearly every day, but I have never looked at it very critically to answer any question accurately.

Recross examination by Mr. Skinner:

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Q. Mr. Mellis, if you piled up the lumber to dry after it had been flooded, and put your little pieces in between to let the air go through, when it dried there would be a stain where that piece had been, would there not? A. No. You know, I said I did not think that the water in piled lumber would penetrate any more than from probably half an inch to an inch towards the center of the boards, and consequently the strips would not stain.

30

Q. If you piled it up that way the cross pieces where the board were piled up would dry different from the rest and there would be a stain there, would there not? A. No, I think there would be no stain, unless each board was stained separately, unless it was exposed to the coal dust or to the clay and mud that stained through there. All that penetrates, according to my experience, is almost clean water. Consequently there is no stain. There would be a mark there if each board had been wet separately.

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CHARLES PEARL, sworn in behalf of defendant.

Direct examination by Mr. Murray:

Q. What is your name, please? A. Charles Pearl.

Q. And where do you live? A. Belleville.

Q. Did you live there in March, 1912? A. Yes, sir.

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Q. What is your business? A. Police officer.

Q. Patrolman, are you? A. Sergeant; I am a Sergeant.

Q. Were you in March, 1912, a sergeant of the police force? A. Yes, sir.

Q. Do you remember the flood of March 12, 1912, at Mr. Jerolaman's place? A. Yes, sir.

Q. What time were you there? A. I should judge one or half-past one in the morning.

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By Mr. Skinner:

Q. Really at night, you mean, do you not? A. Yes, sir.

By Mr. Murray:

Q. How did you come to go there? A. Why, it was on my rounds.

Q. In the course of your rounds? A. Yes, sir.

Q. Do you know where the culvert is? A. Yes, sir.

30

Q. Under Cortlandt Street? A. Yes, sir.

Q. Did you notice the culvert that night? A. Yes, sir.

Q. Can you say what was its condition with regard to its being open or being stopped up? A. Why, it was open, taking all the water; she was carrying all the water all right.

Q. Was it raining when you were there? A. Yes, sir.

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Q. Hard? A. Yes, sir.

Q. Was it an unusual storm? A. Why, I should think so.

Q. How long had it been raining? A. Well, that I can hardly remember now.

Q. Well, what time did you go on duty that night? A. Why, I come out in the street at ten o'clock.

10

Q. Was it raining then? A. Well, that I can't say.

Q. Well, you know it was raining very hard? A. Oh, yes.

Q. Did you see any water in Mr. Jerolaman's yard? A. Yes, sir.

Q. Where did you see it? A. I was in the yard.

Q. You were in the yard, were you? A. Yes, sir.

20

Q. Where was the water coming from? A. It seemed to be coming from the back of the yard, over the railroad, that way.

Cross examination by Mr. Skinner:

Q. Well, did you go back on your rounds that night again past Mr. Jerolaman's place? A. Well, I come back there once more; yes, sir.

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Q. What time was it? A. Well, say two o'clock or half-past two; I just went up to the avenue and came back.

Q. A few minutes after? A. Yes, I just went up to the avenue.

Q. The same condition then as it was when you passed the first time? A. Yes, sir.

Q. A little difference, was there? A. Very little difference, so that you would hardly notice.

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Q. What was the difference? A. I don't think there was as much water coming then.

Q. Not as much? A. No.

Q. The rain had stopped then, had it? A. It had ceased a little then.

Q. Did it stop? A. Well, it rained all night that night.

Q. As a matter of fact, Pearl, was there any flood there that night at all? A. Yes, sir.

Q. Was it there when you were there at 1:30? A. Yes, sir.

Q. Was Mr. Jerolaman's property overflowed? A. Yes, sir.

Q. And the pipe was taking all the water? A. Yes, sir. 10

Q. So that although the water ran over Mr. Jerolaman's property and flooded it, it all got into this pipe, did it? A. No, sir; it didn't all get in that pipe; it came out of the gateway.

Q. Well, the pipe is down below the level of Cortlandt Street, is it not? A. Yes, sir.

Q. Was there not water running out over Cortlandt Street? A. Out of his gate; yes, sir. 20

Q. You had to walk past the pipe, did you not? A. On the west side of Cortlandt Street.

Q. And the pipe was lower than the street? A. The street was higher than the pipe.

Q. The pipe was lower than the level of the street? A. Yes, sir.

Q. So that you walked in water how deep? A. Well, I should judge half-way to my knee.

Q. And the pipe was lower down yet under the water, was it not? A. Well, I didn't walk in no water over the pipe. 30

Q. No, but you walked in water up to your knees, and the pipe was lower than the ground you walked on, was it not? A. I walked in water on the north side of the pipe, on the west side of the street.

Q. That is where the pipe is, is it not? A. No, the pipe is pretty near directly on the corner, and I walked north on the west side of Cortlandt Street. 40

Q. Wasn't there water on the side where the pipe was? A. No, sir; not coming over on the sidewalk there.

Q. Where was it? A. Coming out of Mr. Jerolaman's gate, west of the pipe.

Q. I asked you where the water was— A. I said no, sir; no water coming over where the pipe was.

10 Q. None at all anywheres? A. No, sir.

Q. Dry ground, was it? A. Yes, sir. Of course, the ground was wet from the rain.

Q. And this was 1:30 in the morning? A. Yes, sir.

Q. Dark and raining? A. Yes, sir.

Q. Did you get down on your hands and knees and inspect the mouth of that pipe? A. No, but I threw a searchlight in it.

20 Q. You did, eh? A. Yes, sir.

Q. From the street? A. Leaning over it that way (illustrating).

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

Q. You did not go in on Jerolaman's property? A. Didn't have to go in.

Q. Did you go to the catch-basin? A. Where?

Q. West of the pipe (indicating on map)? A. It is north of it, is it not?

30 Q. West of it, towards the avenue. You did not go to that, did you? A. Why, no.

Redirect examination by Mr. Murray:

Q. What do you mean by the catch-basin that is referred to? A. Why, he means that wall that is built up there—isn't that it—that runs up to Mr. Jerolaman's building.

40 Mr. Skinner: The wall is part of it, running west from the mouth of the pipe.

Witness: No, I didn't go near that.

By Mr. Skinner:

Q. What you did was to look at the pipe itself?

A. Yes.

Q. This side, east of the catch-basin? A. East of the catch-basin.

Q. And you saw that the water was running in the pipe? A. Yes, sir; running good and clear.

Q. And was it about full? A. Well, no.

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Q. Within a few inches of the pipe? A. I should say within six or eight inches.

By Mr. Murray:

Q. Mr. Pearl, just turn around here a moment (indicating on map). The entrance to the culvert is about there, is it not—that is, at the southwest corner of Mr. Jerolaman's office? A. Yes, sir.

Q. And where is Mr. Jerolaman's gate? A. Mr. Jerolaman's gate lays west of it.

20

Q. West or north? A. North, on the west side.

Q. Now, where were you when you used your searchlight? A. Right over the top of the culvert.

Q. On which side of Cortlandt Street? A. On the west side.

Q. Then you were looking down, were you? A. Looked right straight down like this (illustrating), as if that was there and I was looking straight down that way.

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Q. And you say you saw the water running down Cortlandt Street? A. Yes, sir; coming out of Mr. Jerolaman's gate.

Q. That is down this way (indicating)? A. Yes, sir.

Q. That is north of the building? A. Yes, sir.

Recross examination by Mr. Skinner:

Q. Was it at Mr. Jerolaman's gate that the water was up to your knee, or was it more than there? A. No, it was not more than that.

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Q. Not more than that? A. No, it wasn't clean up to my knees, about half-way up.

Q. Now, that is about 15 feet north of the pipe, is it not? A. 15 feet, yes.

Q. What was there between the gate and the pipe to keep that water that you waded through nearly knee-high from getting down to where the pipe was? A. Why, it is upgrade.

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Q. Upgrade? A. Yes, you have got to walk up an incline there a bit.

Q. Well, an incline— A. Yes, from Mr. Jerolan's gate up to the pipe it is an incline.

Q. You mean the incline of Cortlandt Street? A. Yes.

Q. The grade of the street? A. Yes.

20

Q. And it is about the ordinary grade, 5 or 6 or 7 feet in a hundred? A. Well, I should judge six or seven inches.

Q. The rise, you mean, is six or seven inches? A. Yes, from the gate over to the pipe.

Q. So that at the gate it was nearly up to your knees, and at the pipe, 15 feet away, there wasn't any water at all? A. Yes.

Q. And the water was down below the level of the pipe about how much—about 5 or 6 or 7 inches, wasn't it? A. Yes.

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JAMES J. DUNN, sworn in behalf of defendant.

Direct examination by Mr. Murray:

Q. What is your business, Mr. Dunn? A. Police officer.

Q. Were you a police officer in Belleville in March, 1912? A. No, chanceman.

40

Q. That is, connected with the police force? A. Yes.

Q. Were you on duty that night? A. Yes, sir.

Q. Whereabouts? A. Jerolaman Street, in that section.

Q. What kind of a night was it? A. A stormy night.

Q. What time did you go on duty? A. Half-past seven.

Q. Was it raining when you went on duty? A. Yes, sir.

Q. Hard? A. Yes, sir.

10

Q. When did it stop raining that night, do you know? A. Well, it rained on and off all night.

Q. What can you say about the size of the storm? A. Well, on Washington Avenue it was over knee deep.

Q. On Washington Avenue—what point on Washington Avenue? A. North of Jerolaman Street.

20

Q. How do you come to remember that? A. Because I couldn't wade through it.

Q. Why did you attempt to wade through it? A. Because I wanted to stop a trolley car I saw headed for it; that attracted my attention, and I didn't see the car after it hit it.

Q. What can you say in regard to the size of the storm with regard to other storms in recent years? A. Well, it came from all the hill section.

30

Q. I mean with regard to the amount of rainfall and the violence with which it came down. A. I don't know.

Q. Were you down west of Mr. Jerolaman's property that night? A. Yes, sir.

Q. What were the conditions there? A. Well, there was a hole in the back of Mr. Jerolaman's property, and the water was taking a course from Mr. Jerolaman's property.

40

Q. From where? A. From the railroad track, and washed out along the railroad.

Q. Is Mr. Jerolaman's property higher or lower than the railroad? A. A little higher, I think.

Q. How much, do you know? A. Well, I have never been in Mr. Jerolaman's place.

Q. Was there water on the railroad track? A. The water was over the overflowing of the railroad track.

10 Q. From where? A. From Washington Avenue.

Q. Did I understand you to say that you saw water going down from the railroad track into Mr. Jerolaman's yard? A. It came from some place off the avenue.

Q. Did you see the culvert under Cortlandt Street that night? A. Yes, sir.

Q. You were there? A. Yes, sir.

Q. What time did you see that culvert? A. Half-past one or two o'clock.

20 Q. Can you say whether or not the culvert at that time was taking all of the water which came down through the brook? A. It was taking the water that went that direction.

Q. Was the water flowing across Cortlandt Street at any time? A. I guess it was north of—

Q. Do you know? A. North of Jerolaman Street.

30 Q. Did you see it? A. I saw it coming into Mr. Jerolaman's office and through Mr. Jerolaman's gate.

Cross examination by Mr. Skinner:

Q. It was up around his office, too, was it not? A. Yes, sir—well, I don't know how deep; I wasn't in Mr. Jerolaman's yard.

Q. Well, it was night. I suppose it was dark? A. Yes, sir.

40 Q. Did you have a searchlight? A. I don't think I used it.

Q. Now, from the little that you could see, or

as well as you could tell, would you say it was up around the office? A. It must have been under his place, in the yard; it came under the building, under his office, and out through the gate.

Q. When it came out through the gate about how deep was it? A. Oh, it wasn't very deep there, not at the time I saw it.

Q. What time was that, by the way? A. The time that I saw it, the early part—I told you about the trolley car.

10

Q. Yes. A. Well, then.

Q. Well, what time of night was that? A. I should judge that was three or maybe half-past three.

Q. Well, that storm began that night, did it not? A. Yes, sir.

Q. Do you remember about what time it began? A. It was raining all night.

20

Q. Well, beginning early in the evening? A. Yes, sir.

Q. Around eight or nine o'clock? A. Yes, sir.

Q. And from there on steady rain? A. Yes, sir.

Q. A hard rain? A. Yes, sir.

Q. Where were you when you spoke of wading on Washington Avenue and trying to hail a trolley car? A. Coming up Washington Avenue.

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Q. Coming up, how far up? A. Going north.

Q. How far had you got? A. Do you know where Essex Street is?

Q. Well, it has been opened recently. I think I do. It comes down back of the—it is the first street north of Jerolaman Street, is it not? A. Yes. I couldn't reach Essex Street.

Q. You were going north? A. Yes.

Q. How far back towards Holmes Street did the water come on Washington Avenue? A. How far back on Holmes Street?

40

Q. When did you begin to be wading in water?

A. I was wading in water all that night, different places.

Q. On Washington Avenue? A. No, only that section.

Q. Well, up in that section on Washington Avenue, when you got to Jerolaman Street were you wading in water? A. No, sir.

10 Q. Just beyond that? A. Just beyond. There is an incline at Essex Street; there is a culvert at Essex Street, and that culvert didn't carry the water.

Q. There is a culvert at Jerolaman Street, is there not? A. No, there is a cross grating there.

Q. Well, the water was rushing down that, was it not? A. No, it went around the corner. When there is too much rain it overflows a little.

20 Q. Were you on the east side of Washington Avenue? A. I was on the east end west.

Q. Well, on the east side of Washington Avenue was there any water near Jerolaman Street? Was the gutter pretty full there on the east side of Washington Avenue with this rain? A. Yes.

Q. So that it was spreading out into the street a little? A. No, sir.

30 Q. Although not covering it? A. No, sir.

Q. And how deep was it in the gutter? A. Oh, it wasn't very deep in the gutter there until it got up around Essex Street.

Q. Rushing a pretty swift stream, though, was it? A. Yes.

Redirect examination by Mr. Murray:

40 Q. Did you say where the water came from that was on Washington Avenue? A. It came from the hill section.

Q. What do you mean by "the hill section?" A. Well, it came north and south and, I suppose, the west.

Q. West? A. It came west and it came north and it came south, south from the Greylock section.

Q. Is there a culvert under Washington Avenue near Essex Street? A. A county culvert, I believe.

Q. Was any water coming over that from Washington Avenue? A. I couldn't tell you that. Did you say over it?

Q. Yes. Was there any block so far as you could see— A. Yes, the water was blocked on Washington Avenue.

Q. Was the culvert under Washington Avenue open or was it blocked? A. I couldn't tell you; I couldn't get near it.

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JAMES F. HANAN, sworn in behalf of defendant.

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Direct examination by Mr. Murray:

Q. Are you a police officer of Belleville? A. Yes, sir.

Q. Were you in March, 1912? A. Yes, sir.

Q. Were you on duty that night? A. Yes, sir.

Q. Whereabouts? A. Up in the Greylock section.

Q. That is what streets? A. Overlook and Greylock and those places.

30

Q. Were you at any time during the night down at Mr. Jerolaman's place, on Jerolaman Street? A. Yes, sir.

Q. What time? A. About half-past one or two o'clock.

Q. You know where the culvert is that runs under Cortlandt Street? A. Yes, sir.

Q. Did you notice the culvert that night? A. Yes, sir.

40

Q. Did you notice whether or not it was taking

the water which came down Jerolaman's brook? A. Yes, sir; it was taking all that.

Q. What can you say as to the weather conditions that night? A. Very bad.

Q. What do you mean by "very bad?" A. Very stormy.

Q. How long had it been storming, do you know? A. All night.

10 Q. What time had it started? A. Oh, early in the night, half-past seven or so.

Q. Was there snow on the ground at that time? A. I don't think there was; I am not sure.

Q. Was it warm or cold? A. Cold.

Q. Did you see any water running across Cortlandt Street at any point? A. Yes, sir.

Q. Whereabouts? A. It came out of Mr. Jerolaman's gate and lodged right in front of his gate.

20 Cross examination by Mr. Skinner:

Q. I suppose there was a whole lot of drift and refuse and sticks coming down with this stream, was there not? A. I didn't notice it.

Q. There was some, though, was there not? A. I don't know.

Q. You would not be able to see it, would you? A. I just happened to be looking over at the Sergeant when he put his light on it.

30 Q. You would not be able to see the driftwood coming down the stream at one o'clock on a dark night, would you? A. Well, there wasn't nothing lodged there.

Q. At the time you looked? A. Yes, sir.

Q. And it was not under water? A. No, no, you could see.

Q. The water had not filled up the pipe, even? A. No, sir.

40 Q. Six or eight or ten inches uncovered? A. Well, four or five inches, anyway.

Q. You did not look at the catch-basin, did you?
A. No, sir; I didn't notice.

Redirect examination by Mr. Murray:

Q. Do you know where the catch-basin is? A.
I guess it is the other side; I am not sure.

Q. Which side? A. North of the other basin.

By Mr. Skinner:

10

Q. Don't you mean west, towards Washington
Avenue? A. Towards the shop, isn't it?

By Mr. Murray:

Q. Have you ever noticed the entrance to the
culvert under Cortlandt Street? A. Yes, sir; where
the grate is, or the iron bars.

Q. Yes, that is the point. A. Yes.

Q. How is it built? Can you describe it briefly?
A. The bars run perpendicular.

20

Q. Is that what you thought that Judge Skin-
ner—

Objected to as leading.

Q. To what did you refer when you mentioned
the catch-basin? A. Why, that was where the
bars were, where the water was running through.

Q. Well, did you notice that or did you not?
A. Yes, sir.

30

Q. Was there any dam there or was there not,
officer? A. Where, in front?

Q. At the entrance of the culvert? A. No, it
was going all right; the water was going in all
right through the bars.

Recross examination by Mr. Skinner:

Q. Hanan, you know the difference between
the catch-basin and the culvert, do you not? A.
Yes, sir.

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Q. After you testified that you saw the culvert

and looked at it, and it was clear, four or five inches clear, I asked you if you went and looked at the catch-basin, and you said no, you did not. Now, you say you did. Is that true? A. I only seen one, the one that the bars was on.

Q. Well, you know that the catch-basin is different from the culvert? A. Yes, sir.

10 Q. And it is west of the culvert, and it is the one that has got the bars on? A. That is the one I looked at.

Q. And you knew all that when I asked you if you looked at the catch-basin, did you not? A. I didn't understand you. I looked at the one with the bars.

Q. Did you not know that the catch-basin was west of the culvert? A. Well, I don't know if it is west or not.

20 Q. Well, it is nearer Washington Avenue, is it not? A. Yes, I guess it is.

Q. You are sure about the bars being perpendicular, are you? A. That is up and down, isn't it?

Q. Yes. A. Yes.

Q. Up and down? A. Yes, sir.

30 THOMAS H. BREEN, sworn in behalf of defendant.

Direct examination by Mr. Murray:

Q. You live in Belleville, Mr. Breen? A. Yes, sir.

Q. How long have you lived there? A. Eighteen years.

Q. Where did you live before that? A. Newark.

40 Q. During the eighteen years that you lived in Belleville were you at any time connected with the town in any official capacity? A. Yes, sir.

Q. In what capacity? A. Township Committeeman.

Q. Anything else? A. I was road overseer.

Q. How long were you road overseer? A. One year; I might say sixteen months.

Q. How long were you Township Committeeman? A. Eight years.

Q. In 1912 were you connected with the town in any way? A. Yes, sir. 10

Q. In what capacity? A. Superintendent of roads and highways.

Q. In March, 1912? A. Yes, sir.

Q. Do you remember the flood of which Mr. Jerolaman speaks, in March, 1912? A. I do.

Q. Now, Mr. Breen, what can you say as to the weather conditions immediately preceding that? A. There was more water than I ever saw in my life before on the roads. 20

Q. A heavy rainstorm, was it? A. Extraordinary heavy.

Q. Were the roads washed out in any other part of the town, to your knowledge? A. Yes, sir; all over the town.

Q. Whereabouts? A. Little Street, Malone Avenue, Jerolaman Street, John Street and Mill Street and Oak Street, and other streets similar.

Q. How long did it rain, do you know? A. Well, it started in the afternoon and kept on continuously up until I don't know what time in the morning. 30

Q. Have you any idea how many inches of rain fell during that time? A. I don't know; I know that the streets was—the water was clean over the center of the roadways up there.

Q. Was there snow on the ground, do you remember? A. I couldn't say. 40

Q. Was it warm or was it cold? A. It was

cold weather; everything was frozen up at the time; it was cold weather.

Q. Was this a cold rain or a warm rain? A. Yes, sir; it was quite a cold rain.

Q. Do you remember as heavy a storm as that during the time you were in Belleville? A. I never saw a storm as heavy as that in my life.

10 Q. Anywhere? A. No, sir.

Q. How old a man are you? A. Fifty-seven next May.

Cross examination by Mr. Skinner:

Q. Mr. Breen, you said the streets were washed out. Was Jerolaman Street washed out west of Washington Avenue? A. Jerolaman Street was washed out from the reservoir down to DeWitt Avenue.

20 Q. Now, when it got down at Jerolaman Street, was there any washout there? A. No.

Q. A good deal of water came down, did it not? A. You say—

Q. On Jerolaman Street at Washington Avenue? A. No.

Q. There was a good deal of water that came down? A. Yes, sir.

Q. And the culverts took it off? A. Yes, sir.

30 Q. And carried it northerly off to the brook? A. Yes, sir.

Q. And on the east side of Jerolaman Street the water that came northerly, when it came to Jerolaman Street, was carried through culverts to this same brook? A. No, sir. There was an opening leading down Jerolaman Street. When they put up these irons they put a curb on both sides, and then they laid the curb about that far from the corner, and there is a gap there both ways.

40 Q. But if the water was coming very fast it

would not turn the corner in that space, would it?

A. No, you can't get it to turn the corner.

Q. Not when it is going fast? A. No, nor when it is going slow. It is a hard matter.

Q. I suppose you saw the damage to the road there and the damage to Jerolaman's place, too, did you not? A. No, I never went in the yard.

Q. Did you have anything to do with taking the bars out of the mouth of the catch-basin at the culvert there at Jerolaman's? A. No.

Q. Do you know anything about it A. I think it was done by the Township Committee.

Q. While you were Road Supervisor? A. I think so.

Q. Shortly after that storm, was it? A. I think it was, yes.

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WILLIAM T. SULLIVAN, sworn in behalf of defendant.

Direct examination by Mr. Murray:

Q. Mr. Sullivan, are you a police officer in Belleville? A. Yes, sir.

Q. Were you in March, 1912? A. Yes, sir.

Q. Were you on duty that night? A. Yes, sir.

Q. What time did you go on duty? A. Half-past seven.

Q. Where were you on duty? A. From Jerolaman Street north to Little Street.

Q. Did you go to Mr. Jerolaman's place that night? A. Yes, sir.

Q. What time? A. Well, I should judge one-thirty.

Q. How did you come to go there? A. Why, what drew my attention to the flood was that the water was flooding Washington Avenue, both east and west of it, you see, and back in a space there

30

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probably of a hundred feet; so I immediately thought the water was flowing on down to the culverts north of Washington Avenue, going on down to Mr. Jerolaman's, and I went down Jerolaman Street to Mr. Jerolaman's property.

Q. You know where the culvert is at Cortlandt Street, at Jerolaman's property? A. Yes, sir.

10 Q. Did you notice whether that was or was not taking the water? A. It was taking the water.

Q. Was there water going over Cortlandt Street at any point? A. Coming out of Mr. Jerolaman's gate.

Q. How long were you there? A. Well, I should judge about half an hour.

Q. What time? A. From half-past one to two.

20 Q. What can you say about the size of the storm that night? A. Why, one of the heaviest I have experienced.

Q. When did it start raining, do you know? A. Why, if I recollect, I think it started early in the night.

Q. And how long did it continue? A. Well, I should judge around three o'clock.

Q. A heavy rain or light? A. Well, I should judge after half-past one it kind of let up.

30 Q. Now, how was it before half-past one? A. Very heavy.

Q. When had you seen a storm like that before? A. I couldn't recall when I seen one that rained so heavy for the time when it did rain. What I mean to say, it started in to rain heavy about eleven o'clock and continued on until around about 1:30.

Q. How old are you? A. Forty-one.

Cross examination by Mr. Skinner:

40 Q. How many were there on the police force in Belleville in March, 1912? A. How many members of the force?

Q. How many officers on duty that night? A. I should say about six.

Q. Six? A. Six—seven.

Q. Seven. And you and Dunn and Hanan and Pearl all got there—four out of the seven? A. Well, I will explain that to you, Mr. Skinner. Jerolaman Street is the dividing line of two posts; it comes to that corner, you see—Jerolaman Street.

10

Q. Was your regular post south of Jerolaman Street? A. North.

Q. Whose post was south? A. Officer Dunn.

Q. And who else? A. Well, Officer Hanan's post extended up to Little Street until such time after twelve when the two men on the upper post doubled up together.

Q. And after that time Hanan's post would have been on Jerolaman Street? A. In on my post.

20

Q. So that in the regular course you got to Washington Avenue and Jerolaman Street? A. Yes, sir.

Q. Was any water coming down Jerolaman Street? A. Yes, sir.

Q. And flooding Washington Avenue? A. Flooding Washington Avenue at Essex Street, at the county drain.

Q. Then you came down alone to Jerolaman's did you? A. No, sir; accompanied with Officer Hanan.

30

Q. And the water was running out of the gate? A. Yes, sir.

Q. How deep? A. Well, I should judge about a foot.

Q. Pretty nearly up to your knees, then? A. No, I wouldn't say that.

Q. Half-way or more? A. Half-way of my boot.

Q. And was this pipe lower than Cortlandt Street? A. What do you mean, what pipe?

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Q. The culvert. A. The point of that pipe comes up to the inside of the sidewalk.

Q. That is, it runs westerly to the inside of the sidewalk? A. It runs westerly to the inside of the sidewalk, and the end of that pipe comes in line with Mr. Jerolaman's office and probably 15 feet south of Mr. Jerolaman's property.

10 Q. I see. Now, is the pipe below the level of Cortlandt Street at the place where the pipe comes under? A. Is the pipe below the level of Cortlandt Street?

Q. It is underneath the street, is it not? A. It is underneath the street; it runs across under the sidewalk.

Q. And it is covered over with earth to what depth, would you say? A. Well, I would say probably 2 feet.

20 Q. So that the sidewalk, in other words, at the point where it goes over this pipe is at least 2 feet above it? A. Yes.

Q. The pipe is at least 2 feet below? A. Yes.

Q. And the top of that pipe was several inches above the water that was going through? A. Yes, sir; the top of it.

Q. And 15 feet away at the office— A. Well, that is the extreme end of Mr. Jerolaman's office, but where the water came through the gateway, that is 25 feet.

30 Q. And 25 feet away the water was half-way up to your knee; is that right? A. Yes, sir.

Q. And there is a slope to the street, is there not? A. A slope running north on Cortlandt Street.

Q. I think Officer Hanan, or maybe it was Officer Dunn—one of the officers said he thought that was perhaps six inches rise; is that about right? A. It is more than that.

Q. More than that, you think? A. Yes, sir.

40 Q. Eight or nine inches or ten inches? A. Well, I would say it was a foot or more.

Q. So that you have a rise of a foot or more

from the gate to the pipe? A. In that 25 feet; yes, sir.

Q. But the pipe is 2 feet below the sidewalk?
A. Yes, sir.

Q. Did you have a light, too? A. No, sir.

Q. A flash? A. No, sir.

Q. Nothing to light you? A. No, sir.

Q. What did you do, get down on your hands and knees? A. No. 10

Q. Just looked? A. No, Sergeant Pearl was there at the time I was there.

Q. Then did he use his flash? A. Yes, sir.

Q. And you saw it? A. Yes, sir.

Q. And did you stand on the sidewalk and look over? A. Stand on the sidewalk, the same as you stand here, and put your flashlight down.

Q. To look into the pipe? A. Well, not to have to look into the pipe; the pipe came flush with the sidewalk. 20

Q. You would have to bend down to look into it— A. If you wanted to look into it you could walk back 4 or 5 feet.

Q. Did you walk back? A. No, sir.

Q. And look? A. No, sir.

Q. You just stood right over it and looked? A. Yes, sir. 30

Q. And you could see that the water was running in? A. Yes, sir.

Q. Four or five inches clear? A. Yes, sir.

Q. In all the openings of the pipe? A. Yes, sir.

Q. Well, is it the same now as it was then? A. I couldn't recall.

Adjourned until Monday, February 8, 1915, at ten o'clock, A. M. 40

THIRD DAY.

Monday, February 8, 1915.

Met pursuant to adjournment.

Present—Counsel as before stated.

10 The Court: Gentlemen of the jury, it was left to you to say whether you would like to view the premises. Have you thought about it?

20 The Foreman: Your Honor, there has been some discussion by the gentlemen of the jury. The majority feel that, in view of the procedure during the week and the map, the lay of the ground has been pretty well brought to their attention. The majority feel that it would not be necessary for them to go there and go over the ground.

The Court: Just as you say, gentlemen. If that is the view of the majority of the jury, the Court will act on it.

Mr. DeGraw: I may say, as long as the matter is so that the jury feel that they can see the situation from the testimony, that we are perfectly satisfied.

30 A map produced by defendant is placed on an easel.

FRANK T. SHEPARD, sworn in behalf of defendant.

Direct examination by Mr. Murray:

Q. Mr. Shepard, what is your business? A. Civil engineer and surveyor.

40 Q. How long have you been a civil engineer? A. Twenty-seven years.

Q. Are you familiar with the Jerolaman property

in Belleville, at the corner of Jerolaman Street and Cortlandt Street? A. I am.

Q. Referring to the map hanging on the frame, I ask you if that is a representation of the property and the buildings of Mr. Jerolaman with relation to their position and the position of the brook? A. It is.

Q. Is that a diagram? A. It is.

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By the Court:

Q. Did you make it? A. I did.

By Mr. Murray:

Q. Now, will you explain to the jury what the portion marked in blue indicates?

The Court: Do you wish to cross examine on the map, Mr. Skinner?

Mr. Skinner: Well, I should like to ask one or two questions.

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By Mr. Skinner:

Q. When did you make it, Mr. Shepard? A. It was made during the Summer of 1914.

Q. During the Summer of 1914? A. Yes, sir.

Mr. Skinner: I do not know whether it makes any difference that it is at a different time or not. I do not know that there has been any change.

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Q. You do not undertake to show there the town sewer system, do you? A. No, sir.

Mr. Murray: No, it is just introduced for the purpose of showing the course of the brook under the buildings.

Q. What is the building west of the railroad, is that the station? A. Yes, that is the station.

40

By the Court:

Q. What is this line here (indicating)? A. That is the westerly line of the Erie Railroad.

Q. What is that line (indicating)? A. Well, that would be a continuation of the westerly side of Isaac Street as it is prolonged.

Q. That is the street on which the railroad is?

10 A. Yes, sir.

By Mr. Skinner:

Q. To avoid any misunderstanding, Mr. Shepard: That building in pink there, to which I call your Honor's attention, is the railroad station, is it not? A. That is right.

Q. You do not mean to say that is in a public street, do you? A. No, I think the property terminates north of the station.

20

Q. In other words, that is not the west line of the railroad that you pointed out, but that is up here, is it not (indicating)? A. Yes, that is right.

By Mr. Murray:

Q. Now, Mr. Shepard, will you explain to the jury what the portion marked in blue represents?

A. The portion marked in blue represents the stream running through the property of Mr. Jerolaman (indicating on map).

30

Q. And what do the portions marked in red represent? A. They represent the station and office and scale and lumber sheds (indicating).

Q. Where is the stable? A. The stable is the westerly building (indicating).

Q. In which direction does the brook flow? A. To the east.

Q. Is the railroad on a level with the yard of Mr. Jerolaman, or is it higher or lower? A. It is higher.

40

Q. About how much? A. About 10 feet.

Q. The brook, then, runs under the railroad track? A. It runs through a culvert under the railroad track.

Q. And I take it from the map that the brook also runs under Mr. Jerolaman's buildings? A. It does.

Q. (Another map is shown to witness.) Now, Mr. Shepard, I show you a map. Will you tell me what that is? A. This is a profile of Jerolaman street from the Erie Railroad westerly to a point just west of the reservoir.

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Q. When was that map made? A. This map was made in the latter part of April, 1888.

Q. And by whom? A. By J. H. Francisco.

Q. And what was his business? A. He was a surveyor.

Q. Did he at that time hold any official position with the Town of Belleville? A. He did; he was Town Engineer at that time.

20

By the Court:

Q. Do you know when it was made? A. Yes, sir; it was made in the latter part of 1888.

By Mr. Murray:

Q. Were you in the employ of Mr. Francisco at that time? A. I was.

Q. Do you remember that map? A. I do.

30

Q. In whose possession is it now? A. In mine.

Q. How does it come to be in your possession? A. I purchased all the records from the estate of J. H. Francisco after his death; this was among them.

Q. Was Mr. Francisco Town Engineer of Belleville up to the time you were Town Engineer?

A. He was.

Q. What does that map show? A. It shows

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the original contour of Jerolaman Street together with the established grade line.

Q. What do you mean by "the established grade line?" A. The line to which it has been improved.

Q. Do you know of your own knowledge whether that map is correct or not? A. I do.

10 Q. Have you ever had occasion to use it in the course of your business? A. I have.

Mr. Skinner: I have no objection, if your Honor please, to the use of this map, if it be established in a proper way as the map for the established grade; but I do not understand that established grades can be proved by the testimony of this witness.

The Court (after discussion): The matter is not now definitely before the Court.

20 Q. Was the new grade as shown on the map actually made the grade of Jerolaman Street by the Town of Belleville?

Objected to.

The Court: Now, I understand the objection to be that there is a better way of showing the municipal action on this subject than by appealing to the witness' recollection.

30 Mr. Skinner: Yes, sir.

Counsel argue.

Q. Mr. Shepard, were you employed by Mr. Francisco at the time that map was made? A. I was.

Q. Did you work with Mr. Francisco on the making of that map? A. I did.

40 Q. Do you know whether or not that map is correct? A. It is.

Mr. Skinner: You were not asked whether it is; you were asked whether

you knew. I ask that that answer be stricken out.

The Court: Say yes or no.

Witness: Yes.

The Court: The witness says he knows; he does not say whether it is correct; he says he knows.

Q. Well, is it or not?

10

Objected to.

The Court: The question is what "correct" means. It may mean several things. It may mean that it is a correct reproduction of the surveyor's work. That would be one sense of the word "correct." Probably the sense intended is that it was a correct representation of some grade adopted by municipal authority, and the question is whether there is not a better way of showing municipal action than by the witness' recollection of the correspondence of this map with something that the Town Committee, I suppose, have done.

20

Mr. Murray: I think possibly I can establish that according to your Honor's suggestion.

Mr. Skinner: Will you let me look at the map? Is there any objection to that?

30

Mr. Murray: No, not at all.

Map shown to plaintiff's counsel.

Mr. Skinner: Let me ask a question or two.

By Mr. Skinner:

Q. You say you were in Mr. Francisco's employ? A. Yes, sir.

Q. Did you make this map yourself? A. No, sir.

40

Q. Well, did you see it made? A. I did.

Q. And in his employ what part did you have in the making of the survey upon which that map is based? A. I assisted in taking the original levels.

Q. Were you there all the time? A. Yes, sir.

Q. Throughout the entire work? A. Yes, sir.

10 Q. So that, from your personal knowledge, then, you know that this is a correct reproduction of the grade of Jerolaman Street as it then was? A. I do.

Q. And then does the red line show the grade recommended by Mr. Francisco? A. It shows the grade recommended by Mr. Francisco and adopted by the town.

20 Q. Well, that was not necessary to the answer of my question, was it? You are testifying, of course, for the town; but when I ask you this, I ask you simply whether it was the grade recommended by Mr. Francisco? A. It was; yes, sir.

By the Court:

Q. That is, the red line? A. Yes, sir.

By Mr. Skinner:

30 Q. Now, since that time you have been township engineer for a number of years, have you not? A. I have.

Q. Have you had occasion to survey in that neighborhood? A. Yes, sir.

Q. Often? A. Very frequently.

Q. Well, in street work—have you had occasion to go on Jerolaman Street more than once? A. A great many times.

Q. And in those times have you had occasion, or need, to know what was the grade of Jerolaman Street? A. Yes, sir.

40 Q. Did you at those times use this map? A. I did.

Q. Did you compare this map with the actual lay of the ground? A. Yes, sir.

Q. You find that Jerolaman Street is macadamized and as existing today is according to this red line here (indicating)? A. I do.

Q. And without any change? A. Without any change.

Q. And it has been so throughout all your experience since 1887, since the original change? A. It has.

10

Mr. Skinner: I have no objection.

By the Court:

Q. What do you know about what you call the original contour, Mr. Shepard? Is that shown on this map? A. It is.

Q. What do you know about that? A. In what respect?

20

Q. As to its being shown correctly on the map. A. It is shown correctly on that profile; yes, sir.

Q. And what kind of a line shows that? A. A black line.

By Mr. Skinner:

Q. Do you mean to say that that red line shows the grade of Jerolaman Street as it is today? A. I do.

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Q. At every point? A. Yes, sir.

Q. You mean by that the established grade by the town; you do not mean the actual condition there? A. The actual condition today; the improvements have all been made to that grade.

Q. For instance, does it show the depression as you come up Jerolaman Street to Washington Avenue from the Erie Railroad? This shows a line crossing Washington Avenue without any depression in it, does it not? A. No, sir; it does not.

40

Q. Where is the depression? A. It shows an eight per cent. grade from the railroad up to the easterly line of Washington Avenue, continuing on a level—

Q. On a level? A. Yes, sir.

Q. It does not show the gutter, does it? A. Yes, sir; it does.

10

Mr. Skinner: Well, I will leave that for the cross examination later. Go ahead and prove that, if you want to.

The Court: Now, are these two maps offered?

Mr. Murray: Yes, sir; both maps are offered.

Mr. Skinner: I have no objection.

20

Profile map and map first referred to by witness are marked respectively Exhibit D1 and Exhibit D2.

The Court: Now, it is suggested by Judge Skinner that this map which was produced by the defendant, and which was used by the plaintiff on his case, contains something that he does not want to be bound by. It has practically been used by both sides for general information, and it might well be marked as an exhibit for the defendant, rather than for the plaintiff.

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The map referred to is marked Exhibit D3.

The Court: I think you say that you have no objection to either of those maps, Judge Skinner?

Mr. Skinner: No, sir.

40

The Court: Then may we assume that the red line shows a grade adopted by the town?

Q. That is the fact, is it? A. Yes, sir.

Mr. Skinner: Yes, sir; I think so. I am perfectly willing to have it go in evidence as testified to by this witness, without objection to the form of it, that it was so adopted. If I should find that there was any error in that, I would want to be free to correct it without binding myself by any admission.

The Court: For practical purposes, it may be considered as proved, subject to correction, if you find that there is an error in it.

10

Mr. Skinner: Yes, sir.

By Mr. Murray:

Q. Mr. Shepard, I call your attention to the high point in the original contour of Jerolaman Street about midway between Linden Avenue and Washington Avenue, as shown on Exhibit D1. According to the map, the highest point of the original contour line of Jerolaman Street between Linden Avenue and Washington Avenue is 350 feet west of Washington Avenue; is that correct? A. That is.

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Q. That is, this point here, the highest point, is 350 feet west (indicating); is that correct? A. Yes, sir.

Q. And Linden Avenue is 700 feet west of Washington Avenue, is it not? A. That is correct.

Q. What is the height of the original contour line of Jerolaman Street at a point 350 feet west of Washington Avenue? A. 74.15 above high water mark of the Passaic River.

30

Q. What was the elevation, or height, of the original contour line of Jerolaman Street at a point between 700 and 800 feet west of Washington Avenue; namely, just to the west of Linden Avenue? A. 71.22 feet.

Q. There was, then, a drop, or dip, or depression, in the grade at Linden Avenue, was there not? A. There was.

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Q. And immediately to the west of Linden Avenue? A. Yes, sir.

Q. How much did that depression amount to? A. 1.93 feet.

Q. What grade was the other? A. 74.15.

Q. And this is what? A. 1.93.

By the Court:

10 Q. What is your vertical scale? A. Five feet to the inch.

Q. And your horizontal scale? A. 100 feet.

By Mr. Murray:

Q. What is the dip, or depression, at Linden Avenue? A. The elevation?

Q. What is the difference? A. 2.93 feet.

20 Q. Higher or lower at Linden Avenue? A. Lower.

Q. And that point at Linden Avenue and immediately west of Linden Avenue is 2.93 feet lower than the point about midway between Linden and Washington Avenues; is that correct? A. That is.

Q. Just indicate on D3 the location of that depression on Jerolaman Street. A. About this point (indicating).

30 Q. Mr. Shepard, up to what year did that condition exist? A. You mean the original contour?

Q. Yes, with that depression? A. The year 1899.

Q. Was there any change made then? A. There was.

Q. And what was that change? A. The town graded the street down to the red line.

Q. To Washington Avenue? A. To Washington Avenue and beyond to the railroad.

40 Q. According to the map, the grade as had been established was made continuous downward from Linden Avenue east towards Washington Avenue; is that correct? A. It was.

Q. In other words, the rise from Linden Avenue towards the east was removed? A. It was.

Q. Mr. Shepard, is that the grade as it exists today, as shown by the red line on the map? A. It is.

Q. Mr. Shepard, referring to the map, Exhibit D1, from a point about midway between Hornblower and Linden Avenues there is a rise in the ground toward the west, is there not, in the original contour of Jerolaman Street? A. There is.

10

Q. To what point? A. It rises all the way up to the point west of the Newark City reservoir.

Q. That is about how far from Washington Avenue? A. Well, it is about—about thirty-five minutes east.

Q. Mr. Shepard, just indicate on Exhibit D3 the summit of the rise on Jerolaman Street. A. (Witness indicates on map.)

20

The Court: Describe what you are pointing to.

Witness: This is the high point on Jerolaman Street (indicating).

The Court: But what is "this?"

Witness: This point on the map is the high point (indicating).

The Court: Nobody will know what "this" means.

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Mr. Skinner: Indicating the point where the figures "165" appear; is that it?

Witness: Yes, sir.

Q. Now, Mr. Shepard, before the change in the grade of Jerolaman Street was made where did the water go which fell on Jerolaman Street west of Linden Avenue? Where did the water go which came on Jerolaman Street from Linden Avenue west?

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Mr. Skinner: Now, this is before Mr. Shepard made the survey.

Mr. Murray: No, I say at the time, at the time the grade was changed, before the town made any change.

Mr. Skinner: You mean as he saw it then where would it go?

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Mr. Murray: Where did it go?

Mr. Skinner: Well, let me ask a question.

By Mr. Skinner:

Q. Did you see any going, Mr. Shepard? A. No, I did not.

By Mr. Murray:

20

Q. Well, Mr. Shepard, what was the condition of the surface of the ground at Linden Avenue, at what is now Linden Avenue, on the north side of Jerolaman Street, before the grade was changed? A. It was low.

Q. What do you mean by that, lower than the— A. Lower than the grade of the street.

Q. Was it level or was it sloping? A. It was sloping to the north.

Q. Sloping toward the north? A. Yes.

30

Q. Where did the slope terminate? A. The slope terminated in the ravine at what is now the head of Essex Street.

By the Court:

Q. Linden Avenue sloped down toward the north? A. Yes, sir; the general contour of the land sloped to the north to the ravine, which is practically in here, at the head of Essex Street (indicating).

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By Mr. Murray:

Q. And where was Essex Street with regard to

the brook? A. Essex Street was just about where the ravine went through (indicating).

Q. Essex Street runs down what was formerly the ravine? A. It does.

Cross examination by Mr. Skinner:

Q. Mr. Shepard, in other words, when the town graded in 1889, on Jerolaman Street, it cut down that knoll, or rise, did it not (indicating)? A. It did. 10

Q. Indicating a point 350 feet away. Now, before that that point was about 3 feet higher than this point at Linden Avenue, was it not (indicating)? A. It was.

Q. And that had a tendency to collect the water right in that hollow, did it not? A. It did.

Q. There was a slope here on the north, was there not (indicating)? A. There was. 20

Q. And some water ran right off onto that slope? A. All that collected in that hollow did.

Q. It did? A. Yes.

Q. You know that, do you? A. Yes, sir.

Q. You were there in rain storms and all kinds of weather? A. No, sir.

Q. Do you know whether any came down Jerolaman Street and over that crown? A. It never did. 30

Q. You know, do you? A. It would be impossible for it to.

Q. If water came down this hill a distance of 3,000 feet or so on the grade that you show there, it would come with pretty considerable velocity, would it not, in a storm? A. It would not.

Q. Without your having been there to see it, you can say that, can you? A. Yes. 40

Q. And it surely would, after the cut in the grade, would it not? A. Yes.

Q. And go with considerable velocity? A. Yes.

Q. And when it got down here at Washington Avenue and Jerolaman Street it would run across Washington Avenue, would it not (indicating)?

A. It would depend on the storm.

10 Q. Well, if it was a big storm and a large quantity of water falling, it would run right on down Jerolaman Street, would it not? A. I don't think so.

Q. Don't you know that you did? A. I think not.

Q. Don't you know that the town had to make repairs on Jerolaman Street there? A. Not from that.

Q. Do you know what caused it? A. I can tell you that that did not cause it.

20 Q. Can you tell what did cause it? A. There was no breaks there.

Q. You do not know whether there were any breaks or not, but your mental process is that you are sure it could not have been by the water coming down Jerolaman Street; is that it? A. Quite sure.

Q. And that is all you know about it, what you think must have been? A. I know it from observation.

30 Q. Before 1889? A. No, after 1889.

Q. The town did not have any trouble from water coming down Jerolaman Street and washing out the gutters and sidewalks and roadways east of Washington Avenue, did they? A. They had some trouble, but it was not caused by the water coming west from Washington Avenue.

40 Q. Did you work for the town at the time they had that trouble? A. Not for the town, but for the town engineer.

Q. Did you have occasion to go up there and look over the ground after there had been a

washout? A. No, but I passed the place twice a day.

Q. In a trolley-car? A. After the trolleys ran; prior to that on the railroad.

Q. The Erie Railroad? A. Yes, sir.

Q. You mean to say that you got your observation from the railroad train, did you? A. The train stopped there. If there had been any washout I would have seen it.

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Q. And the fact that you did not see it when the train stopped there is your foundation for saying there was no washout? A. No, my foundation for saying that is that there was no sufficient volume of water going down that hill to cause a washout.

Q. Then there was not any need, so far as you could see, for the town to put any culverts in : Washington Avenue and Jerolaman Street and run the water north, was there? A. The culverts were not put in for that purpose.

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Q. They were put in, though? A. They were put in to make easy access to drivers.

Q. They were put in? A. They were put in.

Q. And that was all they were put in for, to make easy access for driving? A. Yes, sir.

Q. And in all the years since that time the water that has come right down Jerolaman Street from Washington Avenue, or the little that has come, has done no harm? A. Not to my knowledge.

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Q. Well, you are careful to say that it hadn't done any harm; you said it hadn't? A. Nothing more than the incidental water that occurs on all hilly streets in a heavy rain.

Q. Well, what did the town have for carrying the water on Jerolaman Street east of Washington Avenue? A. They had a cobble gutter.

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Q. Just an open gutter? A. Yes, sir.

Q. That is what they did have up to what time? A. It is still there.

Q. The gutter is still there, but that is not the provision that they have got for carrying the water, is it? A. At the present time they carry the water to a storm water sewer.

10 Mr. DeGraw: One moment. That storm water sewer is something that was put in since the cause of action arose. I do not think it is cross examination.

The Court: Proceed.

20 Q. So that since this flood of 1912, which Mr. Jerolaman complains of, the town has taken care of the water coming down Jerolaman Street from Washington Avenue by putting in a storm water sewer; is that right? A. The town in the last five years have laid out a comprehensive plan of storm water sewerage, not only in this particular section, but all over the town.

Q. You were town engineer, were you? A. Yes, sir.

Q. And you are still? A. Yes, sir.

30 Q. And you are here testifying for the town, but will you please answer my questions without arguing? I am only asking you whether there was a storm water sewer there. I did not ask you about anywhere else. A. There is no storm water sewer on Jerolaman Street west of Cortlandt Street.

Q. There is not? A. Not between Cortlandt and Linden.

40 Q. There has been for years a storm water sewer running up on the north side of Jerolaman Street east of the railroad, has there not? A. East of Cortlandt Street; yes, sir.

Q. East of Cortlandt Street, is it? A. Yes, sir.

Q. And it was a Y from that that ran into—

A. Pardon me. The first section was built up to Cortlandt Street and then extended to Washington Avenue.

Q. Was not that on Jerolaman Street? A. Yes, sir.

Mr. DeGraw: One minute. We have not gone into the matter of laying storm drains, which is an improvement that covers the entire town. I have not any great objection, but all that has happened since this cause of action arose, and it has nothing to do with this case, and I do not think it is strictly cross examination. I therefore object to the whole line of questioning. 10

The Court: I think that any provision that has been made to take care of water on Jerolaman Street up to the present time is competent. Therefore, I overrule the objection. 20

Defendant's counsel object to this ruling of the Court.

Objection noted as ground of appeal.

Q. There was, then, a storm sewer built on Jerolaman Street from Cortlandt Street to Washington Avenue? A. Yes, sir.

Q. Did you not just say a few minutes ago here that there was no storm water sewer built on Jerolaman Street? A. I misspoke myself. If you recollect, I corrected myself. 30

Q. You are correcting it now? A. Yes, sir.

Q. Now, that has been done since the flood of 1912, has it not? A. Yes, sir.

Q. The same cobble gutters are there, are they not? A. Yes, sir.

Q. That, you say, were complete and adequate to cover and take care of all the water that came down Jerolaman Street east from Washington 40

Avenue, and there were no washouts because of them—no water coming over? A. That is true.

Q. But the town has gone to the expense of laying a storm water sewer up to Washington Avenue on Jerolaman Street; is that right? A. That is right.

10 Q. Now, what water does that sewer take? A. It takes the water from a drainage area of 237 acres, as represented—

Q. That is, this storm water sewer on Jerolaman Street? A. Jerolaman Street, Washington Avenue, Division Avenue, and the other streets through which it runs.

Q. It runs west of Jerolaman Street, does it?

The Court: Washington Avenue, you mean, do you not?

20 Mr. Skinner: Yes. I beg your pardon.

Q. It runs west of Washington Avenue here? A. Yes, sir.

Q. Does it take any of the water that comes down Jerolaman Street west of Washington Avenue? A. It does.

Q. It takes some of it, does it not? A. It does.

30 Q. So that this sewer that you are telling about now takes all the water that used to come down Jerolaman Street to Washington Avenue? A. Yes.

Mr. Murray: If your Honor please, I would like to object to all this line of testimony on the question of the storm water sewer. I do not want to object to every question that is asked and answered, but I would like a general exception, if possible, to all that line of questioning.

40 The Court: You may take an exception to this question. A general exception is

sometimes objectionable, because you cannot always tell where its application runs out. Consequently, I think, it is always better to take objections to each question. That makes it entirely definite. I understand that you object to this last question?

Mr. Murray: Yes, sir.

The Court: Very well.

Defendant's counsel object to this ruling of the Court.

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Objection noted as ground of appeal.

Q. Mr. Shepard, this contour line on D1 shows a low spot running from a point which you have defined as 350 feet west of Washington Avenue?

A. Yes.

Q. How far west does that go? A. It runs about 400 or 450 feet.

20

Q. And back to DeWitt Avenue—about how far from that high point? A. About 800 feet.

Q. Now, that not only was the contour of Jerolaman Street, but practically the contour of the land on the south, was it not? A. Practically the contour of the land on the south, yes.

Q. There was a flat tableland, and is still, within about those boundaries that I have pointed out, running southerly from Jerolaman Street clear down to John Street, Belleville? A. That is true.

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Q. And that is a distance of how far? A. To John Street?

Q. Yes. A. About three-quarters of a mile.

Q. And to Holmes Street how far is it? A. About an eighth of a mile.

Q. An eighth of a mile from Jerolaman Street to Holmes Street? A. To Holmes Street it is about half a mile.

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The Court: As measured on Jerolaman Street, three blocks and continuing to the west?

Mr. Skinner: Yes.

The Witness: Yes, sir.

Q. Turning to D3, give us the exact distance.

A. I had the wrong street in mind when I said half a mile.

Q. Take it on Hornblower Avenue and measure from Jerolaman Street down to Holmes Street.

10 A. (measuring on map): It is about 2100 feet.

Q. And from there on down to VanHouten Place? A. 1300 feet.

Q. Making 4,300 feet from VanHouten Place to Jerolaman Street; is that right? A. That is right.

The Court: That is over a half a mile.

Mr. Skinner: Yes, sir.

20 Q. Now, at the time that this map was made a good deal of that was swamp land, was it not?

A. I wouldn't call it swamp land; some of it was low land.

Q. Well, low land in times of storm gets swampy, does it not? A. Not necessarily.

Q. Well, it would if there was not any way of carrying the water off, would it not? A. It might; it would depend altogether on the character of the soil.

30 Q. Well, as a matter of fact, knowing the character of the soil and the whole territory up there, as you do, you know, do you not, that after heavy storms and heavy showers water collected and laid for hours and days on the territory lying south of Jerolaman Street and north of Holmes Street? A. Certain portions of it; yes, sir.

Q. And there were ponds there that were used by the children to skate on in Winter, and so on? A. Yes.

40 Q. Now, the town did some grading and macadamizing on DeWitt Avenue and Hornblower Ave-

nue about the same time that it made this change of grade in Jerolaman Street, did it not? A. It did.

Mr. DeGraw: Just a minute. I would like to interpose the same objection here, if your Honor please, because the direct examination has not touched on anything south there, or the grading of those streets to the south.

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The Court: I think anything that has to do with the disposition of Jerolaman Street water is competent.

Defendant's counsel object to this ruling of the Court.

Objection noted as ground of appeal.

Q. And it also did the same kind of work, either at the same time or within the next few years, on other streets that lay in this territory between Jerolaman Street on the north, VanHouten Place, or Academy Street, on the south, and New Street on the west, did it not? A. It did.

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Q. Now, the effect of that work being done was to make more water run to Jerolaman Street, was it not? A. It was not.

Mr. Murray: Just a minute, I object to that, if the Court please, on the same ground.

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The Court: I make the same ruling.

Defendant's Counsel object to this ruling of the Court.

Objection noted as ground of appeal.

Q. It was not, you say? A. It was not.

Q. And the water did not naturally run that way? A. It didn't naturally fall toward Jerolaman Street.

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Q. Then when you say the effect was not to make

more water run, you do not mean to say that the water did not run, but that the town work did not have anything to do with it; is that it? A. Practically the same thing.

Q. That is what you mean, practically? A. Yes, sir.

10 Q. Now, of course, the macadamizing of a road would make the water run a little easier, would it not? A. No, it would not.

Q. The water would soak up in a macadamized road as quickly as it does on a dirt road? A. It wouldn't soak in the macadam as much as it would soak in the dirt in the gutter.

Q. Would it soak in the macadam as quickly as it did in the dirt? A. No.

20 Q. The effect of the macadamizing was that there was a contour given to it, a crown, that would send the water to the gutter? A. Yes.

Q. And that sent to the gutter, it would travel in the gutter in the direction of the slope of the ground? A. It would.

30 Q. Do you mean to say that the surface of the road—there was clearing out of the gutters, too, was there not? A. When the macadamized roads were built the gutters were dirt. There was a strip of macadam of 14 feet on all the streets, and the gutters were simply dirt gutters.

Q. But the whole street was cleaned up, was it not? A. No, simply cleaned up the roadways.

Q. You mean exclusive of the sidewalks? A. Exclusive of the sidewalks.

Q. They put down the macadam and made no provision, except just gutters, for carrying away the water? A. No, they did not.

40 Q. They did try to carry off the water, then, did they? A. They fixed the grade for the roads and simply formed a dirt gutter.

Q. And did they fix the grade for the road for the

purpose of disposing of water? A. No, that was not the reason.

Q. What was the purpose? A. The fixing of the grade was merely for the purpose of travel.

Q. Now, just tell us what the grade was on, say, Hornblower Avenue. A. Well—

Q. How much to the hundred feet was the grade on Hornblower Avenue at the point of highest or greatest ascent? 10

Mr. DeGraw: I object to the question as not cross examination.

The Court: As I said before, I consider everything competent which will throw any light on the history of the Jerolaman Street water.

Defendant's counsel object to this ruling of the Court. 20

Objection noted as ground of appeal.

Question read.

Mr. Skinner: That is, the steepest grade at any point on Hornblower Avenue between Academy Street and Jerolaman Street.

A. As I haven't the profile of Hornblower Avenue with me, I can't tell you.

Q. But you can from recollection, can you not?

A. It is a flat grade. 30

Q. Some grade, is it not? A. Yes, sir.

Q. A little? A. I should judge about six inches in a hundred feet.

Q. That is just about enough to make water run, isn't it? A. Just about.

Q. And it is not a grade that is put in for the convenience of travel, is it? A. In fixing the grades the original contour of the land was followed as far as possible. 40

Q. That is not what I asked you. I say that a grade of six inches to the hundred is a grade whose

purpose is to dispose of water and not to serve the convenience of people travelling on the road? A. Yes.

Q. Now, the same thing was true of the grade on DeWitt Avenue, was it not? A. Yes.

Q. And how about New Street? A. The same rule would apply to all the streets.

10 Q. And on all these streets they were graded so as to give a grade of about six inches to the hundred, were they? A. Not necessarily; there were different percentages of grades; that would be a minimum grade.

Q. At least that? A. Yes.

Q. And that was six inches to the hundred sloping downwards toward Jerolaman Street, was it not? A. In most cases, yes.

20 Q. And that did not have the tendency to send the water to Jerolaman Street, did it? A. The water would flow in that direction, as it originally did.

Q. Then the town did not change any of the dirt roads, left them just as they found them as to grade; is that right? A. No, that is not right.

Q. They did change them? A. Yes, sir; they did.

30 Q. And the change in every instance was to make a grade to Jerolaman Street where none before existed or to make the existing grade a little more; is that right? A. I don't get your question.

Q. The changes that the town did make were of this character; they either made a grade toward Jerolaman Street where none before existed or they took the existing grade and made it a little more pronounced? A. They took existing grades, the existing slope toward Jerolaman Street, and simply ironed out the road, made it straight, where before there were depressions.

40 Q. Where before there were depressions that

would hold water, they ironed them out so that the water would run? A. Well, the natural slope of that whole shed is toward Jerolaman Street.

Q. If you have only got a grade of six inches to the hundred, you have got to have every depression ironed out to make the water run, have you not?

A. You can't take water over a grade of less than six inches in a hundred on a dirt road very well.

Q. Well, you said that culverts were put in at Jerolaman Street and Washington Avenue, or I think you said—I do not want to misquote you—that that was for convenience of driving over them?

A. Yes, sir.

The Court: To make easy access for drivers, as I got it.

The Witness: That is the sense of it.

Q. That was the intention, was it not? A. It was.

Q. That you gathered from your knowledge of the state of mind of the town authorities in doing it? A. No. At that time there were a good many hundred dollars spent for these culverts all over town. Prior to that the culverts were consisted of telford, trap rock blocks, and they were deep and bad for driving. A man driving over the gutters was apt to break a wheel, and the town went to the expense of a good many hundred dollars and had these sluiceways, or culverts, placed at all the corners, and this was one of them.

Q. Do you not know that there was a time when storm water used to come down Jerolaman Street and wash down dirt and sand over the end of the railroad track where the car line terminated there?

A. Never to my knowledge.

Q. You mean that you never saw it? A. I do

Q. Well, these culverts that you speak of as being for people to drive over them, or make driving

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easier—take the culvert at Jerolaman Street and Washington Avenue—did it catch the water that came down Jerolaman Street from the west? A. It didn't catch the water, but the water turned and went through it.

Q. The water caught the culvert, you mean? A. Practically, yes.

10 Q. Well, put it that way. The water, having caught the culvert, turned and went north, did it not? A. It went as it always went.

Q. I do not want you to argue the case for the town. I asked you whether it did not turn and go north? I do not want to argue with you. A. I didn't mean to argue. I meant to say that the water turned north.

Q. As it always did, you mean? A. Is that a question?

20 Q. Yes. As it always did, I ask you now? A. Yes, sir.

Q. And you base that from your observation of the Erie Railroad as you passed through, a block and a half away, or two blocks away? A. No, sir.

Q. What do you base it on? A. On passing it on the trolley car for about eighteen years every day.

30 Q. The trolley car did not run there in 1899, did it? A. No, sir.

Q. When did it begin to run? A. As near as I can recall, about seventeen or eighteen years ago.

Q. Well, you never heard of a suit by a man named Burton against the town, did you? A. I did.

Q. Now, your red line that you have got here, you say, shows the grade as it is? A. That is correct.

40 Q. Shows the street as it is? A. It shows the grade of Jerolaman Street.

Q. It does not show the street as it is, does it? A. That is a hard question to answer. The street

should be up to that grade. There might be cases where it would be an inch or two above or an inch or two below.

Q. For example, if the workmen of the town or the gas company had gone with a wagon and excavated and made a slight mound there, it would not show on your map? A. No.

Q. Or a hill? A. It wouldn't show on the map today, no.

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Q. And if since the making of the map any employee of the town had gone to Washington Avenue and Jerolaman Street and had raised the crown so as to be higher than its former level, it would not show on this map, would it? A. It would not.

Q. If there was anything of that kind done, this map would not show it? A. No, sir.

Q. Did you go to this place, or the scene of this map, shortly after the flood of 1912, that Mr. Jerolaman is complaining about? A. I did not.

20

Q. You said that the slope north of Jerolaman Street at a point opposite about Linden Avenue was in general contour to this ravine at Essex Street, or about Essex Street? A. I did.

Q. That was only the general contour; there were depressions, were there not? A. There were depressions and rises; there was a little slope.

Q. The ground was irregular? A. Yes, sir.

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Q. Pretty deep depressions at one or two places, were there not? A. Yes, sir.

Q. Where the water would collect? A. It collected in pools until it could get out.

Q. Until it evaporated or got away? A. Yes, sir.

Q. This water that came down Jerolaman Street and caught the culvert and turned north got into the brook that runs through Jerolaman's property, did it not? A. It did.

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Q. And does it do that now? A. A small portion of it, yes.

Q. But the greater part of it has been taken into this storm sewer that you mentioned before, has it not? A. It has.

Q. A small part, you say, now runs into the brook that goes through Jerolaman's property? A. Yes.

10 Q. What part is that? A. The part that falls on Washington Avenue north of Jerolaman Street in a storm.

Q. On Washington Avenue, what? A. North of Jerolaman Street, between Jerolaman Street and the culvert.

Q. Mr. Shepard, the flat land that lay on the top of the hill south of Jerolaman Street—there was a ridge, was there not, somewhere down near John Street? A. The shaded pink line shows the highest point; the water ran in both directions from that pink line.

Q. That shaded pink line is about on a line with VanHouten Place? A. It is.

Q. So that water that fell south of that pink line would go toward John Street? A. Yes.

Q. And water that fell north of the pink line would go toward Jerolaman Street? A. Correct.

30 Q. And was anything done to the grade of any of those streets to prevent the water from going south to John Street? A. No, sir; the grade is where the pink line is indicated.

Q. And that is where it was before the macadamizing? A. Yes, sir.

Q. And before the macadamizing nothing was done to cut down that ridge that sent the water in two directions? A. That was the high point in the grade.

40 Q. Was there anything done at that end of this territory shown within the pink line to raise the

grade? Did they not fill up some of the streets down there at the southerly end near that pink line? A. Not a general fill. As I testified before—

Q. No, I mean a special fill. A. Not to my knowledge; no, sir.

Q. Did they not fill the streets down at that end so as to make that grade all six inches to the hundred that you have told about? A. As I stated before, there were certain portions of the streets filled, necessary to make a long, straight grade. 10

Q. Now, was it not by such filling that they accomplished this grade of six inches or more to the hundred? A. Yes, either by filling or cutting; they accomplished the same result.

Q. Well, it was done by filling down at that end, was it not? A. I don't know; not to my knowledge. 20

Redirect examination by Mr. Murray:

Q. Mr. Shepard, were not storm sewers installed in other portions of the town about the same time as the installation of the Jerolaman Street sewer? A. There was.

Q. Where were they? A. There was one built on John Street, Smith Street and West Factory Street. 30

The Court: Take your pointer and indicate it.

Witness (indicating on map): That locality is over on this end, the southern end.

Mr. Murray: If your Honor please, I did not want the witness to describe those; I simply wanted to show that this was one part of the general system all over the town. 40

Witness: There were a great many built all over the town.

Recross examination by Mr. Skinner:

Q. When was that done? A. Which one have you reference to?

Q. The general doing that Mr. Murray just questioned you about, that you said was done. A. May I refer to my memorandum?

10 Q. Yes. A. (referring to memorandum): I don't seem to have it here. It was done about two years ago. And I might add that there is some other sewers in the course of construction at the present time.

Q. You are sure it was not done before that? A. The one on Cortlandt Street, east of Cortlandt Street, on Jerolaman Street, was built before that time, yes; that was the first one built.

20 Q. Well, you know the township reports when you see them, do you not? A. Yes, sir.

Q. Just to refresh your memory, let me show you one of the printed copies for the year 1897. I call your attention to that in the town committee's report: "Iron top culverts have been placed at such intersections of streets, or at such points on the streets, as have been considered necessary, and at other places earthen pipes have been laid." A. Yes.

30 Q. That refers to a general improvement by putting down culverts, does it not? A. Yes, sir.

Q. Now, do you not think you are mistaken in saying that it was done two or three years ago? A. No, I do not. I am speaking of the storm water sewers; that has reference to the culverts that were placed to make easy driving.

40 Q. That is, where there was an open gutter an iron top grating would be put over it so that people could drive over them? A. Yes. They were not gratings; they were iron castings, plates. They have been referred to here as gratings.

Q. Were they put on the earth without any attempt to connect them? A. No, they were not; two parallel rows of curbing set in the ground.

Q. Those rows of curbing were set in the ground, but below the level of the street? A. No, they were not.

Q. Usually? A. No. The idea was to have continuity of driving across the street.

Q. If you put it in and did not put it below the level of the street, and put an iron cover on that, you would have the cover sticking up above the ground, would you not? A. Not when the cover was only half an inch thick, no.

Q. So that the curb was laid flush with the street? A. Yes, sir.

Q. And then the plate put on top? A. Yes, sir.

Q. And the curbstone that you speak of was about what? A. Probably about sixteen inches in thickness and three or four feet long.

Q. When you say "thick," do you mean the width? A. Yes, sir.

Q. So that those two curbstones formed the sides of a culvert, did they not? A. Yes, if you want to call it that.

Q. Well, it took the water? A. Yes, sir.

Q. Or the water took it? A. That is right.

Q. And it was that kind of work that was done here in 1897, as shown by this report? A. Yes, sir.

Q. You recall that as being done? A. Yes.

Q. Then, when you spoke of something being done within two or three years, then you did not mean that, did you? A. I did not.

Q. You referred to more elaborate storm water sewers? A. To the storm water sewer.

Q. There was a culvert, or grating, of the kind that we have been speaking of, placed at Rossmore Place, was there not? A. Yes, sir.

Q. And the water caught that and ran down Jerolaman Street? A. Yes, sir.

Q. And on through Jerolaman Street to the brook that passes through Mr. Jerolaman's property? A. Yes.

Q. Water on the east side of Washington Avenue, its general direction was north, was it not? A. Yes, from a point a little south of Rossmore Place.

10

Q. From a point a little south of Rossmore Place on Washington Avenue, you mean? A. About here where this pink line is (indicating).

Q. From where the pink line is the water on the east side of Washington Avenue ran north? A. It did.

Q. And it did not turn the corner and go down Jerolaman Street, did it? A. I think at one time it did.

20

Q. And then that was changed? A. I don't know whether it was changed or not.

Q. Well, it does not now, does it? A. I don't know whether it does or not. There is a grating, or one of those covered crossings, at that point, but whether an opening has been left on the easterly of that to take this water down that gutter I don't know.

30

Q. If there was an opening to take it down here there would not be any need for that grating going across the street, would there? A. Yes, there is to have a continuity for driving, as I have said before.

Q. If the water was going down Jerolaman Street, why have a gutter covered with something for continuity of driving? If the water came east on Washington Avenue and turned, what was the use of having any gutter on that side? A. Because the county road had a gutter on that side before Washington Avenue was improved.

40

Q. You mean the reason for there being a gutter there was because there was a gutter there? A. Yes, the town didn't have any right to close up the gutter on that street.

Q. Well, the water that turned that corner after some storms made considerable damage, did it not? A. You mean turning down Jerolaman Street?

Q. Yes. A. As I testified before, not to my knowledge; I have never seen any damage caused by it turning that corner.

Q. Did you have in 1900 some repairs made on Jerolaman Street up to Washington Avenue? A. No, sir; I wasn't engineer there.

Q. Was Mr. Francisco engineer there? A. Yes, sir.

Q. Were there cobble gutters in Jerolaman Street then? A. I don't know; I know there were some there; I don't know when they were laid. I didn't have anything to do with this particular job.

Q. Was there a storm ditch on Jerolaman Street east of Cortlandt Street? A. There was an open ditch where a stream ran through.

Q. And was that built up with stone work masonry? A. It was built up on the lower end, near the Eastwood factory, with a stone wall on each side; between Stephens Street and Cortlandt Street it was a large open stream, a ditch, with high, open banks on either side.

By the Court:

Q. Where was that with reference to Jerolaman Street—the open ditch where the stream ran? A. Perhaps I could show you here (indicating on Exhibit D3). This is Cortlandt Street, the next street below is Stephens. From this point down—

Q. Do not say "this point," because it does not

mean anything. A. From the corner of Jerolaman Street and Cortlandt Street, running easterly to Stephens Street, there was an open ditch, or stream, about on the northerly curblin of Jerolaman Street.

Q. Jerolaman Street east? A. East of Stephens—

10 Q. East of Cortlandt? A. East of Cortlandt. Below that point the condition existed down to the westerly line of the Eastwood Wire Works, and at that point they had a stone wall on each side carrying the water past their property. That is my recollection.

By Mr. Skinner:

20 Q. Well, don't you think that this part between Cortlandt and Stephens Street was walled up by the town? A. No, I do not.

Q. Don't you remember the town rebuilding that—

30 Mr. DeGraw: This wall that he is speaking of is away below Jerolaman Street, away below the scene of the damage, and any water that got in that would have to come back to cause any damage, and I do not see where it has any bearing on the plaintiff's case, except to prolong the matter.

Q. Were you town engineer in 1901? A. No, sir; I was not.

40 The Court: I think it is competent. It may prolong the trial, but it was apparently put there to prolong the brook, and the relation of it to what is above it, is, I take it, a matter to consider.

Defendant's counsel object to this ruling of the Court.

Objection noted as ground of appeal.

Q. I call your attention to this report of the year 1901, in this language: "The committee also found it necessary to rebuild a large portion of stone work to maintain the storm ditch on Jerolaman Street." Do you recall anything about that?

A. I do not.

Q. You do not recall that the town had to rebuild a storm ditch on Jerolaman Street? A. I do not.

10

Q. At any rate, the only ditch on Jerolaman Street is the one that took the water as it came through Mr. Jerolaman's property; is that right?

A. That is right; that is the only ditch I know of on Jerolaman Street.

Q. I show you the report for 1904, the year ending March 1, 1904, and I call your attention to this: "Union Avenue has been graded from Jerolaman Street to Division Avenue." Do you recall that? A. Yes, sir.

20

Q. Union Avenue was graded, then, some time in the year ending March, 1904, was it not? A. Yes.

Q. Not back in 1888 or 1889? A. No, Union Avenue was a recent grading.

Q. And there was some of that recent grading done by the town on other streets up in that flat section on the hill there? A. Yes, sir.

30

Q. Through the years following 1889, was it not? A. Yes.

Q. And it spread over a long period, then? A. Most of the grading was done by private individuals; the town had very little to do after 1888 and 1889 and 1890, and all those streets was south of Jerolaman Street; the only street north was Linden Avenue that the town improved.

Q. There was not any grading done by private people on streets that were macadamized, was there? A. No.

40

Q. And all those streets there were macadamized, were they not? A. South of Jerolaman Street; yes, sir.

10 Q. Now, I call your attention to this in the report: "Several streets in our town with a steep grade have suffered the most, and the roadbeds were almost entirely washed out, especially so with Jerolaman Street, and your committee recommend that something be done to prevent reoccurrence of the same. The best possible way would be to build a culvert. This would prevent the expense every year of repairing this street." Now, will you say, in the face of that, that the town did not have annual expense in repairing Jerolaman Street? A. Yes, they did, but I think this refers to the portion of Jerolaman Street west of Union Avenue. I know that there were frequent washouts up there.

20 Q. Where is Union Avenue? A. Down here (indicating). I know that there were frequent washouts down here, around this curve.

Q. There were washouts around this curve at New Street, were there not? A. Yes, sir.

Q. Why, there is only a small part of your drainage area to drain down to there, is there not? A. Yes, but this drains in both directions; all this land drains to Jerolaman Street (indicating).

30 Q. Well, if that drains to Jerolaman Street, it comes down to Jerolaman Street at Linden Avenue? A. Yes, practically.

Q. And down to Washington Avenue, too, does it not? A. Yes.

Q. So all the washouts that there were up there could be repeated down here, because the same volume of water was coming down here, and more, too, was there not (indicating)? A. Yes.

40 Q. Was not Jerolaman Street repaved or the macadam pavement widened east of Washington

Avenue in 1905 or 1904? A. It was paved up to the gutter line; I don't know just what year.

Q. Well, before that it had been 14 feet in width, had it not? A. Yes.

Q. And they widened the macadam to run right to the gutter, did they not? A. Yes, they did that on most of the hill streets.

Q. And what was that paving of the gutter intended for, do you know. What was the reason?

10

A. For the carrying of the water.

Q. What water? A. Such water as fell on it.

Q. Such water as fell on it? A. Or came to it.

Q. And there was water that came to it besides the water that fell on it, was there not? A. I think I already testified that the water there on Washington Avenue might have turned the corner; I don't know; but the object of paving the gutter on hill streets is to prevent the curb from washing out.

20

Q. Well, if all that it took there was from Washington Avenue to the railroad, it would not be necessary to pave the gutter, would it? A. Well, a sandy soil, it would wash out more readily than clay.

Q. Well, what would fall in that area would be a comparatively small volume of water, would it not? A. Yes, in that area.

30

Q. So that if there were washouts, there was water that came down Jerolaman Street east of Washington Avenue other than the water that fell on it at that point? A. Yes, if there was washouts.

Q. That gutter was laid extra width, was it not? A. You are speaking of east or west of Washington Avenue?

Q. East of Washington Avenue. A. No.

Q. What is the usual width of a gutter? A. 4 feet.

40

Q. I call your attention to this language of the

report of 1905. See if it does not refresh your memory. "The gutter on the south side of Jerolaman Street has been paved on to a width of 6 feet and a distance of about 750 feet, and it seemed to answer all purposes for which it was intended."

A. That is correct, and that refers to the gutter west of Washington Avenue.

10 Q. They had a six foot gutter west of Washington Avenue and running down to Washington Avenue to carry the water that came down there in times of storms, did they not? A. To carry the water at all times.

Q. And it had to be half as wide again as ordinarily, did it not? A. Not necessarily; they could have put a gutter there 4 feet wide to carry that.

20 Q. You do not think they just wasted the money, do you? A. No. If I might explain the reason for that—

Q. Yes. A. The soil west of Washington Avenue is very sandy and gravelly formation, and it did not take much of a rain to wash it out. That is the reason for that gutter being made that width.

By the Court:

30 Q. Can you tell the eastern limit of that 700 feet? A. Yes, the westerly curblineline of Washington Avenue is the easterly limit of that stretch.

By Mr. Skinner:

Q. And there was sandy soil right there on the slope that shows here on your Exhibit D1 as having a grade of six per cent.? A. Yes.

Q. That is where there was sandy soil? A. All gravelly soil up through there.

40 Q. And when there is a washout there that sand and gravel would be washed down to Washington Avenue, would it not? A. I have noticed it down

there. It would have more effect of tearing holes in it than to wash out down there.

By the Court:

Q. How many culverts were there at Washington Avenue and Jerolaman Street? A. Two, one on either side.

Q. On either side of what? A. Washington Avenue. 10

Q. In what direction were they laid? A. Parallel with the curblines of Washington Avenue crossing, Jerolaman Street.

Q. And the length of each culvert was how much? A. 48 feet between the curblines; they occupied all the space between curblines in Jerolaman Street.

Q. A continuous cast-iron surface? A. Yes, sir.

Q. 48 feet long? A. Yes, sir.

Q. On each side of Washington Avenue? A. 020
On the curblines of Washington Avenue.

Q. And crossing Jerolaman Street? A. Yes, sir.

Q. And which culvert was it that the water caught, or did it catch both of them? A. The culvert on the westerly side of Washington Avenue carried the water that came down the curblines of Jerolaman Street west of Washington Avenue; the one on the easterly side took the water on Washington Avenue from a point just south of Ross- 030
more place, and I am not sure whether some of that water turned and went down the west line of Jerolaman Street. Possibly it did, as I said before.

Q. Are you acquainted with the natural water-course that has been referred to, the brook coming out of the spring? A. Very well acquainted with it.

Q. Up west of Washington Avenue? A. Very well acquainted with it. 40

Q. How did the water from that spring finally get across Washington Avenue, or the land on

which Washington Avenue now is? A. It originally flowed through a depression, and when the county built Washington Avenue they provided for that by a culvert. The spring is at the bottom of a deep ravine, which was the bottom of a watershed of 237 acres.

Q. And the water flowed from that spring— A. Easterly to the river.

10 Q. The spring was not so low that it had enough to carry the stream to the east? A. No, there was a good flow.

Q. This culvert which the county put in, as you say, what kind of a culvert was that? A. Stone, masonry.

Q. And how situated with reference to the surface of Washington Avenue? A. Situated so that the water from Washington Avenue would drop
20 down this original watercourse through culverts or catch-basins.

Q. Then this stone construction— Would you call it a culvert? A. Yes.

Q. —was below the surface of Washington Avenue on which travel goes? A. Yes, sir.

Q. How much? A. Well, I should judge 7 or 8 feet, perhaps more, the bottom of it.

30 Q. Not visible from the roadway? A. No, sir; not unless you got off the side of the street and looked down.

Q. And do you recall the course of the water before that culvert was constructed?

Mr. Skinner: When was it, Mr. Shepard? I think it was back of his time.

The Court: Yes.

40 A. This culvert was constructed in about 1870 or 1871, when Washington Avenue was built. That is before my time.

Q. That is back of your time? A. Yes, sir.

Q. Then you are not acquainted with the original brook? A. I am not; no, sir.

Q. And you cannot tell us how much water came down that natural watercourse? A. It took all the water from the watershed of 237 acres.

Q. No, I mean how much water originally came out of the brook itself? A. No, but there was a good flow; I remember that there was a good flow there.

10

Q. Did the spring ever go dry? A. Not to my knowledge.

By Mr. Skinner:

Q. The 237 acres that you speak of was west of Washington Avenue and south of Jerolaman Street? A. It lay both north and south of Jerolaman Street and west of Washington Avenue.

Q. What was there to carry the water from the south of Jerolaman Street north of Jerolaman Street? A. Before Jerolaman Street was improved?

20

Q. Yes, before it was improved. A. Before it was improved, so far as I know, it flowed over the road. Jerolaman Street was simply an old country lane at that time, and the natural contours of the land show that it sloped in both directions to this ravine that went down through Essex Street.

30

Q. Then your idea is that the water south of Jerolaman Street before it was improved ran over into this territory north of Jerolaman Street, and so got to the ravine? A. There is no question about that, except such small amount that might fall in pools and remain there until absorption.

Q. And the reason it fell in pools and stayed in pools was because the ground was flat, was it not? A. It was irregular in places.

40

Q. It was flat, was it not? A. Not in all places, no.

Q. It was almost absolutely level, was it not?

A. No, sir; it was not.

Q. So that the township had to actually fill to get a grade of six inches in a hundred feet? A. Well, that was only one incident that I recollect.

Q. Well, you recollect that one, do you not? A. Yes, sir.

10 Q. Will you tell us, Mr. Shepard, what is the area of a pipe 30 inches in diameter?

Mr. Murray: I object to that.

The Court: I will allow it.

A. I could by computation.

Q. Can you tell me offhand? A. I could in half a minute.

20 JAMES OWEN, sworn in behalf of defendant.

Direct examination by Mr. Murray:

Q. What is your business, Mr. Owen? A. Civil engineer.

Q. How long have you been a civil engineer? A. About fifty-five years.

Q. Were you ever engineer for the county? A. I was, sir.

30 Q. How long were you county engineer? A. Oh, about forty-five years.

Q. What period did that cover? A. From 1868 to within a year, about a year ago, and then there was a gap of about another year.

Q. Do you know where Mr. Jerolaman's property is, at corner of Jerolaman and Cortlandt Streets? A. I do, sir.

Q. You know the brook that flows under the building and through a railroad culvert? A. Yes.

40 Q. Do you know the area of the hole through which the brook flows under the building? A.

There are two different areas; there is the area where it enters from the open point to the covered way.

Mr. Skinner: Do I understand that Mr. Owen is testifying to the area today?

Mr. Murray: Yes.

By Mr. Skinner:

Q. Then may I ask when these measurements were made? A. Last March.

Q. Last March, 1913? A. 1914.

Q. When you say the measurement of the opening do you take into consideration the bottom or bed of the stream as one of the factors? A. That is the fact.

Q. Then the measurement of the opening would depend upon the amount of debris or sand or dirt that there was deposited in the bottom of the stream, would it not? A. Certainly.

Q. And the measurement of the opening in March, 1914, it might be entirely different from the measurement of the opening in 1912, might it not? A. It might.

Mr. Skinner: I object to the testimony, then, as irrelevant, tending to prove the size of the opening in March, 1914, with the factor that he has stated. It is entirely unreliable with regard to the times as to which we claim. Perhaps my objection goes more to the weight of the testimony than its admissibility.

The Court: I am disposed to receive the evidence, subject to other considerations.

By Mr. Murray:

Q. Will you state it? A. I have four different areas here. The entrance to the—

Q. All I ask is just the entrance, the area of the

entrance under the building at this point (indicating). A. I make that about 4 square feet.

Q. What is the area of the culvert under the railroad?

The Court: Four square feet at what point, Mr. Owen?

10 Witness: Where the water leaves the open channel and runs underneath the buildings of Mr. Jerolaman.

Q. And what is the area of the easterly end of the railroad culvert? A. $11\frac{1}{3}$ feet— $11\frac{1}{3}$ square feet.

Q. The railroad culvert area, then, is more than twice as large as the hole under the building? A. Yes, sir.

20 Q. Mr. Owen, were you familiar—when was Washington Avenue laid out, do you know? A. Well, the first survey of Washington Avenue was in 1868; it was laid out in 1869, about, and opened and graded in 1871; it began in 1870—1871 and 1872.

Q. Did you have anything to do with the making of the survey or superintending the work of laying out Washington Avenue? A. Yes, sir; I was engineer of the work.

30 Q. Mr. Owen, I show you a map (shown to witness). Will you tell us what that is? A. This is the profile of Washington Avenue as adopted by the County.

By the Court:

Q. Adopted when? A. Well, it was adopted about 1870, Judge.

By Mr. Murray:

40 Q. By whom was that map made? A. The original map was made by me; this was copied in my office by one of my assistants.

Q. Who has possession of this map? A. It is filed in the county engineer's office.

Q. A county record, is it? A. A county record.

Q. Now, Mr. Owen, you will notice on this map that there is a red line and also an irregular black line. What do those two lines indicate? A. The red line indicates the grade of the avenue when constructed; the black line was the original surface of the ground before construction.

10

Mr. Murray: I offer the map in evidence.

Q. Was Washington Avenue in fact constructed according to the grade as shown on the map? A. It was, sir.

Q. Is that the present grade of Washington Avenue? A. That is the present grade of Washington Avenue.

20

Mr. Murray: I offer it.

By Mr. Skinner:

Q. According to survey made by you recently? A. No, sir.

Q. How do you know what the present grade of Washington Avenue is? A. Because it has not been changed.

Q. How do you know that? A. By my own observation and knowledge.

30

Q. You have not been county engineer for some time, have you? A. Oh, for about a year.

Q. Do you mean to tell us that you can tell the condition of any one of the county roads there one year after you have left office? A. Yes, sir; surely.

Q. You have travelled over all of them? A. I have travelled over this.

40

Q. And you could see that the grade had not been changed? A. Yes, sir.

Q. Was that your reason for saying so? A. Yes, sir.

Q. Don't you know that you cannot travel over a road and by the eye tell whether the grade has been changed, if the change was small? You would not say that, would you? A. Well, it depends on what your definition of the word "small" is.

10

Q. Well, what you would call small. You would not be able to detect what you would call a small change by just travelling over the road? A. An inch change, no, I wouldn't be able to get, I think; but, to explain matters, Judge, the trolley track on both sides of the avenue is there, and, as far as my observation is concerned, the trolley track has not been changed.

20

Q. Well, as a matter of fact, you do not know anything about it, do you? A. I know all about it, sir. I know it has not been changed, because I have been there continuously, even though I am not county engineer.

Q. And you cannot say that about any other part of Washington Avenue? A. No, sir.

Q. Well, why can you say that about this part? A. Because my attention has been called to it recently.

30

Q. How recently? A. During the last year.

Q. How recently? A. I was there Friday.

Q. How recently has your attention been called to it? A. Since last March, 1914.

Q. And you know it has not been changed since March, 1914? A. Yes, and back of that I was officially connected with it, with a gap of a month.

40

Q. And did you make that map yourself? A. Not this one; no, sir.

Q. Well, the original? A. The original I made.

Q. You say it is a county record. What do you

mean by that? A. Filed in the office as a recorded map.

Q. Recorded? A. Well, not recorded, but it is a map of record, if you wish to be particular.

Q. I do wish to be and I want you to be. Is that a recorded map or not? A. Well, I say it is a map on record.

Q. It is one of the maps that you made as county engineer? A. Yes, sir. 10

Q. Do you know any provision of law that requires them to be recorded? A. The law says that we are to keep the office open for the purpose of keeping the books and maps and data.

Q. You say this is a copy of the map made under your direction? A. This was made under my direction.

Q. You know that there are maps in the County Clerk's office and the Register's office? A. Yes, sir. 20

Q. And you know that they are recorded maps? A. Yes, mostly.

Q. Well, you know that there are recorded maps there? A. Yes. Well, I didn't know you were going to be so particular as that. I will take that back, then, and say it is a map on record.

Q. A map on record? A. Yes, sir. 30

By the Court:

Q. Are you able to say, Mr. Owen, whether this was the grade that existed on the 12th and 13th of March, 1912? A. Yes, sir.

Q. And in November, 1911? A. Yes, sir.

Mr. Murray: I offer the map in evidence.

Mr. Skinner: I do not object to it on the ground of its being a copy, for Mr. Owen says he knows it is a correct copy. That is enough for me. 40

The Court: Is there any objection to its being marked, Mr. Owen?

Witness: Oh, no, it is not a county—

The Court: It seems to have an official character. I will admit it.

Map marked Exhibit D4.

By Mr. Skinner:

10 Q. Mr. Owen, when his Honor asked you whether this map could be marked, you replied, "No, it is not a county"—and then stopped. What were you about to say? A. I don't remember. My attention was shut off a moment afterwards. I was probably thinking about your qualification of a recorded map and a map of record, and I probably meant to say that this was not a recorded map; I meant to say it was a matter of record.

20 By Mr. Murray:

Q. Mr. Owen, do you know whether the grade of Jerolaman Street was ever—do you know when the grade of Jerolaman Street was established, about? A. 1888.

Q. Were you familiar with the contour of Jerolaman Street before it was graded? A. I was.

30 Q. I refer you to the map called the Jerolaman Street profile map, and marked Exhibit D1, and ask you whether that correctly represents the original contour of Jerolaman Street, as you remember it? A. As I remember it; yes, sir.

40 Q. Now, Mr. Owen, I call your attention to the fact that there seems to be a rise in the original contour map between Linden Avenue and Washington Avenue; that is, at the point 350 or 400 feet east of Linden Avenue it is about three feet higher than the point to the west of Linden Avenue; is that right? A. That is correct.

Q. Was that the condition of the land prior to the change of grade? A. It was.

Q. How long had it been that way, Mr. Owen, so far as you know? A. That was its original condition; I can't say how long it existed. Jerolaman Street was originally an old lane, and the condition existed as long as Jerolaman Street existed prior to the new grading.

10

Q. What can you say as to the character of the land at Linden Avenue and immediately to the north of Jerolaman Street? A. Prior to that regrading of Jerolaman Street all the water coming from the west and all the water coming from the south ran off Jerolaman Street and onto the land north of Jerolaman Street to the ravine.

Q. Mr. Owen, at what point did the water run off at Jerolaman Street? A. At the low point, wherever it was.

20

Q. Will you indicate to the jury where that point was? A. (indicating on Exhibit D1): About half-way between Linden Avenue and Hornblower Avenue.

Mr. Skinner: Indicating on the map?

Witness: Indicating on the map.

Q. Will you indicate to the jury where the ravine was into which this water flowed? A. About where the "w" is in the name "Hornblower Avenue" (indicating).

30

By the Court:

Q. Where is the low point on Jerolaman Street?

A. About there (indicating)—no.

Q. You said about half-way between Hornblower Avenue and Linden Avenue? A. No. That is not the low point on Jerolaman Street; the low point of Jerolaman Street—the ravine was about half-way between Jerolaman Street and Division Street (indicating).

40

Q. The low point is down here north of Jerolaman Street. Now, where was the low point on Jerolaman Street, the point where the water left it? A. That would be half-way between Linden Avenue and Hornblower Avenue (indicating).

Q. That is what you said before? A. Yes, sir.

By Mr. Murray:

10 Q. Will you indicate to the jury on the map marked "Exhibit D3" the course of the water which came down Jerolaman Street? A. When?

Q. Prior to the grading of Jerolaman Street? A. (Indicating.) The water came down Jerolaman Street to a point half-way between here and Hornblower Avenue, and then flowed to the north toward the ravine, and then down the ravine as it was opened then to a culvert on Washington Avenue, and down further easterly to the culvert under the
20 railroad, and onto Mr. Jerolaman's land, and then down Jerolaman Street to the river in an open stream.

Q. Where did the water flow which fell on Jerolaman Street for a distance of 300 feet east of Linden Avenue? A. The territory for 300 feet?

Q. Yes, for a territory of 300 feet. A. Originally that flowed to the west.

30 Q. The water came down and flowed both ways into this one spot; is that correct? A. That is right.

Q. Speaking now, Mr. Owen, of the water that flowed on the east side of the rise which is shown to be between Linden and Washington Avenues, where did that water flow prior to the change in the grade? A. That ran down in the west gutter of Washington Avenue, then northerly along the
40 west gutter of Washington Avenue to the culvert.

By the Court:

Q. What culvert? A. The culvert over this brook (indicating).

By Mr. Murray:

Q. Now, Mr. Owen, will you point to the jury and show to the jury on the Washington Avenue profile map, marked Exhibit D3, the location of Jerolaman's brook? A. You can see it where the large mass of blue coloring is; at the bottom of that mass was the brook. That line above shows the grade of Washington Avenue (indicating).

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Q. Washington Avenue was laid out by whom? A. By the county.

Q. A county road? A. Yes, sir.

Q. Did the town have anything to do with grading it? A. Nothing at all.

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Q. There was a continuous slope of Washington Avenue toward the north from a point about 700 feet south of Jerolaman Street; is that right? A. It is.

Q. In other words, from there down to there (indicating)? A. Yes, sir.

Q. And there is a rise to the north from Jerolaman's brook a distance of how far, can you tell? A. About 550 feet.

Q. And then from that point there is another rise, is there not, for how far? A. No, there is a fall then to the north; there is a fall for about 200 feet—250 feet.

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Q. And from that point still running north there is another rise, is there not? A. A rise there for about fifteen or sixteen hundred feet.

Q. Now, Mr. Owen, referring to the water which fell on Jerolaman Street prior to the change in grade east of the high point between Linden Avenue and Washington Avenue, where did that water go? You said it went to Washington Avenue, did

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you not? You testified that it flowed down Jerolaman Street to Washington Avenue? A. When?

Q. Prior to the change of grade of Jerolaman Street? A. No, sir; I said it flowed—it flowed to the low point (indicating).

Q. I am speaking of the water that fell east—
A. That went on west of Washington Avenue (indicating).

10 Q. Referring to the profile map, where did the water go after it reached that point? A. It ran continuously north to the culvert.

Q. And that was owing to what? A. Owing to the grade of Washington Avenue and the construction of Washington Avenue at that time. Of course, when Washington Avenue was first opened Jerolaman Street was nothing but a lane, and there was
20 no outlet on the other side; it wasn't opened then on the other side.

By the Court:

Q. What do you mean by "the other side?" A. On the east side. And the water consequently was all taken on Washington Avenue and carried to the culvert.

By Mr. Murray:

30 Q. Mr. Owen, do you know whether Jerolaman Street was in fact changed as shown on the Jerolaman Street profile map? A. Yes, sir; I fixed the grades for that myself.

Q. You did that yourself? A. Yes, sir.

Q. How did you come to do that? A. I was consulting engineer for the Township of Belleville when they were macadamizing their roads, and I had charge of the pavement, and also laid out the
40 grades.

Q. And you worked in connection with Mr. Francisco then, did you not? A. Yes, I did.

Q. You were consulting engineer? A. Yes.

Q. After the change in grade of Jerolaman Street where did the water flow which reached Jerolaman Street west of Hornblower Avenue? A. It ran down Jerolaman Street to Washington Avenue.

Q. And from thence where? A. Into the west gutter of Washington Avenue, north along the west gutter.

Q. North along the west gutter to the brook? A. Yes, sir.

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Q. And what caused it to flow along there? A. Washington Avenue was so constructed that it should take it.

Q. Was there a crown, or rise, or was the center higher than the sides of Washington Avenue as it was built? A. (indicating): The center that is present here, referring to D1, shows the grade—it falls down to the west gutter of Washington Avenue, and then there is a rise in the crown of the avenue, and then falls across to the east gutter, and then the grade of Washington Avenue—of Jerolaman Street, I should say, east of Washington Avenue, was run out to meet the curb grade, or sidewalk grade, of Washington Avenue, so as to obstruct as much as possible, that any water that would run over on the west side of Washington Avenue would run away in the east gutter and not run in Jerolaman Street.

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Q. What you have said relates to a period after the change of grade of Jerolaman Street? A. No, at that same time.

By the Court:

Q. When you say "to the curb line," you mean to the top of the curb? A. The curb height; yes, sir. Very often we run the grade out in intersecting streets to meet the level of the street. In this case we didn't do that. Washington Avenue is a

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wide avenue, and running the grade across would make it act as a dam to the water running from the avenue.

By Mr. Murray:

10 Q. Then the effect of your testimony as to the changing of the grade of Jerolaman Street was that the water, instead of coming down Jerolaman Street and flowing through midway between Hornblower Avenue and Linden Avenue toward the north and down to Essex Street, flowed down Washington Avenue and along Washington Avenue; is that correct?

Objected to as leading.

The Court: The objection is sustained.
Ask the witness how it ran.

20 Q. Indicate on Exhibit D3.

Mr. Skinner: Has he not done that?

Witness: I have done that.

30 Q. Indicate on Exhibit D3 the course of the water which ran down Jerolaman Street before the grade was changed and after the grade was changed. A. (indicating): The water before the grade was changed accumulated and concentrated at the low point on the street between Hornblower and Linden Avenue, and all ran north on private property. After the grade was changed all that water that came down Jerolaman Street came down to the west gutter of Washington Avenue, and then arrived at the same point in the culvert and crossed Washington Avenue, running north.

By the Court:

40 Q. Some water came down the north side and some down the south side of Jerolaman Street, I suppose? A. Yes, sir, both sides.

Q. The north gutter and south gutter? A. Yes, sir.

Q. Where did those streams respectively go?

A. You mean prior to the grading or subsequent?

Q. Subsequent. A. They both ran down into the west gutter of Washington Avenue.

Q. And through what apertures did they reach the culvert? A. Well, the water in the south gutter of Jerolaman Street ran down to the west gutter of Washington Avenue, and then down to the iron culvert, to the north gutter of Washington Avenue, and then the water from the north gutter of Washington Avenue wet it, and they flowed together down to the culvert below northerly.

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Q. Then both streams were caught on the west side? A. On the west side.

Q. Of Washington Avenue? A. Of Washington Avenue.

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Q. At the dates that were mentioned, 1911 and 1912, what was the degree of the grade at that point of Washington Avenue going north, say, from the south side of Jerolaman Street? A. About 2.7 feet in a hundred. Excuse me a moment. That is wrong. 1.7 feet in a hundred—1 foot 9 inches in a hundred.

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By Mr. Murray:

Q. Now, referring, Mr. Owen, again to the Washington Avenue profile map, can you state what became of the water which flowed southerly along Washington Avenue to the depression just south of the point marked "Lane"?

The Court: On what map?

Mr. Murray: On the Washington Avenue profile map, Exhibit D3. I am referring to the first depressions north of Jerolaman's brook.

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10 A. The water ran in the two gutters of Washington Avenue to a pipe culvert which ran across Washington Avenue, and then ran off Washington Avenue into private property, and ran down to the railroad, and then ran in a ditch along the railroad to a ditch near the station, and the railroad company laid a pipe taking the water into the main stream, the main Jerolaman stream, at the station.

Q. Who constructed the culvert at Washington Avenue? A. The county did that.

Q. The county did that? A. The county constructed both of them.

By the Court:

Q. Near what place is that? A. Near Malone Avenue.

20 Q. And that is how far from Jerolaman Street?

A. Oh, about 900 feet.

By Mr. Murray:

Q. The water which reaches Washington, then, for a distance of about 2200 feet north of Jerolaman's brook reaches Mr. Jerolaman's brook above the railroad culvert; is that correct?

Objected to as leading.

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Cross examination by Mr. Skinner:

Q. Mr. Owen, you say that you have been an engineer for fifty-five years? A. About that; yes, sir.

Q. You must have begun in infancy, did you not? A. No, I was about fifteen when I began.

Q. It is hard to believe. A. I was too small, almost, to carry an instrument.

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Q. Are you as familiar with all parts of Essex County as you are with this particular part? A. I guess so.

Q. And know not only what it is today, but what it was thirty and forty years ago? A. I guess so. My memory may have failed me some; I can't tell.

Q. And even the knowledge of the old inhabitants as to the course of water is not as good as yours as to any street in Essex County? A. On the course of water, because my business—I was building bridges all over the county—gave me a very intimate knowledge of watercourses.

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Q. And you remember all that you observed? A. No, sir.

Q. Well, you have refreshed your memory on these points lately, have you not? A. On the question of these—

Q. Yes. A. No, sir.

Q. You have been up there all over that ground, have you not? A. No.

Q. You are in Mr. Jerolaman's employ, are you not? A. Mr. Jerolanian's employ?

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Q. Oh, that was a great mistake. You are in the employ of the Town of Belleville, are you not? A. I imagine so.

Q. For the purpose of testifying in this suit? A. I imagine so.

Q. Now, when the grade of Jerolaman Street was changed, as you say, the crown of it east of Washington Avenue was brought up so as to act as a dam? A. Well, I don't say that it was brought up; I say that the grade was established so that it would act as a dam, in case it might wash out.

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Q. Well, did you not say it was brought up to act as a dam? A. Oh, yes.

Q. And something was done to the crown by raising it, was there not? A. Well, this profile will show that.

Q. Well, was it by raising it? A. This red line shows the grade established; the black line shows that the grade—the old grade and the grade as es-

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tablished were coincident. Instead of cutting the sidewalk down, as we usually do in those cases, make the roadway continuous, we ran up to the sidewalk level (indicating).

Q. That was at Washington Avenue? A. That was at Washington Avenue.

10 Q. You say that the grade was brought up to act as a dam. Where does the grade of Jerolaman Street act as a dam on the west side of Jerolaman Street? A. I didn't say on the west side, I said on the east.

Q. Now, you have just been pointing to the west side. A. Oh, no.

Q. Well, the east side, then.

The Court: The east side of Washington Avenue?

20 Mr. Skinner: Yes.

Q. The grade of Jerolaman Street was brought up there to act as a dam and to obstruct the flow of water down Jerolaman Street, was it not? A. Yes, sir.

Q. That was the purpose of it? A. That was the intention.

30 Q. What water was there that it was to obstruct? A. (Indicating.) To obviate any occasional wash that might happen from a freshet.

Q. It was within your knowledge that at times of freshet water did come down there, was it not?

A. No, but from the fact in levelling the grade of Jerolaman Street and bringing so much water down Jerolaman Street extra precautions were taken to keep it from running across, that is all; that was the idea.

40 Q. Then the purpose of it was to prevent the water that was being thrown down Jerolaman Street by your change of grade on Jerolaman Street west of Washington Avenue—to prevent that

running down across Washington Avenue and down the east side? A. Well, it was to prevent something occurring, not anything that had happened.

Q. To prevent it? A. For the future; yes, sir.

Q. Now, the water that had come down Jerolaman Street before that grading, you say, had gone off somewhere to the north between Linden and Hornblower Avenues? A. Yes, it ran north.

Q. It ran to this watercourse? A. Yes, sir. 10

Q. And was there a well defined path that it followed? A. Why, I can't say about that from memory now. The evidence shows that at one time there was a pipe there—

Q. No, I am speaking of— A. Well, I can't remember that now.

Q. You cannot remember what path it travelled or whether there was a watercourse there? A. No. 20

Q. You do not remember what the course of these streets was east of Hornblower Avenue and north of Jerolaman Street? A. There were no streets there then.

Q. None there then at all? A. No, not to my knowledge.

Q. Now, you speak of a pipe. Do you recall anything about a pipe? A. I can't recall that pipe. 30

Q. But you have heard it mentioned in the testimony? A. I have heard it mentioned in the testimony, and it was natural that there should be a pipe there.

Q. Natural to take the water off? A. To take the water off of the south side of Jerolaman Street.

Q. Now, when you made this change you anticipated a very large increase in the volume of water that would come down Jerolaman Street 40

to Washington Avenue, did you not? A. Certainly.

Q. And you expected the culverts at Washington Avenue and Jerolaman Street, plus this raising of the crown of Jerolaman Street, would be sufficient to divert that water all north? A. That is right; that was the intention.

10 Q. Jerolaman Street was old Barrack Lane, was it not? A. Yes, sir.

Q. And it ran east of Washington Avenue as well as west of Washington Avenue? A. Not in a direct line; there was a break there of about 200 feet.

By the Court:

Q. What was the name? A. Barrack Lane.

20 By Mr. Skinner:

Q. Well, you got that from me just now, did you not? A. Yes, but I have heard it before.

Q. Well, did it cross Washington Avenue? A. Not directly, no; there was a jog of about 200 feet there.

30 Q. Now, the part of it that was west of Washington Avenue, was that north or south of the part that was east of Washington Avenue? A. Well, if I remember rightly, there was a jog—the part east of Washington Avenue was south of the present line, if I remember rightly.

Q. The part east was south of the present line? A. Yes, sir; south of the present line; that is what I remember.

40 Q. That is not just what I asked you. I asked whether the old east portion was north or south of the old west portion? A. That is what I say: The two parts are continuous now.

Q. Perhaps I would understand you if you add to that that the present line of the part west is

the same as it was; is that right? A. That is about right, yes.

Q. So that you think that the old part of Barrack Lane on the east of Washington Avenue used to be south of the present line? A. That is the way my memory serves me. I haven't looked at the map in several years. Consequently, that is one of the things I don't remember exactly. Washington Street was there before the County built Washington Avenue. Washington Street ran from John, I think, up to Jerolaman Street and stopped there.

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Q. Well, within the present lines of Washington Avenue? A. They just widened the street; it is a 66-foot street.

By the Court:

Q. Which branch of Barrack Lane did Washington Street stop at? A. Stopped at the western end of it, if I remember right.

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Q. At the one furthest north? A. The one furthest north. I am a little misty about that question. My recollection is that it was to the south. Mr. Jerolaman may know better, but my memory is that it was south; it was not a continuous street.

By Mr. Skinner:

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Q. You said that the area of the entrance under Mr. Jerolaman's building where this water-course ran was 4 square feet? A. About that, yes.

Q. What were its dimensions? A. The length on the skew was 12 feet; the length on the square was 5 feet. We took three or four distances, the depth from the under side of the sill to the bed of the brook, and the average of the four was ten inches.

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Q. Ten inches, then, in depth ? A. The average of the four.

10 Q. And when you spoke of the length, did you not mean the width of it? A. The length, or the width, of it, yes. You must remember that the brook runs under the building at a sharp angle, and the face of the opening, as you see, under the building would not give you the capacity of the channel, because it is on a skew.

Q. The point where it ran under the building, you mean, there (indicating)? A. Yes.

Q. Then do you mean that the width of that opening there, indicating the place where the brook goes into the building, was what (indicating)? A. It was 12 feet on the skew and 5 feet on the square.

Q. That is, 5 feet measured at right angles? A. Yes.

20 Q. And 12 feet measured down along that pink line (indicating)? A. That is right.

Q. Now, if that was ten inches deeper it would have been twice as large, would it not? A. Yes, sir.

Q. In other words, it was wide, but shallow? A. It was wide, but shallow, yes, sir.

30 Q. And if the depth of the stream was reduced by the accumulation of rubbish and sand and dirt, and all that, coming down in floods, it would have a very marked effect on the size of the opening, would it not? A. Oh, yes. There wasn't any there at that time when I was there.

Q. In other words, a difference of two inches in depth would make a great difference in the capacity of the opening? A. Oh, yes, so many square inches.

40 Q. How would that measurement of 4 square feet compare with the measurement of a pipe 30 inches in diameter? A. The area of the pipe is 4.9 square feet.

By the Court:

Q. What is that? A. The area of a 30-inch pipe is 4.9 square feet.

Defendant Rests.

At 1 o'clock P. M., the Court takes a recess of one hour.

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After Recess.

THEODORE JEROLAMAN, plaintiff, recalled in his own behalf in rebuttal.

Direct examination by Mr. Skinner:

Q. Mr. Jerolaman, after this storm of 1912, or this flood of 1912, did you see any member of the Township Committee at or about the scene of the flood? A. Mr. Frank—

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Objected to as incompetent, immaterial and irrevelant.

The Court: The question is not what he said, but whether he saw a member of the Township Committee there. Proceed.

The Witness: Mr. Frank Cadiz.

Q. How soon after the flood? A. Well, some time, I think, in the forenoon.

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Q. The forenoon of what date? A. The day after the flood.

Q. And following that were there any workmen there? A. There was.

Q. At what point did you see Mr. Cadiz, at what part?

Mr. Murray: I object to that, if your Honor please, on the ground that what took place after the flood cannot have any possible bearing on the causes of the flood.

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The Court: I am not prepared to say that. Defendant's counsel object to this ruling of the Court.

Objection noted as ground of appeal.

Q. At what point was Mr. Cadiz? A. Near that storm drain, that branch, or Y, put in by the township.

10 Q. At that time what was the condition of the mouth of that drain as to obstruction or stoppage?

Objected to on the grounds above stated, and on the further ground that it is not rebuttal.

After argument the question is withdrawn.

20 Q. Have you seen Mr. Cadiz in the court room during the course of this trial? A. I have, two days.

Q. What was the diameter of the mouth of that drain, the pipe that you have said the town put in?

Mr. Murray: I object to this on the same ground, if the Court please, because it is not proper rebuttal.

The Court: I will allow it.

30 Defendant's counsel object to this ruling of the Court.

Objection noted as ground of appeal.

A. Thirty inches.

40 Q. And what was the size of the opening of the watercourse, or bed of the stream, at the point where it first went under your buildings on the west side? I mean what were the dimensions of the opening prior to the flood of 1912?

Mr. Murray: I object on the same grounds that I objected before.

The Court: I will allow it.

Defendant's counsel object to this ruling of the Court.

Objection noted as ground of appeal.

A. At the west side, the entrance to my property?

Q. Yes. I will show you on this diagram. Referring to Exhibit D2, you see this point here where the stream is indicated in blue as it is running under your building (indicating); do you see that? A. Yes, sir.

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Q. Now, at that point what was the size of the opening just before the flood of 1912? A. It was 2½ feet deep all through, so that point—this was 12 feet.

Q. 12 feet which way? A. Lengthways with my building.

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Q. And 2½ feet deep? A. 2½ feet deep.

Q. And what were the dimensions of that same drain at the point where it came out from under your building, on the east end of the building, near Cortlandt Street?

Objected to on the same ground; objection overruled.

Defendant's counsel object to this ruling of the Court

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Objection noted as ground of appeal.

Q. Do you see where I mean, right there (indicating)? A. It gradually grew deeper until it was 3½ feet deep and 5½ feet wide.

Q. At the point where it came out from under the building were those dimensions? A. Yes.

Q. What was the smallest cubic contents of that drain at any point under your building? A. 5 feet and a little over wide and 2½ deep.

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Cross examination by Mr Murray :

Q. When did you measure this opening, Mr. Jerolaman? A. When?

Q. When did you measure the openings that you have just testified to? A. When I built the drain, the walls.

10 Q. And that was how long ago? A. Oh, it must have been twelve or fifteen years ago.

Q. Fifteen years ago? A. Twelve or fifteen.

Plaintiff Rests.

Mr. Murray: If your Honor please, I would like at this time to ask for the direction of a verdict in favor of the defendant on both counts.

20 The first count, you will recollect, charges the town with an unlawful diversion of water, by means of which the volume of the water entering the stream was increased, which was the cause of the damage which occurred in November, 1911.

The second count charges the same cause with reference to the flood of March, 1912, with the addition that he claims that, due to the negligent construction of the drain at Cortlandt Street, the stream became blocked at that point.

30 Just to review briefly the evidence relating to the first count. There was a great deal of testimony, or considerable testimony, concerning the situation south of Jerolaman Street. The plaintiff, however, finally centered his case, as Judge Skinner, as I understood him, stated, on the fact that the town had diverted northerly into Washington Avenue the water which flowed down Jerolaman Street. In support of that contention he produced
40 as witnesses Mrs Kay, Mr. Kingsland and himself, all of whom testified that at some time—they could not fix the date within ten or fifteen years—the water flowed across Washington Avenue down Jer-

olaman Street, that part of Jerolaman Street east of Washington Avenue, and that at some time, the date of which they could not fix, the town, by means of culverts, diverted that stream northerly into Washington Avenue. The defendant, on the other hand, by its witnesses, Mr. Owen Mr. Shepard and Mr. Mellis and Mr. McCoy, testified that the water which came down Jerolaman Street overflowed Washington Avenue at very few intervals—some of them that it did not overflow at all. I think it was Mr. Owen who said that during very heavy freshets it might overflow the crown of Washington Avenue and go down Jerolaman Street.

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The defendant produced the map known as the Jerolaman Street profile, which map was made at the time of the change in grade, and it shows precisely in feet and inches the exact location, the exact contour of Jerolaman Street as it existed in 1889, and prior to 1889. The accuracy of that map has not been disputed or discredited in the least. The plaintiff has not attempted to discredit it. The map is fortified further by the testimony of Mr. Owen to the effect that the water collected in the depression of Jerolaman Street at Linden Avenue flowed northerly midway between Hornblower Avenue and Linden Avenue, and from thence easterly into Essex Street. Mr. Owen, I might say, worked there, assisted in the laying out of Jerolaman Street, acted as consulting engineer to Mr. Francisco, and he knows, and has stated as of his own personal knowledge that the water so flowed. Mr. Shepard testified, not that he had ever actually seen the water flow down at that point, but testified that the lay of the land was such that it would flow there. The testimony of neither of those gentlemen has been contradicted in the least. There has been no one called by the plaintiff to

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controvert their testimony; their testimony stands uncontradicted.

10 Now, let us look at the effect of that testimony. That testimony simply shows that before the change of grade of Jerolaman Street in 1888 the water flowed down Jerolaman Street until it came to a point midway between Hornblower Avenue and Linden Avenue, and from thence northerly to the ravine, and from thence easterly into the brook.

20 Now, for the purpose of argument, assume that the defendant after the change of grade in 1888 did cause the water to run down Jerolaman Street to Washington Avenue, and did divert it northerly to Washington Avenue. That did not increase the flow of the water into the brook in the least, because the effect of it was to bring it northerly into the brook by way of Washington Avenue instead of bringing it northerly into the brook by way of Linden Avenue. The same water and in the same quantity got there before and after the changes made by the town. That testimony, as I say, is undisputed; there is no controversion of it. The map shows that at Linden Avenue, or between Linden and Hornblower Avenues, there was a depression of 3 feet—2.97 feet, to be strict—in the natural grade of Jerolaman Street.

30 Now, water which flowed west of Jerolaman Street would come to this depression, fill up and run off to the side. It could not run anywhere else. Water will always seek its lowest level and follow the line of least resistance, which in this case was northerly to the ravine, which all the testimony shows is the natural settling place of all this water in this entire drainage area. As I said in my opening, it is the bottom of the funnel at that point.

40 Now, the gist of the plaintiff's case in the first

count is an increase of flow. We claim it is no increase in flow; it is a change of the route.

Now, as to the second count. The same thing applies to so much of the second count as relates to the increase of flow, the same arguments and the same testimony. The additional feature of the second count—that is, the March, 1912, flood—is the alleged damming up of the culvert at Cortlandt Street.

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Before I go into that I wish to call your Honor's attention to the fact that the testimony is that the water which reached Washington Avenue for a point 2200 feet north of Jerolaman's brook flowed south along Washington Avenue, so that it reached Jerolaman's brook. Part of it reached it at the culvert at Washington Avenue; part of it flowed through the culvert north of Jerolaman's brook about Malone Avenue through a county culvert, not a town culvert, above, between Washington Avenue and the railroad, and from thence alongside of the railroad into a pipe which the Erie Railroad built, and to conduct that water along that track into Mr. Jerolaman's brook, which is above. That shows the immense quantity of water which came, without fault of the town or without any action on the part of the town, into this brook.

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Now, as to the flood. The only testimony that the plaintiff introduced on this point is that he was there at this property about midnight of March 12th or 13th, on whatever night the flood occurred; that he went into his gate, into his office and into his yard; that when half-way back into his yard he was caught by a flood of water coming from the west waist-deep, and with a current strong enough, as he expressed it, almost to sweep him off his feet; that he turned around, went back out of the yard into Cortlandt Street

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and went home; that the next morning he saw that there were some stones, some small sticks and some brush in the mouth of the Cortlandt Street culvert. Mr. Jerolaman does not say that he saw any other evidences of a dam in Cortlandt Street. He does not say that he looked to see whether there was a dam or not, and surely, on the plaintiff's own testimony, in such an important feature as that, if there was a dam there the plaintiff would have seen it. If he was so much interested as to walk back in the ice-cold water in March, wade in it up to his waist, he certainly would have been interested enough to look at the culvert and see if there was a dam there.

Now, on the other hand, the proof which the defendant introduced is this. The four police officers testified that they were there that night; that it was about midnight. They testified that they looked at the culvert, and they saw that it was running clear. Some of them say there was six inches to spare between the top of the water and the top of the culvert; some say there was a foot. The testimony on that, of course, naturally varies. The point is that they looked at it, and one of them had a searchlight, and another looked at it with him, with the searchlight, and they saw that distinctly. They looked at it and turned their searchlight on it. That evidence is not controverted. They say at the same time—and this is the important point—that at the very same time that the water was running through clear in the culvert the water was coming out of Mr. Jerolaman's gate in a flood at the back of his yard. The physical facts show that to be the case, because Mr. Mutch testified that the coal was washed from the back of his yard against the railroad to the front of his yard—all the coal, if I remember right, was washed down to the front of his yard

—and that the dirt was banked up on the east-erly side, or the Cortlandt Street side, of Mr. Jerolaman's yard to the depth of $2\frac{1}{2}$ or 3 feet. The policeman further testified that he was up on the railroad track on the back of Mr. Jerolaman's yard, and saw the water pouring down from the railroad track into Mr. Jerolaman's yard right in the back of his coal-bins.

The testimony of the surveyor, Mr. Owen, shows that the hole through which the water passed under the building is half of the dimensions of the culvert under the railroad. Mr. Jerolaman denies this, and gives measurements, which were made, if I remember right, some fifteen years ago. That shows it was $2\frac{1}{2}$ feet deep. As Judge Skinner said when Mr. Owen testified, his objection was that a hole will fill up. If Mr. Owen's testimony was not good, what good is Mr. Jerolaman's testimony taken from facts fifteen years ago?

Objected to as summing up before the jury.

Mr. Murray: I have no desire to sum up, except to say that the evidence is so overwhelming in weight as to entitle us to have a direction of a verdict. I have got to sum up somewhat to show the weight of the evidence. However, I will be through in a moment.

The main point is that these facts show that the water was blocked at Mr. Jerolaman's barn, where the brook passed under it, and not at the dam.

I ask that a verdict for the defendant be directed on both counts.

The Court: This, I think, is evidently a case for the jury. The fact part of the case is dependent on the amount of credit to be given to witnesses who do not agree.

Defendant's counsel object to this ruling of the Court.

Objection noted as ground of appeal.

Mr. DeGraw sums up for defendant.

Mr. Skinner sums up for plaintiff.

The Court charges the jury as follows:

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ADAMS, J.:

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Gentlemen of the Jury: This case calls for the application of well settled law to the facts as you shall find them to have been. I do not understand that counsel differ as to the rules of law. I will read a convenient statement: "No responsibility attaches for damage done by the diversion of surface water where the diversion is merely incidental to and occasioned by the making or alteration of street grades; but where a municipality puts in execution a scheme of improvement by which surface water collected from a large area is prevented from following the course of the streets, and is carried by artificial means from where it would be otherwise discharged and made to flow onto the land of one person, in ease of the land of others, then an actionable wrong is committed." The distinction is, as you see, between the changes of the direction of flowing waters that are necessarily involved in the ordinary course of street improvements and the accumulating and diverting of waters by artificial means for the purpose of changing the direction and depositing or discharging them upon lands which they would not otherwise have reached. This is the case of an individual, but it is a convenient and pithy statement of the point. The Court says that a landowner has no right, for example, to build a house on his land and collect the rainfall in a gutter on it and discharge it by spout on his

neighbor's land. At the same time, he might cultivate his own land; he might plow it up and sow it, and in that way, if the land sloped toward his neighbor, the direction of the water that fell from the heavens might be affected, and the result might be that the neighbor would get rather more of it in that process than he otherwise would. For that no action would lie.

Taking that as a very general statement of the law, the Court and jury have before them occurrences on two different dates: on November 11, 1911, and March 12 and 13, 1912. The occurrence of March 12th and 13th, I suppose, is the same storm, both sides of midnight. On each of those two occasions there was a storm, an unusually heavy waterfall. The first one, the earlier date, is complained of in that portion of the complaint, which is the plaintiff's statement of his cause of action, which is called the first count. In that count he complains merely of the water being thrown on him by diversion in this way. The second count is somewhat different. That relates to the later date, and it contains another element, which requires some consideration, and it has a double aspect. It says, in the first place, that on March 12th and 13th the stream was so much increased in volume and force by reason of the artificial drainage system, and so much impeded in its flow by certain bars which the town had built in a covered concrete drain and storm sewer that the water was dammed up. In the first place, the water came down in abundance, due to the acts of the town, and in the second place it was retained by a dam, or by an obstruction, a clogging, of an outlet provided by the town; so that one part of that count is a complaint for the water's coming and the other is a complaint for its not going as freely as it otherwise would.

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I am not going into the facts of this case, because I want to give you the case as soon as I can. Taking the first date, the date of November 11, 1911, the question as to this earlier flood is this: whether some part of this injury to the plaintiff was occasioned by water which the Town of Belleville artificially diverted to the land of the plaintiff, and which but for such artificial diversion would not have reached the plaintiff's land. The evidence is that there was a watercourse coming from a spring, so that all the water that reached the plaintiff's land was not water that was diverted; part of it was there by nature. But the question is whether some part of the injury to the plaintiff was occasioned by water which was thus artificially diverted. If you say yes to that question, that conclusion points just to that extent to an injury for which the plaintiff may recover. If you say no—that is, if you say that on that date, November 11, 1911, there was no such superabundance of water occasioned by artificial diversion—then as to that whole occurrence on November 11, 1911, the plaintiff has not made out his case.

Now, as to the transaction of March 12th and 13th. There you ask yourselves the same question, because, as I said before, this matter has a double aspect, and the question as to March 12th and 13th is whether some part of the injury to the plaintiff was occasioned by water which was artificially diverted to the plaintiff's land and which but for such diversion would not have reached the plaintiff's land. If you answer this question yes, then just to that extent the plaintiff may claim for any injury thus received, independent of the clogging question. And, passing on to the clogging question, if you say yes to the general question, you will further inquire whether the plaintiff was injured by the clogging up of such exit through the

inadequacy of the outlet provided. In that view of the case, the town was to blame for throwing water on this land, and just so far as any effort to remedy this difficulty reduced the evil, just to that extent the liability of the town was reduced, but the town would be still liable for the damage which was not remedied.

Suppose you answer this general question no, and say, "No, there was not any superfluity of water thrown on this land on these dates in March by an artificial diversion." Why, then, the plaintiff has not made out his case as to that date on this question of diversion, but you have another question to consider, entirely independent of the question of diversion, and that is the adequacy of the outlet, supposing there was no diversion. On that subject I understand the law to be this: When a public sewer becomes clogged (and the same is true of a drain of surface water), and private property thereby becomes flooded, it is the duty of the municipality, when notified of the situation, to take the necessary steps to remove the clog with reasonable promptness, and for the breach of such a duty an action will lie. Therefore it was the duty of the town when notified of this situation, it having already undertaken to provide an outlet, to take the necessary steps to remove the clog with reasonable promptness. Had the town such notice and knowledge of the situation that it knew or ought to have known that the outlet which it provided was or might be inadequate? If so, the town is liable for the clogging. If not, the town is not liable for the clogging.

On whatever sums you find due to the plaintiff, if you do find them due, you will add interest.

I have been requested to charge certain propositions on behalf of the plaintiff, as follows:

"First. If the jury is satisfied that the town,

by artificial means diverted water that was not going to plaintiff's land so as to precipitate it upon plaintiff's land, to his damage, it will not excuse the town that the water, years before, by another route, had reached the watercourse that ran through plaintiff's land." I understand that to mean that the mere fact that at one time the water, by another route, had formerly come upon the plaintiff's land will not be a material inquiry where we are considering a case where water was diverted which was not going to the plaintiff's land, which is the supposition contained in the request. I charge that.

So, again: "Second. If the jury find that, at the time complained of, water which, in its natural course, according to the grade of streets and levels of adjacent property, would not have reached plaintiff's land, was artificially collected and diverted by the town to plaintiff's land, to his damage, it will not excuse the town that the water, years before, by another route, had reached the watercourse that ran through plaintiff's land." In other words, if on the 11th of November, 1911, and the 12th and 13th of March, 1912, water which would not have come to plaintiff's land in any way was thrown upon it, the fact that at some prior time it had come upon the plaintiff's land by some other course is past history which does not concern the Court and jury. I charge that.

By the defendant I am requested to charge certain propositions. This is the first one:

"The plaintiff is not compelled to submit to the destruction or injury of his property by the intentional diversion of surface water from streets, but he is compelled to bear the consequences naturally flowing from the reasonable grading and improvement of streets." As to that I say that

I have no objection to the request, with certain modifications. I leave out the word "intentional," and will add certain other words, so that it would read: "The plaintiff is not compelled to submit to the destruction or injury of his property by the diversion of surface water from streets, but he is compelled to bear the consequences naturally flowing from the reasonable grading and improvement of streets." If the effect produced was in fact to divert artificially to the land of the plaintiff water which would not have otherwise reached it, such diversion not being merely incidental to the opening or repairing or alteration of streets, the plaintiff has a cause of action. The intent is immaterial; the fact is all important.

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I charge the second request substantially as requested, interlining the words "or may increase" and the word "solely." I will read it as modified: "The grading, guttering and surfacing of streets as a necessary incident increases, or may increase, both the quantity and velocity of surface water sent to the point of discharge, and if you find that the injury complained of on November 11, 1911, was due solely to such incidental increase either in quantity or velocity of surface water, you should find in favor of the defendant on the first count."

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The third request I charge: "A municipality is not liable for damage done by the diversion of surface water where the diversion is merely incidental to and occasioned by the making or alteration of street grades."

The fourth request I charge, interlining the word "solely." It is as follows: "If you find that the injury complained of on November 11, 1911, was due to the diversion of surface water and that such diversion was solely incidental

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to or occasioned by the proper making, alteration, improving or grading of streets, you should find in favor of the defendant on the first count."

10 The fifth request I charge, inserting the words "at the times of the acts complained of," so that it will read: "If you find the fact to be, as the defendant claims, that the water on Jerolaman Street at the times of the acts complained of naturally flowed into the brook by way of what is now Linden Avenue instead of by way of Washington Avenue, you must find for the defendant."

The sixth request, the seventh request and the eighth request I deny except as I have charged.

20 I charge the ninth request: "The burden of proving the cause of both of the overflows complained of is upon the plaintiff and not upon the defendant; he, the plaintiff, must establish the cause by a preponderance of the evidence"—by what the jury may deem to be the preponderance of the evidence; that is, the greater weight of good, reliable, satisfactory proof.

With these remarks, gentlemen, I leave the case with you.

The Jury Retires.

30 Mr. Skinner: I respectfully ask that my objection be noted to that portion of your Honor's charge that dealt with the rule of law on the town's duty to remove a clog in the sewer after notice; my objection being that, while I thought, as I caught your Honor's words there, they were such as would give the jury the impression that, unless the town had some notice of the clog in the sense of actual stoppage of the sewer, it would not be liable, our contention was that it
40 was liable if it had put in anything that would clog, even though it did not at the time; that

they were chargeable with its obvious, ordinarily foreseeable consequences.

Objection noted as ground of appeal.

Mr. Skinner: Then I ask that my objection be noted to your Honor's language in which you charged according to the second request of the defendant with some modifications. I especially note this objection: That it would seem to confine the plaintiff's recovery to the jury's ascertainment that the injury was due solely to the increase in the quantity and velocity of the water, whereas our contention is that, even though that was only a contributing element, the plaintiff might recover for so much as it contributed. His recovery does not rest upon their ascertainment that his injury was due solely to that increase; there may have been more than one element entering into the damage, and the jury might have the duty to determine how much this element entered. This would confine them, I thought, to an ascertainment that it was the only element.

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Objection noted as ground of appeal.

Mr. Skinner: Then the same objection to your Honor's language in charging as requested in the fourth request, with modifications, and noting especially the objection that it seemed to me to make the plaintiff's recovery rest upon finding that the damage was solely caused by this diversion of surface water.

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Objection noted as ground of appeal.

Mr. Skinner: I note my objection, if your Honor please, to the charge according to the fifth request—(I can only designate them by the numbering of the request here)—my objection being that it seems to me to be based upon a set of supposed facts for which there is no foundation in the case—no testimony whatever. There is

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nothing to show that at the time of the acts complained of the water naturally flowed into the brook by way of what is Linden Avenue. The defendant's claim is not that; it is that at the time of some of the acts complained of, namely, the increase of the flow of water in Jerolaman Street, covering a period of several years, and the diversion at Washington Avenue. There is
10 nothing in the case to justify, it seemed to me, the suggestion that the water at any time is claimed to have flowed into the brook by way of Linden Avenue—I should not say at any time, but is claimed to have flowed that way at the time of the placing of the bars.

Objection noted as ground of appeal.

Mr. Murray: If your Honor please, I would like to note upon the record an objection to the
20 charge of the Court as contained in the first request of the plaintiff as charged; that is, that portion which states: "If the jury is satisfied that the town, by artificial means, diverted water that was not going to plaintiff's land so as to precipitate it upon plaintiff's land, to his damage, it will not excuse the town that the water, years before, by another route, had reached the water-course that ran through plaintiff's land."

30 Objection noted as ground of appeal.

Mr. Murray: I will note my objection to the first and the second of the plaintiff's requests to charge.

Objection noted as ground of appeal.

Mr. Murray: Also to the entire charge, on the ground that it does not make clear to the jury that the plaintiff, in order to establish a cause of action
40 on the first count, must show that more water actually reached the brook above the plaintiff's land than would have reached the brook at that point had the land remained in its original condition.

Objection noted as ground of appeal.

Defendant's Requests and Objections.

Defendant's counsel request the Court to charge the jury as follows:

(1) The plaintiff is not compelled to submit to the destruction or injury of his property by the intentional diversion of surface water from streets, but he is compelled to bear the consequences naturally flowing from the reasonable grading and improvement of streets.

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Charged as modified.

Defendant's counsel object to the refusal of the Court to charge specifically as requested.

Objection noted as ground of appeal.

(2) The grading, guttering and surfacing of streets as a necessary incident increases both the quantity and velocity of surface water sent to the point of discharge, and if you find that the injury complained of on November 11, 1911, was due to such incidental increase either in quantity or velocity of surface water, you should find in favor of the defendant on the first count.

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Charged as modified.

Defendant's counsel object to the refusal of the Court to charge specifically as requested.

Objection noted as ground of appeal.

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(3) A municipality is not liable for damage done by the diversion of surface water where the diversion is merely incidental to and occasioned by the making or alteration of street grades.

Charged.

(4) If you find that the injury complained of on November 11, 1911, was due to the diversion of surface water and that such diversion was incidental to or occasioned by the proper making, alteration, improving or grading of streets, you

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should find in favor of the defendant on the first count.

Charged as modified.

Defendant's counsel object to the refusal of the Court to charge specifically as requested.

Objection noted as ground of appeal.

10 (5) If you find the fact to be as the defendant claims that the water on Jerolaman Street naturally flowed into the brook by way of what is now Linden Avenue instead of by way of Washington Avenue, you must find for the defendant.

Charged as modified.

Defendant's counsel object to the refusal of the Court to charge specifically as requested.

Objection noted as ground of appeal.

20 (6) In order to recover damages under the first count, you must find that the defendant not only diverted the flow of water, but also that such diversion resulted in materially increasing the volume of water; consequently, if you find that the water which the plaintiff claims was diverted from Jerolaman Street into Washington Avenue and thence into the brook would have reached the brook by way of what is now Linden Avenue, if the grade of Jerolaman Street had not been changed, you
30 must find for the defendant on the first count.

Denied except as charged.

Defendant's counsel object to the refusal of the Court to charge specifically as requested.

Objection noted as ground of appeal.

40 (7) If you find for the defendant on the first count, you must also find for the defendant on the second count, unless the plaintiff has established to your satisfaction by a preponderance of the evidence that the overflow on March, 1912, was caused

by the negligent construction of the entrance to the Cortlandt Street culvert.

Denied except as charged.

Defendant's counsel object to the refusal of the Court to charge specifically as requested.

Objection noted as ground of appeal.

(8) If you find for the defendant on the first count and find that the overflow on March, 1912, occurred because the plaintiff, when he erected his buildings over the stream, failed to allow sufficient space to permit the water naturally increased by heavy rainfall to pass thereunder, you must find for the defendant on the second count. 10

Denied except as charged.

Defendant's counsel object to the refusal of the Court to charge specifically as requested.

Objection noted as ground of appeal. 20

(9) The burden of proving the cause of both of the overflows complained of is upon the plaintiff and not upon the defendant; he, the plaintiff, must establish the cause by a preponderance of the evidence.

Charged.

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Notice of Appeal.

(Filed October 26, 1915.)

ESSEX COUNTY CIRCUIT COURT.

ON APPEAL TO

COURT OF ERRORS AND APPEALS.

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 THEODORE JEROLAMAN,
 Plaintiff-Appellee,
v.
 THE TOWN OF BELLEVILLE, in the
 County of Essex,
 Defendant-Appellant.

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To Messrs. Pitney, Hardin & Skinner, attorneys
 of plaintiff-appellee.

Take notice, that the defendant appeals from the
 whole of the judgment entered in this cause on
 the following grounds:

1. The Court charged the jury:

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If the jury is satisfied that the town by artificial
 means diverted water that was not going to plain-
 tiff's land so as to precipitate it upon plaintiff's
 land, to his damage, it will not excuse the town
 that the water years before, by another route, had
 reached the watercourse that ran through plain-
 tiff's land. I understand that to mean that the
 mere fact that at one time the water, by another
 route, had formerly come upon the plaintiff's land
 will not be a material inquiry where we are con-
 sidering a case where water was diverted which was
 not going to the plaintiff's land, which is the suppo-
 sition contained in the request.

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2. The Court charged the jury :

If the jury find that, at the time complained of, water which, in its natural course, according to the grade of streets and levels of adjacent property, would not have reached plaintiff's land, was artificially collected and diverted by the town to the plaintiff's land, to his damage, it will not excuse the town that the water years before, by another route, had reached the watercourse that ran through plaintiff's land. In other words, if on the 11th of November, 1911, and the 12th and 13th of March, 1912, water which would not have come to the plaintiff's land in any way was thrown upon it, the fact that at some prior time it had come upon the plaintiff's land by some other course is past history which does not concern the Court and jury.

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3. The Court charged the jury :

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"Gentlemen of the Jury: This case calls for the application of well settled law to the facts as you shall find them to have been. I do not understand that counsel differ as to the rules of law. I will read a convenient statement: 'No responsibility attaches for damage done by the diversion of a surface water where the diversion is merely incidental to and occasioned by the making or alteration of street grades; but where a municipality puts in execution a scheme of improvement by which surface water collected from a large area is prevented from following the course of the streets, and is carried by artificial means from where it would be otherwise discharged and made to flow onto the land of one person, in ease of the land of others, then an actionable wrong is committed.'" The distinction is, as you see, between the changes of the direction of flowing waters that are necessarily involved in the ordinary course of street improve-

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ments and the accumulating and diverting of waters by artificial means for the purpose of changing the direction and depositing or discharging them upon lands which they would not otherwise have reached. This is the case of an individual, but it is a convenient and pithy statement of the point. The Court says that a landowner has no right, for example, to build a house on his land and collect the rainfall in a gutter on it and discharge it by spout on his neighbor's land. At the same time, he might cultivate his own land; he might plow it up and sow it, and in that way, if the land sloped toward his neighbor, the direction of the water that fell from the heavens might be affected, and the result might be that the neighbor would get rather more of it in that process than he otherwise would. For that no action would lie.

20 Taking that as a very general statement of the law, the Court and jury have before them occurrences on two different dates: on November 11, 1911, and March 12 and 13, 1912. The occurrence of March 12th and 13th, I suppose, is the same storm, both sides of midnight. On each of those two occasions there was a storm, an unusually heavy water fall. The first one, the earlier date, is complained of in that portion of the complaint, which is the plaintiff's statement of his cause of action, which is called the first count. In that count he complains merely of the water being thrown on him by diversion in this way. The second count is somewhat different. That relates to the later date, and it contains another element, which requires some consideration, and it has a double aspect. It says, in the first place, that on March 12th and 13th the stream was so much increased in volume and force by reason of the artificial drainage system, and so much impeded in its flow by certain bars which the town

had built in a covered concrete drain and storm sewer that the water was dammed up. In the first place, the water came down in abundance, due to the acts of the town, and in the second place it was retained by a dam, or by an obstruction, a clogging, of an outlet provided by the town; so that one part of that count is a complaint for the water's coming and the other is a complaint for its not going as freely as it otherwise would. 10

I am not going into the facts of this case, because I want to give you the case as soon as I can. Taking the first date, the date of November 11, 1911, the question as to this earlier flood is this: whether some part of this injury to the plaintiff was occasioned by water which the Town of Belleville artificially diverted to the land of the plaintiff, and which but for such artificial diversion would not have reached the plaintiff's land. The evidence is that there was a water-course coming from a spring, so that all the water that reached the plaintiff's land was not water that was diverted; part of it was there by nature. But the question is whether some part of the injury to the plaintiff was occasioned by water which was thus artificially diverted. If you say yes to that question, that conclusion points just to that extent to an injury for which the plaintiff may recover. If you say no—that is, if you say that on that date, November 11, 1911, there was no such superabundance of water occasioned by artificial diversion—then as to that whole occurrence on November 11, 1911, the plaintiff has not made out his case. 20 30

Now, as to the transaction of March 12th and 13th. There you ask yourselves the same question, because, as I said before, this matter has a double aspect, and the question as to March 12th and 40

13th is whether some part of the injury to the plaintiff was occasioned by water which was artificially diverted to the plaintiff's land and which but for such diversion would not have reached the plaintiff's land. If you answer this question yes, then just to that extent the plaintiff may claim for any injury thus received, independent of the clogging question. And, passing on the clogging question, if you say yes to the general question, you will further inquire whether the plaintiff was injured by the clogging up of such exit through the inadequacy of the outlet provided. In that view of the case, the town was to blame for throwing water on this land, and just so far as any effort to remedy this difficulty reduced the evil, just to that extent the liability of the town was reduced, but the town would be still liable for the damage which was not remedied.

Suppose you answer this general question no, and say, "No, there was not any superfluity of water thrown on this land on these dates in March by an artificial diversion." Why, then, the plaintiff has not made out his case as to that date on this question of diversion, but you have another question to consider, entirely independent of the question of diversion, and that is the adequacy of the outlet, supposing there was no diversion. On that subject I understand the law to be this: "When a public sewer becomes clogged (and the same is true of a drain of surface water), and private property thereby becomes flooded, it is the duty of the municipality, when notified of the situation, to take the necessary steps to remove the clog with reasonable promptness, and for the breach of such a duty an action will lie. Therefore, it was the duty of the town when notified of this situation, it having already undertaken to provide an outlet, to take the necessary steps to

remove the clog with reasonable promptness. Had the town such notice and knowledge of the situation that it knew or ought to have known that the outlet which it provided was or might be inadequate? If so, the town is liable for the clogging. If not, the town is not liable for the clogging."

4. The Court refused to charge the jury as requested by defendant, as follows:

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"The plaintiff is not compelled to submit to the destruction or injury of his property by the intentional diversion of surface water from streets, but he is compelled to bear the consequence naturally flowing from the reasonable grading and improvement of the streets."

5. The Court refused to charge the jury as requested by defendant, as follows:

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"The grading, guttering and surfacing of streets as a necessary incident increases both the quantity and velocity of surface water sent to the point of discharge, and if you find that the injury complained of on November 11, 1911, was due to such incidental increase either in quantity or velocity of surface water, you should find in favor of the defendant on the first count."

6. The Court refused to charge the jury as requested by defendant, as follows:

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"A municipality is not liable for damage done by the diversion of surface water where the diversion is merely incidental to and occasioned by the making or alteration of street grades."

7. The Court refused to charge the jury as requested by defendant, as follows:

"If you find that the injury complained of on November 11, 1911, was due to the diversion of surface water and that such diversion was incidental

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to or occasioned by the proper making, alteration, improving or grading of streets, you should find in favor of the defendant on the first count."

8. The Court refused to charge the jury as requested by defendant, as follows:

10 "If you find the fact to be as the defendant claims that the water on Jerolaman Street naturally flowed into the brook by way of what is now Linden Avenue instead of by way of Washington Avenue, you must find for the defendant."

9. The Court refused to charge the jury as requested by defendant, as follows:

20 "In order to recover damages under the first count, you must find that the defendant not only diverted the flow of water, but also that such diversion resulted in materially increasing the volume of water; consequently, if you find that the water which the plaintiff claims as diverted from Jerolaman Street into Washington Avenue and thence into the brook would have reached the brook by way of what is now Linden Avenue, if the grade of Jerolaman Street had not been changed, you must find for the defendant on the first count."

30 10. The Court refused to charge the jury as requested by defendant, as follows:

"If you find for the defendant on the first count, you must also find for the defendant on the second count, unless the plaintiff has established to your satisfaction by a preponderance of the evidence, that the overflow on March, 1912, was caused by the negligent construction of the entrance to the Cortlandt Street culvert."

40 11. The Court refused to charge the jury as requested by defendant, as follows:

"If you find for the defendant on the first count and find that the overflow on March, 1912, occurred because the plaintiff, when he erected his buildings over the stream, failed to allow sufficient space to permit the water naturally increased by heavy rainfall to pass thereunder, you must find for the defendant on the second count."

12. The Court refused to charge the jury as requested by defendant, as follows: 10

"The burden of proving the cause of both of the overflows complained of is upon the plaintiff and not upon the defendant; he, the plaintiff, must establish the cause by preponderance of the evidence."

13. The Court refused to grant the motion of the defendant for non-suit. 20

14. The Court refused to grant the motion of the defendant for the direction of a verdict.

15. The Court admitted evidence, over the objection of defendant's counsel, to show the provisions that had been made to take care of water since the cause of action arose.

16. The Court allowed the following question, over the objection of defendant's counsel, viz.: "Was not that on Jerolaman Street?" 30

17. The Court allowed the following question, over the objection of defendant's counsel, viz.: "So that the sewer that you are telling about now takes all the water that used to come down Jerolaman Street to Washington Avenue?"

GIFFORD & MILLER,
Attorneys for Defendant-Appellant. 40

Summons.

(Filed May 26, 1913.)

The State of New Jersey, to The Town of Belleville, in the County of Essex:

10 You are summoned to answer the annexed complaint of Theodore Jerolaman, in an action at law in the Essex County Circuit Court. And take notice that unless you file your answer to said complaint with the Clerk of the Essex County Circuit Court at Newark 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, Frederic Adams, Esq., Judge of the Essex County Circuit Court, at Newark, this 21st day of May, 1913.

JOSEPH McDONOUGH,
Clerk.

Pitney, Hardin & Skinner,
Attorneys.

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Complaint.

(Filed May 26, 1913.)

ESSEX COUNTY CIRCUIT COURT.

<p style="text-align: center;">THEODORE JEROLAMAN, Plaintiff,</p> <p style="text-align: center;"><i>v.</i></p> <p style="text-align: center;">THE TOWN OF BELLEVILLE in the County of Essex, Defendant.</p>	}	<p style="text-align: center;">Action at Law.</p>	10
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The plaintiff, Theodore Jerolaman, of Cortlandt Street, in the Town of Belleville, County of Essex and State of New Jersey, says:

1. The Town of Belleville in the County of Essex is and has been since November 16, 1910, a municipal corporation of the State of New Jersey, under the provisions of Chapter 113 of the Laws of 1895 of New Jersey, prior to which time the Township of Belleville in the County of Essex was a municipal corporation of the State of New Jersey.

2. Before and at the times hereinafter stated, and ever since to the present time, plaintiff owned and occupied, and has owned and occupied premises with the appurtenances at the northwest corner of Cortlandt Street and Jerolaman Street in Belleville, New Jersey, and erected and maintained, and has maintained thereon for many years a store, dwelling, lumber sheds with lumber piled thereon, coal pockets filled with coal, stables and wagon scales, conducting on said premises a lumber, coal and hardware business.

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3. Across said premises flows, and has always flowed since plaintiff's possession, a small open stream which drains the surface water of some of the territory lying to the west of plaintiff's premises and which runs for part of the way under the said sheds and buildings.

10 4. Prior to the times hereinafter stated the Township of Belleville in the County of Essex and the Town of Belleville in the County of Essex artificially directed and diverted the surface water drainage of a large area of territory lying to the west, southwest and northwest of plaintiff's premises, out of its natural and accustomed channels and changed the natural flow thereof both in direction and volume by means of a system of culverts, sluices, catch basins, chutes and
20 gutters, so that surface water drainage which naturally would flow in certain directions was entirely changed and was not permitted to flow as it used to flow.

5. By the combination of said system of culverts and drains, and by the special alteration of the surface of the ground and the placing of masonry and iron and other structures at certain points in streets and elsewhere, a large volume
30 of water which otherwise would not have reached said brook flowing through plaintiff's premises was artificially conducted north into said brook above and to the west of plaintiff's premises.

6. By reason of the artificial drainage system described a great increase in surface and flood water was poured into this stream, and on or about November 11, 1911, so much increased the said stream in volume and force as to overflow
40 its banks, carry a great quantity of sand and gravel into the said yard and deposit the same

there, and to cut and carry away soil, wet, destroy and render valueless much land, lumber, coal and buildings of the plaintiff.

SECOND COUNT.

Plaintiff repeats Paragraphs 1, 2 and 3 of the first count.

4. About the first of the year nineteen hundred and twelve the Town of Belleville in the County of Essex built a covered concrete drain and storm water sewer extending a branch of it in the bed of the stream above mentioned, to receive the waters of the same, and negligently placed across the mouth of the drain where it opened in the stream, bars of iron and other solid substance obstructing the free passage of water and whatever might be carried thereon. 10

5. On or about March 12th and 13th, 1912, the said bars caught and retained debris and material carried by said stream so as to dam the stream and cast the water thereof in great volume back upon the premises of the plaintiff, and by reason of the obstruction and flow of water plaintiff's lumber, shingles, coal, cement, scales, buildings, yard and driveway were greatly damaged and much material destroyed and rendered valueless. 20

Plaintiff demands on the first count one thousand dollars (\$1,000) damages and on the second count six thousand dollars (\$6,000) damages. 30

PITNEY, HARDIN & SKINNER,
Attorneys of Plaintiff.

Stipulation.

(Filed June 11, 1913.)

ESSEX COUNTY CIRCUIT COURT.

THEODORE JEROLAMAN,
Plaintiff,

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v.

THE TOWN OF BELLEVILLE in the
County of Essex,
Defendant.

} Action at Law.

Whereas, the time limited for the filing of the
answer of the defendant expires on June eleventh,
nineteen hundred and thirteen, and

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Whereas, it is the desire of both parties that
the time for filing such answer should be ex-
tended to Wednesday, June eighteenth, nineteen
hundred and thirteen.

It is hereby stipulated and agreed that the
defendant have until June eighteenth, nineteen
hundred and thirteen in which to file its an-
swer to the complaint in the above entitled cause
filed.

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PITNEY, HARDIN & SKINNER,
Attorneys of Plaintiff.
JOHN DEGRAW,
Attorney of Defendant.

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Answer.

(Filed June 18, 1913.)

ESSEX COUNTY CIRCUIT COURT.

<p style="text-align: center;">THEODORE JEROLAMAN, Plaintiff,</p> <p style="text-align: center;"><i>v.</i></p> <p style="text-align: center;">THE TOWN OF BELLEVILLE in the County of Essex, Defendant.</p>	}	Action at Law.	10
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The defendant, The Town of Belleville in the County of Essex, in answer to the complaint filed in the above entitled cause, says:

1. That it admits the truth of the allegations contained in Paragraph I of the first count.

2. That it admits that portion of Paragraph II reading as follows: "Before and at the times hereinafter stated and ever since to the present time, plaintiff owned and occupied and has owned and occupied premises with the appurtenances at the northwest corner of Cortlandt and Jerolaman Streets, Belleville, New Jersey, and erected and maintained and has maintained thereon for many years a store, dwelling, lumber yards," but the defendant denies the other allegations in said paragraph contained; that is to say: That portion thereof reading as follows: "with lumber piled therein, coal pockets filled with coal, stables and wagon scales, conducting on said premises a lumber, coal and hardware business."

3. That it admits the truth of the allegations contained in Paragraph III of the first count.

4. That it denies the truth of the allegations contained in Paragraph IV of the first count.

5. That it denies the truth of the allegations contained in Paragraph V of the first count.

10 6. That it denies that on or about the eleventh day of November, nineteen hundred and eleven or at any other time the said stream overflowed its banks, and says that if there was such an overflow it was not caused or contributed to in any degree whatever by acts of the defendant, its agents or servants; and that it further denies that any sand or gravel was carried thereby into said yard and deposited therein and that it cut and
20 carried away any soil and wet, destroyed and rendered valueless any land, lumber, coal, or buildings on the premises.

First defense to first count.

Defendant, in further answer to all of Paragraphs No. 4, No. 5 and No. 6 of the first count and in defense thereto, says:

30 1. That if the defendant installed or constructed culverts, sluices, catch basins, chutes and gutters, it installed them pursuant to authority vested in the defendant as a municipal corporation by the Legislature of the State of New Jersey, and were necessary for the protection and preservation of the health and well being of persons and property within its boundaries, and that they were installed and constructed with the greatest
40 of care and in accordance with approved engineering standards.

Second defense to first count.

That if there was an overflowing of the stream mentioned in Paragraph 6 of the first count of the complaint caused by an increase in the volume of the water therein such increase in the volume of water was caused and brought about by the conjunction of the following facts and circumstances over which the defendant had not control.

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1. By an unprecedented rainfall immediately preceding such overflowing.

2. By changes by private parties extending over a period of fifteen years in the natural contour of the land to the west, southwest, northwest and north of the plaintiff's premises, which changes served to increase the volume of water flowing into the said stream.

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3. By surface water accumulating for a great distance in and upon Washington Avenue, which is a County highway in the exclusive control of the authorities of the County of Essex, and flowing in and along the same from the north and south to and discharging into the said stream above and to the west of the plaintiff's premises, such accumulation of water was artificial and caused by changes made by the County authorities of the said County in the grade and surface of said avenue.

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Third defense to first count.

If the said stream overflowed its banks, such overflowing was caused by the erection of the plaintiff's buildings over the stream, which is a natural water course, so close to the surface thereof that in event of a moderate usual and natural rise in the stream, the free flow thereof was and is obstructed, thereby causing the bed of the stream to be filled up by the settling of earth held in suspension in the water and causing the water to dam

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and back up and overflow the banks of the stream and flood the premises of the plaintiff.

Answer and defense to second count.

The defendant interposes to Paragraphs 1, 2 and 3 of the second count the same answer interposed to the corresponding paragraphs of the first count.

The defendant in answer to Paragraph IV of the second count, says:

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1. That the defendant on or about the time in said paragraph mentioned, caused to be built and constructed a covered concrete drain and storm water sewer, extending from the west side of Cortlandt Street easterly to the Passaic River, but defendant further says that the same was constructed by it merely as agent and on behalf of the County of Essex which has exclusive jurisdiction of the said stream, it being a natural and open water course, and that the said concrete drain or storm water sewer was so built and constructed so as not to interfere in any degree whatsoever with the free flow of the said stream, and that the said concrete drain or storm water sewer is and always has been maintained by the said The County of Essex, and that the defendant has never had any control or jurisdiction over the same, and it denies that it is liable for any damage which may have been caused to the plaintiff thereby, or by defects in the construction thereof.

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Defendant further says that by reason of the large size of the entrance to the said concrete drain or storm water sewer and by reason of the swiftness of the flow of the stream above mentioned, the same was a menace to the safety of the children and others who might by accident fall into the same, and that for their protection and for the further purpose of preventing refuse from the plaintiff's premises entering the culvert, clogging

and obstructing the free flow of the water through the same, the defendant caused to be placed two small bars of iron across the entrance to the same which said bars of iron were so placed as to interfere as little as possible with the free flow of water, and at the same time serve the purpose for which they were so placed as hereinabove set forth, and that the said bars in fact did not interfere with the free flow of the water in any appreciable degree and that they were so placed with the greatest of care and in a manner usually adopted by competent engineers in such situations.

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The defendant denies the truth of the allegations set forth in Paragraph V of the second count contained, and in defense thereto interposes the same defenses set forth as the second and third defenses to the first count as fully as if the same were here repeated at length.

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Third defense to second count.

Defendant in further defense says that if the said stream was dammed and backed up and caused to flow upon the premises of the plaintiff, such damming and backing up and overflowing was caused by lumber or waste, refuse, debris, etc., belonging to the plaintiff, and which he unlawfully, without right and negligently permitted to enter and be carried by said stream to the entrance of the said culvert or storm water drain and there remain partially or wholly closing the said entrance.

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Defendant denies that the said plaintiff suffered damage to the sum of one thousand dollars and Six Thousand Dollars, or any other sum or sums whatever.

Defendant prays that the complaint be dismissed with costs of suit to be taxed.

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JOHN DEGRAW,
Attorney of Defendant.

Amended Answer.

(Filed June 28, 1913.)

ESSEX COUNTY CIRCUIT COURT.

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THEODORE JEROLAMAN,
Plaintiff,

v.

THE TOWN OF BELLEVILLE in the
County of Essex,
Defendant.

Action at Law.

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The defendant, The Town of Belleville in the County of Essex, in answer to the complaint filed in the above entitled cause, says:

1. That it admits the truth of the allegations contained in Paragraph I of the first count.

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2. That it admits that portion of Paragraph II reading as follows: "Before and at the times hereinafter stated and ever since to the present time, plaintiff owned and occupied and has owned and occupied premises with the appurtenances at the northwest corner of Cortlandt and Jerolaman Streets, Belleville, New Jersey, and erected and maintained and has maintained thereon for many years a store, dwelling, lumber yards," but the defendant denies the other allegations in said paragraph contained; that is to say—that portion thereof reading as follows, "with lumber piled therein, coal pockets filled with coal, stables and wagon scales, conducting on said premises a lumber, coal and hardware business."

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3. That it admits the truth of the allegations contained in Paragraph III of the first count.

4. That it denies the truth of the allegations contained in Paragraph IV of the first count.

5. That it denies the truth of the allegations contained in Paragraph V of the first count.

6. That it denies the truth of the allegations contained in Paragraph VI of the first count.

First defense to first count.

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Defendant in further answer to all of Paragraphs Nos. 4, 5 and 6 of the first count, and in defense thereto, says:

1. That the culverts, sluices, catch-basins, chutes and gutters were installed by it pursuant to authority vested in the defendant as a municipal corporation by the Legislature of the State of New Jersey, and were necessary for the protection and preservation of the health and well being of persons installed and constructed with the greatest care and in accordance with approved engineering standards.

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Second defense to first count.

That the overflowing of the stream mentioned in Paragraph 6 of the first count of the complaint, was caused and brought about by the conjunction of the following facts and circumstances over which the defendant had no control:

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1. By an unprecedented rainfall immediately preceding such overflowing.

2. By changes by private parties extending over a period of fifteen years in the natural contour of the land to the west, southwest, northwest and north of the plaintiff's premises, which changes served to increase the volume of water flowing into the said stream.

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3. By surface water accumulating for a great distance in and upon Washington Avenue, which is a county highway in the exclusive control of the authorities of the County of Essex, and flowing in and along the same from the north and south to and discharging into the said stream above and to the west of the plaintiff's premises, which accumulation of water was artificial and caused by changes made by the County authorities of the said County in the grade and surface of said avenue.

Third defense to first count:

That the overflowing of its banks by the said stream was caused by the erection of the plaintiff's building over the stream, which is a natural water course, so close to the surface thereof that in event of a moderate usual and natural rise in the stream, the free flow thereof was and is obstructed, thereby causing the bed of the stream to be filled up by the settling of earth held in suspension in the water and causing the water to dam and back up and overflow the banks.

Answer and defense to second count.

The defendant interposes to Paragraphs Nos. 1, 2 and 3 of the second count the same answer interposed to the corresponding paragraphs of the first count.

The defendant in answer to the Paragraph IV of the second count says:

1. That the defendant on or about the time in said paragraph mentioned, caused to be built and constructed a covered concrete drain and storm water sewer, extending from the west side of Cortlandt Street easterly to the Passaic River, but defendant further says that the same was constructed by it merely as agent and on behalf of the County of Essex which has exclusive jurisdiction of the

said stream, it being a natural and open water course, and that the said concrete drain or storm water sewer was so built and constructed so as not to interfere in any degree whatsoever with free flow of the said stream, and that the said concrete drain or storm water sewer is and always has been maintained by the said The County of Essex, and that the defendant has never had any control or jurisdiction over the same, and it denies that it is liable for any damage which may have been caused to the plaintiff thereby, or by defects in the construction thereof.

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Defendant further says that by reason of the large size of the entrance to the said concrete drain or storm water sewer and by reason of the swiftness of the flow of the stream above mentioned, the same was a menace to the safety of the children and others who might by accident fall into the same, and that for their protection and for the further purpose of preventing refuse from the plaintiff's premises entering the culvert, clogging and obstructing the free flow of the water through the same, the defendant caused to be placed two small bars of iron across the entrance to the same which said bars of iron were so placed as to interfere as little as possible with the free flow of water, and at the same time serve the purpose for which they were so placed as hereinabove set forth, and that the said bars in fact did not interfere with the free flow of the water in any appreciable degree and that they were so placed with the greatest of care and in a manner usually adopted by competent engineers in such situations.

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The defendant denies the truth of the allegations set forth in Paragraph V of the second count contained, and in defense thereto interposes the same defenses set forth as the second and third defenses

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to the first count as fully as if the same were here repeated at length.

Third defense to second count.

10 Defendant in further defense says that the damming and backing up of said stream and the overflowing of the same on the premises of the plaintiff was caused by lumber or waste, refuse, debris, &c., belonging to the plaintiff and which he unlawfully, without right and negligently permitted to enter and be carried by said stream to the entrance of the said culvert or storm water drain and there remain partially or wholly closing the said entrance.

Defendant denies that the said plaintiff suffered damage to the sum of one thousand dollars and six thousand dollars or any other sum or sums whatever.

20 Defendant prays that the complaint be dismissed, with costs or suit to be taxed.

JOHN DEGRAW,
Attorney of Defendant.

Reply to Amended Answer.

(Filed July 14, 1913.)

ESSEX COUNTY CIRCUIT COURT.

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THEODORE JEROLAMAN,
Plaintiff,

v.

40 THE TOWN OF BELLEVILLE, in
the County of Essex,
Defendant.

Action at Law.

The plaintiff, in reply to the amended answer filed in the above-entitled cause, says:

(1) That it denies all the allegations of the paragraph numbered One.

(2) That said paragraph discloses no defense.

In reply to the second defense to the first count.

(1) It denies all the allegations of said defense.

In reply to the third defense to the first count.

(1) It denies all of the allegations in said defense.

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In reply to the first defense to the second count.

(1) It denies that said defendant constructed said drain merely as agent, and on behalf of the County of Essex and denies that the County of Essex has exclusive jurisdiction of the said stream, and denies that said concrete drain or storm water sewer was so built as not to interfere in any degree with the free flow of the said stream, and denies that the said concrete drain is and always has been maintained by the said The County of Essex, and that the defendant has never had any control or jurisdiction over the same. Plaintiff further denies that said stream was a menace to the safety of children and others who might by accident fall into the same; and denies that said bars of iron were placed in said drain with the greatest of care, and in the manner usually adopted by competent engineers.

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(2) That said first defense to the second count discloses no defense as a matter of law.

In reply to the second defense to the second count.

(1) Plaintiff makes the same reply as to the second and third defenses to the first count.

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In reply to the third defense to the second count.

(1) Plaintiff denies all the allegations of said defense.

PITNEY, HARDIN & SKINNER,
Attorneys of Plaintiff.

Rule Amending Complaint.

(Filed December 15, 1914.)

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ESSEX COUNTY CIRCUIT COURT.

THEODORE JEROLAMAN,
Plaintiff,

v.

THE TOWN OF BELLEVILLE, in
the County of Essex,
Defendant.

Action at Law.

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The plaintiff having moved to amend the complaint filed in the above-entitled cause, and it appearing that DeGraw & Murray, attorneys of the defendant, consent thereto;

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It is ordered, that the second count of the complaint filed in this cause be, and the same is hereby amended, so as to read as follows:

“SECOND COUNT.

Plaintiff repeats Paragraphs 1, 2, 3, 4, and 5 of the first count.

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6. About the first of the year, 1912, the Town of Belleville in the County of Essex, built a covered concrete drain and storm water sewer, extending a branch of it in the body of the stream above mentioned, to receive the waters of the same, and

negligently placed across the mouth of the drain, where it opened in the stream, bars of iron and other solid substance, obstructing the free passage of water and whatever might be carried thereon.

7. On or about March 12th and 13th, 1912, the said stream was so much increased in volume and force by reason of the artificial drainage system described, and so much impeded in its flow by the said bars, which had caught and retained debris and material carried down said stream, that the water thereof overflowed its banks and was cast back in large volume upon the plaintiff's premises, carried and deposited thereon a great quantity of sand and gravel, cut and carried away soil, injured plaintiff's buildings and wet, destroyed and rendered valueless much land, lumber, coal, cement, shingles, and scales of the plaintiff."

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It is furthermore ordered, that the defendant file its answer to the complaint as amended within five days from the date hereof.

Dated December 15, 1914.

On motion of

PITNEY, HARDIN & SKINNER,
Attorneys of Plaintiff.

Let the above rule be entered.

FREDERIC ADAMS,
Circuit Court Judge.

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Rule actually entered December 15th, 1914.

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Answer to Amended Second Count.

(Filed December 21, 1914.)

ESSEX COUNTY CIRCUIT COURT.

10	<p style="text-align: center;">THEODORE JEROLAMAN, Plaintiff,</p> <p style="text-align: center;"><i>v.</i></p> <p style="text-align: center;">THE TOWN OF BELLEVILLE in the County of Essex. Defendant.</p>	}	Action at Law.
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20 The second count of the complaint having been amended by the plaintiff, the defendant answers and interposes defenses to the same as follows:

1, 2, 3. The defendant interposes to Paragraphs No. 1, No. 2, and No. 3 of the second count as amended, the same answers interposed to the corresponding paragraphs of the first count.

30 4. The defendant in answer to Paragraph No. 4 of the second count, says, that it denies the truth of all of the allegations contained in Paragraph No. 4 of the second count as amended.

5. That it denies the truth of all of the allegations contained in Paragraph No. 5 of the second count as amended.

6. That it denies the truth of all of the allegations contained in Paragraph No. 6 of the second count as amended.

40 7. That it denies the truth of all of the allegations contained in Paragraph No. 7 of the second count as amended.

Defense to second count, as amended.

The defendant interposes to Paragraphs 1, 2 and 3 of the second count as amended, the same answers interposed to the corresponding paragraphs of the first count.

The defendant, in answer to Paragraphs No. 4, No. 5, No. 6 and No. 7 of the second count as amended, says:

That the defendant at or about the time in said paragraphs mentioned, caused to be built and constructed a covered concrete drain and storm water sewer, extending from the west side of Cortlandt Street easterly to the Passaic River, but defendant further says that the same was constructed by it merely as agent and on behalf of the County of Essex which has exclusive jurisdiction of the said stream, it being a natural and open water course, and that the said concrete drain or storm water sewer was so built and constructed so as not to interfere in any degree whatsoever with the free flow of the said stream, and that the said concrete drain or storm water sewer is and always has been maintained by the said The County of Essex, and that the defendant has never had any control, or jurisdiction over the same, and it denies that it is liable for any damage which may have been caused to the plaintiff thereby, or by defects in the construction thereof.

Defendant further says that by reason of the large size of the entrance to the said concrete drain or storm water sewer and by reason of the swiftness of the flow of the stream above mentioned, the same was a menace to the safety of the children and others who might by accident fall into the same, and that for their protection and for the further purpose of preventing refuse from the plaintiff's premises entering the culvert, clogging and obstructing the free flow of the water

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10 through the same, there were placed two small bars of iron across the entrance to the same which said bars of iron were so placed as to interfere as little as possible with the free flow of water, and at the same time serve the purpose for which they were so placed as hereinabove set forth, and that the said bars in fact did not interfere with the free flow of the water in any appreciable degree and that they were so placed with the greatest of care and in a manner usually adopted by competent engineers in such situations.

20 The defendant, in further defense to all of the allegations contained in the second count as amended, interposes thereto the same defense set forth as the first, second and third defenses to the first count, as fully as if the same were here repeated at length.

30 Defendant, in further defense to all of the allegations contained in the second count as amended, says; that the damming and backing up of said stream and the overflowing of the same on the premises of the plaintiff was caused by lumber or waste, refuse, debris, etc., belonging to the plaintiff and which he unlawfully, without right and negligently permitted to enter and be carried by said stream to the entrance of the said culvert or storm water drain and there remain partially or wholly closing the said entrance.

Defendant denies that the said plaintiff suffered damage to the sum of one thousand dollars and six thousand dollars, or any other sum or sums whatever.

Defendant prays that the complaint be dismissed with costs of suit to be taxed.

DEGRAW & MURRAY,

Attorneys of Defendant.

Reply to Amended Answer to Amended Second Count.

(Filed January 27, 1915.)

ESSEX COUNTY CIRCUIT COURT,

<p style="text-align: center;">THEODORE JEROLAMAN, Plaintiff,</p> <p style="text-align: center;"><i>v.</i></p> <p style="text-align: center;">THE TOWN of BELLEVILLE in the County of Essex, Defendant.</p>	}	<p>Action at Law.</p>	10
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The plaintiff in reply to the amended answer to the amended second count, filed in the above entitled causes, says: 20

In reply to the second defense to the amended second count:

1. He denies that said defendant constructed said drain merely as agent and on behalf of the County of Essex, and denies that the County of Essex has exclusive jurisdiction of the stream, and denies that said concrete drain or storm water sewer was so built as not to interfere in any degree with the free flow of the said stream, and denies that the said concrete drain is and always has been maintained by the said the County of Essex, and that the defendant has never had any control or jurisdiction over the same. 30

Plaintiff further denies that said stream was a menace to the safety of children and others who might by accident fall into the same, and denies that said bars of iron were placed in said drain 40

with the greatest of care and in the manner usually adopted by competent engineers.

2. That said second defense to the amended second count discloses no defense as a matter of law.

In reply to the third defense to the amended second count.

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1. He denies all the allegations of Paragraph No. 1.

2. That said paragraph discloses no defense.

In reply to the fourth defense to the amended second count.

1. He denies all the allegations of said defense.

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In reply to the fifth defense to the amended second count.

1. He denies all the allegations of said defense.

In reply to the sixth defense to the amended second count.

1. Plaintiff denies all the allegations of said defense.

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PITNEY, HARDIN & SKINNER,
Attorneys for Plaintiff.

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Amended Answer to Amended Second Count.

(Filed January 29, 1915.)

ESSEX COUNTY CIRCUIT COURT,

<p style="text-align: center;">THEODORE JEROLAMAN, Plaintiff,</p> <p style="text-align: center;"><i>v.</i></p> <p style="text-align: center;">THE TOWN of BELLEVILLE in the County of Essex, Defendant.</p>	}	<p>10</p> <p>Action at Law.</p>
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The second count of the complaint having been amended by the plaintiff, the defendant hereby amends its answer and defenses to the same, so that such answer and defenses shall read as follows:

First defense.

1, 2, 3. The defendant interposes to Paragraphs Nos. 1, 2 and 3 of the second count as amended, the same answers interposed to the corresponding paragraphs of the first count.

4. The defendant in answer to Paragraph No. 4 of the second count, says, that it denies the truth of all of the allegations contained in Paragraph No. 4 of the second count as amended.

5. That it denies the truth of all the allegations contained in Paragraph No. 5 of the second count as amended.

6. That it denies the truth of all of the allegations contained in Paragraph No. 6 of the second count as amended.

7. That it denies the truth of all of the allegations contained in Paragraph No. 7 of the second count as amended.

Second defense.

10 The defendant interposes to Paragraphs Nos. 1, 2 and 3 of the second count as amended, the same answers interposed to the corresponding paragraphs of the first count.

The defendant, in answer to Paragraphs Nos. 4, 5, 6 and 7 of the second count as amended, says:

20 That the defendant at or about the time in said paragraphs mentioned, caused to be built and constructed a covered concrete drain and storm water sewer, extending from the west side of Cortlandt Street easterly to the Passaic River, but defendant further says that the same was constructed by it merely as agent and on behalf of the County of Essex which has exclusive jurisdiction of the said stream, it being a natural and open water course, and that the said concrete drain or storm water sewer was so built and constructed so as not to interfere in any degree whatsoever with the free flow of the said stream, and that the said concrete drain or storm water sewer has and always has been maintained by the said The County of Essex, and that the defendant has never had any control, or jurisdiction over the same, and it denies that it is liable for any damage which may have been caused to the plaintiff thereby, or by defects in the construction thereof.

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40 Defendant further says that by reason of the large size of the entrance to the said concrete drain or storm water sewer and by reason of the swiftness of the flow of the stream above mentioned, the same was a menace to the safety of the children and others who might by accident fall into the same, and that for their protection and for the fur-

ther purpose of preventing refuse from the plaintiff's premises entering the culvert, clogging and obstructing the free flow of the water through the same, there were placed two small bars of iron across the entrance to the same which said bars of iron were so placed as to interfere as little as possible with the free flow of water, and at the same time, serve as the purpose for which they were so placed as hereinabove set forth, and that the said bars in fact did not interfere with the free flow of the water in any appreciable degree and that they were so placed with the greatest of care and in a manner usually adopted by competent engineers in such situations.

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Third defense.

That the culverts, sluices, catch basins, chutes and gutters were installed by it pursuant to authority vested in the defendant as a municipal corporation by the Legislature of the State of New Jersey, and were necessary for the protection and preservation of the health and well-being of persons and property within its boundaries, and that they were constructed and installed with the greatest of care, and in accordance with approved engineering standards.

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Fourth defense.

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1. That the overflowing of the stream mentioned in Paragraph No. 7 of the second count of the complaint as amended was caused and brought about by the conjunction of the following facts and circumstances, over which the defendant had no control.

(a) By an unprecedented rainfall immediately preceding such overflowing.

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(b) By changes by private parties extending over a period of fifteen years, in the natural con-

tour of the land to the west, southwest, northwest, and north of the premises, which changes serve to increase the volume of the water flowing into said stream.

10 (c) By surface water accumulating for a great distance in and upon Washington Avenue, which is a county highway, in the exclusive control of the authorities of the County of Essex, and flowing in and along the same from the north and south to and discharging into the said stream above and to the west of the plaintiff's premises, which accumulation of water was artificial and caused by changes made by the County authorities of said county, in the grade and surface of said avenue.

Fifth defense.

20 1. That the overflowing of its banks by the said stream was caused by the erection of the plaintiff's building over the stream, which is a natural water course, so close to the surface thereof, that in the event of a moderate, usual and natural rise in the stream, the free flow thereof was and is obstructed, thereby causing the bed of the stream to be filled up by the settling of earth held in suspension in the water, and causing the water to dam and back up and overflow the banks of the stream, and flood
30 the premises of the plaintiff.

Sixth defense.

40 1. Defendant, in further defense to all of the allegations contained in the second count as amended, says: that the damming and backing up of said stream and the overflowing of the same on the premises of the plaintiff was caused by lumber or waste, refuse, debris, etc., belonging to the plaintiff, and which he unlawfully, without right and negligently permitted to enter and be carried by said stream to the entrance of said culvert or

a total verdict of thirty-one hundred fourteen dollars and eighty-four cents (\$3114.84) and the sum of eighty-nine dollars and seventy-eight cents cost of suit.

Judgment entered and signed February 8th, A. D. 1915.

WILLIAM S. GUMMERE,
Judge.

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Clerk's Certificate.

ESSEX COUNTY CLERK'S OFFICE.

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

Joseph McDonough, Clerk of the County of Essex in the State of New Jersey,

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Do hereby certify that the foregoing is a true and correct copy of the notice of appeal and entire transcript of all the pleadings and proceedings and the judgment record in the case of Theodore Jerolaman *v.* The Town of Belleville in the County of Essex and the same is taken from and compared with the original paper and record in my office as the same now remains on the files of said office.

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In testimony whereof, I have hereunto set my hand and affixed the official seal of said County and City of Newark, N. J., this day of , A. D. 1916.

JOSEPH McDONOUGH,
Clerk.

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