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BILL OF COMPLAINT.

Filed March 28, 1924.

In Chancery of New Jersey

To the Honorable Edwin Robert Walker, Chancellor of the State of New Jersey:

The complainant, Consolidated Safety Pin Company, a corporation of the State of New Jersey, respectfully shows:

1. That the complainant is a corporation organized under the laws of the State of New Jersey and having its principal office and place of business in the Town of Bloomfield, in the County of Essex in said State.

2. That the Town of Montclair in the County of Essex, the defendant hereto, was at all times hereinafter mentioned and is now a municipal corporation of the State of New Jersey located within the County of Essex in said State.

3. That the complainant herein is now and has been since the year 1891 the owner of the following tract and parcel of land and premises situate, lying and being in the Town of Bloomfield and Borough of Glen Ridge, in the County of Essex and State of New Jersey, bound and described as follows:

Beginning at the intersection of the northerly line of land conveyed by the executors of Joseph F. Ward, deceased, to Charles W. Powers with the easterly line of the Newark and Bloomfield Railroad Company, which point is the northwest corner of said Powers lot, and from thence running (1) along the easterly line of said Railroad

north fourteen degrees forty seven minutes west about three hundred and sixty-two feet to line of land of Jacob C. Ward; thence (2) along the line of his land north eighty two degrees twenty minutes east two hundred and eleven feet and six inches to a corner in his land; thence (3) still along his land south thirteen degrees forty minutes east three hundred and thirty two feet and one inch to a point in Farrand Street directly opposite the northeast corner of said lot of Charles W. Powers; thence (4) south seventy-four degrees ten minutes west across Farrand Street and along the north line of said Powers lot two hundred and three feet and five inches to land of said Railroad at the place of beginning.

Excepting thereout the following described parcel heretofore conveyed to the Jenkins Mfg. Co., to wit:

Lying between Farrand Street and the right of way of the Delaware, Lackawanna & Western Railroad Company and more particularly described as follows: Beginning at a point in the easterly side line of the right of way of the Delaware, Lackawanna & Western Railroad Company, which point of beginning is distant two hundred and thirty-five feet and eighteen hundredths of a foot (235.18 ft) measured along said easterly side line of said right of way from the point of intersection of said easterly side line of said right of way and the northerly side line of Washington Street as the same is now monumented, and running from said point of beginning (1) along said easterly side line of said right of way of the Delaware, Lackawanna & Western Railroad Company on a course north twenty-two degrees forty-two minutes west two hundred and forty-six feet and sixty-seven hundredths of a

foot (N 22° 42′ W 246.67 ft) to a point; thence (2) through lands of the party of the first part north sixty-one degrees fifty-three minutes east one hundred and eleven feet and eighty hundredths of a foot (N 61° 53′ E 111.80 feet) to a point; thence (3) still through lands of the party of the first part south twenty-seven degrees thirty-two minutes east one hundred and twenty-four feet and fifteen hundredths of a foot (S 27° 32′ E 124.15 ft) to a point still in the lands of the said party of the first part; thence (4) south sixty one degrees fifty-nine minutes west thirteen feet (S 61° 59′ W 13 ft) to a point still in the lands of the party of the first part; thence (5) south twenty-seven degrees twenty-eight minutes east one hundred and thirty-six feet and ninety-seven hundredths of a foot (S 27° 28′ E 136.97 ft), more or less, to the dividing line between the lands of the party of the first part and lands now or formerly of Annie E. Conniff; thence (6) along said dividing line south seventy-four degrees sixteen minutes west twelve feet and forty hundredths of a foot (S 74° 16′ W 12.40 ft) to lands formerly belonging to Cornelius VanWagoner; thence (7) along line of land formerly of Cornelius VanWagoner north fourteen degrees fifteen minutes west two feet and seventy hundredths of a foot (N 14° 15′ W 2.70 ft) to a point; thence (8) south sixty-seven degrees eighteen minutes west one hundred and eight feet and thirty hundredths of a foot (S 67° 18′ W 108.30 ft) more or less to the point or place of beginning.

That complainant herein is now and has since October 1922 been the owner of the following tracts and parcels of land contiguous to the above described parcel, to wit:

FIRST TRACT: Beginning at a point in the southerly line of lands of the party of the first part where the same is intersected by a line in prolongation of the southwesterly line ofFarrand Street northwesterly from the Bloomfield boundary line, which point is the end of the first course of first tract in deed of even date herewith by party of second part to party of first part; thence south 74 degrees 14 minutes west twenty one feet and 65 hundredths of a foot; thence north 67 degrees 42 minutes east twenty one feet and 48 hundredths of a foot; thence southeasterly two feet and 46 hundredths of a foot to the place of beginning. Containing 26.40 sq. ft.

SECOND TRACT: Beginning at the intersection of the center line of Tony's Brook with the northwesterly line of lands of party of the first part; thence south 73 degrees 24 minutes west eighty-one feet, more or less * * * to the land of the D. L & W. R. R., thence along that line south 22 degrees 42 minutes east ninety feet and 21 hundredths of a foot to lands of party of the second part; thence north 74 degrees 14 minutes east forty-five feet more or less to the center of Tony's Brook and thence northerly in the center line of said Tony's Brook ninety-four feet more or less to the place of beginning.

4. That along the southwesterly side of the lands and premises of the complainant and running through the same there is a certain brook or water course commonly known as Tony's Brook; that said brook has its origin and source within the corporate limits of the Town of Montclair and flows generally in an easterly direction through a portion of the said Town of Montclair, and across the corporate limits of the Borough of Glen Ridge and through the said Town

of Bloomfield and discharges in the Second River, which said river ultimately discharges into the Passaic River in the Town of Belleville in the County of Essex.

5. That the said Tony's Brook is now carrying and has for some time past carried considerable surface water which has accumulated along its course within the limits of the said Town of Montclair and the said Borough of Glen Ridge, which municipalities lie to the west of the property of the complainant and which are at a level considerably higher and above the level of complainant's lands.

6. That at times of heavy rains and freshets a very large volume of water flows through the said brook and through the premises of the complainant and frequently during the course of a year the waters flow down the said brook and overflow the banks thereof and spread out upon and over the lands of the complainant in such a way and manner as to injure the buildings erected upon said premises and also to interfere with the manufacturing operations of the complainant thereon.

7. That in times of heavy rains and freshets as aforesaid, the channel of the said brook is inadequate and insufficient to carry the surface water flowing down the same from the said municipalities located above the complainant's lands and premises as aforesaid; that should the amount of water flowing down said brook be augmented to any extent whatever the overflow of waters would be such as to greatly damage the lands and buildings of the complainant and to cause an absolute cessation of operations within the buildings upon said lands.

8. That recently complainant has learned that the said Town of Montclair have undertaken to establish and construct a certain Storm Sewer System in Pine, Walnut, Grove and Chestnut streets in the said town; that the area proposed to be drained by said system amounts to at least sixty or possibly seventy acres of land and such drainage area is generally described as follows:

Beginning at a point in the center line of Montclair Avenue about 500 feet south from the center line of Chestnut Street, thence northerly along the center line of Montclair Avenue to a point in the center of Montclair Avenue about 850 feet south of the center line of McDonough Street, thence in a northeasterly direction, through private property, to a point in the center line of Christopher Street about 575 feet south of the center line of McDonough Street, thence in a southerly direction, through private property, to a point in the center line of Grove Street about 200 feet north of the center line of Columbus Avenue, thence easterly, at right angles to Grove Street, to a point about 300 feet from the center line of Grove Street, thence in a southwesterly direction, parallel to Grove Street, to a point about 250 feet south of the center line of Oxford Street, thence in a northwesterly direction to a point in the center line of Label Street about 200 feet from the center line of Christopher Street, thence northeasterly, through private property, about midway between Christopher Street and Montclair Avenue, to a point about 500 feet south of the center line of Chestnut Street, thence northwesterly, through private property, to the point of beginning, in the center line of Montclair Avenue.

9. That the surface water within the limits of the area hereinabove described has for a period of thirty years last past and upwards flowed in a general easterly direction and drained into what is known as the Third River, which ultimately discharges into the Passaic River within the limits of the Town of Nutley in the said County of Essex.

10. That complainant is informed and verily believes and charges to be true that the said Town of Montclair by its officers and agents are so constructing the said Storm Sewer System as to gather the surface water from the said area and to conduct the same by means of pipes and sewers in a direction almost opposite to that from which they have been flowing as aforesaid, and to discharge the said waters upon and into the said Tony's Brook within the limits of the said Town of Montclair; that by reason thereof the waters flowing down the channel of the said brook toward the property of the complainant will be very greatly increased in volume especially during the periods of freshets and rains.

11. That the said Town of Montclair and the officers thereof propose by means of artificial drains to divert the surface water of the aforesaid area from the course which it would otherwise take and cause it to discharge in the said water course known as Tony's Brook as aforesaid; that by reason of the said actions on the part of the said defendant hereto, the said waters will be conducted to the said brook where they would not naturally flow and where they would not go but for the artificial drains and changes effected by the said defendant as aforesaid.

12. That complainant has been conducting for many years last past upon its said lands and premises manufacturing operations in the buildings and structures erected thereon; that complainant has in the various departments of its operations about three hundred employees regularly engaged therein; that whenever the waters from the said brook overflow the lands and premises of the said complainant as above alleged, the manufacturing operations of the complainant are very seriously affected; that the rise in the waters of said brook have heretofore necessitated the extinguishing of the fires in the power plant of the complainant and thereby caused an entire cessation of manufacturing operations in complainant's said plant; on such occasions also the goods and chattels of the complainant upon the said premises have been seriously injured and damaged; that any increase in the volume of water coming down the channel of the said brook will in times of heavy rains cause an overflow of water upon the lands of the complainant and render its manufacturing plant substantially useless.

13. That the complainant has heretofore notified the officers of the said defendant municipality of its rights in the premises and requested them to desist and refrain from making preparations to discharge the said surface waters into the said brook and water course and have informed the said defendant that any increase in the volume of water running down the same will work irreparable injury to the complainant; that although requested to do as aforesaid, the said defendant and its officers have refused to abandon the drainage scheme as aforesaid and have informed the complainant that the said defendant

intends to proceed with the said drainage scheme according to the plan above mentioned.

Complainant is without adequate remedy in the courts of law and therefore prays:

1. That the said Town of Montclair in the County of Essex, the defendant hereto, may answer this bill of complaint without oath and each statement therein contained:

2. That the said defendant may be by the decree of this Honorable Court enjoined and restrained from discharging the surface water from the aforesaid drainage area hereinabove described into the channel of the said Tony's Brook and from discharging the same directly or indirectly upon the lands of the said complainant, and from discharging the same at any point in said brook above the complainant's lands.

3. That complainant may have such further and other relief as may be agreeable to equity and good conscience.

4. That a writ of subpoena may issue commanding said defendant to answer this bill of complaint and to abide by such decree as this Court may make in the premises.

(Signed) LUM, TAMBLYN & COLYER,
Solicitors for and of Counsel with Complainant.

AMENDED ANSWER AND COUNTER-CLAIM.

Filed September 13, 1924.

IN CHANCERY OF NEW JERSEY.

Between

THE CONSOLIDATED SAFETY PIN COMPANY,
Complainant,

and

The "TOWN OF MONTCLAIR" in the County of Essex, "THE BOROUGH OF GLEN RIDGE" and the "COUNTY OF ESSEX,"
Defendants.

On Bill, &c.

Amended Answer and Counter-Claim.

1. This defendant has no knowledge or information sufficient to form a belief as to the allegations of paragraph (1) of the bill of complaint so leaves it to proof by complainant.

2. This defendant admits the allegations of paragraph (2) of the bill of complaint.

3. This defendant has no knowledge or information sufficient to form a belief as to the allegations of paragraph (3) of the bill of complaint so leaves it to proof by complainant.

4. This defendant admits that a natural water course known as Tony's Brook runs near or through some of the complainant's land and premises; that said brook has its source as alleged in paragraph (4); that said brook flows through the Town of Montclair, Borough of Glen

Ridge and Town of Bloomfield as therein alleged and that said brook discharges as therein alleged.

5. This defendant admits the allegations of paragraph (5) of the bill of complaint but states that the accumulation of surface water alleged therein from within the limits of the Town of Montclair is of surface water from within the natural watershed and natural drainage area of the said Tony's Brook and that there is no other legal, equitable, natural and feasible way for such water to go and that such water has so gone as it was rightful that it should with the knowledge and acquiescence of and without objection on the part of the complainant. That the said surface waters from the Town of Montclair originally naturally so flowing are now largely drained into the said Tony's Brook above complainant's property by means of drains and sewers constructed and maintained by this defendant said Town of Montclair which said drains and sewers have been constructed, maintained and used for the said purposes with the knowledge and acquiescence of and without objection on the part of the complainant. That at least thirty such said drains and sewers have been so constructed, used and maintained at great cost since the year 1907 by this defendant as a part of its general surface water sewer system relying on the said use of said Tony's Brook as the outlet thereof as was well known to the complainant which as aforesaid acquiesced in the said construction and maintenance and said use thereof and made no objection to the said construction and maintenance and use thereof. This defendant further states that the accumulation of surface water therein alleged from within the limits of the defendant Bor-

ough of Glen Ridge is of surface water for a long time past so carried by Tony's Brook some of which is from within the natural watershed and natural drainage area of said Tony's Brook and for which there is no other legal, equitable, natural and feasible way for such water to go and which has so gone as it was rightful that it should with the knowledge and acquiesence of and without objection on the part of the complainant but also is of surface waters not within the natural watershed and natural drainage area of the said Tony's Brook. That said defendant Borough of Glen Ridge so this defendant is informed and believes many times heretofore has on its own behalf and that of this defendant and the defendant County of Essex notified the complainant of said defendants said use of Tony's Brook and has also on its own behalf and that of this defendant and the defendant County of Essex notified the complainant that complainant had so constructed, maintained and used a certain dam across said brook, had so walled in and restricted and interfered with the natural course, channel, flow and velocity of said brook as to interfere with said defendants said use of said brook, and demanded on its own behalf and that this defendant and the defendant County of Essex, complaint cease so interfering with defendant's said use. That complainant has recently recognized the said rights, claims and demands of said defendant and of this defendant, and of the defendant, County of Essex, and has recently complied with same to the extent of making openings in said dam for the passage of storm water and opening the same to permit such passage, so this defendant is informed and believes. That in addition to the said surface waters from this defendant 'Town

of Montclair'' and from the defendant ''Borough of Glen Ridge'' this defendant alleges that the defendant ''County of Essex'' drains from within the Borough of Glen Ridge into said brook above complainant's property from Bloomfield avenue, a public highway owned and under the control of said defendant, a large amount of surface water, some of which is from within the natural watershed and natural drainage area of Tony's Brook and for which there is no other legal, equitable, natural and feasible way for such water to go and which has so gone as it was rightful that it should with the knowledge and acquiescence of and without objection on the part of the complainant but also is of surface waters not within the natural watershed and natural drainage area of said brook. That said defendant County of Essex so this defendant is informed and believes many times heretofore has on its own behalf and that of this defendant and the defendant Borough of Glen Ridge notified the complainant of said defendants' said use of Tony's Brook and has also on its own behalf and that of this defendant and the defendant Borough of Glen Ridge notified the complainant that complainant had so constructed, maintained and used a certain dam across said brook, had walled in and restricted and interfered with the natural course, channel, flow and velocity of said brook as to interfere with said defendants said use of said brook and demanded on its own behalf and that of this defendant and the defendant Borough of Glen Ridge that complainant cease so interfering with defendant's said use. That complainant has recently recognized the said rights, claims, and demands of the defendants, and has recently complied with same to the extent of making openings in said dam for the passage of

surface water and opening the same to permit such passage, so this defendant is informed and believes. This defendant alleges on information and belief that such surface waters from the defendant "Borough of Glen Ridge" and from Bloomfield avenue owned and controlled by the defendant "County of Essex" in the Borough of Glen Ridge are of surface waters some of which originally naturally flowed into Tony's Brook above complainant's property, some of which originally naturally flowed into Tony's Brook above complainant's property but became diverted away from said brook or to points on said brook below complainant's property, some of which originally naturally flowed into Tony's Brook below complainant's property and the remainder of which originally naturally flowed away from Tony's Brook into some other water course or courses; but at various times before and after the year 1891 down to this date at times unknown to this defendant but known to the complainant, both the defendants "Borough of Glen Ridge" and "County of Essex" and their predecessors to whose rights they have succeeded have by means of various artificial drains and sewers in the Borough of Glen Ridge and in, on and along Bloomfield avenue, in said borough and have by means of paving, grading and regrading certain streets and avenues in said Borough of Glen Ridge and said Bloomfield avenue diverted a very large amount of such surface waters into Tony's Brook above complainant's property that otherwise would either not flow into said brook or would enter it below complainant's property and said defendants have so diverted such waters with the knowledge and acquiescence of and without objection on the part

of the complainant. That the said surface waters from the defendant "Borough of Glen Ridge" and the defendant "County of Essex" are largely drained into the said brook by means of drains and sewers constructed and maintained by the said Borough of Glen Ridge and the said County of Essex and their predecessors which said drains and sewers have been constructed and used for the said purposes with the acquiescence of and without objection on the part of the complainant. That in addition to the said surface waters there is drained into the said brook above the complainant's said property and from within the limits of the Borough of Glen Ridge by means of drains, sewers and otherwise other sewerage from dwellings and business buildings, which is with the acquiescence of and without objection by the complainant. That in addition to the foregoing drainage of surface waters and sewerage the complainant itself at its own property of; in spite of the notice to it aforesaid that it, the complainant, was inequitably and illegally so interfering with and restricting the natural course, channel, flow and velocity of said brook and inducing, causing and aggravating said conditions as to prejudice, injure and damage the rights of this defendant and those of the defendants Borough of Glen Ridge and County of Essex.

7. This defendant denies that in time of heavy rains and freshets the natural channel, course and way of discharge for said brook is inadequate and insufficient to carry the surface waters from said brook's natural watershed and natural drainage areas within the limits of the Town of Montclair. This defendant denies that complainant has now or ever has had any legal or equitable right to obstruct by a dam, or other-

wise, and to confine said brook and the said surface waters from the Town of Montclair to or in any other than the natural channel, way or manner. This defendant states that any damage or injuries complainant's lands, buildings, or property may have heretofore suffered or hereafter suffer and any interference heretofore or hereafter with complainant's manufacturing operations has been and will be due to complainant's own acts and omissions in that complainant now inequitably and illegally discharges into said brook and augments the amount of and adds aforesaid hereto waters, liquids, solids and sewerage not natural to the drainage area of said brook and in prejudice and to the injury and damage of this defendant and its rights; and in that said property was bought by, and said buildings were erected and used with notice to and knowledge of the complainant that as aforesaid the said very large volume of water flowed through said brook and notwithstanding said notice and knowledge the said buildings were not only not erected and used to avoid and so as to be protected from such damage and to avoid interference with and so as to protect from interference with such manufacturing operations but that complainant in about the year 1910 so constructed or altered the construction at or near its property of a certain dam on said Tony's Brook; and has so walled and banked in and restricted and interfered with the natural course, channel, flow and velocity of the said brook; as to produce a condition likely to induce, cause and aggravate the conditions complainant alleges and now complains of; and complainant has done so in spite of the notice to it aforesaid that it, the complainant, was inequitably and illegally so interfering with and restricting the natural

course, channel, flow and velocity of said brook and inducing, causing and aggravating said conditions as to prejudice, injure and damage the rights of this defendant and those of the defendants, Borough of Glen Ridge and County of Essex. This defendant states that the amount of surface water that will be drained into the said brook by means of its sewer referred to in paragraphs (8) and (10) of the bill of complaint and paragraph (8) of this answer will be comparatively insignificant in volume compared with the natural volume of drainage of the said brook at the complainant's property and the damage, if any, caused by the said surface water drained by this defendant's said sewer will be insignificant and negligible compared with the advantages gained to the public and this defendant and citizens of the Town of Montclair by said use.

8. This defendant admits that it has undertaken to establish and construct a certain storm sewer system in Pine, Walnut, Grove and Chestnut streets within the limits of the Town of Montclair, but this defendant states the facts to be, as to the area to be drained by said sewer and the boundaries of the same as follows:

The sewer is designed and being constructed to carry both of the following two areas:

The first of said areas comprises about 52 acres and is generally bounded and described as follows:

"BEGINNING in the center line of Label Street, distant one hundred and eighty seven (187) feet more or less, west of the center line of Christopher Street; thence northeasterly across private property, seven hundred and twenty-five (725) feet more or less to a point on the center line of

Montclair Avenue, which point is three hundred and fifty (350) feet more or less, south of the center line of Chestnut Street; thence northerly along the center line of Montclair Avenue seventeen hundred and ten (1710) feet, more or less which point is seven hundred (700) feet more or less, north of the center line of Columbus Avenue; thence easterly four hundred and eighty (480) feet more or less, across private property to the center line of Christopher Street, distant northerly one thousand and twenty-eight (1,028) feet, more or less from the center line of Columbus Avenue; thence southeasterly one hundred (100) feet more or less, to a point on private property, thence southerly and parallel or nearly so with Christopher Street, eight hundred and fifty (850) feet more or less, to a point on private property, which point is distant one hundred and forty (140) feet more or less, east of the center line of Christopher Street, and distant one hundred and fifty (150) feet more or less north of the center line of Columbus Avenue; thence southeasterly and parallel or nearly so with Columbus Avenue, two hundred and seventy (270) feet more or less, to a point in the center line of Grove Street, which point is distant one hundred and three (103) feet more or less north of the center line of Columbus Avenue; thence southeasterly along the rear line of lots fronting on Columbus Avenue three hundred and ten (310) feet to a point on the center line of Columbus Avenue, which point is distant two hundred and seventy (270) feet more or less southeast of the center line of Grove Street; thence southerly five hundred and thirty (530) feet to a point on the center line of Ardsley Road, which point is distant four hundred and two (402) feet more or less southeast of Grove

Street; thence southwesterly three hundred and sixty (360) feet more or less to a point in Tuxedo Road, which point is distant three hundred and eighty five (385) feet southeast of the center line of Grove Street; thence westerly five hundred and thirty (530) feet to a point on the center line of Cambridge Road, which point is distant eighty (80) feet south of the center line of Grove Street; thence southwesterly and parallel or nearly so to Grove Street five hundred and eighty (580) feet to a point distant two hundred (200) feet more or less southwest of Oxford Street; thence southerly one hundred and fifty (150) feet more or less to a point distant two hundred and sixty (260) feet north of the center line of Walnut Street; thence westerly two hundred (200) feet more or less, to a point on the center line of Grove Street, said point distant two hundred and twenty four (224) feet north of the center line of Walnut Street; thence northerly four hundred (400) feet more or less to a point on the center line of Christopher Street and Label Street; thence westerly along the center line of Label Street one hundred and eighty seven (187) feet to the point of BEGINNING." ..

The second of said areas comprises about 18 acres and is generally bounded and described as follows:

"BEGINNING at a point two hundred (200) feet east of the center line of Grove Street, which point is distant two hundred and sixty (260) feet north of the center line of Walnut Street; thence one hundred and fifty (150) feet more or less northerly to a point distant eighty (80) feet more or less south of the center line of Grove Street; thence, five hundred and eighty (580) feet more or less northeasterly and parallel to

Grove Street to a point on the center line of Cambridge Road, which point is distant eighty (80) feet more or less south of the center line of Grove Street; thence easterly two hundred and fifty (250) feet more or less, to a point distant two hundred and ten (210) feet more or less, southeast of the center line of Grove Street, and mid-way between Cambridge Road and Tuxedo Road; thence southeasterly and parallel to Cambridge Road, four hundred and fifty (450) feet more or less, to a point distant one hundred and twenty (120) feet more or less, northwest of the center line of Tremont Place; thence southerly four hundred and ninety (490) feet more or less, to a point distant one hundred and fifty (150) feet more or less, north of the center line of Oxford Street; thence southeasterly and parallel or nearly so to Oxford Street one hundred and eighty (180) feet, more or less, to the dividing line between the Town of Montclair and the Borough of Glen Ridge; thence southerly and along said dividing line one hundred and ten (110) feet more or less, to the center line of Oxford Street; thence southerly three hundred and twenty (320) feet more or less, to a point on the center line of Innes Place, which point is distant fifty (50) feet more or less southeast of said dividing line; thence westerly one hundred and seventy (170) feet more or less to a point on the center line of Walnut Crescent, which point is distant two hundred and twenty nine (229) feet more or less, south of the center line of Oxford Street; thence one thousand and ten (1,010) feet more or less westerly to place of BEGINNING."

The waters from this area are to be added in the future to the said sewer.

9. This defendant denies that the surface water within the area mentioned in paragraph (8) of the bill of complaint and as more correctly set forth in paragraph (8) of the answer has for the period alleged in paragraph (9) of the bill of complaint, flowed as alleged, and says that any of such surface waters as may have so flowed for any part of the said period did not so flow naturally nor due to any acts or omissions of this defendant and that it was always the right, plan and intention of this defendant as complainant had notice of to drain said surface waters from said area into said Tony's Brook as the legal, equitable, natural and only feasible outlet of all of said waters as soon as the locality of said area had so improved and developed as to indicate the best manner of doing so and as a step towards that end and preparatory thereto did, in the year 1916, construct its sewer system between said area and said brook of a design and size to join with and carry to said brook such drainage of said area of all of which complainant had notice and made no objection thereto.

10. This defendant denies as aforesaid that the surface water from said area has been flowing as alleged in paragraph (10) of the bill of complaint. Admits that for the reasons aforesaid this defendant intends to use said storm water system to gather some of said surface waters and conduct and discharge the same to and into said brook within the limits of the Town of Montclair as the legal, equitable, natural and only feasible place to discharge the same but denies that such waters flowing down and through the natural channel of said brook will unnaturally, inequitably, illegally or materially

increase the volume of waters of said brook at the premises of the complainant and states that the same will be comparatively insignificant in volume compared with the natural volume of drainage of the said brook at the complainant's property and the damage if any caused by the said surface water drained by this defendant's said sewer will be insignificant and negligable compared with the advantages gained to the public and this defendant and the citizens of the Town of Montclair by said use.

11. This defendant admits that for the reasons aforesaid this defendant intends to use said storm water system to gather some of said surface waters and conduct and discharge the same to and into said brook within the limits of the Town of Montclair, but this defendant denies as alleged in paragraph (11) of the bill of complaint that thereby it proposes to or will divert any of said surface waters from the natural flow thereof and asserts that said brook is the natural outlet and place for all of said surface waters to naturally flow to.

12. This defendant denies knowledge or information sufficient to form a belief as to the manufacturing operations of the complainant or of the number of its employees or as to the effect thereon on its goods and chattels of the waters of the said brook. This defendant states that any damage or injuries complainant's lands, buildings or property may have heretofore suffered or hereafter suffer and any interference heretofore or hereafter with complainant's manufacturing operations has been and will be due to complainant's own acts and omissions in that complainant now inequitably and illegally discharges into said brook and augments the

amount of and adds as aforesaid thereto waters, liquids, solids and sewerage not natural to the drainage area of said brook and in prejudice and to the injury and damage of this defendant and its rights; and in that said property was bought by, and said buildings were erected and used with notice to and knowledge of the complainant that as aforesaid the said very large volume of water flowed through said brook and notwithstanding said notice and knowledge the said buildings were not only not erected and used to avoid and so as to be protected from such damage and to avoid interference with and so as to protect from interference with such manufacturing operations but that complainant in about the year 1910 so constructed or altered the construction at or near its property of a certain dam on said Tony's Brook; and has so walled and banked in and restricted and interfered with the natural course, channel, flow and velocity of the said brook; as to produce a condition likely to induce, cause and aggravate the conditions complainant alleges and now complains of; and complainant has done so in spite of the notice to it aforesaid that it the complainant was inequitably and illegally so interfering with and restricting the natural course, channel, flow and velocity of said brook and inducing, causing and aggravating said conditions as to prejudice, injure and damage the rights of this defendant and those of the defendants Borough of Glen Ridge, and County of Essex. This defendant states that the amount of surface water that will be drained into the said brook by means of its sewer referred to in paragraphs (8) and (10) of the bill of complaint and paragraph (8) of this answer will be comparatively insignificant in volume compared

with the natural volume of drainage of the said brook at the complainant's property and the damage if any caused by the said surface water drained by this defendant's said sewer will be insignificant and negligible compared with the advantages gained to the public and this defendant and citizens of the Town of Montclair by said use.

13. This defendant admits that the complainant on or about October 27, 1923, notified this defendant of its alleged rights. This defendant admits it has proceeded to construct the said sewer system and asserts that it has done so because it considers for the reasons aforesaid that it is entirely within its legal and equitable rights so to do and that complainant has no equitable or legal right to prevent it from so doing.

FIRST SEPARATE DEFENSE.

1. That the complainant in the year 1891 dedicated to the public use including that of this and of each of the other defendants and to the predecessors of each of the defendants to the rights of which predecessors these defendants have succeeded, the said Tony's Brook at and on complainant's said property and dedicated to the said public use the water way of the said brook at and on complainant's said property and dedicated to the said public use so much of complainant's said property as constitutes the water way of the said brook and so much of complainant's said property as lies under the water way of the said brook, said dedication to the said public use being for the drainage into said brook above complainant's said property and on, into and over complainant's said property surface

waters from above complainant's said property within the natural water shed and drainage area of Tony's Brook within the limits of the municipalities of the defendant Borough of Glen Ridge, of this defendant Town of Montclair and of Bloomfield avenue owned and controlled by the defendant, County of Essex within the Borough of Glen Ridge, and that the said public of which this defendant the Town of Montclair and its inhabitants and the other defendants were and are a part, and this defendant, its predecessor, the Township of Montclair, and the defendant Borough of Glen Ridge and its predecessor the Township of Bloomfield, thereafter accepted the said dedication and the defendant County of Essex, and have continuously ever since used the same for the said purpose and this defendant Town of Montclair has since the year 1907 continuously used the same for that purpose by constructing and using at least 30 drains and sewers at great expense therefor to drain into said brook surface waters from within this defendant's limits from within the water shed of said brook. The complainant dedicated the same by permitting the said public and this defendant and each of the other defendants and their predecessors to make such expenditures and to so use the said brook and complainant's said property and acquiescing down to this time in the said use, expenditures, construction and maintenance of same by the said public and this defendant and each of the other defendants without objection on its part, as herein shown and hereby referred to.

SECOND SEPARATE DEFENSE.

1. This defendant disclaims as unauthorized by and not binding on this defendant the acts or omissions of any other person whereby any of the surface waters referred to in the bill of complaint flowed other than into Tony's Brook.

THIRD SEPARATE DEFENSE.

1. The construction and use of the sewer in question is in furtherance of a natural and lawful scheme of municipal and public improvement in connection with the grading and improvement of its streets by this defendant for the drainage area and locality in question and the complainant, therefore, has no cause of action.

FOURTH SEPARATE DEFENSE.

1. That the complainant's land being below this defendant the Town of Montclair and that of each of the other defendants, it is subject to the flow of all surface water from within each defendant's limits from within the watershed of said brook, and each defendant has an easement over the property of the complainant for the passage of all surface waters from within each defendant's limits from the natural watershed of said brook, as herein shown and hereby referred to.

FIFTH SEPARATE DEFENSE.

1. Complainant's alleged rights if any are qualified ones and subject to each defendant's right to drain all the surface water from within each defendant's limits from within said brook's natural watershed into said brook, as herein shown and hereby referred to.

SIXTH SEPARATE DEFENSE.

1. The construction and use of said sewer by this defendant will not increase to any appreciable extent the present volume of the water of the said brook nor to any appreciable or separable extent the damage which complainant admits it now suffers and is liable to suffer under existing conditions and complainant, therefore, is not entitled to any relief against this defendant.

SEVENTH SEPARATE DEFENSE.

1. That the passage of time has not invested the complainant with any right, title or interest of, in or to the said brook, the use of said brook, the natural water way of said brook and the lands at the complainant's property beneath said brook, adverse to the rights of this defendant nor either of the other defendants, nor by way of prescription as time cannot run against this defendant, nor either of the other defendants in such circumstances.

EIGHTH SEPARATE DEFENSE.

1. That the alleged rights of the complainant are insignificant as compared with the rights of the public constituting the Town of Montclair, this defendant and the other defendants as herein shown and hereby referred to.

NINTH SEPARATE DEFENSE.

1. The complainant has no right to maintain any dam at its said premises across the said brook.

TENTH SEPARATE DEFENSE.

1. The complainant has no cause of action against this defendant as the dam now on its premises on the said brook has not been in existence for the past twenty years continuously.

ELEVENTH SEPARATE DEFENSE.

1. The complainant is guilty of laches and has not been vigilant in asserting its alleged rights as herein shown and hereby referred to.

TWELFTH SEPARATE DEFENSE.

1. That the rights complainant claims have not for the past twenty years been openly, uninterruptedly and notoriously exercised and used by it, nor has the height of water which complainant now claims the right to maintain been maintained or used by it at that height continuously during the period of the past twenty years.

THIRTEENTH SEPARATE DEFENSE.

1. The complainant is estopped to interfere with this defendant in the construction of the sewer referred to in the bill of complaint and paragraph (8) of this answer and the discharge thereby of said surface waters as complainant has permitted and acquiesced in and made no objection since the year 1891 to this defendant or its predecessor so using said brook and since 1907 constructing at great expense at least 30 other sewers designed and used to discharge surface waters from the natural water shed within its limits of Tony's Brook into the same above complainant's property and acquiesced and permitted this defendant, and made no objection to defendant's planning and constructing its general sur-

face water system and parts thereof with the end in view by this defendant of eventually constructing, using and so discharging the sewer in question, and permitted and acquiesced in and made no objection to the construction of the existing sewer system lying between said Tony's Brook and the sewer in question, in a manner to prepare for and in order to join to this sewer in question. And complainant is also estopped because it has permitted and acquiesced in and made no objection to the defendant Borough of Glen Ridge and its predecessor Township of Bloomfield since the year 1891 and the defendant County of Essex since the year 1891 discharging such surface water from within and from without the natural watershed of said brook into said brook above complainant's property and to said defendants doing so by means of drains and sewers and by means of paving, grading and regrading certain streets and avenues in the Borough of Glen Ridge and of Bloomfield Avenue in said Borough of Glen Ridge constructed, used and maintained by the said defendants at great expense, as herein shown and hereby referred to.

FOURTEENTH SEPARATE DEFENSE.

No storm or surface water from the area alleged in paragraph 8 of the bill of complaint could or did lawfully go or flow by way of drain, sewer or otherwise in an easterly direction into or through any other municipality and the private properties therein, into Third River and Passaic River, as alleged in paragraphs 9, 10 and 11 of bill of complaint, during the period alleged in paragraph 9, as it was and is a condition precedent to the legality of such drainage, sewerage or flow, that the provisions of the con-

stitution and statutes of New Jersey in each case made and provided be complied with. The provision of the constitution is at Art. I, Sec. 16. That such statutes are:

Law 1917, Chap. 152, Art. XXI, and Stcts. 1-17 thereof, inclusive, particularly.

Law 1895, Chap. 113 and Sect. 60 thereof particularly.

Law 1884, Chap. 24 and Sects. 1-14 thereof, inclusive, particularly.

To which constitution, statutes and the amendments and supplements thereto for the said conditions, provisions and particulars, reference herewith is respectfully made, which constitution and statutes are made a part hereof.

That the bill of complaint be dismissed with costs.

HAROLD BOUTON,
Solicitor for and of Counsel
with Defendant, Town of Montclair.

REPLICATION TO AMENDED ANSWER.

Filed September 29, 1924.

IN CHANCERY OF NEW JERSEY.

Between

CONSOLIDATED SAFETY PIN COMPANY,
Complainant,

and

THE TOWN OF MONTCLAIR, in the County of Essex,
Defendant.

On Bill, etc.

Replication to Amended Answer.

The replication of the complainant to the amended answer of the defendant, and answer to its counter-claim:

Complainant joins issue on the amended answer of this defendant.

LUM, TAMBLYN & COLYER,
Solicitors for and of Counsel with Complainant.

ORDER OF REFERENCE.

Filed June 20, 1924.

IN CHANCERY OF NEW JERSEY.

Between CONSOLIDATED SAFETY PIN CO., *Complainant,* *and* TOWN OF MONTCLAIR, *Defendant.*	*On Bill, etc.* *Order of Reference.*

The solicitor for the defendant consenting hereto:

It is on this 20th day of June, A. D. 1924, on motion of Lum, Tamblyn & Colyer, of counsel with complainant, ORDERED that the above-entitled cause be referred to Hon. J. N. Backes, one of the Vice-Chancellors, to hear the same for the Chancellor and to report to him thereon and advise what order or decree should be made therein.

E. R. WALKER,
C.

I consent to the entry of the above order.

HAROLD BOUTON,
Solicitor for Defendant.

TESTIMONY.

IN CHANCERY OF NEW JERSEY.

September 23, 1926.

Between CONSOLIDATED SAFETY PIN CO., *Complainant,* *and* TOWN OF MONTCLAIR, BOROUGH OF GLEN RIDGE and COUNTY OF ESSEX, *Defendants.*	

Transcript of shorthand notes of testimony taken in the above-entitled matter before his Honor John H. Backer, Vice-Chancellor, at the Chancery Chambers in the City of Newark, New Jersey, in the presence of Lum, Tamblyn & Colyer (Mr. Ralph Lum) for complainant; Harold Bouton and George R. Beach for defendant Town of Montclair; James Mylod for defendant Borough of Glen Ridge, and Arthur Vanderbilt for defendant County of Essex.

EARLE F. COPP, sworn for complainant.

Direct examination by Mr. Lum.

Q Mr. Copp, what is your business? A I am vice-president and general manager of the Consolidated Safety Pine Company.

Q How long have you been such? A Well, I have been general manager for several years; I have been vice-president about three weeks.

Q How long have you been connected with the company? A I have been there thirteen years.

Q Under whose supervision is the operation and running of the plant at Bloomfield? A Mine.

Q How extensive a plant is that, briefly?

The Court: Have you a map?

(Map produced.)

Q Have you the title deeds of your property? A Yes, sir; I have the title deeds.

Mr. Lum: I offer in evidence the title deeds of the property of the Consolidated Safety Pin Company.

(Paper marked Exhibit C. 1.)

Mr. Lum: I also offer in evidence the certificate of incorporation of the company.

(Paper marked Exhibit C. 2.)

Q Can you place on that map Tony's Brook in relation to your plant? A Right here (indicating).

The Court: Indicated on the map of the Consolidated Safety Pin Company's property.

Q Briefly, how extensive a plant is yours? A We occupy about 70,000 square feet; three floors.

Q How many, average, employees? A About three hundred—a little over three hundred.

Q Your business is what? A Manufacture of safety pins and metal specialties.

Q Do you know whether there is any brook near your property or running through your property? A There is a brook that runs through our property in back of our building.

Q What is its name? A Tony's Brook.

Q And how long have you known that brook to flow through there? A Since I have been with the company.

Q Generally is the flow of that brook as shown on that map before you? A I think so. I haven't studied it very carefully. This is Tony's Brook all right. They have it laid out here. The railroad goes along on the left-hand side.

Q And that flows—its source is in what municipality? A Its source, I believe, is in Montclair.

Q And it flows through what other municipalities? A Glen Ridge and Bloomfield.

Q And then discharges where? A I think it discharges in Second River.

Q And that Second River goes into the Passaic? A I think it does.

Q Now is Montclair above your plant or below? A It is above it.

Q Can you tell us whether in times of heavy rain and freshet large volumes of water come down that brook? A It does, yes, sir; we do have a large volume of water down through the brook when we have heavy storms.

Q Has that water caused any injury to your buildings, premises or business? A It has.

Q Is the channel of that brook adequate and sufficient to carry the surface water discharged into it at your place in times of heavy storm? A No.

Q In this past summer were there any severe storms? A Yes, sir; there was a very severe storm; there were several, but there was a very severe storm, I think it was around July 25th.

Q Were you there at the time? A I was away at the time.

Q Your engineer who is here, was there at the time? A Our engineer, yes, sir, he was there at the time.

Q And was a report made to you of that? A A report was made to me.

Q Was there any serious storms before that in that year? A I think there have been several storms this year, and I believe they were all in July.

Q Now, of your own knowledge, was there any in last year, 1925? A Yes, sir; there was one about—some time in July, 1925.

Q Were you there? A I was not there then.

Q Report was made to you of it? A Yes, sir.

Q And in 1924, in the summer, was there any? A There was a storm in 1924. It was either in the latter part of June or first of July.

Q Were you there? A I don't think I was at that one either.

Q Was report made to you of that? A Yes, sir.

Q Did you learn some three or four years ago —four or five years ago—before filing this bill— of a contemplated plan of Montclair with reference to surface water in the Pine, Walnut, Grove and Chestnut street sections? A Yes, sir; I learned of that.

Q What did your company do? A We wrote to the Town of Montclair and told them we didn't think they had a right to do it.

Mr. Lum: I ask for a copy of the letter.

The Witness: And we said, I think, we would try to protect ourselves.

Q You sent two notices, one in October 27th, 1923, and one November 22nd, 1923, did you? (Letters produced.)

Mr. Lum: I offer them.

(Papers marked Exhibits C-3 and C-4.)

A Those are my signatures.

The Court: Letters produced on call.

Q How soon after you had knowledge of the adopted ordinance and proceedings did you give notice to Montclair? A Well, I don't know exactly: I know when I first learned that they were going to do it, I called in an engineer to make a survey to see just how much damage we were likely to have from it, and after I had received his report I not only wrote that letter, but I saw the County Engineer about the matter.

Q After these protests and notices was the plan of Montclair carried out? A Yes, sir; it was.

Q Since the connection of this area so that that water has come down in Tony's Brook has the flow increased? A Yes, sir; it has.

Q Since that time has your damages been more serious than ever before? A Yes, sir; they have.

Q What do you recall in particular with reference to a roadway and wall? A Well, the storm in July, 1924, either the latter part of June or the early part of July, 1924, washed away—one of our walls it washed away we had to rebuild and the other had to be repaired. That was the worst storm that we had ever had up to that time. It cost us about anywhere from two to three thousand dollars to repair the damage.

Mr. Bouton: I object to any further testimony of this kind unless he shows that the damage he speaks of comes from the Pine

street sewer. He is speaking of a storm. He don't mean to say that all of the harm comes from the Pine Street sewer. Let him separate it. We object to any testimony that does not concern us.

The Court: They cannot prove everything at once. It will be disregarded if the testimony is not connected and pertinent.

Q What damage has this flow of water occasioned at your plant, briefly—the nature and extent? A Well, it generally—which storm do you mean?

Q You have spoken of three storms, 1924, 1925 and 1926. Take 1924 first.

Mr. Bouton: We object to that.

The Court: Same ruling.

Mr. Bouton: For this reason, your Honor, that their bill was filed prior to these storms and their damage, if any, is limited to the time prior to that.

The Court: This is to abate a nuisance. Objection overruled.

The Witness: In 1924 we not only had to repair the walls, but we had to clean up our brass in the brass room and wipe off our steel and re-oil it, and I believe at that time we had some trouble with our flooring on the first floor; in fact I think that can be borne out by a witness who we had to do some repairing there. The other storms since then —(interrupted).

The Court: What about 1925?

The Witness: 1925 and 1926 storms have simply been mostly damage in the plant, that

is, to the raw material, and in the engine room, that is about where most of it has been.

Q Has it or has it not interfered with the operation of your plant, the running of the engines? A It happens these storms have happened in the middle of the night. If they had happened in the daytime it would have required to shut the plant down. We would have had to dump our fires.

The Court: You were not there.

Mr. Lum: The engineer will cover that.

Q Now, something has been said of a dam on your property. Will you very briefly describe that dam?

The Court: Can't the engineers do that?

Mr. Lum: I guess so; yes, sir.

Cross examination by Mr. Bouton.

Q Mr. Copp, when did you first become connected with the company, the complainant? A 1913.

Q Now, you spoke of—in your complaint and your affidavit—of other damage, or damage that you were suffering before the Pine street sewer was connected, is that right? A Yes, sir.

Q Now, will you tell us what you referred to in that respect, by each year, if you may, from the time you became acquainted with it? A You mean since 1913?

Q Yes. A I cannot recall the storms we had each year since 1913.

Q Well, about how many storms did you have that caused you damage prior to the time of your

filing of the bill? A We had storms that caused damage prior to the filing of the bill.

Q I say how often—how many times a year? A When we had extreme heavy rainfall.

Q Can you give us an idea of what you recall as to the number of times a year that you had such damage? A Why, it might be once or might be twice a year.

Q It was once or twice a year during each of the years then down to—let us see, 1922, 1924—let's see, when did you file your bill? A 1924.

Q Was it once or twice a year? A Possibly.

Q And what was the nature of the damage? A Well, it was similar to the damage we have had since, but not as excessive.

Q Not as excessive. It was very similar, wasn't it? A Yes, sir.

Q And in fact, by your bill of complaint and your affidavit, you say it was serious enough for you to have to draw your fires, wasn't it, and you had to suspend manufacturing operations, didn't you? A Yes, sir.

Q And your stock was damaged, wasn't it? A Yes, sir.

Q In what respect then can you say that the damage you have suffered since 1924, particularly by reason of the Pine street sewer—not to the whole storm—where can you say in any respect that from your own knowledge the water that came from the Pine street sewer caused you any damage? A In the storm of 1924 the water was so much greater at that time that it washed our walls away and it never washed them away prior to that.

Q I understand you to have said that, but I am asking you to separate and show that that excess over what you had noticed before was due

to the Pine street sewer alone. A Well, that would be very impossible for me to do.

Q And you can't do it? A An engineer probably could do it.

Q I say you can't do it. A I am not an engineer.

Q No. You can't do it. A I am not an engineer, no. I can't do it personally, no.

Q That is it, and so that it might have been due to a heavier storm than any that had occurred before. A It might have been; the record would show that.

Q Now, Mr. Copp, is it not a fact that some of the damage during the period prior to 1924 came from the water that came from Bloomfield avenue through Farrand street, storm water flowing from Bloomfield avenue? A No, sir.

Q At no time would you say? A I wouldn't say at any time—(interrupted).

Q Then what did happen?

Mr. Lum: Complete your answer, Mr. Copp.

The Witness: I would like to say this, that there is a sewer on Farrand street that during heavy storms backed up water out of the brook. The water that comes in from Farrand street—I mean from Bloomfield avenue—I do not think ever caused us any damage.

Q But you have seen water coming from the direction of Bloomfield avenue, through Farrand street into your property, haven't you, in storm time? A I have seen water flowing from Bloomfield avenue through Ward street towards Far-

rand street, but I wouldn't say it has come into our property.

Q Will you say that it hasn't come into your property as recently as August or July of this year? Do you recall in July of this year it came from Bloomfield avenue into your property? A In July of this year when they had that storm I was not there, so I can't say.

Q No, but did you hear that it did? A No, sir.

Q Now, will you describe in a general way the use—the location with respect to the brook and the use of each of your buildings that you claim suffered any damage from this overflow? A Well, our engine room and our first floor has—(interrupted).

Q Your engine room—please take each part of the building by itself; we will take the other up later. A The engine room—(interrupted).

Q Now, how near to the brook is that? A Why, I should say that that was eighteen or twenty feet away from the brook.

Mr. Bouton: Here is the map that I have had made.

Q Will you look at that and see if that generally describes your location? Look at it carefully because we would like to use that. A Yes, sir; that generally describes it. This is the brook and there is the boiler room (indicating).

Q Now, Mr. Copp, will you describe the location with respect to vertical elevation of the grates or fire with respect to the top of the bank from which you say it is eighteen or twenty feet? Do I make it clear? A I think you do. I do not know that I can give you the exact elevation

of the grate of our fires. I think they are higher than the top of the bank.

Q You are not sure? A No; I am not sure.

Q Now, what is in that house or room that you call it? Just tell us generally what is there, so that we can see what it is that you claim the water interferes with. A There are two boilers, there is a water filter, there is a pump; in the engine room, which adjoins the boiler house, which is all in that same building, if you want me to describe that—(interrupted).

Q Yes, I do. A There are two engines with the condenser and all electric apparatus and air producers there.

Q Where are the fires—the grates—let us take the grates—in what part of the building are those grates and how many of them are there? A There are two boilers and they are in the building that is nearest to the brook.

Q And they are about how far? A I said, I think, about eighteen or twenty feet.

Q Two boilers and two fires and two grates? A We are not always running two fires; we are generally running one. One we have as auxiliary.

Q As an auxiliary. Now, what, if any, auxiliary power have you when you shut down that boiler house? A None at all.

Q By reason of the floods or anything else? A None at all.

Q You do not operate at all? A Well, if we need power we can't operate.

Q If you need power you can't operate? A No, sir.

Q Now, as I understand it, you say that from the time that you came to that company there were one or two storms a year that caused a sim-

ilar damage to that which you now complain of—one or two storms a year? A Possibly.

Q And your bill of complaint says that it interfered with your fires and stopped manufacturing operations. A At various times it has.

Q Now, how many occasions do you remember when that occurred? Did it happen at each of these storms that you speak of? A No.

Q Did it happen once a year? A No.

Q How often did it happen? A Do you mean when we had to cease operations?

Q Yes, or when it interfered with your operations, cutting down your operating force.

The Court: Your power.

The Witness: Perhaps two or three times.

The Court: 1924, '25 and '26?

The Witness: No; he is talking from the time I came to the plant in 1913.

Q Yes; I want you to say when they stopped up to that time, that is right? A Yes, sir.

Q Now, how long was your suspension? A We generally would have to shut down for the balance of the day until we cleaned out the grate—the debris.

Q Do you remember at any time that you were connected with the company that from the bank on the side on which your main buildings are located, in a direction substantially perpendicular to Bloomfield avenue or to the back of the brook, that your company built a dam of earth or of bags or something of that character, to shut off the water from sweeping down across your land from the brook above? Do you understand

me? A I think I understand you, but I do not recall that condition in my time.

Q Have you never heard of that? A I can't remember it. It might have been done during a storm.

Q You do not remember any such general embankment perpendicular to the channel of the stream that was put there to stave off such storm floods that you speak of? A I do not recall it, no.

Q Do you recall any times when bags or the building up the edge of the brook was made along the brook to keep off the water? A Since what time?

Q While you were there prior to 1924, during these flood times? A I cannot say.

Q Well, now then, we will proceed to describe these buildings. We have taken your engine and boiler room. You said that you had to suspend operations for the balance of the day or until you had the debris removed. Did that ever take—did it take all of one day or all of two days at times? A It generally meant we would shut down for the balance of the day.

Q If it happened during the night it might mean all the next day? A We generally put a crew on—whenever we had storms at night we put a crew on and worked right through the night up until morning.

Q What do you recall to have been the period of time—the longest period of time—or the average—let us take the average period of time, or describe in any way you want to, the periods of time during, after storms, that you had to suspend operation. A Well, we would send the operators home and while it might be possible for us to get the plant running again within a

few hours, four or maybe three hours, it was never practical for us to tell the operators—(interrupted).

The Court: The operators were dismissed.

The Witness: Yes, sir; we couldn't get in touch with our operators again.

Q You said at least a day. A Yes, sir.

Q Do you remember whether you ever lost more than a day? A ?

Q What other buildings have you that have operators in them? A We only have this one plant.

Q One plant; is that one building? A Yes, sir; they are all connected.

Q Is this plant operated by power? A Yes, sir. We have some hand operations, but a very small part of our plant is hand work; most of it is machine work.

Q Are there buildings that merely have stock—that is, stock that you are going to manufacture into a finished product? A Yes; there is one building.

Q Where are any of those buildings—or what building is that located in and where is that located with respect to the—(interrupted). A The raw material?

Q Yes. A At the north end of the plant. On the map I can show you.

Q On the north end of the plant. Now, what is the general size of that building?

The Court: You have it on the map here.

Q What is the name of the building? A Storehouse.

Q And how many floors in that building? A Three floors in that building, the same as the rest of it.

Q Now, at what level is the lowest floor? Is there a cellar to the building? A No, sir.

Q What level is the lowest floor—is it at ground level? A I would say it is at the ground level.

Q Ground level. How much above that first floor level is the other—the second floor? A Well, I can't tell you that offhand.

Q Do you remember any occasion when the water ever from these floods went into the first floor of that building, that is before 1924? There were occasions, were there not? A Yes; surely.

Q Yes. And has any flood ever gone as far as the second floor? A Not in my time.

Q Now, then, that is the storehouse. What other principal building? Have you a factory building, you might call it? A Well, it is all the factory building.

Q You term of what is—where the operators work or manufacture. A We have adjoining that stock room and also adjoining the boiler room—we have what we call the wire manufacturing department.

Q Where is that with respect to the brook? How far from the brook is that? A I wouldn't want to state that.

The Court: That is in the rear of the other building?

The Witness: Yes, sir; it adjoins the boiler room.

Q And how many floors to that building? A Three.

Q And what is the level of the first floor of that building? A I would say it was the ground level.

Q Now, what other building is there; that is the wire manufacturing building. A There is a press room.

Q The what? A Press room.

Q Is that a separate building or connected? A No; it is all connected.

Q What is the level of the first floor of that building? A About the same level as the others.

Q That is the ground level? A I think so.

Q Now, what is—shall we call it the main building? A I have been describing the main building.

Q What is the next building? A Then you have adjoining that, the office.

Q What is the level of the floor of the office, substantialy the same thing? A About the same.

Q Ground level. Now, what is the level of the next building, whatever it may be? A That is the shipping room.

Q What is the level of that? A Shipping room, also storehouse.

Q What is the level of the floors of those? A I think there is a little difference in the level there, but it is all supposed to be ground level.

Q All the floors are ground level? A I think so, yes, sir.

Q Now, are those the same levels now that they were when you first went there? A Yes, sir.

Q Then you have done nothing, in spite of the storms that you suffered from, as you describe it to 1924—nothing was done in the way of raising the floors to avoid or prevent damage.

A We would have to demolish our buildings to raise the floors.

Q Nothing was done. A Well, I think there was something done. We tried our best to avoid the storms when we could.

Q But you didn't raise the levels of those floors? A No, sir; we didn't raise the level.

Q And you continued to put raw material in the storehouse? A Yes, sir.

Q Is that so? A Sure.

Q Now, you spoke of the damage you suffered up to 1924 and since 1924 as to what you suffered in storm time. In the ordinary flow of that brook you suffer no damage whatever, do you? A No, sir.

Q That is, you can say, for three hundred and sixty or three hundred and sixty-two or three days a year, or of that part of the time you operate—(interrupted).

The Court: Other than heavy storms.

Q Other than heavy storms. That is so, isn't it? A Yes, sir.

Q These severe storms you speak of since 1924, in what respect that you yourself know, if any, did they cause you any longer or greater suspension or damage? A Well, these storms that we have had since that time have come in the nighttime, and, as I have said, we put a crew on immediately and would be able to operate in the morning. No doubt our damage has been greater in the first storm, 1924, July 6th or 8th, when one wall was washed away and the other wall was seriously damaged.

Q One wall of what? A We have retaining walls alongside of the brook and one of the walls was washed away and the other was damaged.

Q You yourself do not know how?

The Court: I thought counsel was directing your attention to retaining walls and you said you didn't know.

The Witness: He was talking about bags, your Honor.

Mr. Bouton: I was talking about something else.

Q When you speak of this heavier damage and greater damage then, you did not have to suspend even as great a length of time as you did prior to 1924 by reason of a different method, do I understand, that you put crews on during the night? A No. It might have been a coincidence, but these storms since that time have been most always at night. In fact, they have always been at night. I am speaking of what, if anything, was greater, in period of time of suspension or anything of that kind? You weren't held up? A We weren't suspended any longer than before.

Q In what way did you suffer any greater damage? A Because of the replacing of the walls.

Q I see. Because of the replacing of the walls. Now what else, if any? Any greater damage to your stock that you could tell? A Well, it is very hard to measure that.

Q And you didn't measure it? A Well, I didn't keep a record prior to the time this new water was diverted into the brook.

Q Since 1924? A 1924. Prior to that time I didn't keep a record of the damage.

Q What was the amount of damage in 1924 to your stock? A To our stock? I think the total

damage in 1924 was between twenty-five hundred and three thousand dollars.

Q 1925, to stock? A I just said twenty-five hnudred or three thousand. That wasn't all damage to stock; that was part due to the wall, in 1925.

Q To the retaining wall, you mean? A To the retaining wall.

Q 1925? A 1925 probably five or six hundred dollars.

Q 1926? A Probably the same.

Q Now there was a very heavy storm in August, in your neighborhood, about five o'clock in the morning. Did you suffer from that? A I don't think we had a flood. That depends on the way the water comes down. I mean if it all comes down within a short time, we are more apt to get it than if it is a prolonged rain.

Q You did not suffer from the early morning August storm? A I do not think so. Our engineer can tell better.

Q Then such record as you kept since 1924 was from the general effect of your flow and you wouldn't say that you distinguished between that that was contributed, if any, by this Pine Street sewer, and the general flow, would you? A I haven't segregated it, no.

The Court: You said you had a loss in 1923.

The Witness: I didn't say that. I do not recollect.

The Court: 1922 or 1921. You have no idea what the amount of loss was in any one of these years?

The Witness: Several hundred dollars. Whenever we have it it generally costs us several hundred dollars.

The Court: In stock?

The Witness: In stock; yes, sir.

The Court: That been going on ever since 1913?

The Witness: Yes, sir.

Q When you heard that Montclair was to build this sewer in question—this drain, in what way have you been able to tell since that thing was constructed that you have suffered any damage from it?

The Court: The storm during which you say you lost your retaining wall, you don't know the time of that storm?

The Witness: I do not recall it. I made some note of the time and I suggested that we check up the rain-fall in Newark to check up whether that was a larger storm than any we had prior to that time, because it came practically just after the sewer was connected.

Q Didn't I understand you to say that these recent storms have been mainly at night? A Yes, sir; that is, that have affected us.

Q And at a time then after your plant had closed and you had gone—closed for the day, I mean. A That would depend. We are running a night shift. If it happened on a week night, why the night shift would have to be sent home.

Q Now, were the gates of the dam—there are gates in this dam, aren't there? A Yes, sir.

Q Were the gates of the dam opened or closed at the times when you say you suffered damage from these night storms? A I would say they were open, although I wasn't there.

Q You don't know then. A No, sir.

Q Then why would you say they were open, if you don't know? A Because our watchman, or whoever is there, the engineer, is instructed, as soon as the water raises to a certain level to trip the gates, and down they go.

Q And at what level is he instructed to trip the gate? A Well, when it gets up pretty high. We don't wait until it gets too high.

Q What height then do you usually maintain the water for your operation behind that dam? A At the height of the gate.

Q At what? A At the height of the gate.

Q What part of the gate? A The top of the gate.

Q The height of the top of the gate is the height at which you usually maintain the water? A That is right.

Q Now, at what height is he directed to trip the gate? A When it begins to raise—when the water begins to rise. If it is just an ordinary rain and the water comes up, why we don't trip the gate, but if it is a severe storm we trip the gate before the water comes down.

Q How far below the level of the bank on the side at which your chief buildings are located is the top of the gate—that is, the elevation at which you usually maintain the water? A Will you ask that question again?

Q (Question read.) A I should say two or three feet.

Q Two or three feet. Now can you be more exact than that? A No, I cannot. I have never measured it.

Q And was, to your knowledge, the watchman present at each of the occasions on the night —that is present at the dam, so that he could

observe the approach of the storm water? A As far as I know.

Q As far as you know. What is his duty in that respect? A What do you mean, in connection with the water?

Q With observing. You say he is—when he sees the water rise to a certain level he is told to trip the gate. Now how much of the time is he supposed to watch that? A Well, he has to watch it long enough to know whether to trip it or not.

Q I understand, but here is the night—it is dark some of the time in the night anyway, and what would be his duty on any of these nights, his usual duty, to observe the progress of the water so as to be able to trip it in time to prevent the storm water from going over the bank? A Why, he would trip the gate very quickly after a heavy storm started, because he would take no chances.

Q Well, is there any certainty that he would be there? A Absolutely, yes, sir.

Q And from your observation of other heavy storms, how quickly does the water go over the bank, in the average storm of which you speak that you suffered damage from?

The Court: Never present.

Witness: I have been, but not either of these occasions I have mentioned specifically.

Q By those you have seen yourself, I mean. A Anyway from half an hour to three quarters of an hour after the storm starts we get the water.

Q Then if the watchman wasn't present during that half hour to open the gates, the water would go over, wouldn't it? A Possibly.

Q Well, it would, would it not, during that half hour, if he hadn't opened the gates?

The Court: If there was water there, yes, sure.

A Yes, sir.

The Court: How quickly would the water recede after the storm, immediately?

Witness: Fairly rapidly; it is quite a flood of water, not immediately. It goes down much more gradually than it comes up. It will go along smoothly for a time and all of a sudden a great torrent will come through—come in a quick flood.

The Court: And then back again to the stream?

Witness: Yes, sir.

The Court: But it doesn't go over the bank?

Witness: I thought you meant the way the water comes down through the brook.

The Court: In time of storm.

Witness: It would go over that way (indicating) and then gradually recede.

The Court: Go over the bank with a rush?

Witness: Yes, sir; go over the bank at different points; over the banks in a gush. It doesn't always go over the banks at one level; see what I mean?

The Court: In front of your mill.

Witness: It may go over down here or up here or different points (indicating). It goes over the walls of the—over the retaining wall.

The Court: And then recedes into the bed of the creek?

Witness: It then goes back into the creek, into the brook.

The Court: Immediately?

Witness: Why, yes, fairly rapidly—fairly rapidly. It depends on the character of the storm. It will stay there as long as the storm lasts.

The Court: When the storm is over.

Witness: Then it goes back.

The Court: Immediately?

Witness: Yes, sir.

Q You have opened these gates too during the daytime when you have had storms, haven't you? A Yes, sir.

Q And have you been at various times notified by the Borough of Glen Ridge to open the gates? A In 1922—this will be rather a lengthy answer, if you want me to answer it. Yes, sir; in 1922 we were notified by some people in Glen Ridge that we were responsible for the flooding of their property—that our dam was responsible. When we got that report we engaged an engineer and made a very extensive survey. After the survey was made the engineer proved conclusively that our gates were not in any way responsible for their flooding.

Mr. Bouton: I object to the conclusion of the witness and move to strike it out.

The Court: Motion denied.

Witness: We then got in touch with the Mayor of Glen Ridge—I think he was a councilman then, Mr. Doe, I think his name was, and we showed Mr. Doe this report and he was so convinced himself as to the character of the report that he took it, I understand, before the county and the county admitted that the trouble that the people in Glen Ridge were complaining about was a bridge and they took down that bridge and made a much larger bridge. That is the information in connection with that.

Q Nevertheless, since that time and before that time, at the request of the authorities of the Borough of Glen Ridge for you to open the gates in time of flood, you have done so. A We have — No, sir. We have had people call us up from Glen Ridge to put our gates down when our gates have been down.

Q Would you say you have never responded by doing so when the borough engineer of Glen Ridge has asked you to? A I wouldn't say never. Do you mean prior to 1924 or since?

Q Yes. A Prior to 1924 possibly, prior to the time—(interrupted).

Q Now, as a matter of fact, not only possibly, isn't it a fact that that happened? A Prior to the time the town of Glen Ridge put in their new bridge, yes, but since that time, no.

Q Well, do you recall ever having a conversation with Mr. George C. Smith who was the Superintendent of Works of the Borough of

Glen Ridge, whereby complaint was made about your dam and the consequences of it, and where you—not you, but some one of your company—agreed that you would do away with the dam without a lawsuit being started? A No, sir; I don't ever recall of such a thing.

Q It wasn't you? A No. I don't think anyone in our employ would do it. No one would have any authority.

Q When you speak of the channel through which the brook in the ordinary times passes in your property, that is, in what shape was that channel when you first joined the company; what was the kind of banks? It was boards, was it not? A I think so.

Q On each side, or timbers of some kind? A I think so. Some of it was, some of it was concrete, I believe.

Q Some of it was. It wasn't a natural dirt bank, I don't suppose, as you would see running through natural country? A No.

Q It was a built channel, I mean, bounded on each side? A Yes, sir.

Q All the time that you have been there? A Yes, sir.

The Court: What is that?

Mr. Bouton: The channel through which the brook passes their property is a channel that is confined by retaining walls.

Q Now, what is the effect when the gates are opened, of your dam, do they not then almost immediately relieve the situation by permitting the storm water to pass off through the channel? A Not during very heavy storms. Even with the gates down the banks will overflow during these times which I speak about.

Q For a short period of time, do I understand you? A Well, it depends on the volume of water coming down.

Q Now what, at any time, have you personally observed as to the depth of water that came over the banks at a storm time; that is, say inches or whatever depth you would call it? A Well, I believe we have had as much as eighteen inches in our boiler room at a time.

Q I don't mean that. I mean how much water have you observed crossing the top of the banks during the period of a storm flow?

The Court: He said about eighteen inches.

Mr. Bouton: No; he says eighteen inches in the boiler room.

The Court: He said it was ground level.

Mr. Bouton: It might go over the bank and be down below, too.

The Court: The witness has illustrated that it was on the level.

Mr. Bouton: I don't understand, he said the edge of the bank is level with the rest of his land. I don't think I asked him that question. I didn't mean to if I did.

The Court: How could he tell how much water was over the bank?

Mr. Bouton: If he stood there.

The Court: I do not see. Proceed.

Q You do not recall that? A No, sir.

Q Now, the average height that you have recalled, how soon did the water pass by after you opened your gates? A I don't understand your question.

Alonzo I. Quackenbush, direct.

Q I mean in storm time your gates are open? A Yes, sir.

Q And some time after that the condition has subsided to an extent that it is normal, is that so? A Ultimately it does.

The Court: It washes over and washes out immediately is what he said. He said it washed over and washed back almost immediately. That is correct, isn't it?

The Witness: Yes, sir.

Re-direct examination.

Q When you put back the retaining wall was the embankment built up higher than it had been before? A Yes, sir; we built it up higher than it was before.

Q Do you recall about how much? A No. But I think we have someone here who can tell you definitely.

ALONZO I. QUACKENBUSH, sworn for complainant.

Direct examination by Mr. Lum.

Q What is your business? A At the present time?

Q Yes. A Superintendent for William Gauch & Son.

Q Were you ever connected with the Consolidated Safety Pin Company? A I was.

Q From what time to what time? A November, 1919, and June, 1926.

Alonzo I. Quackenbush, direct.

Q In the summer of 1924 did you observe any storm there at the plant? A I did.

Q What time? A Why, it was in the afternoon, I believe.

Q What did you observe? A There was a storm and the gates had been lowered—the gates of our dam had been lowered and I walked up Tony's Brook to Clark Street Bridge, just above our property, and when I arrived at the Clark Street Bridge there wasn't any water flowing over the floor of the bridge, but I hadn't been there but a few moments when the water did wash over the floor of the bridge and back over the street into Tony's Brook and I saw just the floor—as the water came over the bridge I looked back down Tony's Brook to our property line and saw that the water passing in the channel of the brook was—the water level was below the beams of a bridge that we have, or we had erected over the brook to our incinerator and all the water was confined in the channel of the brook and passing clear of our bridge, and after the water had come over the Clark Street Bridge I observed that the water still was clear of our bridge; in other words our bridge was not holding back any of the water and all of the water was confined in the channel. That is all.

Q Then what did you later observe? Did you observe on that storm? Did the water come out of the channel so as to injure your property? A I do not recall that it did at that time, no.

Q Well, what next, the next storm that you observed? A The next storm was somewhere in 1925—summer of 1925.

Q What did you observe then? A Why I was called to the factory—it was at night, or possibly three o'clock in the morning—and I

received a telephone message to come to the factory and when I arrived there I found that our dam—the gates of our dam had been lowered and that our boiler room floor had been flooded. The water was receding at the time that I got there but there were clearly defined water marks in the boiler room showing the water had reached within probably a foot and one-half above the floor level and the water—our driveway that we had to the bridge to the incinerator that I have referred to had been washed away. It was a gravel driveway and there were considerable deposits of mud that had been washed against our boiler room and roller room doors and blocking them.

Q Was there any water on that occasion, in the stock room? A Yes; there was water in the stock room and in what we would call the wire department, in the boiler room and in the engine room.

Q What was the next time that you observed? A None that I recall.

Cross examination by Mr. Bouton.

Q As I understand you went with the company in 1919? A Yes, sir.

Q And did you live in that neighborhood? A No; I had just come from the South at that time.

The Court: That was the time you went to work there?

The Witness: In Newark, I lived, when I went to work for them.

Q In 1919 you started with the Consolidated, at the property in question? A Yes, sir.

Q And no doubt you observed, as Mr. Copp did, storms previous to 1924, that came over the banks, didn't you? A I don't recall anything definite on the matter, no.

Q Well, when do you begin to get definite about that then? A Well, the report that I have referred to.

The Court: No severe flooding that you remember prior to 1924?

The Witness: There were floodings, your Honor, prior to that time, but definite times—

The Court: Didn't ask you that, not quite as severe?

The Witness: I don't think they were, no.

The Court: The extent of the water?

The Witness: The trouble wasn't as great, no.

Q You do not recall, then, any time, such as your then employer refers to in his bill of complaint, when the fires were put out and the manufacturing operations stopped by reason of the floods prior to this time? A I believe there were occasions when we had to shut down the plant.

Q You do remember them then? A I recall that there was, yes.

Q Now when was that? A I do not know, definitely.

Q It was while you were there? A Yes; it was.

Q And how many times did it happen? A During the number of years—

The Court: 1919 to 1924?

The Witness: 1919 to 1924 possibly two or three times.

The Court: Put the fires out?

The Witness: All the fires were drawn and we had to shut the plant down, yes, sir.

The Court: How high are your fires above the level of the floor?

The Witness: Above the level of the floor, about a little over two feet—between two and one-half and three feet.

The Court: You had two and one-half feet of water there?

The Witness: No, sir, there is a certain hazard there when the water is coming in the clean-out doors of the boiler—when water is coming in the clean-out doors of the boiler, there is a certain hazard at that point and you have to take precautions.

The Court: Against explosions?

The Witness: Yes, sir.

Q And on these occasions then there was water coming through these places that you mentioned? A I said that, yes.

Q Up to what time were you with the company? A June 1926—this present June.

Q 1926, and during 1924 to 1926 how many storms do you recall, three? A Two definitely.

Q Two definitely.

The Court: Where is Gouch's place?

The Witness: In Newark.

Cross examination by Mr. Vanderbilt.

Q In that one storm where you observed the water at the Clark Street Bridge was there any debris there stopping the course of the water? A At Clark street?

Q Yes? A No.

Q At the Clark Street Bridge, on either side? A No, sir.

Q You observed that especially? A Yes, sir.

The Court: Clark Street Bridge is in Montclair, about where?

The Witness: In Glen Ridge, I believe.

Mr. Vanderbilt: Just above the dam.

Q And the railing was not washed away? A The railing, of the bridge, in 1924? No, sir.

Q 1925? A Not that I know of, no, sir.

Further cross examination by Mr. Bouton.

Q You say you arrived there after the storm of 1924—you arrived there after? A 1924? No, 1925.

The Court: Three o'clock in the morning.

The Witnes: Yes, sir.

The Court: After what, after the storm started?

The Witness: After the storm started. I don't know what time it started, but after our dams were down, possibly an hour. I couldn't say definitely.

Q Did you see the dams go down? A No, sir.

Q You mean the gates?

The Court: How do you know they were down, someone tell you?

The Witness: The engineer, yes, sir.

Q Did you mean the gates? A Yes, sir, gates of the dam.

SAMUEL N. REID, duly sworn, testified as follows:

Direct examination by Mr. Lum.

Q Where do you live? A 37 Farrand street, Bloomfield.

Q And by whom are you employed? A Consolidated Safety Pin Company.

Q How long have you been with that company? A Since October 25th, 1920.

Q In what capacity? A Engineer.

Q In this past year, 1926, did you observe any severe storms at the plant? A Yes, sir.

Q Give us the details, the dates? A Well, I couldn't just give you the dates. It was the last big storm we had.

The Court: In August?

The Witness: Yes, sir, the storm started—we had a storm at night, around 7 o'clock, and I personally went over there and we let one small gate go at first; the water commenced to raise a little more and we let the second gate, the big gate go, and after a short while it went down—well, it continued to rain though, during the night, and they called

me about three o'clock in the morning. At that time I came out of the house and I never see as heavy a rain as was coming down.

Q Cloudburst? A Just like a cloudburst. It soaked me through just going across the street. When I go down the brook, at that time, was just full of water, but I knew it was coming down so hard that I let the other gate go, and a short while after that it came down with a rush, and I was out there and it was about up to the top of the brook and I looked down below and I could see water running. And I went down below and the water was then running over at the lower end of our place and I went around the buildings and came up and at the upper end of the buildings it was running over at what we call the well and above the bridge, and the water—

Q Your bridge or the Clark Street Bridge? A Above our bridge. It was running over there and running down across the end of the building and down Farrand street about six inches deep and down the back of our building.

The Court: Ran over Montclair, about six inches deep?

The Witness: Way down to the center. Through that railroad bridge it was about four feet deep. It runs right down Farrand street and floods the whole center.

The Court: What center do you mean?

The Witness: Bloomfield Center. It was in the cellars on Washington street.

The Court: I mean Montclair.

The Witness: This was Bloomfield.

The Court: Up in Montclair it washed out everything too, didn't it?

The Witness: I wasn't up there.

Q At what point on the banks of the brook did the water overflow first, the water, with reference to your place? A About forty feet below the dam.

Q In other words, the first place that you saw the water over the bank, was below the dam? A Below the dam.

Q And the next place you observed it come out over the banks was where? A Just above the engine room door, and the well there.

Q And did it come over at all by the gates? A No, sir.

Q Explain briefly to the Court how the gates operate? A We have three gates that operate on hinges with latches at the top; operated with wheels above for raising them, on two of them; on the other we have a lever that raises two hooks at once and lets the gates go down to the bed of the brook.

Q So, that the gate operates similar to this illustration, you lift a clutch and the gate falls over to the bottom of the brook (indicating)? A Yes, sir.

Q The gates when operated stand perpendicular? A Yes, sir.

Q When the clutch is released it falls to the level of the brook? A Yes, sir.

Q Where the gates are, is the brook wider than it is above and below? A Yes, sir.

Q Can the dam then, when operated, at any time cause any obstruction whatever? Are the gates at the point of the dam wider than the bed of the brook above and below? The banks of the brook? A Yes, sir.

Q How much wider? A The width of the brook is sixteen feet between the walls and at the gates there is twenty-eight feet.

Q So, that there is sixty per cent. greater opening at the dam than above? A Yes, sir.

Q When the gates are down—

The Court: What is the width of the brook above the dam?

The Witness: Sixteen feet.

The Court: What do you dam in then?

Mr. Lum: Just a minute.

The Court: Is there a reservoir?

The Witness: About three feet.

The Court: Is there a reservoir above the dam?

The Witness: Yes, sir.

The Court: Now, what width is the reservoir?

The Witness: Runs from 16 feet at the upper end branches out, when it gets above the brook, about twenty feet, and probably the full width is about thirty-five feet, but there is two piers in it of about three feet; twenty-eight feet at the gates.

Q Look here; does this blue print show the dam there? A Yes, sir.

Q Now, prior to the 1925 storm, were there any other storms that you observed in this year? A This year?

Q Yes. A No; that is the only one where it came over. We have had floods, but not as bad as that. I have been there at all of them.

Q Haven't had as bad a storm as that in years, have you? A That was awful.

Q Did you answer that question I asked as to whether there were any other storms this year that did you any harm? A No, sir.

Q And in 1925, what was the situation? A 1925?

Q Yes. A Why there was that storm there that overflowed the banks that morning that Mr. Quackenbush spoke of.

Q About what time was that? A That happened around three o'clock in the morning, between two and three.

Q What month? A That I couldn't remember right off.

Q Have you any memorandum that you made at the time? A I think I have in my pocket.

Q Will you refer to it? Made by you at the time? A Yes, sir.

Q Refer to it and give us that? A I simply got it down, I think, July, I haven't got the date.

Q July, 1925? A I think it was.

Q Describe that storm, what you observed? A Why, I was—Mr. Quackenbush called me in the morning—I lived at that time quite a little distance away from the plant—and he said that the watchman claimed he couldn't get me on the phone, and I got out and got my car and got right over there, and when I got there the water was receding, but the place was all covered with mud; the driveway above was all washed down towards the boiler room and you could see where the water had been washing around the boards of our well so that they flowed down around Jenkin's factory. The drum or empty drums that were standing around were washed away.

Q Did the water come in the boiler room? A Yes, sir.

Q And during the 1926 storm? A Yes, sir; boiler room and engine room.

Q How about the stock room? A This last storm the water came through the stock room, first floor, through the stock room into the wire room.

Q In the last storm the water came down in the stock room first? A Yes, sir.

Q Describe the way it came up, how it approached, in the 1925 storm? Was there water in the stock room? A I wouldn't say in the stock room. I knew it went through the engine room myself, because I didn't go up that end but went through the engine room into the store room.

Q When you say "store room" you mean the store room fronting on Ward street? A North, upper end of the building.

Q The stock room would be the room nearest Montclair? A That is the store room, the brass room, yes, sir.

Q Now, in 1924, what did you observe? A 1924?

Q Yes. A Well, I can't just recollect which time that was.

Q Have you any memoranda of it that you made? A 1924? I think I have.

Q Do you recall a storm that washed out the walls? A Oh, yes, I remember that one. That was the first big storm we had after this matter came up.

Q Now tell us about the first big storm after this matter came up? A Why, that happened, I don't know, I wasn't there that night. I don't think I lived here at that time.

Q Did you see the situation when you did get there? A Afterwards, yes, sir.

Q Had it been up? A The water had been in the engine room, because I had to get men to get the water out of the pits.

Q And what about the retaining walls? A The retaining walls was washed down from the bridge down to the well.

Q Had that ever happened before? A No, sir.

The Court: Where is the well?

The Witness: The well is half way between the bridge that we have at our place and the dam. It is the one where we take the water for the condenser.

Q Have you observed whether your damage has been greater and the water heavier in these storms since 1924 as compared with before 1924? A I don't know about the damage, because I don't know how much that was, but I know the water gets higher.

Q The boiler room is above the dam? A Lower.

Q Nearer Montclair than the dam—upstream? A Yes, sir; a little.

The Court: So is the warehouse which you said was flooded?

The Witness: Yes, sir; above the dam. What was that question you asked? Oh, about the height of the water?

Q Yes. A When the storms came up I generally myself, when I am there, go out and stand on the bridge over the gates where I can look

through and see the Clark Street Bridge and our own bridge.

The Court: The bridge at the dam?

The Witness: The bridge is right over the top of the gates—over the dam. I stand there and watch to see how the water comes up. The water gradually raises, that is, you have got fifteen minutes that you won't even see the water discolor, then you see the slow movement of the muddy water coming into it, and it will raise maybe two or three inches—it will probably raise up to about six, and then in about twenty minutes after that you will see just a gush of water coming down there probably—it used to run anywheres from a foot to eighteen inches and I should say now it runs from twenty-five inches to twenty-eight inches.

Q By now you mean since 1924? A Yes, sir, well, from this last storm.

The Court: What?

The Witness: Last storm. The last storm we had water in the brook only half full and when the water started to come it came immediately, rushed right up and overflowed the banks, so it must have come up at that time,—

The Court: What below the dam?

The Witness: The whole place filled right full.

The Court: You say there were retaining walls washed out in 1924. Were they above or below the dam?

The Witness: That was above, and one below.

The Court: On your side?

The Witness: On our side.

Cross examination by Mr. Bouton.

Q Can you fix the date of this 1924 storm you speak of? A The one that come over—

Q Yes? A That is the only one we had that year that I know of.

Q Yes, the only one. In what month was that: June, did you say? A I couldn't just tell you.

Q Was that about the time, do you think? A Some time there. I don't think I got that.

The Court: Some time in the summer.

Q If you have,— A I haven't got the date down.

Q Have you ever seen water coming from the direction of Bloomfield Avenue thru Farrand Street into your property? A No, sir.

Q During any of the time you have been there since 1920? A No, sir.

Q Were you there during all of July in this year? A Yes, sir.

Q Do you remember a heavy storm in the latter part of July? A Yes, sir.

Q Did you observe the conditions there then? A The water that comes from Bloomfield Avenue flows down Farrand Street and goes to the Center.

Q Goes down Farrand Street? A Yes, sir.

Q How does it get into Farrand Street from Bloomfield Avenue? Is that Ward Street? A It goes through Ward Street, flows right down through the center.

Q You don't know whether or not during that time any water came from Bloomfield Avenue? Into your lands? No, sir. It didn't, the current was the other way. I walked through it.

Re-direct.

Q Just see if you can straighten us out on this date in 1926. Have you the memorandum that you made at the time.

The Court: 1926?

Mr. Lum: Yes; whether it was July or August.

The Court: It was August.

Mr. Lum: The August storm did not do us any harm at all. The July storm did.

The Court: It was the terrific storm.

The Witness: On July 24th.

Q And in August, do you recall there was a very heavy storm in August, the 24th, started in the early morning, whether it did you any harm? A That one that overflowed the banks, that is the one I was called out on.

Q Do you recall in 1926 there were storms in both July and August, last summer? A Yes, sir.

Q And did they both do your plant harm? A There is only one this year that came over.

Q Only one. Now won't you look at your memoranda and see whether it was July or August? A Started on July 24th, the first one; we let two gates down and on the 25th we let the small gates down at three o'clock in the morning.

Q And did the severe storm in August cause you any damage or overflow your banks or not? A Not that I know of.

The Court: You remember a very heavy storm, wind, hail and heavy rains in August?

The Witness: No, I do not.

Q So that the only storm that did you injury in 1926 was that of July 25th, that you have just spoken of? A Yes, sir.

Cross examination by Mr. Vanderbilt:

Q When the gates are closed does the reservoir or slack water extend back as far as Clark Street Bridge? A No, sir.

Q How far back does it extend? A It doesn't go up as far as the laundry, and the laundry is right next to us. The level of the water is just—it is really on our property.

Q Now, when there is no storm or unusual condition, what would be the height of the water running through Clark Street Bridge? A Why, there isn't enough water running under it to fill the width.

Q To fill the width of the bridge—in other words, maybe an inch or two inches of water? Is that right? That is about all.

Q And from Clark Street Bridge on the water is more or less still water, isn't it, right up to your dam? A No, no still water till it gets down to the end of our property. It runs down smooth from the Clark Street bridge to the end of the laundry property.

Q That water is one or two inches in depth until it strikes the laundry? A Yes, sir; then it runs into our reservoir, below that.

Further cross by Mr. Bouton.

The Court: When you speak of the width of the brook you mean the top of the bank?

Mr. Lum: No, the side.

The Court: When you speak of the width of the brook you mean from the top of the bank to the top of the bank?

The Witness: Well the banks are perpendicular there. Both banks are perpendicular. There is 16 feet between them.

The Court: From the top level of one to the top level of the other?

The Witness: Top level of the other.

Q Can you give us the date of the storm in 1925, in July, that you speak of as having damaged you? A 1925, July?

Q Didn't you say there was a storm then? A 1924?

Q No, 1925, last year? A Yes, sir, that was,—

Q In July, what date was that? A That I couldn't tell you.

Q You do not recall? A I remember there was a flood, but I wouldn't swear I put the date down.

Q Would your memorandum there tell you the year, 1925? A No, I haven't got that down. I would not be certain.

HERBERT B. CHURCH, sworn for complainant, testified as follows:

Direct examination by Mr. Lum:

Q What is your business? A Sales engineer, engineering questions that come up in connection with sales that I handle. I am by profession an engineer.

Q Are you familiar with the dam at the Consolidated Safety Pin Co. plant? A Yes, sir; I am.

Q When did you first become familiar with that? A I entered the employ of the Consolidated Safety Pin Company in 1904.

Q When did you become acquainted with the dam? Was there a dam there when you went there in 1904? A There was.

Q And did you do anything in connection with the dam while you were there? A Tore it out—in 1905 we tore that one out and put a new one in, which was a trifle higher.

The Court: Is that the present one?

The Witness: No, sir.

Q Was there anything later done to the dam? A That one was torn out.

Q When? A As I recall it it was about 1908.

Q And is that the present structure? Or has that been changed? A That has been changed since then.

Q When? A 1912 we went about 25 or 30 feet up the course of the stream and widened it, as well as going, well, approximately 20 feet below it and widened it, and putting in another gate, which made the opening larger than it had been, by eight or ten feet.

Q And then are you now familiar with the dam and its operation? A I know how it operates, yes, sir.

Q And are you familiar with the measurements of it generally? A In a general way.

Q Will you look at this blue print and see if it accurately shows the situation with reference to the dam? A That shows it.

Q Fairly accurately? A Yes, sir.

Q Now does that dam appear, from an engineering standpoint, as a factor which in any way could cause the floodings of this brook over the plant of the Consolidated Safety Pin Company? A It could. It would unless the gates were operated.

Q I mean with the gates in proper operation? A If the gates were in proper operation that part of the brook or the dam there would not hold back any water.

The Court: Would not be a factor?

The Witness: Would not be a factor.

Q Would the opening at the gates be wider than the bed of the brook above? A It is wider.

Q And would you very briefly describe the operation of the gates? A Well, the gates have been changed since I installed them. At the time that that dam was built they operated with a,— (interrupted).

The Court: Now?

The Witness: They operate with a hinge motion now; so that when they are tripped they fall—the force of water takes them down.

Q Fall immediately? A With the force of the water.

The Court: Fall to what?

The Witness: Fall to the level of the bed of the brook.

Q After the gates have been tripped, what is their relation to the bed of the brook? A They lie on the bed of the brook.

Q Lie on the bed of the brook? A Yes, sir.

Cross examination by Mr. Bouton:

Q Mr. Church, I think I met you a few days ago? A Yes, sir.

Q Mr. Church, what was the nature of the original dam that you speak of—when did you first go there? A In May, 1904.

Q Now am I recollect in describing—have you not already described, to someone that I asked to visit you, that dam in this language, "When I came there was across the brook at just about where the present dam is located two slabs of wood, one on top of the other, which raised the natural flow about 15 inches?" A No, sir.

Q You didn't say that? A No, sir; I did not.

Q What did you say of that nature? A The dam that was there in existence at the time that I went there was a square piece of timber which was, as I recall it, about 12 by 14 inches.

Q And how high was that wooden dam, 14 inches? A About 12 inches.

Q Twelve inches. Is it correct—how long did that stay there? A Well, we built the second dam in August, 1905.

Q Well, this first one that you speak of, being constructed of the twelve by fourteen inch piece of timber, was the only dam that was on the brook at the property of the Consolidated Safety Pin Company, was it not? A Yes, sir.

The Court: What would twelve or fourteen inches of water being dammed back be of use for?

The Witness: It would flow into the cistern from which we took our boiler water at that time.

Q What was the nature and height of the second dam you built? A The second dam was some twenty to twenty-four inches high.

Q And how high was the elevation, the usual elevation of the water behind that second dam as you used it in your operations? A Whatever flow of water there was went over the top of the dam.

Q And that was not in excess of twenty-four inches high above the level of the bottom of the brook? A Not more than that.

Q Not more than that—was that the dam then that continued up to this present dam? A Yes, sir.

Q Am I correct in repeating language that was reported to me as made by you as follows, "—

The Court: Do you expect to contradict him later on? Time and place.

Q At your home, were you visited by a man who inquired about the overflow of the brook, to whom you made—(interrupted). A I was visited by someone.

Q About two years ago.

The Court: Name.

Mr. Bouton: C. M. Bouton.

The Witness: I couldn't tell you his name.

Q You made a statement to him? A Yes, sir; he called on me, but I don't know who he was.

Q Did you make the following statement, "I recall several times when the brook overflowed its banks as far north as just below Clark street, once across Farrand street and into an alley owned by the Consolidated down to Ward street where the sewers took care of it. These times occurred in freshet times after rains?" A Yes, I recall one such statement.

Q You made that statement or substantially in those words? A Practically.

The Court: And what you stated then was the fact?

The Witness: But I recall—I recall one such instance where it did overflow some streets.

Q Do you remember stating this, at that same time—

Mr. Lum: I do not think this is cross examination of this witness.

The Court: You may recall the witness.

ALBERT HAGEL, sworn for the complainant, testified as follows:

Direct examination by Mr. Lum.

Q Where do you live? A 213 Parkhurst street, Newark.

Q By whom are you employed? A Consolidated Safety Pin Company.

Q How long have you been with them? A About eighteen years.

Q And did you observe any storms there in this last summer, 1926? A Why I came after the water had overflown the banks.

Q What time did you arrive? A I arrived there on Sunday morning.

Q What was the date? A I believe that was the 24th and 25th, I believe, of July.

Q And what was the condition when you arrived? A Why I could see where the water had overflown the banks at the bridge and washed out the roadway there.

Q What bridge, Clark street? A Bridge at our property, and the water had run in the first floor and all the material was all wet and the boiler room was all mud where the water had been in there.

Q Do you recall a severe storm in August of this year? A I do.

Q Rain in the morning, early; terriffic thunder storm? A I remember it raining.

Q Did that overflow the banks? A No, it did not overflow the banks. Most every storm it is almost over the banks, lately here; it almost overflows every storm.

Q Now in 1925 did you observe any storms? A Why no, I wasn't there. I know there was a storm and it overflowed the banks, I saw it after, the next day, when I went in there.

Q What did you observe? A Where the water had washed out the roadway, the dirt, and flooded the floor in the first—(interrupted).

Q Where the—were the materials injured? A Was all wet, we had to dry it out.

Q What is your position at the plant? A At the present time, superintendent.

Q What were you in 1924? A Assistant superintendent.

Q In 1924 did you observe a storm? A Why I came after it was over, I saw the condition of the place.

Q And what was that? A Why the material was all wet the same as the flood in 1925; water in the boiler room. You could see where the water was, mud all over.

Q Do you recall anything about your retaining walls in the 1924 storm? A Yes, sir, there was one wall down, I believe.

Q Had your retaining walls ever been washed out before, during the eighteen years you were there? A Not to my knowledge.

The Court: Have I been told how high the retaining walls were?

Mr. Lum: You were told they were made higher after 1924, when they were rebuilt, but I do not think the height was given. Montclair has had surveys made of all those things by our permission—

Mr. Bouton: It is on the map.

Q What have you observed, if anything, as to the relative height of the brook on storms since 1924 as compared to before 1924? A Why most all storms—severe storms—now come right up to the top of the brook. In fact, the storms—the last storm we had, that was in July, it came up out of the manhole in the street—I never saw that condition before.

Q Farrand? A On Farrand street, came back from the brook up thru the manhole; I never saw that condition before.

Q Would you say there is more water coming down since 1924 than before? A I would. In other words, we built our walls higher in different places.

The Court: Were the storms heavier after 1924?

The Witness: No. I don't think that, your Honor, I think there is more water coming down.

The Court: You know whether there is more downpour of rain in these storms you have mentioned than those you had in mind you observed prior to 1924.

The Witness: Well, I don't know just how severe they were—whether they were any severer prior to 1924, I couldn't say. There are conditions there that you can see now. There is more water coming down now than there used to be.

Cross examination by Mr. Bouton.

Q You say the water came up thru the manhole in Farrand street? A Farrand street.

Q Why do you say that water was from the brook? A Why because the pipe from that manhole runs into the brook.

Q Then you think that the water went thru the pipe up through Farrand street and came in the opposite direction to which it usually came before it came over the bank? A It couldn't run into the brook because there was so much water it forced itself back and up thru the manhole.

Q Show us the course on this map—or the location of the manhole in Farrand street that you speak of? Will you indicate that?

The Court: You understand the map?

Q There is Farrand street—(indicating) and this is the brook, and there is the dam (indicating). A Here—about here (indicating).

Q Opposite what? A Opposite the office.

Q Farrand street, opposite the office, is the manhole. Isn't it a fact that the manhole that you speak of is located on a storm drain that comes from Bloomfield avenue, goes under your factory and discharges below the dam? A Below the dam?

Q Yes; so it is water from Bloomfield avenue that goes thru the drain to which this is a manhole, doesn't it? A The water goes thru there—I say I never saw the condition where it came back thru the manhole before until lately.

The Court: He wants to know whether this manhole is over a drain that runs from Bloomfield avenue?

The Witness: I believe it is. I believe it takes in surface water from Bloomfield avenue.

EDWARD M. HARRISON, sworn for the complainant, testified as follows:

Direct examination by Mr. Lum.

Q What is your business now, Mr. Harrison? A I am not in active business in an ordinary commercial sense at the present time. I am an engineer by profession, graduated from Stevens Institute, in 1905.

The Court: Served in our legislature at the last session?

The Witness: I happen to be a member at the present time. I am trained as an engineer, not as a lawyer.

Q Are you familiar with the Pine street sewer area? A Yes, sir.

Q How long have you been familiar with that area? A I was born in Montclair, and in a general way have known it well ever since I was old enough to know. I am fifty-six now.

Q Where, for the twenty or thirty years before 1924, did the water that is now taken care of by the Pine street sewer go? A In about thirty odd years—

Q A period before 1924, for twenty odd years? A It went down into Ridgewood avenue and then through a culvert across Ridgewood avenue and diagonally thru a ditch—(interrupted).

Q Will you show it on the map? A It went down thru there (indicating). From the corner of Cambridge Road and Grove street, a pipe put in by the Huckes to about half-way thru the block between Cambridge Road and Oxford street; then the pipe went in an easterly direction for—I don't know the exact number of feet, but the pipe went a certain distance covered.

Mr. Bouton: Let me put in an objection to any testimony that will show that this water ran thru Oxford street, so far as it is alleged to be binding on us.

The Court: Let me get the facts.

Q And how big is this area taken care of by the Pine street sewer? A About sixty acres.

The Court: Property shown on this map as three and four?

The Witness: Yes, sir.

Q Before the Pine street sewer was opened, for some twenty odd years, where did the water from the area three and four on that map go? How was it taken care of? A If you want to go back of thirty years—(interrupted).

Q No, now listen to the question, please. It is very simple. Starting before they joined that sewer— A Yes, sir.

Q —and for twenty odd years, where did it go? You can answer it, can't you? A Yes, sir.

Q Please do.

The Court: Show me on the map and give the points on the map so that we may follow it on the record.

The Witness: The water was picked up at the corner of Grove street and Cambridge Road, right there (indicating), carried about halfway between Cambridge Road and Oxford street in a pipe, then turned in an easterly direction, in a covered pipe, for probably two or three hundred feet, then emptied into an open ditch and went down to what is now Tremont Place; there was four eight inch tile drains carried it under the sidewalk, then it flowed in a southerly direction thru Tremont Place to the northerly side of Oxford street, easterly thru Oxford street and Ridgewood avenue, northerly on Ridgewood avenue to a culvert that isn't on there, then northerly to a culvert which crosses Ridgewood avenue, and down thru the lots to a watercourse running into an enlarged basin at Bay street, Bloomfield, then thru a pipe which discharged under the bridge on into the Third River. Entered

the Third River. That is changed a little in the last two or three years when the county put a short drain from this former culvert—from the culvert across Ridgewood avenue down to an extension of—I think it is Cambridge Road—where Mr. Jarvis, in developing his property, put in a large storm sewer which runs under the road and then into the lots down to this former watercourse.

Recess.

Q Mr. Harrison, would the flow from this area, this sixty or seventy acres, be a matter of considerable moment or very small moment? A Well, it would be very serious to come on top of a normal—I mean the flow was sufficient to bring it up, as has been testified to—up to the top of the retaining walls that they built down at their factory. The water would overflow, according to the plan of the sewer, which starts with twenty-four inch pipe and ends with thirty-six.

Q Where is the twenty-four inch pipe? A Up in Chestnut street, Chestnut and Christopher.

Q And where is the thirty-six inch pipe? A Where it discharges in that former storm sewer in Pine street at the southerly side of the Erie Railroad tracks.

Q Just what do you mean by a 36-inch pipe? A 36 inches in diameter.

Q Goes into Tony's Brook between Glen Ridge Avenue and the Railroad Tracks? A At Pine Street.

Q Goes into the brook? A Yes, sir.

Q Are you familiar with the plant of the Consolidated Safety Pin Company? A In a gen-

eral way; not the manufacturing process; general layout, outside and general lay of the plant, yes, sir.

Q And you have been so for how long? A That is only a comparatively recent thing, that I have made a study of the plant conditions, except by going by it, and looking down—

Q But since 1923 have you been familiar with the topography and their problem there of the water. Since before this bill was filed you have been in touch with it, haven't you? A Yes, sir; I know the layout there, practically, that they had.

Q Do you know whether, after the retaining walls were washed out in 1924 they were elevated when they were put back? A I couldn't testify as to that, no, sir.

Q Are you familiar with the operation of the dam? And the gates there? A Yes, sir.

Q And will the dam, with proper lowering of the gates, add to such conditions or not? Decrease them.

Q Why that? A I will give you the exact figures. We took measurements the other day. Well, the flow through what we call the fan, that is the wall of one side, partial concrete and plank, and the other side practically all plank, the distance between those is 21 feet, that is about opposite the boiler house.

The Court: At the point of the dam?

The Witness: Above the dam; and the dam itself, that is the gate area of the opening is eight feet eight inches on the north side, the main gate, which is the center gate, is 13 feet 8 inches, and the south gate, which is near the railroad track, is seven feet seven

inches. Now if the openings on those gates are dropped there is 29 feet 11, as against 21 feet above.

The Court: Is the opening clear?

The Witness: Yes, sir; they go below the bed of the brook when they drop.

The Court: Is it clear all the way the width of the brook?

The Witness: Well, I am giving you the width of the gates that drop and that gives you the flow-way through.

The Court: Any obstructions between the sides, at the gates?

The Witness: Yes, sir; but I have only given the actual gate area. I am not taking into consideration— The areas that I have given are the gates that drop that is its width. When those three gates drop you got that much opening clear for the water to pass through; makes a total of 29 feet 11 inches.

The Court: The entire stretch of the gates?

The Witness: Yes, of the gates.

The Court: When the gates are down is there a clear opening from one side of the brook to the other?

The Witness: Yes, sir, 29 feet, 11 inches.

The Court: You do not mean the abutments?

The Witness: No, sir, I do not consider the abutments, I consider the gates. For illustration (indicating), if that is five feet wide and that drops, that gives you an opening of five feet. If you have another of ten, that gives ten feet, and so on.

The Court: Are there abutments between the gates?

The Witness: Yes, sir.

The Court: What width?

The Witness: I haven't got that, I didn't think that was necessary.

Q Would the abutments be a factor in anyway if the openings between the gates had several feet more than the openings above? A Well, possibly a small, it might—it would form a factor in case of obstructions or something like that. You wouldn't have it go through the clear twenty-nine feet, but I mean you would have that much flow area. You have got 29 feet flow area through the operation of the gates as against 21 above it.

Q Then from an engineering standpoint would you say that the dam with the gates down could in any way add to flood conditions there, or cause them? A With the gates down?

Q Yes. A No, outside of something logging in there; I mean by that an artificial dam being created; but with the gates down, no dam in there, you would get more flow area down there than you would above.

Q Have you observed the water conditions in Tony's Brook since the Pine Street sewer has been emptied into Tony's Brook? A No, I have not.

Q For how many years, of your own knowledge, has it been since water from the area now drained by the Pine Street sewer went into Tony's Brook—in other words, what was the period between 1924 and for many years before that, that the water had gone down some other way than Tony's Brook?

The Court: The other way that he has already informed us of?

Mr. Lum: Yes.

A I don't know that I could positively say, from actual observation—my own observation. It would be five years since I have been down there and looked at those conditions.

Q If you listen to the question—(interrupted). A I got your question.

Q I want to know do you know whether ten years ago did the water that is now drained from the Pine Street Area go into Tony's Brook? A No, sir.

Q All right. Did it 15 years ago? A No, sir.

Q Did it 20 years ago? A No, sir.

Q How long, to your knowledge, is it since it has, without my going back from year to year? A Somewhere in the neighborhood of 30 to 35 years.

Q And during that time have streets been put through this whole section—developments opened up? A Yes, sir.

Q And during that time has the Town of Montclair generally continued to grow and the area that formerly flowed into Tony's Brook continued to grow, and develop? A Yes, sir; rapidly.

The Court: The area of three and four on this map has been of very recent subdivision and development, hasn't it?

The Witness: Yes, sir; comparatively so. It is building up very rapidly now.

The Court: Only within the last five years.

The Witness: Yes, sir. I mean the great bulk of it, on the east side of Grove Street,

particularly, that is within the last three or four years.

Q Were you familiar with the contemplated project of the Pine Street sewer, before it was—before the ordinance was put through? A Yes, sir.

Q Was it a subject of discussion in the neighborhood and at the council meetings of Montclair, before it was done? A Yes, sir.

Q And were you generally familiar with what happened there?

Mr. Bouton: I object at this time to any testimony of this character.

The Court: Objection overruled. The answer was yes.

Q By whom was there protest, if any?

Mr. Bouton: I object to the answer. What transpired before that cannot be binding on this defendant, general talk about the project. I can't see where that is relevant in any way. I understand you are referring now to general conversation?

Mr. Lum: I am referring to the meetings you have set up.

The Court: Council meetings?

The Witness: Yes, sir; I will give you that.

Q Give us the history of it briefly? A This matter had been up for some years as the flood conditions and storm water conditions at the corner of Grove Street and Cambridge Road were very troublesome to the people in that neighborhood; this pipe was not large enough to take care

of the water and it used to flood the road and if a good storm come it would practically make it impassable on foot and very disagreeable.

Q On Grove Street or Cambridge? A Grove and Cambridge both. There is a little depression there. It flooded there. That is where the storm flow started. It didn't take the water, so that it backed up in the street and flooded the street there, very badly, and there was considerable complaint, and along in 1920 or 1921 there was some agitation as to whether they would put some improvements there. It never culminated in the form of ordinance and plan until 1922, when the ordinance was first acted upon. Of course, an ordinance is acted upon at the first reading and then they give a hearing, generally two weeks later, and at this hearing there was a large number of protests filed, and at that time there was in existence an association called the Fourth Ward Improvement Association, which filed a protest and the protests were largely owing to the method by which the relief was endeavored to be accomplished. The average person down there felt,— (interrupted).

Mr. Bouton: I object to the conclusions, your Honor, and ask to strike it out.

Q Were you personally in touch with the situation at that time? A Yes, sir.

Q What did you know of your own knowledge? A I went down with some people that lived in that neighborhood,— (interrupted).

Q Now you have spoken of the Fourth Ward; where is the Fourth Ward with reference to this? A South of Walnut Street and East of Grove Street.

Q As an engineer would you say there was any other method at the time of giving relief to that section without dumping the excess—carrying it into Tony's Brook?

Mr. Bouton: I object on the ground of irrelevancy.

The Court: If it is irrelevant it won't hurt you.

Mr. Bouton: We would like to call your Honor's attention to this point, that is very important. If this water originally naturally went to Tony's Brook, as I think the other side concedes, then the riparian proprietors have a right to call upon us at any time to put the water of this section into that brook.

The Court: Take care of it at that time. The objection is overruled.

Q Answer the question. A The question is, please?

The Court: Was there some other feasible way of disposing of the water?

The Witness: Absolutely.

Q Your answer is absolutely. What way? A Why you could run the pipe right down through Cambridge Road, practically parallel to the course it has gone for all these years; right down through from Grove Street through Cambridge Road, down Ridgewood Avenue, and then go back to the course it has taken to the water course diagonally through the fields to Bay Street into the pipe at Bay Street.

Q As a result of the protest in 1922, was the proposed project abandoned? A Yes, sir; in

1922 the Director of the Department of Streets and Public Improvements announced that owing to the protests of the people,—

Mr. Bouton: The records should be produced.

The Court: Were you there at the time?

The Witness: No, sir; I got it from the minutes.

Q Have you the minutes? A Yes, sir.

The Court: Where did you get the minutes?

The Witness: The general records, because those minutes must be printed and distributed?

The Court: Is that so?

Q How do you know about it?

Mr. Bouton: I doubt if there was any official statement as to the abandonment for that reason. I knew there was an original project that was not put through and eventually the Board of Commissioners did take it up again. I don't think they abandoned it because of the protests, but the records ought to show.

The Witness: Allow me to read the record.

The Court: I don't care whether it was under protest or not, it was not carried out.

Q Without referring to the minutes, there was a project that was not carried out at that time, it was dropped? A Yes, sir.

Q When was it taken up again? A About one year later.

Q What happened when it came up the year later, was there any protests then—were there protests then? A Yes, sir.

Q And was it then carried out and put through? A Not the original ordinance as reintroduced again. I mean the protest,—

The Court: Tell us about the ordinance. Was the project carried out as it now is?

The Witness: Yes, sir; apparently, yes, sir, finally; there were several steps in between.

Cross examination by Mr. Bouton:

Q When you speak of the matter of taking this to the east, may we call it—some other way than the present way—you have mentioned going through Cambridge Avenue, have you not? A Yes, sir.

Q Then you speak of it going down and through some fields?

The Court: Ridgewood Avenue?

The Witness: No, that is off Ridgewood Avenue.

Q Now, quite near by this, where you speak of it going, it leaves the Town of Montclair and would have to be carried through the Borough of Glen Ridge, would it not? A Yes, sir.

Q Are the fields that you speak of owned by Mr. Jarvie, a private owner? A Yes, sir.

Q That is the course that you suggested, is that not so? A Yes, sir.

Q And they would have to continue on into the Town of Bloomfield, would they not? A Yes, sir.

Q Before they reached the point that you speak of? A Yes, sir.

Q The first public waterway that there is, so far as that may be public, is the Third River in the Town of Bloomfield, east of Broad street, is it not? A No, sir, I don't believe—

Q What other is there? A There has been a watercourse there for generations.

Q Where? A From—starting at Bay street, where the water originally started in the pipe, took it down to the Third River, there was a big gulley there, pretty near as deep as this room.

Q This gulley was a watercourse? A Yes, sir; watercourse.

Q You say there is water in there all the time? A No, sir.

Q It is a deep ravine, is it not? A Yes, sir.

Q And the first watercourse that continually runs water, is Third River, is it not? In Bloomfield, east of the Town of Montclair? A Yes, sir.

The Court: If the waterflow were in the course you suggested down towards Bloomfield, towards Ridgewood avenue—

The Witness: Yes, sir.

The Court: —and continued, would it strike Tony's Brook?

The Witness: No, sir.

The Court: At no time?

The Witness: No, sir; different drainage area entirely.

The Court: Third River?

Edward M. Harrison, cross.

The Witness: Yes, sir.

Q The only portion of what you call a watercourse that exists at the present time, that is this ravine that we speak of, is on Mr. Jarvie's property, isn't it? A I couldn't answer, the lower part of that.

Q Is there any part between there and Oxford street that you know of—there is no gulley or ravine between those two places that you would say was a natural waterway, is there? A Yes, sir.

Q Where? A Right north of—well, about four or five—three or four or five hundred feet north of this new street Mr. Jarvie has cut through. The waterway started at Ridgewood avenue.

Q At Ridgewood avenue? A Yes, sir.

Q But there is nothing between that point on Ridgewood avenue—where is that street, would you say, how far north of Oxford street, several hundred feet? A Well, Cambridge Road is the next block north.

Q And about how far would you say, Mr. Harrison, that that was approximately? A About—north of Oxford?

Q Yes. Several hundred feet? A I should think roughly that that was about two hundred—two hundred and twenty-five feet.

Q Now between that point and Oxford street there is nothing you speak of by, "ravine" or "natural waterway" is there, connecting those two? A No.

Mr. Bouton: Between Oxford Road and this point he speaks about?

The Court: Cambridge.

Mr. Bouton: Yes.

William A. Hartley, direct.

The Witness: There was, but it has been obliterated.

Q There is nothing there now? A Not now, but there was.

Re-direct.

Q What has become of it? A In the course of building which has been very rapid, this old watercourse that water use to take between the lots—between Oxford street and Cambridge Road, they have built on and obliterated.

Q That is since the Pine street sewer was turned into Tony's Brook? A Yes, sir; within the last year or two.

Mr. Lum: I would like to have the right reserved to put in the minutes without stopping to do it now.

WILLIAM A. HARTLEY, sworn for complainant, testified as follows:

Direct examination by Mr. Lum.

Q Where do you live? A I live in Glen Ridge.

Q What is your work? A My work is night watchman.

Q For what? A For the Consolidated Safety Pin Co.

Q How long have you been with them? A About six or seven years.

Q Are you familiar with the dam at Tony's Brook at the plant, do you know that dam? A Well, yes.

Q And have you any duties in connection with that dam in time of storms? A I have to lower the gates.

Q And do you or do you not lower them in all heavy storms? A All heavy storms.

Q Has there been any storm while you have been there, the six years, when the water has overflowed the banks? A Yes, sir.

Q When the gates were not lowered? A No, sir.

Q Have you ever failed to lower the gates in time of heavy storms? A No, sir.

Q And even when the gates were lowered, you have seen the banks overflowed? A Yes, sir.

Q It is a long operation or short operation to lower the gates? A Well, it is a short one.

Q And what is your duty—what do you do—how high do you wait for the water to get? A Well, I have a point that I look at, I watch and see, and when it gets to that point I lower the gates. Sometimes when it is a severe storm I do not wait for that. I let them down right away.

Q And that point is where, how far up the side? A Well, there is a mark, mark of my own.

Q It is above or below the top of the gates? A Well it is about a foot above the top of the gates.

Q Foot above the top of the gates. Now how high is the top of the bank at that point, above the top of the gates? A Well, I can't exactly tell you.

Q About how high? A I couldn't exactly tell you, I haven't measured it.

Q Well, is it six inches or three feet? A Some parts it is higher than others. Some parts it is two feet, some parts it is three feet.

Q Above the mark you follow on the bank. Is the bank higher than the mark that you—(interrupted.) A Oh, yes.

Q How much higher? A I couldn't exactly tell you because it is a kind of a slope, the opposite bank.

Mr. Lum: Cross examine.

(Not cross examined.)

Complainant rests.

FREDERICK R. BERNETT, sworn for defendant, testified as follows:

Direct examination by Mr. Bouton.

Q Mr. Bernett, were you ever in the employ of the Cosolidated Saftey Pin Company? A I was, yes, sir.

Q And over a period between what years, about? A Why in 1900, running up to about 1908 to 1909.

Q During that period, what were your general duties? A I drove a truck, pair of mules.

Q Did you in the course of your general duties ever have anything to do with working in connection with any water that came into the property of the Consolidated Safety Pin Company from over the Banks of Tony's Brook? A I did.

Q Just tell us the nature of what you did, and as near as you can the years in which you did it or the time which you did it? A Why it is pretty hard for me to tell you the year.

Q Start with the earliest time?

The Court: That is near enough, between 1900 and 1908.

Q Tell when you did it, specify particular instances? A During my time there the brook overflowed several times, but in one instance it came down pretty rapid, and I recall it distinctly, because I worked all that day hauling up sod, and most anything that I could get, against the doors, to keep it from going in on the stock—

Q Against the doors in the warehouse? A In the warehouse, where they kept the brass, and I think we worked there all morning, and I think at two o'clock she came clean over, over the bank—well, it run down in front of the factory, maybe a foot, or a little more, of water, and the reason I remember it so distinctly is because we had to back the truck into the windows and get the girls out of the shop.

Q The water then was—why did you bring the girls out of the shop that way? A To cart them to Bloomfield avenue.

Q Why did you take them out in that way? A On account of the water.

Q And were any of the girls carried out in any other way by the employees? A Not that I know of.

Q I believe the facts are that they were, are they not, Mr. Bernett? A Carried out in some other way?

Q Weren't some carried out on foot—didn't the men help to carry them out without the truck? A Yes, sir.

Q Tell us about that? A But I didn't carry them.

Q You didn't. Now Mr. Bernett, do you recall whether or not during the time that you

were there there was any embankment built at the property of the Consolidated Safety Pin Company approximately perpendicularly to the channel of the brook, to keep the water from the brook coming out in storm times? A Yes, sir.

Q Yes; where was that located, and what was the nature of it? A One bank, which I worked on myself, ran along the brook from the property line of Consolidated—(interrupted).

Q Will you please show us on this map that we may have an idea of it. Describe the location. Here is the Consolidated property, there is the brook, the dam, Farrand street and the last building—do you see that? A Yes, sir, this is the factory.

Q Yes; there are the last two buildings. A We built a wall or dirt knoll probably about four feet or a little more, stretching to the factory from the brook all the way along the brook, along their property line.

Q Did you build anything from the brook towards Farrand street? A No, I didn't, but there was one there.

Q There was one there? A Not from the brook to Farrand street.

Q What was its location? A It ran behind the barn from the brook across the property line.

Q And about how high was that? A About three or four feet.

Q It was made of what? A Dirt—stones.

Q It was on the property of the Consolidated. Now do you recall whether the condition that you speak of, where the truck was used for the purpose that you have mentioned, was after any severe rainstorm. Had it rained much before that? A Before what?

Frederick R. Bernett, cross.

Q Before the condition of the depth of water that you speak of on that property? A It rained; yes.

Q How long had it rained? A Oh, it rained probably all night.

Q Do you recall? A Yes; it rained all that day, too.

Q Had it rained the day before? A Not the day before, I think it started that night.

Q Do you recall what, if any dam, was on the brook on the property of the Consolidated at the time you were there? A Well, there was a dam there.

Q And what was the nature of it? A I think it was two layer of ties, piled one upon the other with a pipe behind it.

Q And the pipe laid where? A This pipe I had reference to held these two ties in their place.

Q And about, approximately, how high was the top of the topmost tie above the level of the bottom of the brook? A Well, I guess those ties were 16 inches, or something like that, two of them.

Cross examination by Mr. Lum.

Q You have recollection of only the one bad overflowing during the eight years? A That was the worst yes, sir.

Q That is the only serious one you have recollection of? A There were others, but not as bad as that one.

Q Not serious. And you say it rained all night and all day, and it rained hard on this occasion? A Up until about two o'clock, yes, sir.

Frederick R. Bernett, re-direct.

Q And your company did everything that it reasonably could to prevent injury to itself, did it? A Yes, sir.

Q Are you familiar with the comparative height of the bank of the stream now? A Now?

Q As they were when you were there? A No.

Q You don't know whether the retaining wall has been built up higher than it formerly was? A No.

Re-direct.

Q You say this was the most serious. Did you not say on direct examination—(interrupted.)

Mr. Lum: If he did, it is there.

Q What, if any other times, during the time you were there did the water overflow the banks of the brook?

The Court: You must exhaust your witness when you have him on direct. He said there were several times.

Q What other heavy floods were there? A There were several times that the banks overflowed, but not as serious as this one I mentioned.

Q Did water go in the mill? A At this particular time?

Q No, at times did the water go in the factory? A No, not that I know of.

PETER E. WIBERG, sworn for the defendant, testified as follows:

Direct examination by Mr. Bouton.

Q Mr Wiberg, when were you first an employee of the Consolidated Safety Pin Company? A In 1881.

Q And where was that? A 151 Crosby street, New York.

Q Do you recall a time when the Consolidated Safety Pin Company was going to move to Bloomfield? A I do.

Q And do you remember about what year that was? A They contemplated getting out of New York City and finally decided.

Q When was it? A They moved out in 1890, in the spring.

Q Now did you go out with them at that time? A No.

Q Was there any particular reason why you did not? A There was.

Q And what was the reason? A There was a personal reason.

Q Was there any reason—if it was a personal reason, unless it has to do with this case, we do not need it. Had you, prior to the time that they went out, been out and examined the land on which they contemplated moving? A I had.

Q And what condition did you find that land to be in? A Practically the same as the Kearny Meadows.

Q In what respect? A It was a swamp and water all over it.

Q And did you later come into the employ of the Consolidated? A Yes, sir, four years.

Q Four years later? A 1894.

Q And from that year, how long did you—were you in the employ of the company? A Until 1909.

Q During the latter period that you were in their employ in Bloomfield, do you recall any instance when at storm times or freshet times water came over from Tony's Brook into the land of the Consolidated Safety Pin Co.? A I remember several times.

Q Do you remember any time when that resulted in water going into the buildings of the company? A I do.

Q With what results? A Well, the employees had to get out, and they also had to raise the material, which consisted mostly of brass—raise it from the floors so it wouldn't get soiled.

Q And how many instances do you remember of that kind during the period you were in their employ in Bloomfield? A I couldn't say definitely, but it must have occurred about three or four times possibly, it was a common thing—it was a periodical occurrence whenever there was a storm; and they raised the bank of the brook practically after every storm and widened the ditch out there.

Cross examination by Mr. Lum.

Q You were there from 1894 continuously until 1909? A I was.

Q And during those years you knew of three occasions when the water came in the plant? A Yes, sir; three or four cases.

Q Three is all you definitely remember, is it? A It was a periodical occurrence. They put a bank up along the brook there and the

bank prevented the water from getting into the brook because it spread over—flooded—came into the property of the Consolidated from behind the barn or up from Glen Ridge, because it flooded over Clark street, Glen Ridge—came in the other way and flooded over Farrand street.

Q I am talking about the flooding of the brook, that is all. That is all we are concerned with just now, and the brook overflowed so that it came in the plant only about three times as you remember, in the time you were there? A I didn't take particular notice of how many. It might have been a half dozen times; but I can positively say it was three times.

Q Do you know how the height of the bank of the brook there now compares with the height of the bank when you were there? A I don't know the condition of the present bank because I haven't been at the place for about 15 or 18 years.

Q You don't know anything about any changes that have been made in the bed of the brook or the widening of it in any way around there in the last few years, do you? A No, in the last few years, but previous to that they widened it out every storm or fixed it up and when the water came in the bank prevented the water from going out so that the bank seemed to do as much damage as good.

HERBERT H. BIDDULPH, sworn for the defendant, testified as follows:

Direct examination by Mr. Bouton.

Q Mr. Biddulph, you were never in the employ of the Consolidated—you were never connected with the Consolidated, were you? But have you lived in the neighborhood of Bloomfield, Glen Ridge and Montclair for a long while? A Yes, sir.

Q How many years? A Between 70 and 80.

Q During the time have you observed ever, conditions of Tony's Brook, at storm times, at the location of the Consolidated property in Bloomfield? A Yes, sir.

Q Have you ever observed whether or not the water overflowed the brook prior to 1924? A Yes, sir.

Q And how often do you recall any conditions of that kind? A My recollection dates pretty well back, of course—

Q Tell us what you recall? A Why nearly every spring at least, there was considerable overflow.

Q At that point? A Yes, sir; all the way down from—

Q We are more interested, particularly now, in the conditions at the Consolidated property. Have you ever observed the water at such times going over the bank? A Yes, sir.

Q How many times do you recall? A You say over the banks—my earliest recollection is that there wasn't much of a bank there.

Q Has that been so since the consolidated was located there? A I can't say that.

Q Now tell us then, in your own language, what you do recall about those conditions since the Consolidated was there? A Well, it was simply—(interrupted.)

Q Since the year 1891—

The Court: Let the witness answer.

A The brook has always, within my recollection, been subject to these high water marks during storms.

Q During freshet times? A Yes, sir. And as I say, originally, there was very little bank there, there were times when the water would come up within 75 feet, I imagine, of Bloomfield avenue, so much so that I remember one case where it flowed in a cellar of a house that stood on the avenue, that is, faced on the avenue. I should imagine it was about 400 feet from Tony's Brook, so that it covered a large area.

Q Was any part of the Consolidated Safety Pin Company included in the area you mentioned? A Oh, yes.

No cross examination.

JAMES J. MOONEY, sworn for the defendant, testified as follows:

Direct examination by Mr. Bouton.

Q Mr. Mooney, you were in the employ of the Consolidated once, were you not? A Yes, sir.

Q And during what period of time? A Around 1909 to 1912.

Q And during that time did you or did you not observe any water coming over the bank from Tony's Brook in storm times? A Yes, sir; I did.

Q How often do you yourself recall it? A Twice that I know was good floods.

Q What do you mean by good floods? A When they swept all over the territory.

Q Swept all over, to what extent, to the buildings? A Down through Farrand street and into the buildings.

Q Did it come into the buildings of the Consolidated? A Came down Farrand street all the way down the catch basin and in the door.

Q Door of what? A Consolidated Safety Pin Company.

Q What buildings, do you recall, in particular? A Ground floor.

Q Buildings used for what purpose? A Store rooms was one; main one, was level with the ground.

Q And do you know anything about a time when it was necessary to draw the fires in the boiler room on account of it? A I remember it well.

Q You remember it well, and just tell us what the conditions were at that time? A That is the night the watchman got me out. That is what you get for living too close to the place where you work—the watchman got me out two o'clock in the morning and I had to go up there and saw the boards off the dam to let the water down and it flooded all the way in until it flooded the generator. When we started up the next day we had to put the lead wire over the top to the switchboard, because the wire from the generator was going through the tunnel or whatever you call it, and they were grounded, and they had to put them overhead, back to the switchboard in order to get started up.

Q What year was that? A I am pretty sure it was between 1909 and 1910, around there.

James J. Mooney, cross.

Cross examination by Mr. Lum.

Q Do you know what the height of the wall was, at that time, of the embankment, as compared with the height of the wall at present? A Pretty close.

Q How much more have they now?

The Court: You mean about the same?

The Witness: Pretty close to what they were. There was a pretty high embankment there, but they had all trees and not plank on the side like it is re-enforced now.

Q When they re-enforced it, as it is now, do you know whether they widened it also? A I don't know.

Q Do you know how much higher it is now than it was then? A No, sir.

Q You know it is higher? A It is a little higher anyway.

The Court: What is a little higher?

The Witness: I couldn't tell you exactly, but I know—

By the Court.

Q What is a little higher? A It is a little higher the way it flooded on the surface of the water.

Q What is higher? A Higher means up, don't it.

Q What do you say is higher? A It only slopes back about—I am not an engineer.

Q I mean what are you referring to? A It floods back about 25 feet further.

James J. Mooney, cross.

Q The flood goes back further? A The flood goes back that way about 25 feet further. It used to come to the old bridge, now it is about 25 feet past the bridge.

Q He is asking about the embankment? A Oh, the embankment, I thought he meant the flood water. I can't answer that question exactly.

Q Is there any difference now from what it was then at the point of the mill, point of the factory? A It is different.

Q Is it higher or lower? A It is higher now.

Q Much? A No, not very much, I don't think.

Further cross.

Q How many years did you work there? A I think I worked there—one time I got fired for sawing it down and letting a tree go through—they had to build a new dam. I wasn't there, the engineer of the new dam, or didn't help to build it up.

Q The factory was badly flooded on one occasion while you worked there? A Yes, sir.

Q That is all you recall? A That is all I recall. I think you can find some of the mud there of the flood yet.

Q You don't know how the height of the dam, nor the height of the bank nor the width of the brook today compares with the height of the bank or the width of the brook at the time of the flood that you speak of, do you? A Well, there ain't much difference I don't think. I don't think there is over 4 feet in width, might be in depth.

Q How about the height? A The height of the embankment is re-enforced, but I don't know when it was re-enforced.

Q How about the height? A The height of the embankment? It is higher now, yes, sir.

Q It would carry a larger volume of water today than it would at that time, wouldn't it, the brook? A If there was no flood gates to let down on the other side of it.

Q Do you know how the gates operate now? A I do. They raise up.

Q They raise up? A Yes, sir.

GEORGE J. SMITH, sworn for the defendant, testified as follows:

Direct examination by Mr. Bouton.

Q Mr. Smith, you were an officer of the Borough of Glen Ridge, at one time, were you not? A I was.

Q What period of time was that? A About 1914 to 1923.

Q And what was your business during that time? A Superintendent of Public Works.

Q During that time did you ever have occasion to notify the Consolidated Safety Pin Company to open the gates of its dam? A On a great many occasions.

Q And what was the result of these notifications? A Sometimes they were complied with and sometimes not.

Q And when they were not complied with, what, if anything did you do? A Well, one occasion I asked them during a severe storm, in person, if they wouldn't go out and open the gates and try to prevent damage to Clark street.

Q And then what happened, if anything? A Well, the—put it this way, the fellow said he didn't care to do it.

Q Did anybody over there tell you to do it? A Yes, sir.

Q And what did they say to you to do? A Well, I don't know whether his Honor will give me permission or not.

Q Did they tell you to do it? A To do it. They told me to do it and I didn't do it.

Q What did they tell you to do? Did they tell you to open the gates yourself? A Yes, sir.

Q They did. In other words they refused to open them, did they? A Positively.

Q And about what year was that? A That would be prior to—let's see, 1922—that would be prior to 1921.

Q Did anybody during your period as an officer or superintendent of public works of Glen Ridge, of the Consolidated Safety Pin Company—did anybody of the Consolidated Safety Pin Company ever speak to you—say to you that they would remove that dam without waiting for a legal proceeding? A After a long drawn-out conversation I told them that I was tired of coming down there and taking this question up and I said if there isn't a move made there is going to be some legal trouble over it, then this representative of the Consolidated Safety Pin Company said, "If we are the actual cause of this damage we will take it down rather than have any legal proceedings."

Q Do you remember who that was? Is he in court? A No.

Q Do you remember his name? A No, sir. I can tell you about where he lives. He was

introduced, or he took it upon himself to say, "I am superintendent of the works."

Q For whom, the Consolidated? A Of the Consolidated. I representing Glen Ridge.

Q What year was that? Do you recall? A No; it would be during one of these flood seasons that we had every summer.

Q Now what was it that brought about this condition that you stated that you had become tired of? A Why going down there constantly from floods overflowing Clark Street Roadway, backing up from the Consolidated Gates.

Q And is Clark street in Glen Ridge? A It is.

Q How far from this dam above? A I would say, about—

Q Yes, approximately? A I would say—(interrupted.)

Q Can you show his Honor the location of Clark street with respect to the dam, on that map? A About five hundred feet back, about.

Q Five hundred feet north? A Yes, sir, upstream.

Cross examination by Mr. Lum.

Q Mr. Smith, there has been a change made in the Clark Street Bridge, in the last few years, hasn't there? A Yes, sir.

Q Have any floods above it since? A Not during my time from the time it was raised up until the time that I left Glen Ridge.

Q You left in 1922? A Yes, sir.

Q You don't know whether since the Clark Street Bridge has been raised there has been any flood there? A Since 1923?

Q Above the Clark Street Bridge, do you? A Since 1923?

Q Yes. A No; I don't know nothing about conditions there at the present time.

Q Don't know whether what you were formerly ascribing to the poor little dam of the Consolidated plant—

The Court: Strike out the poor.

Q —the dam of the Consolidated plant, might have been due to the Clark Street Bridge, do you? A Why it was always due to Clark Street overflowing up until the time the bridge was raised. When they lowered the gates, that is the drop gates and raised the rise gates, why then of course the water would recede—wouldn't have any floods—then have to go down and spend the borough's money again to clean up Clark street.

Q Do you know what the comparative elevation of the top of the dam is as compared with the Clark Street Bridge? A Yes, sir; at that time we appealed to the company the gates were dropped and opened thoroughly, there was a drop of 18 inches, for I myself measured it.

Q Do you know how much the Clark Street Bridge was raised? A To be exact I couldn't tell you, but I tell you in the neighborhood of 15 inches, or more. It might have run twenty inches, but I know it was raised.

Q Do you know whether there has been any flood above the Clark Street Bridge since that bridge was raised or not, do you? A No, sir.

Q Do you know that this whole subject as to the Consolidated dam having anything to do with the flood conditions was taken up with Mr. Doe, the mayor of Glen Ridge? A I took it up with Mr. Doe.

Q Do you remember the reports of Mr. Jackson the Consolidated Safety Pin Company's engineer to Mr. Brownworthy? A No, sir.

Q You do not remember it was after the report of the Consolidated's engineer that Glen Ridge then took the matter up with the County and that the County raised the bridge? A Mr. Doe did not impart anything to me of that transaction.

Q Now what is the height of the top of the embankment, at the Consolidated plant, above the top of the gates? A Well, I didn't measure it. Never did measure it, but I know that there is a rise there.

Q Three feet at least? A No; I wouldn't say three feet at least.

Q About three feet? A In the neighborhood of three, maybe two.

Q And were you ever there when the gates were in and the brook was overflowing the bank, when the dam was up? A Yes, sir; when it was coming in on the upper end of their lock work—they have a lock at the head of that cut-in in the company's yard—and flooded down towards the engine room.

Q And at the time the water was overflowing the bank, the gates of the dam had not been either raised or lowered? A Wasn't overflowing the banks.

Q I am asking you if you ever knew a time when the water was overflowing the banks and at that time the gates of the dam were up in place? A I never see it overflowing the banks.

Q You never saw that water overflow the banks? A No, sir.

Q So that whenever you asked to have the gates operated, whenever it was, the water was

not overflowing the banks? A Not the Consolidated banks, no.

WILLIAM A. STICKEL, sworn for the defendant, testified as follows:

Direct examination by Mr. Bouton.

Q Mr. Stickel, what is your present occupation? A Civil Engineer.

Q You are the County Engineer of Essex County? A Yes, sir.

Q How long have you been such? A Since 1921.

Q And were you connected with the County in an engineering capacity before that? A As Assistant County Engineer back to 1916.

Q Now you, therefore, are familiar with the conditions—surface water conditions, storm water conditions, so far as they affect Bloomfield avenue above the dam on the property of the Consolidated Safety Pin Company in Bloomfield? A I am.

Q And Bloomfield avenue is a county road, is it not? A That is correct.

Q And Bloomfield Avenue runs along near by Tony's Brook for a considerable distance, doesn't it above the property that we speak of, through Glen Ridge, and Montclair? A It does.

Q Now in the course of its length in the Borough of Glen Ridge and the Town of Montclair above the property of the Consolidated, how many and where located are any storm waterdrains of the county that are maintained by the County of Essex? A We have one at Liberty street—one at Bloomfield avenue and

Liberty street, one at Bloomfield avenue—(interrupted)

Q If I may suggest it, as we take each one, will you use this—answer this particular question, with reference to each one, whether or not it drains storm water from part of the water shed of Tony's Brook and how long has it been in use, so far as you can? A The most easterly one is at Bloomfield avenue and Liberty street, which drains area within the original Tony's Brook drainage are, and we have records that it existed in 1887. The next one is at Bloomfield avenue and Hillside avenue, and the same facts apply to that, that it existed in 1887, and lies within the drainage area. The third is at Bloomfield avenue and Ridgewood avenue and the same facts apply to that, that it existed in 1887, and of course, drains an area within the drainage area of Tony's Brook. The next one—we had a culvert on Bloomfield avenue approximately where the D., L. and W. Railroad now crosses Bloomfield avenue, with the bridge across the avenue, which allowed the brook to run through the avenue. I don't know whether that would drain any water or not. The next water shed—and that existed in 1887, and allowed the water within the drainage area to go under Bloomfield avenue. The next drainage area takes in the Valley Road, Montclair, a county road, where a modern storm sewer system eventually found its way into Tony's Brook in the vicinity of the Valley Road and Bloomfield avenue, and that was built approximately 1915, and takes in a drainage area which lays within the original drainage area of Tony's Brook. That is about all that the County has.

Q Are you familiar with areas marked three and four, the areas in question, or are you—(interrupted.) A Yes, sir, I am familiar.

Q Are you familiar with the topography of Montclair at the side of those areas—adjacent to them? A Yes, sir; in a general way.

Q And can you say as a result of your familiarity in that respect whether or not there are—that in your opinion are or have been any natural water courses out of either of those areas to the east beyond the line of the boundary between Glen Ridge and Montclair? A I have no knowledge of any.

Q Do you know whether there are any at present? A Yes, sir; an outlet by way of Oxford street.

Q I am speaking of natural water courses. A Natural water course, no, I do not.

Q What was the natural water course of the two areas, do you know? A I do not know.

Q Do you know whether the present construction—present drainage construction is within the Tony's Brook area? A It is my belief—(interrupted)

Q Do you know? A I do not.

The Court: Can you tell from the construction of the drains—

The Witness: No.

The Court: —whether the flowage is natural—whether the flowage is the natural course?

The Witness: I do not understand you.

The Court: Could you, from the construction of the drains, elevation or depression of the drains, say whether the course

of the present drainage is consistent with the natural drainage?

The Witness: I could make an interpretation of the topography as I see it as to what I believe it was, I do not know.

Q And what is that interpretation? A My belief is that there was a ridge which prevented water from coming down Oxford street, and I base that belief on the natural topography which exists today.

Q And where, in your opinion, did it originally and naturally go? A In the vicinity, in the general direction towards Pine street and thence into Tony's Brook.

Cross examination by Mr. Lum.

Q Do you know how long it is since any water from there went southerly and into Tony's Brook before Montclair gathered it together by the Pine street sewer? A Just repeat that question, if I may, because I didn't get the gist of it.

Q (Question read.) A I know that Oxford street, the present method of carrying water to Third River, existed in 1915, which is as far back as my knowledge goes of Essex County control of it.

Q You found in 1915 then this water they are now sending through Pine street sewer into Tony's Brook did not go into Tony's Brook in 1915? A No, it did not.

Q And there was evidence, apparent to you, that it didn't for some considerable time before that, is that not so? A Well the street existed —how long prior to 1915 Oxford street existed I, Judge, do not know.

Q Wouldn't be surprised to find that it had been going the same way you say it did in 1915, for 15 or 20 years before that, would you? A I don't know.

Q What makes you think that water—that flow—was not in the direction of Oxford street or Cambridge street? A Your Honor, Oxford street—(interrupted)

Q Take Cambridge street? A Cambridge street has a summit in the neighborhood—no, I am wrong. Cambridge—I am not questioning Cambridge at all. I claim it came down Oxford street. Cambridge street or Grove street I know nothing about. There is no evidence there to give me any belief as to what happened on Cambridge.

Q Is the decline running east on Cambridge street to Grove? A Yes, it goes down.

Q Is it natural? A That, Judge, I don't know.

Q You can tell by the appearance, can't you? Did you examine it? A I would say that it might be natural or might be artificial. No way of telling that.

Q If it was natural that would be the natural flow, Grove street, wouldn't it? A Yes, sir.

Q Could you tell by the back yards off of Cambridge street whether the lay of the land there was natural or not? A The section is such a modern section—it might have been level in that particular section.

Q None undeveloped? A Not on Cambridge.

Q On Oxford? A On Oxford, yes, the block, a series of terraces.

Q This stream that you found in 1915 going down by way of Oxford street, so that it did not

go into Tony's Brook, continued through 1916 and 1917, and years after the same way?

The Court: Down Oxford street?

Mr. Lum: Yes.

A Yes, sir.

Q And that continued the same way until the new sewer was built on Pine street and it was collected and thrown into Tony's Brook? That is true, isn't it? A No, sir.

Q When did it stop, before 1924? A It is still coming there, a portion of it.

Q Running easterly on Oxford street? A There is still water coming down Oxford street to—(interrupted)

Q To Grove? A Yes, sir.

Q Where is it deposited? A It eventually reaches Ridgewood avenue and then through the pipes. Mr. Jarvie, the property owner, has constructed, and laid to elevation and then by way of Bay avenue and Third River.

Q Why wasn't that the flow of the drainage from areas three and four on the map? A I am judging by the terraces on Oxford street, which would indicate a natural ridge had been cut through by a street allowing water to go through the ridge.

The Court: He asks why wasn't that then the natural drainage for the area covered by three and four.

The Witness: I cannot understand how the natural water could have gotten through these terraces that exist.

The Court: You do say there was a depression on Cambridge Road?

The Witness: In 1915?

The Court: Yes?

The Witness: Yes, sir.

Q Why wasn't that then, the natural way for this water to be taken, as an engineering problem? A Why wasn't it the natural way for it to be taken?

Q Yes, as an engineering problem, dealing with the situation? Normal engineering? A I haven't studied the Pine street sewer to see which was the best way to take the water. I am not familiar enough with the subject to answer that question.

Q But Cambridge Road, you say, was a natural course of flowage of the drainage of three—areas three and four? A No, Oxford—you mean the natural drainage?

Q Yes. A No, I claim three and four never did go through. A portion—

Q Three and four, Grove street and Cambridge street is within the area three? A Yes, sir.

Q And you say there was a drainage down Cambridge street to Ridgewood avenue? A Yes, sir.

Q Natural drainage? A No; not all the way through.

Q Well, down to the eastward—(interrupted) A I will say up as far as Grove street. When you get to Grove street it would be held in.

Q Yes, at the westerly point? A Easterly point of the ridge, or easterly point of the drainage area.

Q Westerly point of Cambridge street? A Yes, sir.

Q Then flowing eastwardly with a natural course? A Yes, sir.

Q Along Cambridge street? A Yes, sir.

Q From Grove street? A As far as—as far west as Grove street, yes, sir.

Q As far as Grove—as far west as Grove? A Yes, sir.

Q According to the grade and level of that property some water still goes down Oxford street? A If I am not mistaken, the area marked four on this map still goes down Oxford street—Oxford and Cambridge.

The Court: That is artificial, you think —cut through?

The Witness: It is my belief.

Q Do you recall Mr. Copp, of the Consolidated Safety Pin Company having an interview with you regarding a sewer? A Yes, sir.

Q Do you remember saying to him that if you had known of the Montclair plans regarding the Pine street sewer you would have shown them the way to join the Bay street sewer being constructed about that time? A I do not.

Q Did you have any conversation with him on the subject? A Oh, yes.

Q He was objecting and protesting against this water being thrown on them? A Came down for the purpose of having the county join in protesting the construction of this storm sewer for Montclair.

The Court: The Bay street drainage goes into Tony's Brook, doesn't it?

The Witness: No, Bay street goes into Third River. This is Bay street and there is Bay avenue (indicating).

The Court: Which do you mean, Bay avenue or Bay street?

Mr. Lum: Bay avenue.

(Adjourned until September 29th, 1926.)

SECOND DAY.

Continuation of hearing, pursuant to adjournment, at the place and in the presence of the parties as before.

ARTHUR E. OWENS, sworn for the defendant, testified as follows:

Direct examination by Mr. Bouton.

Q Mr. Owens, what is your business? A Civil engineer.

Q And what is your present connection? A I am chief engineer of the Central Railroad Company of New Jersey.

Q And have been a resident of Montclair for some time? A With the exception of two years, I have lived there all my life.

Q And you know the vicinity of Oxford street, Montclair? A I do; yes, sir.

Q Did you or not reside in that neighborhood? A I lived at one time on Christopher street, just north of Chestnut.

Q Will you kindly examine the part of that map designated as areas three and four, and say whether or not you are acquainted with the topography of those sections? A I am acquainted with it, yes, sir.

Q Were you acquainted with that section at the time that you resided in that immediate section? A Yes, sir, and before that time.

Q And before that. Now do you recall whether or not—a time when Oxford street was not cut through to Glen Ridge? A I remember distinctly when Oxford street—easterly end of Oxford street was at the intersection of Walnut Crescent.

Q That is in Montclair? A Montclair, yes, sir.

Q And the time that you mention, was there or was there not any natural water course from the areas in question going to the east on the line or near the line of Oxford street? A I know of none.

Q Was there any—do you know where Cambridge Road is? A Yes, sir.

Q Was there any at Cambridge Road, that you remember? A Might I ask at this time—you spoke of a natural water course?

Q Yes. A There were no—as my notion of a natural water course is one in which water ordinarily runs, probably fed by springs or a live stream, as distinguished from a channel for surface waters—(interrupted)

Q That is the purpose of the question? A I know of no natural water course in that vicinity.

Q What would the flow of the rain water be? A That would be the surface water over the ground.

Q Natural flow? A In that particular locality the natural flow of the rain water, was, generally speaking, from the north to the south, in a general direction, in that area.

Q Will you indicate that on the map for the Court? A Assuming area three indicates the watershed area, the surface water from that territory—no, the general trend is to the south, across Walnut street and across the Greenwood Lake Railroad, and so coming to the Tony's Brook somewhere between Grove street and Pine.

The Court: That was at what time? That you are speaking of?

The Witness: That was late '80's and '90's.

The Court: What is your age now?

The Witness: 50.

Q Was there at that time or not any elevation of the ground at the eastern boundary of the sections in question that was higher than to the west; that is, along the boundaries of areas three and four? A Yes, sir; the ground let us say, along just about Tremont Place and Cambridge Road and extending to a point somewhere near where Columbus avenue crosses Grove street and down to a point marked Innis Place was all generally higher than the ground immediately to the west of it. In other words, I might explain the topography of that whole section this way, that there are what might be called ridges extending in a generally northerly and southerly direction; one about where Montclair avenue is shown crossing the Erie, then in the vicinity of Christopher street and Walnut street, and extending southerly, crossing Woodland Place, Fairmont avenue, and generally southerly to Tony's Brook area, from just east of Grove street, that was originally a line extending northerly and south-

erly. There was a corresponding ridge generally parallel to it and to the east of it, so that between those two ridges there was this valley, and the surface water collected from it went down through this valley and found an outlet into Tony's Brook in the neighborhood of Pine street.

Q Mr. Owens, do you remember any particular occasions when you say any storm water flowing in that direction that you speak of and if so will you indicate in what manner you saw it flow and where? A I remember especially one occasion, after a very heavy rainstorm, when I was at one of the houses on Walnut Crescent.

Q Will you point that out as you explain it? A Walnut Crescent being there (indicating), as marked on the map, and the surface water from that storm—it was quite a heavy storm—as I remember it it was a very heavy thunderstorm —the flooding waters came across Oxford street and went right in the rear of this—probably it was a depth of 12 to 18 inches deep—in that backyard, flowing in a southerly direction, went across Walnut street just west of its intersection with Walnut Crescent, and so on down into Pine street and through a—past the Erie Railroad—I wouldn't say whether the culvert was there at that time or before, but the culvert was put in there at one time to take that water—and so on down the grade of that whole territory from Belmont avenue to Tony's Brook, being to the south, and I am sure I saw that one particular storm, and I am quite sure I have seen others.

The Court: Where is the culvert?

The Witness: Under the Erie Railroad.

By the Court.

Q At Pine street? A Between Pine street and Piermont,

Q That was to take care of what rain water? A That was to take care of the water from these areas in question, three and four.

Q Did the water have any other escape than that course? A No, sir; that is the natural course for the surface water in that territory. I speak of that culvert particularly, because I can remember—I may explain why my memory was pretty good—my father was town surveyor, town engineer, ever since I was a little fellow six or seven years old and I used to go with him and work with him in my spare time. I speak of that culvert because I was with him when he arranged with the then superintendent of the Erie Railroad to build a culvert somewhere between Pine street—to let water which was impounded back of the Erie Railroad at the time of high water, through under that bank without flooding Clairmont avenue, which is much lower at that point.

Q Where is Clairmont avenue? A (Pointing to the map.) The area which I was just referring to is the easterly end of Clairmont avenue near the intersection of Pine street. You will observe there is a triangle formed by the intersection of Clairmont avenue, Pine street and the Greenwood Lake branch of the Erie. That I remember used to flood at times of high water after rains because of no adequate drainage provisions under the railroad tracks. That was arranged for at the conference my father had with the superintendent of the Erie Railroad and I know it was

put in after and that trouble was largely alleviated.

Cross examination by Mr. Lum:

Q What was the date, as near as you can fix it, when that culvert was put under the Erie Railroad? A I couldn't have been more than, I was born in 1876—and I couldn't have been more than seven or eight years old when that happened. I was less than ten years old I am quite sure.

Q How large was that culvert? A I couldn't say.

Q Small one? A I do not recall.

Q How long did that culvert exist there, do you know? A I do not.

Q Is there one there now at that point? A I think the storm water sewer system that has been installed has done away with that necessity —the necessity of an individual culvert at that point.

Q Up until what time was it there? A That I couldn't say. I know it was put in at the time, because I was interested in it and knew the results they wanted to attain by putting it in were obtained, and there was no flow of water stayed at that point, that is, to the same extent that it did before.

Q This particular time that you refer to when you saw the water running 12 or 18 inches deep back of the house where you were visiting, about how old were you at the time of that visit? A I must have been probably 14 or 15 years old, maybe 16; maybe I was less than 15.

Q In the neighborhood of 35 years ago? A Yes, sir.

Q And did you know that thereafter the water, for many years, in that general area referred to as three and four, flowed easterly, whether through a natural water course or by ditches worn by the force of the water itself, or over fields, and went down into Third River? A I do know that it went through another course.

Q And that was about thirty odd years ago? A It was after that.

Q Shortly after that? That is, three or four or five years after that? A I wouldn't want to say that. I know it was some period after this storm, the one I spoke of, that the water was diverted through Oxford street and out an entirely different outlet.

Q And after then it continued to go that way continuously after until the Pine street sewer caught it up and threw it back into Tony's Brook? A To my best knowledge, yes, sir.

Q How was that accomplished? A Why Oxford street was extended easterly, cutting through that ridge which I speak of and forming an artificial channel—Oxford street intercepting the water from the south and taking it by reason of the regraded surface which was way below the natural contour of the land, and the water followed out Oxford street to Ridgewood avenue in that vicinity and then through other courses, finally getting into the Yantico, Third River; artificial course.

Q Did you ever hear or do you know of your own knowledge that some several years before this date that you refer to when you observed this storm from the house where you were visiting, an old man named Porry had so changed a dam there that the water which had originally

not gone into Tony's Brook did go into Tony's Brook? A No; I never heard of that.

Re-direct.

Q Mr. Owen, I show you a map entitled at the top "Oxford street" and I show you a page entitled "Read Map" and ask you if you have examined either or both of those and if you have, what, if anything, you can say about that map as applying to Oxford street? A I recognize the index book as being an index of maps in my father's office, and I recognize the map by means of an index number on the map as being in all probability one of the maps referred to in the index book, especially so as the index book refers to "Read Map," Oxford street map, and this map is Oxford street No. 26, and the map bears that same number. I cannot identify that—in other words, identify that map as being in his office.

Q What if anything does that map show you regarding Oxford street? A This map shows the ground surface on the location of Oxford street and in a red line the proposed grade. It indicates—and assuming that those lines are correct it indicates that at a point east of the intersection of Oxford street and Walnut Crescent the ground was three feet higher than at a point some 250 feet west of the intersection of Walnut Crescent and Oxford street.

Q West or east? A West. My reply was that the ground west was lower than the intersection.

Q What do you mean by your father's office, official office? A Yes, sir; the office my father held.

Q Official office as surveyor of the town? A At that time he had only one office, did all his work in that office.

Mr. Lum: He was county engineer for a great many years?

The Witness: He was county engineer at that time as well as town engineer.

Mr. Bouton: I offer the map in evidence.

(Marked Exhibit D. 1 of this date.)

ALBERT F. RAHN, sworn for the defendant.

Direct examination by Mr. Bouton.

Q Mr. Rahn, did you ever live in Montclair? A Yes, sir.

Q For how long; over what period of years? A About thirty years.

Q And where, if at all, did you live in the neighborhood of Oxford street? A Lived on Oxford street for about 25 years.

Q Up until when? A Until 1910.

Q And did you after live in that section? A Yes, sir.

Q Will you show the Vice-Chancellor a painting you have there. It is rather unusual, but it is a picture made by this gentleman's father of the very point in question at a certain year, that I think your Honor may find some advantage in.

The Court: Go on.

Q Who made this picture? A Father painted it.

Q Do you know in what year he painted it? A It is dated 1890.

Q And what does the picture show? A It shows Oxford street at the intersection of Walnut Crescent.

The Court: Painting of that location of Oxford street as indicated.

The Witness: Right here at the corner.

Q And as you look at that picture, Mr. Rahn, what point of the compass are you looking? A You are looking directly northwest.

Q Will you designate, if you can, on the map, the point?

The Court: No.

Q There is shown a road on that picture, the point you have your finger on, what is that? A That is the intersection of Oxford and Walnut Crescent.

Q Do you recall whether or not, from your own personal recollection, Oxford street at that time extended east of that point? A It did not.

Q Do you recall whether or not there was any elevation of land higher than—at that section —that was higher than the land to the west of it? A On the north and east side it was higher.

Q And do you recall whether or not that ridge extended in a northerly direction? A North.

Q Now you may put that down. Do you recall from your own observation the course that any—will you look at areas three and four there.

The Court: How did the water flow after a rain?

Q How did the water flow after rain, in what direction? A Southerly direction.

Q Towards what point?

The Court: Southerly direction.

Q Southerly direction. And from your own observation, where did that pass out, if it did pass out of either of those areas, designating on the map street intersections or anything nearby? A It passed from Oxford street across property owned by Mr. Smith at that time.

Q Where was that located upon that map, will you show the Vice-Chancellor? A (Indicating.)

The Court: Which way did it flow?

The Witness: It flowed south, right across the terrace towards Pine street.

Q Mr. Rahn, do you remember whether or not there were any natural water courses there flowing to the east out of this section at the time you speak of? A No, there were not.

The Court: What time are you speaking of?

The Witness: Well, that is when I was a boy there, about 19, in 1892 or 1895.

Cross examination by Mr. Lum.

Q Then shortly after 1892 to 1895 the water started to flow down to the east, into the Third River, didn't it? A Not to my recollection.

Q And you never remember a time when the water flowed east? A Flowed south.

Q You recall no diversion to the east of Oxford street? A Yes, sir.

Q In 1910 do you mean to say? A I do not recall just what date it was.

Q Well, was there ever any time when the water changed its course while you were there? A Not to my knowledge.

Q So that as you recall it all the time up until 1910 the water continued to go to the south? A I don't know to 1910. The water continued to go to the south.

Q As long as you lived there? A As long as I was there.

Q You were there until about 1910? A 1910.

Q When was the Oxford street extended on through? A I cannot recall the date.

Q While you lived there? A Yes, sir.

Q Some several years before you moved? A Yes, sir.

Q And didn't that have any tendency to change the direction of the surface water? A It was supposed to, but at that time I remember that the water still hesitated in some way—it didn't go on to Ridgewood avenue.

Q It was intended to throw it on to Ridgewood avenue? Through Oxford street? A Right.

The Court: Through Oxford street on to Ridgewood avenue?

The Witness: Yes, sir.

Q Do you remember four pipes coming out at the edge of the sidewalk on Tremont street? A I do not.

Q You never saw those. Then if they were there for a great many years taking a great deal

of surface water east, you never saw them? A I never saw them.

The Court: Pipes coming out where?

Mr. Lum: Tremont street; testified to by Mr. Harrison.

The Court: Where were they supposed to be?

Mr. Lum: They are there now. They are blocked up with dirt and grass.

The Court: The outlet on Tremont street?

Mr. Lum: Yes. All the water up northerly came right straight through the middle of the block. The physical situation is very apparent there today. The pipes are still in there although it does not serve.

Q You have seen water then, all the time you were there—lying in between Walnut street and the Erie Railroad? A Not lying there, no. I never followed the water any further than Walnut street. I knew it ran down towards Walnut street, and I didn't follow it any further.

Q Didn't know whether it went on east or south? A The natural lay of the land would be to make it go south.

Q You have no knowledge of your own as to where it went? A I know it went to Walnut street, and across Walnut street and I never saw it—

Q From— A Pine street.

Q Pine street didn't extend to Oxford? A No, it extended to Walnut.

Q How did the water at Oxford street get to Walnut street? A It crossed private property.

Q Were there gullies there? A Just the natural slope of the land.

Q How old are you? A 39.

Q You do not remember an awful lot about conditions there in 1890, do you? A 1890? I didn't say 1890, did I?

Q You were speaking about 1892? A 1895. Well, we played around there as boys.

Q Didn't I understand you to testify that that picture showed the condition there at the time it was painted? A This painting shows Oxford street, how it was in 1890.

Q You weren't born at that time, were you? A Born in 1887.

Q You were three years old, and you remember that condition when you were three years old, do you? A I don't remember this painting, I remember the street in that condition.

Q Don't remember the conditions that existed in that painting at all, when the painting was made, do you? A This condition appeared after this painting was made, for years.

The Court: And that you recognize?

Mr. Bouton: I offer the painting in evidence for whatever it may be worth.

The Court: How can it be incorporated in the evidence?

HARRY C. MILLER, sworn for defendant, testified as follows:

Direct examination by Mr. Bouton.

Q What is your business? A Civil engineer.

Q Have you made any survey for the Town

of Montclair of the section in question of areas three and four? A The firm of Miller & McGiven.

Q Your firm? A Yes, sir.

Q Have you a map as a result of that survey that was made of those areas? A Yes, sir.

Q And will you compare it generally with those on that map and see if it corresponds? A I believe so, generally.

Q What? A I believe so.

Mr. Bouton: We offer that map in evidence as to the boundaries of three and four. They differ a trifle from what is in the bill of complaint, but they are substantially the same.

Mr. Lum: No objection. No questions.

(Paper marked Exhibit D. 2 of this date.)

ARTHUR E. OWENS, recalled for further

Cross examination by Mr. Lum.

Q You do not of your own knowledge, Mr. Owens, of course, know when the survey referred to in D-1 was made, or by whom, do you? A I don't know by whom it was made but from the indications of the conditions shown on that profile I would be warranted in drawing the conclusion that it was made before Oxford street was extended easterly from Walnut Crescent, and which, as I recall, was at some time subsequent to 1890, we will say, therefore, those conditions must represent the conditions as they existed about that time.

Arthur E. Owens, further cross.

Q And you have no way of checking and no data by which anything can be told as to the accuracy of this survey? A No, sir.

By the Court.

Q When did your father cease to be engineer? A Of Montclair?

Q Yes. A About somewhere in the neighborhood of 1910 I should say, or just prior to that. He was still county engineer until 1914.

Q Is he living? A He is dead.

Q When did he die? A Four years ago.

Q Engineer up until his death? A He was retired in the last three or four years.

Q Do you know where the map came from? A That came from his files, I am quite certain.

Q You didn't get it, did you? A No, sir. I recognize handwriting here, and the map itself, as being part of his files.

Q Were you in his office? A Oh, yes, I worked for him.

Q When? A I worked for him in 1896 and 1897 and part of 1898 and prior to that all my life I had been around the office as a boy working for him.

Q Is that his work? A That is not his personal work, no. I might explain that he had several different engineers working for him. He didn't do all the work personally.

Q Can you tell whose work it is? A No, I can't tell who made that particular map.

Q No initials? A No initials, that I can tell that, by any particular man.

Arthur E. Owens, further cross.

Further cross.

Q Where is Walnut Crescent shown on this map on the profile Exhibit D. 1? A Walnut Crescent is about station 11 on the map, being about 1,100 feet easterly from Grove street.

Q Is it shown on there? A It isn't marked as such, no, but that can be verified by comparing the distance on these other maps in evidence, as to the distance between Grove street and Walnut Crescent. That is about—if I may have that last map that was put in evidence—

Q About 1,100?

The Court: Does that show the land to the east of Walnut Crescent as being elevated?

The Witness: Yes, sir.

Q Above the land at the corner of Locust and Walnut Crescent? A Oxford and Walnut Crescent, this black line is the center line of the street as it existed, or as it was proposed, and the colored lines are the elevations of the side lines in the street.

The Court: The top of the map?

The Witness: Yes, sir. That shows the ground as it existed at the time it was made, the red line indicates the proposed grade, and if you notice there is a descending grade all the way from Grove street to Ridgewood avenue, cutting through a hill which existed just east of the corner of Oxford street and Walnut Crescent at a point 150 feet, where that—at station 1250 the elevation of the ground is marked on this profile as being

246.96, at a point of section 9 plus 50 the elevation of the ground is marked as an elevation of 243.33; the difference between those two elevations is 3.63.

The Court: Of what?

The Witness: Indicating that the ground at station 9½ is 3.63 feet lower than the ground at 13½—no, at 12½. In other words there is three feet fall from station 12½ to station 9½, towards the west. That would correspond on this map on the wall as a point on Oxford street just east of the Glen Ridge-Montclair line as being the high point and the point approximately midway between Clairmont Place and Crescent street as being the low point, and the low point being where the surface water flowed across Oxford street. That odd station is the intersection of Oxford street and Walnut Crescent on the larger map, but not this survey, about station 11½.

Q Mr. Owens, you referred to ridges carrying the water to the south. Do you recall that Montclair avenue is sort of a natural dividing line? A Montclair avenue is located, generally speaking, on the top of one of these ridges. I did not say the ridges carried the water to the south. What I said was the ridges existed and the water went from those ridges east and west to the low point between the two ridges and then the water went south when it reached the low point.

Q Wasn't there a difference anciently, as to whether the water to the west of Montclair avenue or to the east of Montclair avenue, as to where it went? A Yes, sir, generally speaking the water that fell on the ground west of Montclair avenue went westerly and into Tony's Brook itself, direct.

Q Montclair avenue is the mount of one ridge? A It is on top of the west side.

Q It is the west ridge, in a way? A The water falling west of Montclair avenue went around into Tony's Brook by some devious route and that that fell east came easterly until it reached the low point in the area between the two ridges and then went south.

Q Into Tony's Brook? A South into Tony's Brook.

Q Natural divide, we might call it? A Yes, sir. There is another one, however, parallel and easterly of that ridge; the one easterly, the one that was cut through by Oxford street, went into the Third River.

Q That went to the Third River? A Yes, sir, and flows into the Passaic River below Nutley at the county line.

M. BAER SALOZ, sworn for the defendant, testified as follows:

Direct examination by Mr. Bouton.

Q What is your business? A Photographer.

Q Have you as such made photographs of the locality of the stream at the Consolidated Safety Pin Company in Bloomfield? A Yes, sir.

Q And other photographs showing Oxford street in Montclair? A Yes, sir.

Q When did you make those photographs? A Monday—this last Monday.

Q And do the photographs that you have there show the—are the results of that work?

George Huttenloch, direct.

Are those photographs those that you made on that day? A Yes, sir. This is a photograph of the— (interrupted).

Q Do they show the true exposure? A Show the true exposure.

The Court: Let them go in subject to correction.

(Photographs marked Exhibit D. 3 of this date.)

GEORGE HUTTENLOCH, sworn for the defendant, testified as follows:

Direct examination by Mr. Bouton.

Q Mr. Huttenloch, what is your connection with the Town of Montclair? A I am assistant to the director of public works.

Q And as such have you made any visit recently to Tony's Brook at the Consolidated plant? A I have.

Q On any such occasions have you had any conversations with any employees of the Consolidated? A Yes, sir; I have had conversations.

Q What particular occasions, if any, did you have conversation with the employees of the Consolidated, concerning the storm flow there, on what date and what was said, if anything? A There was one in particular— (interrupted).

Mr. Lum: I object. I don't know who the employee was. We can't be bound by any chance conversation with 600 employees.

The Court: If you strike out what was said, I will admit it.

George Huttenloch, direct.

Mr. Lum: I have no objection.

Q On what date were you there? A July 25, 1926.

Q This year? A This year.

Q And with whom, of the Consolidated, did you have any conversation, on that occasion? A There were two employees of the Consolidated that I talked with concerning this flow.

Q Where did you have your conversation? A They were in the boiler room of the Consolidated plant.

Q And what if anything did they say to you?

The Court: Objection sustained. Who were they?

Q Who were they, Mr. Huttenloch? A I don't know their names, but they are employees of the Consolidated Safety Pin Company.

Q Laborers? A I don't know their official business.

Q Did they have any official position, or were they workmen? A They were workmen.

Q What did they say to you of their personal observation, of any conditions?

The Court: Purely hearsay.

Q Mr. Huttenloch, have you observed on any particular occasions, if so when, any conditions—particular conditions—at the dam on Tony's Brook at the Consolidated property? A I have, on June 16, 1925.

Q What condition did you observe? A I found the gates were down and quite some debris in the dam, and I took a picture of it.

Q And what was the nature of the debris?
A There was a large stump.

Mr. Lum: Won't the picture speak for itself?

The Court: No.

The Witness: Large stump, several pieces of branches of trees, quite a little stone and gravel.

The Court: What?

The Witness: Stone and gravel.

Q Where was the stone and gravel located?
A At the dam.

Q Well, what part of the dam?

The Court: Bottom of the water, I presume?

The Witness: Yes, at the bottom; it filled up around the dam on one side, in one side in particular.

Q What was the height of the water at the time you speak of? A The height of the water at the time I saw it?

Q The height of the water at the time you are speaking of this debris. A When I saw it there was very little water in the brook.

The Court: You were not there during a storm?

The Witness: This was immediately after the storm—after the storm had receded.

Q Were the gates open or shut? A Two gates open and one closed.

Q What was the location of the gravel and stone and what you speak of with respect to the opening in the dam?

The Court: At the gate that was shut?

A The gate that was shut was practically filled in to the height of the gate with this debris.

Q Now, have you on any other occasion of a definite date seen anything similar?

The Court: You say there had been a storm then?

The Witness: There was a storm just previous to that.

The Court: How long before, hours or—

The Witness: I should say about five or six hours previous to my visit.

The Court: What took you down there at that time; why did you go?

The Witness: It has been my duty to visit that section of Tony's Brook.

The Court: Why did you go at that time?

The Witness: What is that?

The Court: Why did you go right after the storm?

The Witness: Why did I go after the storm?

The Court: Right after the storm, yes.

The Witness: That is my work. I was supposed to do it and I did it.

The Court: To do what?

The Witness: To go down and observe the conditions in the brook at the Consolidated Safety Pin Company, and after this storm I did it.

The Court: And you found one of the gates closed?

The Witness: One of the gates closed.

The Court: Choked up?

The Witness: Choked up.

Cross examination by Mr. Lum.

Q Do you know whether that storm had overflowed, that June 16th storm?

The Court: Isn't that true of all storms?

Mr. Lum: No, not storms that we know of.

The Witness: There was evidence that it did overflow the banks.

Q What evidence did you observe as to that? A The wash and the high point of the water always leaves a line along the bank.

Q Could you identify that line from previous lines? A How is that?

Q Could you identify that line from previous lines? A Yes, sir.

Q How? A I had a record of the previous lines.

The Court: This line was a wet line?

The Witness: Oh, yes.

Q And did you go in the engine room? A I went in the engine room.

Q Well, was there water in there? A Yes, sir.

Q From this overflow at that time? A Yes, sir.

Q And did you speak to Mr. Copp, the manager of the plant, about it? May I see the pic-

ture? Speak to Mr. Copp, the manager? A Not at this time I didn't.

Q Who are those men there in the picture, shown in the picture? A Employees of the Consolidated Safety Pin Company.

Q Cleaning the rubbish out of the brook? A Yes, sir.

Q In other words, you found that immediately after the storm the Consolidated Pin Company were taking the limbs and the stumps and the refuse that had flowed down from above, on their property, and carrying it out, did you? A Yes, sir.

Q Careful, conscientious work, wasn't it?

The Court: Eh?

Mr. Lum: Careful work, wasn't it?

The Court: Paid for.

Q This picture actually shows the condition of the brook five or six hours after the ceasing of a heavy storm, does it? A After this heavy storm; yes, sir.

Mr. Lum: I offer the photograph for identification.

(Marked Exhibit C. 1 of this date for identification.)

Q You didn't arrive during the storm? A I did not.

Q You didn't know when that one gate was raised, in order to impound the water so that they might use it in the operations, did you? A Will you repeat that question?

Q You don't know whether that one gate, which is shown up in that picture, was raised how long after the storm, do you? A I do not.

Q You can see from the conditions shown in that picture at the time, if they were going to have water impounded there it was necessary to begin to raise the gates when the water was getting as low as that, couldn't you? A Yes, sir.

The Court: Where is the dam?

The Witness: This is the dam.

The Court: What is this here?

The Witness: That is a bridge over the top of the dam.

The Court: Where is the dam?

The Witness: The dam is here. That is one abutment and here is another (indicating).

The Court: Where are the gates?

The Witness: The gates were down, all down like that (indicating).

The Court: Where is the water—where is the stream?

The Witness: The stream runs along here —the gates are right down here.

The Court: Which is the banks?

The Witness: Here is one of the banks here, and here is the other (indicating).

WILLIAM H. DEWAR, sworn for the defendant, testified as follows:

Direct examination by Mr. Bouton.

Q What is your connection with the Town of Montclair—or Borough of Glen Ridge? A Borough Engineer of Glen Ridge.

Q And as such are you familiar with any storm drains in the Borough of Glen Ridge, that drains storm water from this—the watershed of Tony's Brook, into Tony's Brook, within the Borough of Glen Ridge? A Yes, sir.

Q Will you kindly tell us the locations of those, such as you know of, and the name of it, if you have a designated name for it? A I have a map here that shows that.

Q Will you please read from that map and put it in the form of testimony, taking the earliest date shown, from your knowledge of it, as to when it was built? A I can't tell exactly when these drains were built. The only thing I can tell you is the location of the drains at the present time.

Q Can't you tell the date when any of them were built? Take the first.

The Court: The year.

The Witness: Only the connecting links, not directly into the brook.

Q How long have you been with the Borough of Glen Ridge? A Since 1922.

The Court: Where were you before that?

The Witness: Where was I before that? With the New York Edison Company.

The Court: In the same employment?

The Witness: Yes, sir, in the employment of map making, and previous to that period with the Central Railroad of New Jersey.

Q You were not familiar with this location until 1922? A Only passing through it, that is all.

Q Who was your predecessor? A Mr. Baechlin, of Bloomfield; Ernest Baechlin.

The Court: The man who was just here?

The Witness: No; I think it is his brother.

Q Will you give us the name and locality, if you have any, for any of these sewers within the water area—

The Court: Surface drain or sewer, which do you mean?

Mr. Bouton: Surface drain within the Borough of Glen Ridge that drains into Tony's Brook?

A I can name and offer in evidence this plan which shows all.

Q Name each one. A Well, there is a drain; Lincoln street to Clark, drains into Tony's Brook-Clark street directly.

Q Will you show the Vice-Chancellor?

The Court: Go on; put it in the record.

A Hillside avenue, Ridgewood avenue, Woodland avenue.

The Court: These all above the plant?

The Witness: Yes, sir, and Bloomfield avenue, Bloomfield avenue being the county drain. That is all the streets that we have drains in.

Q What area does that cover in your town? A Well, I can't tell.

Q Well, I mean the area that is drained. A Well, I can't tell exactly the figures.

Q Approximately? A I don't know as I could even make an approximation of it.

Q In miles? A It shows it all on this map, just the drainage area.

Q Can't you explain from your map for the record and his Honor? A Yes, sir, the area covered starts at Clark street; it runs south to Windsor Place, then west to a point about halfway between Ridgewood avenue and Hamilton Road, then it goes north to the rear line of property facing on Lincoln street, then it goes west again to the rear line of property on Summit street, then east to Ridgewood avenue, then along Ridgewood avenue to Woodland avenue and then north across the railroad tracks to Bloomfield avenue, west down Bloomfield avenue to just a little west of Highland.

The Court: How many blocks are in that rainshed as shown in your map?

The Witness: I would say about twelve blocks; not all full blocks, some of them half blocks.

The Court: And all flow into this brook north—

The Witness: Yes, sir.

The Court: —of the point in question?

The Witness: Yes, sir.

The Court: North of the factory?

The Witness: Yes, sir.

The Court: Anything more?

The Witness: Well, it continues then east on Bloomfield avenue to the rear line of property on Herman street; then north on that line to within about 100 feet of Belleville avenue.

The Court: Belleville avenue is your high street, isn't it?

The Witness: No, sir; it is not. Highland avenue might be considered, or Douglas Road.

The Court: I don't mean elevation, but the high street of the town, also high street of Montclair?

The Witness: No, sir; it is not.

The Court: Main street, I mean.

The Witness: No; it continues into Glen Ridge avenue, Belleville avenue coming from Montclair through Glen Ridge.

The Court: Bloomfield avenue?

The Witness: Bloomfield avenue has no connection with Belleville at all.

The Court: What?

The Witness: Bloomfield avenue has no connection with Belleville avenue at all except through Highland avenue.

Q Can you tell us what of those sewers or drains have been built during the time you were in office? A Why, the Clark street drain was extended during my time.

Q Any others? A And the Woodland avenue was extended from Ridgewood west during my time.

Q And in your opinion do the areas drained by these drains that you have mentioned drain storm water from within the natural watershed of the brook within the Borough of Glen Ridge? A Will you please put that question again?

Q (Question read.) A Yes, sir; they do.

Cross examination by Mr. Lum.

Q None of these drains in any way concern the plots shown as three and four on the map, do they? A No.

Q Haven't any connection with those, have they? A I don't know where it is. I was just going to look. It is in Montclair. It has no connection at all.

Q Now, your testimony—by it you do not mean us to infer that Glen Ridge has recently taken to dumping water in Tony's Brook that did not go into it before? A Oh, no. They were all built before I went there—

Q You spoke of the Clark street extension. Does that flow of water have some other outlet? A Naturally not; indeed, never had.

Q So you haven't increased the water in Tony's Brook? A Not at all.

Cross examination by Mr. Mylod.

Q You have enumerated all the sewers that enter Tony's Brook within the Borough of Glen Ridge—that run into Tony's Brook? A Yes, sir.

Q And all those drains and all the water that flows into Tony's Brook through Glen Ridge originated within the natural watershed of Tony's Brook? A It does.

John A. Brown, direct.

JOHN A. BROWN, sworn for the defendant, testified as follows:

Direct examination by Mr. Bouton.

Q Mr. Brown, you are the Borough Clerk of Glen Ridge, aren't you? A Yes, sir.

Q And as such familiar with the proceedings of the borough with regard to the sewers that have been mentioned by the town engineer? A Yes, sir.

Q As such borough clerk have you investigated, pursuant to the subpoena calling upon you to produce in the notice or demand of the Consolidated Safety Pin Company directed to the government of the Borough of Glen Ridge, against building the sewers, that your town engineer has just mentioned? A I haven't any records of any objections.

Q As such clerk have you investigated the time, the date and the year when Oxford street was taken over as a public street by the Borough of Glen Ridge? A I find no records on it—on the borough books—of having been taken over as a public street.

The Court: Oxford street at the point of the former ridge is the dividing line between the Town of Montclair and the Borough of Glen Ridge?

Mr. Bouton: Very nearly so.

Q Mr. Brown, you have heard the town engineer mention the drains this morning? A I have.

Q How long have you been town clerk? A January 1, 1910.

James E. Torrey, direct.

Q And are you as such familiar with the proceedings in connection with the building of those drains? A With some of them.

Q And which are you acquainted with? A Why, one of the drains which runs underneath the Lackawanna Railroad to Tony's Brook was put in when the double track was laid. It was about the year 1913 or 1914 when the railroad work was going on. It was necessary to put that drain in on account of the change of grade of the ground under the railroad, but it takes the same water that went on the surface before.

Q My question is, are you, as the town clerk, familiar with the proceedings authorizing the construction?

The Court: Of course he is; he is the town clerk.

Q And to your knowledge were the proceedings in connection with the drains in question in accordance with the law and regularly adopted? A As far as I know.

The Court: When were these drains put in?

The Witness: At various times.

The Court: Well, when was the last one?

The Witness: The last one was the one in Clark street—extension.

The Court: When?

The Witness: About three years ago; two or three years ago.

The Court: When were the others, those mentioned by the previous witness?

The Witness: At various times by the county, and this one by the Lackawanna Railroad about 1913, and some by the borough about 1917 on Ridgewood avenue; the one on Ridgewood avenue when the street was paved.

Q When was the Borough of Glen Ridge set up as a separate municipality apart from the old Township of Bloomfield? A It was incorporated on the 13th day of February, 1895.

Cross examination by Mr. Lum.

Q You don't know of any water being diverted by Glen Ridge into Tony's Brook which did not originally go into it, do you? A No, not at all.

Mr. Lum: May I call Mr. Torrey so that he can get away?

Mr. Bouton: No objection.

JAMES E. TORREY, sworn for complainant.

Direct examination by Mr. Lum.

Q Mr. Torrey, what is your business and where do you live? A Paterson, N. J.

Q And what is your business? A Civil engineer.

Q How long have you been such? A Twenty-five years.

Q Did you ever live in the vicinity of Oxford street? A Yes, sir; a few hundred feet south.

Q What place; will you point it out exactly, on the map? A (Indicating.) From 1882 we had a house at the foot of Walnut street, almost on the Montclair-Glen Ridge line; twenty-four years later the house itself was moved the other side of what is Walnut Crescent—Walnut Crescent was cut through, and Oxford street opened from Grove street to Walnut Crescent.

The Court: Walnut Crescent in Glen Ridge or Montclair?

The Witness: In Montclair.

Q Will you tell the Court what is your earliest recollection of surface water conditions in that vicinity? What year? A Somewhere between 1887 and 1890, I would say, after we had been living there for three years.

Q Where, Walnut Crescent? A At Walnut Crescent.

Q That would be when? A Between 1887 and 1890.

Q What did you observe as to the natural flow of the water at that time and at that place? Tell us the history.

The Court: Which way would the water flow at that time?

A What little there was through our place flowed to the south towards Walnut street, but a very small flow.

Q (By the Court.) Through the backyards; do you mean? A Through the backyards; not enough to do any damage.

The Court: What, if anything, happened at that time?

The Witness: About that time, immediately following the opening of Christopher street, the first heavy storm after that, a regular small river flowed through there.

The Court: Through the backyards?

The Witness: Through the backyards.

The Court: Will you show me where Christopher street is?

The Witness: (Indicating.)

The Court: Christopher street runs north and south and east of Grove street.

The Witness: West of Grove street.

The Court: West of Grove street, parallel with Grove?

The Witness: After Christopher street was opened a ditch was constructed to take surface water under Grove street out into Hinks' Woods.

The Court: That was where?

The Witness: The woods bordered on Grove street extended north from Grove street almost to Chestnut street, the ground was low and flat and after every rain the water stood in the woods.

The Court: Where is Chestnut street?

The Witness: Right here.

The Court: Oh, yes, that is west of Grove?

The Witness: West of Grove; and in fact stood on the low ground immediately west of Grove street at the same point, north of Oxford and west of Grove.

The Court: That is within area three on this map?

Q And when was Oxford street cut through, about? A You mean extended east from Walnut Crescent?

Q Yes.

The Court: We have that.

A I don't remember the exact date.

Q About? A I would say it was a year after the dam was built.

Cross examination by Mr. Bouton.

Q Mr. Torrey, your house, do I understand, was located near the Crescent? A Fourteen Walnut Crescent.

Q And did there not then at the time, in 1887 or 1890 as you recall, west of Walnut Crescent, exist a natural depression of considerable proportions that ran north and south from very nearly Oxford street, and isn't it still there today, behind the houses? A There was a natural depression.

Q And it is of considerable depth, isn't it? A Very slight depth.

Q What do you mean? A Runs north of Oxford.

Q And from Oxford street south isn't there a very perceptible gully that is several feet lower than the land on the Walnut Crescent, behind the houses across the street from where you lived, running substantially north and south, toward Pine street? A At the point where our house was located?

Q No, in back of the houses across the street from you? A No.

The Court: It was on the west side.

Q On the west side, back of the houses on the west side of Walnut Crescent? A The low point was in the rear of the houses.

Q Yes; that is quite extensive. It runs along quite a bit, from nearly Oxford street, does it not? A From nearly Oxford street?

Q And that was the natural topography of that land? A Yes, sir; that was the low point.

Re-direct.

Q And what volume of water did you ever see going through that point before the dam was put there, an appreciable quantity or not? A Negligible.

HARRY TRIPPETT, sworn for defendant, testified as follows:

Direct examination by Mr. Bouton.

Q Mr. Trippett, what is your connection with the Town of Montclair? A Town clerk.

Q And how long have you been town clerk? A Thirty-two years last May first.

Q What is the official name of Montclair at the present time? A Town of Montclair in the County of Essex.

Q How long has it been such?

The Court: Never mind that.

Q Mr. Trippett what date and year did Oxford street become a public street? A The town took it over by ordinance—(interrupted).

The Court: Why go into this, I thought counsel was going to agree.

Mr. Bouton: We can made a list.

The Court: Make a list and submit it to the other side, and if they do not agree with it send for this man. That is all, Mr. Trippett.

Mr. Bouton: I offer a map—

The Court: Put your map in subject to correction.

WILLIAM H. WARNOCK, sworn for the defendant, testified as follows:

Direct examination by Mr. Bouton.

Q Mr. Warnock, what is your connection with Montclair? A I am the town engineer of Montclair.

Q And how long have you been such? A Early in 1923.

Q And are you familiar with these areas three and four? Of the new Pine street sewer? A Yes, sir.

Q And where does the outlet of the new Pine street sewer end? A Tony's Brook, the new Pine street sewer.

Q Yes. The old Pine street line—show us the point on the map where the new Pine street sewer ends? A Here, (indicating). South of the Erie tracks.

Q Now, at this point, by what means does it, if it does, get to Tony's Brook? A Through the old Pine street storm drains.

The Court: Connected, weren't they? The old and the new?

The Witness: Yes, sir.

Q Have you as town engineer had occasion to observe whether or not the water flows on Oxford street in any quantity except at the time of storms, to the east? A There is no water on Oxford street unless in storms.

Q There was something said here the other day about there being a stream now on Oxford street, is there any such to your knowledge? A There is not, no, sir.

Q Mr. Warnock, was this map that we see here made under your supervision? A A part of it only.

Q Does it correct show the items on it in the outline of the watershed of Tony's Brook within the Town of Montclair? A To the best of my belief, yes.

Q Does it correctly show the watershed of areas three and four according to the survey made by Miller and McGiven? A Yes, sir, substantially.

Q Does it show the location of storm drains within Tony's Brook watershed in Montclair? Of drains made prior to Pine street drainage, to Tony's Brook? A That is the part that we put on in our office.

Q Does it correctly show those as they now exist in the Town of Montclair? A Yes, sir.

Cross examination by Mr. Lum.

Q How big is that new sewer at the Erie tracks? A Thirty-six inches.

Q Three foot diameter pipe? A Thirty-six inches, yes, sir.

Q And on Grove street about twenty-nine inches, isn't it? A I think twenty-four in Grove street.

Q Twenty-four. Now before the new Pine street sewer was connected in there, the water which now flows into the old Pine street section went easterly into Third River, didn't it? A East on Oxford street, yes, sir.

Q East on Oxford street; and Oxford street has been there as long as you remember? A I have only been here since 1923.

Q There are catch basins along the side of Grove street? A Yes, sir.

Q And other streets, in order to catch all the water and take it down into the new section? A That is correct.

The Court: Where was the old drain you speak of on Pine street?

The Witness: Just south of the Erie tracks. To Tony's Brook.

The Court: What water did it carry just from that point?

The Witness: It carried all up to that area here indicated, to the line of three.

The Court: The old drainage then from Walnut street or from the Erie Railroad south—(interrupted)

The Witness: Erie Railroad south.

The Court: —what water did it carry?

The Witness: All the water in that particular area.

The Court: That is east of the—south of the railroad?

The Witness: No, that particular area went up to this line here (indicating the southerly green line of area three and four.)

Q That was before any drain north of the railroad? A Yes, sir.

Q It took the natural flow. When do you say the rain water went through Oxford street? A Before this line went north of the Erie tracks.

The Court: On Pine street?

The Witness: On Pine street.

The Court: And up Walnut?

The Witness: And up Walnut, over Grove to Christopher street. That is our new Pine street line. Before that was constructed this water in this area here—(interrupted).

The Court: Area four?

The Witness: Yes, sir, and three—any water that ran out through the head of Cambridge Road or the head of Oxford street at Grove flowed easterly in Grove street—in Oxford street.

The Court: And crossed the line into Glen Ridge?

The Witness: Yes, sir.

The Court: What is the meaning of the extended green line on the map—heavy line?

The Witness: That is another drainage area of Tony's Brook above the Consolidated Safety Pin Company.

The Court: All flows into Tony's Brook through surface drains?

The Witness: All flows into Tony's Brook.

The Court: Naturally?

The Witness: Its natural tendency is Tony's Brook.

The Court: And all north of the Pin Company's property?

The Witness: Yes, sir.

The Court: Area three and four prior to the construction of the surface drain north of the railroad track on Pine street, and to Walnut street you say ran eastward on Oxford street?

The Witness: The bulk of it I would say.

The Court: The bulk of it?

The Witness: Yes, sir.

JOHN P. WENTWORTH, sworn for the defendant, testified as follows:

Direct examination by Mr. Bouton.

Q What is your business? A I am a civil engineer.

Q As such have you had anything to do with the investigations and calculations concerning the drainage of the new Pine street sewer? A I have.

Q Or drains for the Town of Montclair? A I have, yes.

Q Do you see the areas on this map, three and four, and you see an outline, a larger outline. Will you tell us if you know who put those on that map and what they indicate? A I put on the line in green. It represents the drainage area of Tony's Brook at the Consolidated Safety Pin Company.

Q Over to what municipalities? A Montclair, Glen Ridge and Bloomfield.

Q And did you put on those boundaries of areas three and four? A I did; yes, sir.

Q And do they correspond correctly with the survey made by Miller and McGiven of those areas? A Yes, sir. Area three is the area that now drains into Pine street drain and area four is the area which now drains through Oxford street and which the town wishes eventually to connect onto the Pine street drain.

Q Where does the water drain from area four? A Area four, over Cambridge Road and Oxford street through Glen Ridge, Bloomfield, to the Third River.

Q It does at the present time? A Area four?

Q Now? A Yes, sir.

Q Is area four, in your opinion or knowledge, within the natural watershed of Tony's Brook, in Montclair? A I think it is; yes, sir.

Q How large an area in acres is the watershed of Tony's Brook in Montclair? A In Montclair?

Q Yes, in Montclair. A 1,669 acres, excluding areas three and four.

The Court: What is area three?

The Witness: Area three is fifty-three acres.

The Court: Four?

The Witness: Area four is eighteen acres, making a total of seventy acres; added to the 1,669 that I just gave makes a total of 1,739 acres.

Q What proportionate part of the total acreage that you have just given us as the watershed within Montclair is area three? A Of the total?

Q Of the total. A Area three is approximately three per cent.

Q And what proportionate part is area four of the total acreage that you have just given? A What I just gave the total in Montclair?

Q Total in Montclair. A Three per cent. is not right. I thought you meant the total drainage area.

Q Then make the correction that is necessary? Just state your correct answer, will you? Is the question clear to you? A That was right. Area three is approximately three per cent.

Q Of the total? A Of the total.

Q Four? A Area four, one per cent.

Q Mr. Wentworth, how much will area three, or does area three increase the drainage area of all the drainage area of Tony's Brook at the Consolidated property? A By three per cent.

Q And by how much does the area—would area four if it were added, add to the total? A One per cent.

Q How much will area three or does area three in storm weather flow—what percentage does area three increase the storm flow? A By about three per cent.

Q Area four, what per cent.? A One per cent.

Q What acreage of watershed of Tony's Brook is there within the Borough of Glen Ridge? A Glen Ridge, 165 acres.

Q Have you the acreage of the watershed of Tony's Brook drained by the county into the brook above the Consolidated? A I haven't, no, sir; and when I said Glen Ridge, I included the entire area within Glen Ridge.

Not cross examined.

DR. HENRY B. KIMMEL, sworn for defendant, testified as follows:

Direct examination by Mr. Bouton.

Q Dr. Kimmel, what is your present occupation? A I am state geologist and also director of the Department of Conservation of Development of the State of New Jersey.

Q Have you at the instance of the Town of Montclair made a personal examination of the topography of area three and four shown on this map? A I have.

Q When did you make that? A Some day the last week in December, 1925.

Q Have you examined in the connection mentioned any records or maps, official records or maps of the State of New Jersey showing the topography of areas three and four? A I have.

Q What map have you in mind? A I have examined the original maps of the topographical survey which was made in about the year 1887 under the direction of George H. Cook, who was then state geologist.

Q As a result of your personal examination of these areas and of your investigation of the said map have you any opinion as to where the storm flow of areas three and four shown on that map originally naturally went? A I believe they went into Tony's Brook, southward into Tony's Brook.

Q (By the Court.) Southward into Tony's Brook? A Southward into Tony's Brook.

The Court: Have you the map?

The Witness: There is a copy of it.

The Court: Is this a matter of opinion or a matter of map?

The Witness: It is judgment based upon the map. The map shows the contour lines—the topography.

The Court: You check up your judgment by the map?

The Witness: By the map, yes, sir, and also I verified the map by an inspection on the ground which shows me that the map was correctly made by scale.

The Court: Is there any question as to the natural flow?

Mr. Lum: Mr. Torrey's testimony seemed to establish that quite clearly, that the amount was trifling, but after they cut through Christopher street it was very great.

The Court: Yes. Is there any dispute as to the natural flow of the water to Tony's Brook?

Mr. Lum: Yes, your Honor, there is.

Cross examination by Mr. Lum.

Q What is there on this map that enables you to tell about natural conditions as they would have existed on the ground thirty-five years ago? On some seventy acres? A The general shape of the topography as shown by the contour lines which are drawn on that map.

Q Does it show the streets? A It shows the streets that existed at the time the map was made.

Q I call your attention to the fact that Christopher street is not shown on this map. Have you observed that on your topographic map? A I presume that if it isn't shown there it didn't exist at the time the map was made.

Q Would the cutting through of Christopher street, from your examination of the ground and your familiarity with the map, have changed the flow of the water? A I want to make sure that I know which Christopher street is. In my judgment it would not. It wouldn't have changed the direction of the flow. It might have changed the rate, the velocity.

Q Do you know when this map was prepared? A The map was surveyed about 1887, possibly 1886.

Mr. Bouton: We offer the map in evidence.

The Court: Is that the original?

The Witness: This is a copy. That is not the original.

DEFENDANT RESTS.

ALBERT HAGER, sworn for complainant, testified as follows:

Direct examination by Mr. Lum.

Q Mr. Hager, have you measured the heights of the retaining wall above the gates? A Yes, sir; I have.

Q At the plant of the Consolidated? A I have.

Q What is the actual difference in the elevation of the one and the other? A The height of the wall, the new wall that we put up—

Q Yes? A One of them is eight inches and the other is twelve inches above the old wall.

Oct. 17, 1922	Park St. & Watchung Ave. to Midland Ave.	15″	1,184.25
Oct. 16, 1923	Midland Ave. Storm Sewer System.....	15″ to 36″	24,601.52
"New Pine Street," the one in question.....			43,440.26
			$176,329.22

Dated: Jan. 24, 1927.

LUM, TAMBLYN & COLYER,
Solictors for Complainant.

HAROLD BOUTON,
Solicitor for Defendant,
"Town of Montclair."

JAMES P. MYLOD,
Solicitor for Defendant,
"Borough of Glen Ridge."

ARTHUR T. VANDERBILT,
Solicitor for Defendant,
"County of Essex."

EXHIBITS C. 3, C. 4 AND MINUTES.

TOWN OF MONTCLAIR
Clerk's Office

Montclair, N. J. March 1, 1927

I hereby certify that the records of the minutes of the meeting of the Board of Commissioners of the Town of Montclair, held October 30, 1923, (page 337, of record book #25, on file in my office), record the receipt of a letter from the Consolidated Safety Pin Company of Bloomfield, and that said letter was referred to Commissioner Hanan for report; and I further certify the following to be a true copy of said letter, the original of which is on file in my Office.

CONSOLIDATED SAFETY PIN CO.

Bloomfield, N. J., U. S. A., October 27, 1923.

To the Honorable Howard F. McConnell, Mayor
and
James T. Hanan
Charles G. Phillips
John Picken
John C. Barclay
Board of Commissioners
of the Town of Montclair.
Montclair, New Jersey.

Gentlemen:

It has just come to the attention of the Consolidated Safety Pin Company of Bloomfield, New Jersey, that the Town of Montclair has adopted ordinances and taken other proceedings looking to the construction of an underground drain or storm sewer in the Town of Montclair, connecting with the existing storm sewer in Pine Street near the southerly line of the right of way

of the Erie Railroad and extending Northerly in Pine Street to Walnut Street, thence westerly in Walnut Street to Grove Street, thence northerly in Grove Street to Chestnut Street and thence westerly in Chestnut Street to Christopher street.

The construction and operation of this proposed storm sewer is intended, so we are informed, to conduct the accumulated surface or storm water from a considerable area lying easterly of Montclair Avenue and Northerly of Walnut Street in said Town of Montclair away from its natural drainage shed and discharge such water through the existing storm sewer in Pine Street and in turn into Toney's Brook, so-called, which lies in and drains another drainage area totally separate and distinct from the area first above described.

The Consolidated Safety Pin Company owns and operates and for more than twenty years last past has owned and operated a large manufacturing plant located on both sides of said Toney's Brook in said Town of Bloomfield, and in connection therewith ponds and uses the waters of said Toney's Brook adjoining said plant at fixed elevations.

The discharge of storm or surface water from the drainage area first above described into said Toney's Brook through the construction and operation of said proposed storm sewer system, upon its connection with the existing storm sewer in Pine Street will prevent the use and operation of said pond and waters of said Toney's Brook in the manufacturing processes and plant of the Consolidated Safety Pin Company, and, at times will add to said Toney's Brook an increased flow of water in excess of the customary flow of said

stream and will cause great and irreparable damage to the manufacturing operations and plant of the Consolidated Safety Pin Company in said Town of Bloomfield.

The Consolidated Safety Pin Company therefore protests against the construction and operation of the proposed storm sewer system which will divert the accumulation of storm or surface water from the drainage area first above described, into Toney's Brook, and further protest against the connection of said proposed storm sewer system with the storm sewer now in said Pine Street, and further protests against the diversion of the storm or surface water that may accumulate in the drainage area first above described and its discharge into said Toney's Brook at any point above the plant of the Consolidated Safety Pin Company.

The Consolidated Safety Pin Company further gives notice that it will seek to protect its rights in the premises, if threatened or if invaded, by appropriate action in equity and at law.

THE CONSOLIDATED SAFETY
PIN COMPANY

By Earl F. Copp
General Manager

The said minutes further show that on the same page that "Commissioner Barclay stated that he would like to know how far that work has progressed, or if work has been started at all."

Mayor McConnell replied that he would have to ask Commissioner Hanan about that matter.

Commissioner Barclay then enquired of the Town Engineer (Mr. Warnock) whether he could give him the desired information.

The Town Engineer said that the work has not been started and that the contract has not yet been executed.

Mayor McConnell added that an ordinance has been adopted providing appropriation for the storm sewer."

Harry Trippert
(Town Seal) Town Clerk
Town of Montclair

MEETING OF NOVEMBER 6th, 1923.

Page 597 of Printed Minutes.

"The Clerk reported receipt of the duly executed contract between the Town and Antonio Lampariello for the construction of the storm water sewer in Pine, Walnut, Grove and Chestnut Streets."

I hereby certify the foregoing to be a true extract from the minutes of the meeting of the Board of Commissioners of the Town of Montclair, in the County of Essex, held November 6, 1923, as the same appear on page 345 of Record Book No. 25 on file in my office.

Harry Trippert
Town Clerk.

MEETING OF NOVEMBER 27th, 1923.

Page 667, 668 of Printed Minutes.

The Clerk read the following letter from the Consolidated Safety Pin Company, of Bloomfield, namely:

November 22nd, 1923.

Town of Montclair, Board of Commissioners.
Attention of Hon. Howard F. McConnell, Mayor of Montclair, N. J.

Dear Sir: Acknowledging receipt of your letter of November 10th last, in response to our written protest of October 27th, against the construction of the proposed storm water sewer system therein referred to, and the discharge of storm or surface water into Toney's Brook, so-called, above the plant of this Company in the Town of Bloomfield, we have been advised by Counsel that we are not now concerned with the original, natural flow of the water from the drainage area, which the proposed storm sewer system is to serve. We are further advised that without regard to the direction of the original flow of such water, we are now entitled, as a riparian proprietor to have the present customary flow of Toney's Brook, adjacent to our lands and plant at Bloomfield, continue as it has for more than twenty years, without increase in volume, or otherwise, due to the accumulation and discharge into it of storm or surface waters collected from a drainage area, from which such waters have not, in fact, for more than twenty years last past flowed into such brook.

We do, therefore, earnestly renew the protest set forth in our letter of October 27th, against the construction of the storm sewer system re-

ferred to and the discharge into Toney's Brook, at any point above our plant, of storm or surface waters from the drainage area described, and we desire to give this further notice that our company will take such action at law or in equity as seems to us necessary or desirable if our rights in the premises are threatened or invaded.

CONSOLIDATED SAFETY PIN CO.

By Earl F. Copp, General Manager.

I hereby certify the foregoing to be a true extract from the minutes of the meeting of the Board of Commissioners of the Town of Montclair, in the County of Essex, held November 22, 1923, as the same appears on pages 368 of Record Book No. 25, on file in my office.

Harry Trippert
Town Clerk

OPINION.

IN CHANCERY OF NEW JERSEY.

Between

CONSOLIDATED SAFETY PIN CO.,
Complainant,

and

TOWN OF MONTCLAIR, *et als.*,
Defendants.

Opinion.

The right of a town to drain surface water in its natural course to a brook is not lost through the action of private owners artificially diverting the course in grading a street on their land, and the town's acceptance of the street and adoption of the grade. The town may revert the course; no rights having accrued to the proprietors below by prescription or equitable estoppel.

For complainant, Lum, Tamblyn & Colyer.

For defendant, Harold Bouton.

BACKES, *V.-C.*

Tony's Brook, a natural water course, has its source, and several branch sources, in the northwesterly section of Montclair, and runs, generally, southeasterly through the town and thence through Glen Ridge and Bloomfield, where it enters Second River, which empties into the Passaic. The natural drainage of all surface water of the town is southerly towards the brook, and all street grading, with the single exception involved in this litigation, conforms to the natural slope. Twenty-three drains of the town's underground surface water drainage system empties

into the brook. As a part of the system the town constructed the "New Pine Street" drain in 1924. This discharges into the "Old Pine Street" drain, which empties into the brook. The old drain runs north on Pine street and serves an area of about eighty acres in the easterly section of the town on the Glen Ridge boundary line. The new drain, an extension of the old one, runs northerly on Pine street to Walnut, westerly to Grove, northerly to Chestnut and westerly to Christopher and is designed to accommodate an area of approximately seventy acres lying partly on the Glen Ridge boundary and northerly of the section served by the old drain. The complainant owns and operates a factory in the low lands through which Tony's Brook flows, more than a mile down stream from Montclair. It has been there since 1891. In freshet seasons and during unusual downpours the brook overflows its banks and into the factory, interrupting operation and causing damage. The flooding is incidental to the location. It is not objected that the artificial drainage into the brook by Montclair is burdensome, although it does, in some degree, contribute to the freshets. The flooding would happen were the drainage natural. The complaint is that surface water in the area tapped by the new drain has been, at least since 1903, diverted eastwardly from its natural southerly course by the laying out and grading of Oxford street from Grove street eastwardly to the Glen Ridge line and that this artificial flow into the streets of Glen Ridge cannot now be lawfully reverted to its natural course, gathered in the new drain and deposited in the brook, to the injury of the complainant. The complainant relies on Jerolaman *v.* Belleville, 90 N. J. L. 206. In that case

the plaintiff's plant was located on a natural water course. The town had regraded the hill-top part of Jerolemon street, and its streets below suffered from storm water. To relieve the situation the flow down the hill was turned into the natural water course, by banking, and a covered drain, so that during a storm the plaintiff's premises were flooded by the diversion, and from back waters due to choking up of the drain, and he sued the town for the damage. The Court of Appeals held, in effect, the law to be that a lower owner must submit, at his peril, to the flow of storm water diverted from its natural channels by lawful grading, but that turning the newly created flow into his premises by artificial means, to his damage, is actionable, just as would be the casting of a natural flow by artificial means, and that upon that issue it is immaterial that in years past the storm water reached his premises by the natural route, for, in the newly created circumstances, he need not apprehend nor guard against the approach of the common enemy except from the point to which it had been invited. The opinion does not go to the length that a natural flow once diverted is unalterable, permanent. Oxford street was laid out and graded by the owners in the development of their land, for habitation, some time before 1903. In adopting the new grade, which depressed eastward, and thereafter carrying storm water into Glen Ridge, and, it is said, eventually found its way to Third River, some two miles away, they cut through a ridge at the town line, which theretofore confined the water within the town and threw it southward to the brook. The town took over the street in 1903, paved it three years later, and has ever since maintained it. The town did

not thereby abandon or lose its easement in this respect to the brook. The private action of the land owners in diverting the natural flow and the the later acquiescence therein by the town authorities, does not prevent the town from reverting it, and to the brook. The complainant acquired no prescriptive right to be relieved of the servitude. Hoboken Land Co. *v.* Hoboken, 36 N. J. L. 540. There is no equitable estoppel, for the complainant has suffered no change in conduct or attitude relying on the diversion. And there is no legal obstacle to the town regrading Oxford street, restoring the natural flow, and catching it up in the drain. It has the power to regrade. The natural flow being restored by regrading, the complainant could not complain against its discharge into the brook; injury from drainage incidental to regrading would not be actionable. Miller *v.* Morristown, 47 N. J. E. 62, aff. 48 *Id.* 645. And the town is not to be put to the expense of first exercising the power in order to enjoy the privilege. That may be regarded as done, to work out the equities, although a familiar maxim is not strictly applicable.

The point raised by the defendant, that the Court should weight the inconvenience—the momentous importance of the drainage system to the inhabitants of the affected area, now thickly populated, as against the comparatively insignificant damage to the complainant—is not maintainable. It appears that the contribution by the new Pine street drain will add approximately four per cent. to the volume of water deposited in the brook from Montclair, and a much less percentage of the entire volume reaching the complainant's factory. Glen Ridge and the County of Essex also drain to the brook. The

Opinion of Vice-Chancellor.

rule is that if the injury is actionable the inconvenience cannot be considered on final hearing Hennessy *v.* Carmony, 50 N. J. Eq. 616, and it is there held that the injury must be sensible and appreciable to be actionable. Fractional contribution, if unlawful, is actionable. Phillips *v.* Phillips, 34 N. J. L. 208; Soule *v.* Passaic, 47 N. J. Eq. 28.

The defendant's contention that the maxim *de minimis* is applicable is not entertainable. Wartman *v.* Swindell, 54 N. J. L. 589. The invasion of the complainant's property may grow into a legal right. Paterson *v.* E. J. Water Co., 74 N. J. Eq. 49. The complainant is not estopped. The drain was constructed under its protest. If it imposes an unlawful burden no protest was necessary. The defendant proceeded at its risk. Paterson *v.* E. J. Water Co. *supra.*

The proper remedy of the complainant, under the circumstances, had the defendant been responsible, is compensation as in Simmons *v.* Paterson, 60 N. J. Eq. 385.

The complainant maintains a dam in the brook, midway its factory, and the defendant by counterclaim prays that it be ordered removed. The dam, unless the gates are opened, of course, interferes with the full flow of the brook in storm weather but the complainant alone suffers. The defendant has shown no damage to itself.

The bill and counter claim will be dismissed.

FINAL DECREE.

Filed February 21, 1928.

IN CHANCERY OF NEW JERSEY.

55/487.

Between CONSOLIDATED SAFETY PIN CO., *Complainant,* *and* "TOWN OF MONTCLAIR," *et als.,* *Defendants.*	*On Bill, etc.* *Final Decree.*

This matter being opened to the Court by George R. Beach, solicitor of the defendant, "Town of Montclair in the County of Essex" in the presence of Ralph Lum, solicitor of the complainant, and of Harold Bouton and George R. Beach, solicitors of defendant, "Town of Montclair in the County of Essex."

And the Court having read and considered the pleadings, and having taken testimony orally and in court, and having heard and considered the arguments of counsel thereon and the Court having duly considered the said pleadings, proofs and arguments and it appearing to the Court that the complainant is not entitled to the relief sought and prayed for by it in its bill of complaint,

It is on this seventh day of February, 1928, by Edwin Robert Walker, Chancellor of the State of New Jersey, ORDERED, ADJUDGED and DECREED that the complainant's bill and the defendant's

Final Decree.

counter-claim be and the same are hereby idsmissed.

E. R. WALKER,
C.

Respectfully advised,

JOHN H. BACKES,
V.-C.

A true copy.

THOMAS BARBER,
Clerk.

NOTICE OF APPEAL.

Filed March 7, 1928.

IN CHANCERY OF NEW JERSEY.

55/487.

Between CONSOLIDATED SAFETY PIN COMPANY, *Complainant,* *and* TOWN OF MONTCLAIR, in the County of Essex, *et als.*, *Defendants.*	*On Bill, etc.* *Notice of Appeal.*

The complainant hereby appeals from so much of the final decree made by the Chancellor on the advice of Vice-Chancellor Backes in the above-entitled cause on the seventh day of February, 1928, as directs that the complainant's bill be dismissed, to the Court of Errors and Appeals in the last resort in all causes.

Dated: February 28, 1928.

LUM, TAMBLYN & COLYER,
Solicitors for Complainant.

EGBERT J. TAMBLYN,
Of Counsel.

I conceive there is good cause for appeal in the above-entitled cause.

EGBERT J. TAMBLYN,
Of Counsel with Complainant.

Notice of Appeal.

Service of a copy of the within notice of appeal is hereby acknowledged, this 3rd day of March, 1928.

GEORGE R. BEACH,
Solr. for Deft., Town of Montclair.

PETITION OF APPEAL.

Filed March 16, 1928.

NEW JERSEY COURT OF ERRORS AND APPEALS.

Between	
CONSOLIDATED SAFETY PIN CO., *Complainant-Appellant,*	*On Appeal from Chancery.*
and	
TOWN OF MONTCLAIR, in the County of Essex, *Defendant-Respondent.*	*Petition of Appeal.*

To the Honorable The Court of Errors and Appeals in the last resort in all causes:

The petition of Consolidated Safety Pin Co., the appellant in the above-stated cause, respectfully shows that your petitioner finds itself aggrieved by a final decree made in the Court of Chancery by His Honor Edwin Robert Walker, Chancellor of the State of New Jersey, bearing date the seventh day of February, 1928, in a certain cause in the said Court of Chancery wherein the said Consolidated Safety Pin Co. was complainant and Town of Montclair in the County of Essex was defendant in this respect to wit: That the said decree adjudges that the complainant's bill be dismissed.

And your petitioner humbly appeals from that part of the decree of the Chancellor which decrees as aforesaid, upon the ground that the same is erroneous in that the Court held that the said defendant is not liable for the injury resulting from the discharge of surface waters in

Petition of Appeal.

the brook and that the complainant is not entitled to the relief sought and prayed for by it in its bill of complaint.

And your petitioner, therefore, prays that the said decree of the said Chancellor may be in the particulars aforesaid reversed, set aside and for nothing holden, and that your petitioner may have such relief in the premises as to this Honorable Court shall seem meet.

LUM, TAMBLYN & COLYER,
Solicitors for and of Counsel with Appellant.

EGBERT J. TAMBLYN,
Of Counsel with Appellant.

Service of a copy of the within petition of appeal is hereby acknowledged this 13th day of March, 1928.

GEORGE R. BEACH,
Solr. for Defendant-Respondent.

ANSWER TO PETITION OF APPEAL.

NEW JERSEY COURT OF ERRORS AND APPEALS.

Between	
CONSOLIDATED SAFETY PIN CO., *Complainant-Appellant,*	*On Appeal from Chancery.*
and	
TOWN OF MONTCLAIR, in the County of Essex, *Defendant-Respondent.*	*Answer to Petition of Appeal.*

The answer of the above-named defendant-respondent to the petition of appeal of above-named complainant-appellant.

This respondent not acknowledging all or any of the matters which in the said petition of appeal are contained to be true, for answer thereto nevertheless says and admits that a decree was on February 7, 1928, made and entered in the Court of Chancery February 21, 1928, in the cause for that purpose mentioned in the said petition as is therein stated; but as to the substance and form thereof this respondent prays to refer thereto when the same shall be produced. And this respondent is advised and believes that the said decree is agreeable to equity, and it prays that the same be affirmed with costs to be adjudged to this respondent.

GEORGE R. BEACH,
Solr. for and of Counsel with
Defendant-Respondent.

Arthur W. Cross, Law Printer, 55-57 Lafayette Street, Newark, N. J.

New Jersey Court of Errors and Appeals

Between

CONSOLIDATED SAFETY PIN COMPANY,
Complainant-Appellant,

and

TOWN OF MONTCLAIR, in the County of Essex,
Defendant-Respondent.

On Appeal from Chancery.

BRIEF FOR APPELLANT.

Statement of the Case.

The appellant is a corporation of this State and is now and has been since the year 1891 the owner of a certain tract of land, lying in the Town of Bloomfield and in the Borough of Glen Ridge, particularly described in the bill of complaint (Case, pp. 1-4). Along the southwesterly side of said lands and running through the same there is a certain water course commonly known as Tony's Brook. This brook has its origin and source within the corporate limits of the Town of Montclair and flows generally in an easterly direction through a portion of said town, across the corporate limits of the Borough of Glen Ridge and through said Town of Bloomfield, discharging in the Second River, which ultimately discharges in the Passaic at Belleville (Case, p. 4). In the bill it is alleged that the brook is now carrying and for some time past has carried considerable surface water accumulating along its course within the limits of Montclair and Glen Ridge, which lie to the west of the property of

the complainant and which are at a higher level (Case, p. 5, l. 10).

It is further alleged that at the time of heavy rains and freshets a very large volume of water flows through the brook and through complainant's premises. These waters overflow the banks of the brook and spread out upon the land of the complainant in such a way as to injure the buildings upon the premises and to interfere with its manufacturing operations. Should the amount of water flowing down the brook be augmented to any extent the overflow of waters would be such as to greatly damage the lands and buildings of the complainant and to cause cessation of operations within the buildings (Case, p. 5, ll. 20-40).

Prior to the filing of the bill of complaint, complainant learned that the Town of Montclair had undertaken to establish and construct a certain storm sewer system in Pine, Walnut, Grove and Chestnut streets in said town. The area proposed to be drained amounts to approximately seventy acres of land. In the bill a description of said area is set forth (Case, p. 6).

It is further alleged that the surface waters within the limits of the area described has for a period of thirty years last past and upwards flowed in a generally easterly directions and drained into what is known as the Third River, which finally discharges into the Passaic within the limits of the Town of Nutley (Case, p. 7, ll. 1-10). Furthermore, the Town of Montclair, it is alleged, was so constructing the storm sewer system as to gather the surface water from the area described and to conduct the same by means of sewers in a direction almost opposite to that from which they had been flowing and to discharge the same into the brook within the limits of Montclair. By reason thereof the waters flowing down the channel of the brook through the property of the complainant will be greatly increased in volume and especially during periods of freshets and heavy rains (Case, p. 7, ll. 12-27).

It is charged that the Town of Montclair proposes by means of drains to divert the surface waters of the area aforesaid from the course which it would otherwise take and cause it to discharge into Tony's Brook. By reason of such action on the part of the town the waters will be conducted to the brook where they would not naturally flow and where they would not go but for the artificial drain and changes affected by the town (Case, p. 7, ll. 28-40).

Complainant has been for many years last past and is now conducting upon its lands and premises certain manufacturing operations. Any increase in the volume of waters coming down the brook will seriously interfere with complainant's manufacturing plant and will inflict damage upon the complainant (Case, p. 8, ll. 1-27).

The bill concludes with a prayer for an injunction against the defendant from discharging the surface water from the drainage area described into Tony's Brook and from discharging the same directly or indirectly upon lands of the complainant and at any point in said brook above the complainant's land (Case, p. 9).

In its answer to the bill of complaint the Town of Montclair admits that it has undertaken to construct a certain storm sewer system substantially as alleged in the bill and recites a more specific description of the area proposed to be drained. The first of these areas comprise about fifty-two acres. The second area comprises about

eighteen acres. It is admitted that the waters from the second area are to be added in the future to the sewer (Case, pp. 17-20). The defendant denies that the surface water within these areas has flowed as alleged in the bill of complaint and says that any such surface waters as may have so flowed, did not flow naturally nor due to any acts or omission of the defendant. It is then alleged that it was always the right, plan and intention of the defendant to drain said surface waters from said area into Tony's Brook (Case, p. 21, ll. 1 to 20).

Again, the defendant admits that it intends to use said storm water system to gather some of said surplus waters and conduct and discharge the same into the brook but denies that it proposes to or will divert any such waters from the natural flow thereof and asserts that the brook is the natural outlet and place for all said surface waters to naturally flow (Case, p. 22, ll. 15-27).

To the answer several separate defenses are added in which the contention of the defendant as set up in the answer to the allegations of the bill are more or less repeated (Case, pp. 24-30).

To the answer of defendant formal replication was filed by the complainant (Case, p. 31).

The cause came on to be heard before the Vice-Chancellor, to whom the cause was referred and the opinion of the Court is found on pages 196 to 200, inclusive, of the printed case. The court below held that the town authorities had the right to drain surface water to the brook as was contemplated by the sewer system and that the complainant could not complain against its discharge into the brook; injury from drainage incidental to re-grading would not be actionable.

The final decree entered in the cause dismissed the complainant's bill (Case, p. 201).

Thereupon complainant filed its notice of appeal and petition of appeal in due course and formal answer thereto has been filed by the defendant (Case, pp. 203-207).

Grounds of Appeal.

The appellant respectfully contends that the decree entered in this cause is erroneous in that the court below held that the defendant is not liable for the injury resulting to the complainant from the discharge of the surface waters from the areas in question into the said brook by the establishment and construction of the said surface sewer system; and further that the Court erred in holding that the defendant had the right to cast the water from said areas upon this complainant by the artificial means indicated in the case; and further that the Court erred in holding that injury sustained or to be sustained by the complainant by the establishment of the artificial drains is not actionable; and further in holding that the complainant was not entitled to the relief sought and prayed for by it in its said bill.

BRIEF OF THE ARGUMENT.

The new Pine street drain was constructed to carry the surface waters accumulating within the areas described in the pleadings. The surface water is caught in certain catch basins along the side of Grove street and other streets so constructed as to gather all such surface waters and cause them to flow down through the new underground drain. At Grove street this drain is twenty-four inches in diameter and at the Erie tracks where it joins the old Pine street sewer it

increases to thirty-six inches in diameter. This general description of the drain is taken from the testimony of William H. Warnock, the Town Engineer of Montclair, who is offered as a witness on behalf of the town (Case, pp. 171-175).

Before the construction of the new Pine street sewer the surface waters from these areas found its way through Oxford street across Glen Ridge and into the Third River at Bloomfield. Such waters pursued the course indicated for some twenty or thirty years prior to the opening of the new Pine street sewer. See the testimony of Mr. Harrison (Case, pp. 87-88).

Upon cross examination of Mr. Warnock, the Town Engineer, he says that before the new Pine street sewer was connected the water that now flows into the old Pine street section went easterly on Oxford street into the Third River (Case, p. 173). Again (p. 174), he says that before the drain was built north of the railroad the rain water went through Oxford street (Case, p. 174, ll. 1-25). Again, at the top of page 175, he says that the areas described drained prior to the construction of the sewer north of the railroad tract, eastward on Oxford street.

Mr. John P. Wentworth, a witness, produced by defendant, stated in his testimony at the top of page 175, referring to the areas under consideration, that area three is the area that now drains into Pine street drain and area four is the area which now drains through Oxford street and which the town wishes eventually to connect onto the Pine street drain. In response to the question as to where the water drains from area four, he replied, "Area four, over Cambridge Road and Oxford street, through Glen Ridge, Bloomfield to the Third River." He further admits that at the time of his testimony that area four was drained to the Third River.

The defendant also produced as a witness on its behalf County Engineer William H. Stickel. He states that he knew that Oxford street, the present method of carrying water to Third River, existed in 1915. At that time it did not go into Tony's Brook (Case, p. 124, ll. 20-35). The surface water continued the same way until the new sewer was built on Pine street and was collected and thrown into Tony's Brook. It so continued until 1924, although at the time of his testimony he says that a portion of the surface water is still coming down Oxford street and finds its way into the Third River (Case, p. 126).

Again, at the top of page 128, he says that area four on the map still drains down Oxford street.

From the testimony of the defendant's own witnesses in addition to the testimony of the witness offered by the complainant, it appears that the surface waters from these areas has been for a period of upwards of thirty years running as indicated through Oxford street, across the Borough of Glen Ridge and finally emptying into the Third River in Bloomfield.

Considerable testimony was produced in behalf of the town for the purpose of showing that the natural level of the territory was such that the surface water accumulated thereon must of necessity found itself to Tony's Brook. A map showing the topography of the region many years ago was offered for the purpose of establishing this contention.

The State Geologist, Dr. Kimmel, was produced as a witness by the defendant and presented a survey made some time about the year 1887 under a former geologist of the State. The witness

admitted that his judgment with regard to the territory was based upon the map (see Case, pp. 178-179).

On behalf of the complainant, Mr. Torrey was offered as a witness. He was a civil engineer by profession and lived in the vicinity of Oxford street in his boyhood. He recounts the conditions existing in these areas during the years 1882, 1887 and 1890. He says, at the top of page 166, that the surface waters accumulating in the neighborhood did not at that time go south into Tony's Brook. See his testimony generally (Case, pp. 162 to 170). In view of the testimony of Mr. Torrey, we respectfully contend that the defendant has failed to show that what is called the natural drainage of the territory anciently was in the direction claimed.

At this point we would particularly refer to paragraphs 21 and 24, inclusive, of the agreed statement of facts (Case, p. 187). It thereby appears that Oxford street was cut through originally as a private enterprise. On December 14, 1903, Oxford street from Grove street in Montclair to the Glen Ridge boundary line was taken over by the Town of Montclair as a public street. The first improvement of Oxford street by the town was that of paving authorized by the town on February 12, 1906, and subsequently constructed. Until the construction of the so-called new Pine street drain, the town had taken no action for the drainage of the surface waters from the areas in question except so far as the acceptance of Oxford street in 1903 and paving of 1906 may have affected the drainage of such waters from said areas.

From the testimony and the proofs offered it is abundantly established that after the territory

in question was re-claimed from its natural state and used for residential purposes, the surface waters began to accumulate in the vicinity of Grove street and Oxford street. For thirty years last past and upward such surface waters have found their way easterly down Oxford street, across Glen Ridge, into the Third River. Some time before 1903 Oxford street was cut through and graded as the property in that vicinity was brought into the market. As far back as 1903 it was accepted as a public street and paved by the town in 1906. At least twenty-five years ago it was taken up as a public street and undoubtedly was open for public uses as long as thirty years ago. The records of the Town of Montclair and the testimony of its own witnesses proves beyond doubt that the surface waters from these areas has followed the grades of the streets as fixed, established and recognized by the Town of Montclair and has found its way, as alleged in the bill of complaint, eastward into the Third River. It is very apparent, then, that if any of the surface water ever did reach Tony's Brook from this area, it has not flowed in that direction for at least thirty years last past.

The Town of Montclair has no right, by artificial drains, to divert the surface water from the course it would otherwise take and cast it on complainant's land.

The appellant grounds its claim to relief upon the doctrines laid down in *Joralemon* v. *Belleville,* 90 N. J. L. 206, and the cases of our courts prior thereto.

The first case to which we will direct attention is *Field* v. *West Orange,* 36 N. J. Eq. 118. The bill in that case was filed for an injunction to restrain defendants from continuing the dis-

charge of the drainage of certain streets on the complainant's land, to his injury.

In the course of the opinion the Chancellor calls attention to the fact that the diversion complained of was not stated in the bill as being the result of the grading or other regulation of the streets. The Court says that assuming that it was caused by the alteration of the grade or in the regulation of the streets, it is quite clear that the defendants have no right to collect the waters from the streets in a body and discharge them onto the complainant's land to his damage, or in the private drain run through it, or on property adjacent to his, to the injury of his property. At the foot of page 118 the Chancellor points out that the injury complained of was somewhat similiar to the injury we complain of in this case. He says:

> "The injury complained of, in this case, is not the result of grading or regulating the streets, but is occasioned by the act of municipal authorities in giving a new direction to the water from the streets, for the purpose of taking part of it to the low lands near the complainant's property and the rest to the private drain on his land. And though by our law there is no redress for the injury done by the diversion of surface water in the grading or regulation of streets, the doctrine cannot be applied so as to give license to the municipal authorities to discharge the waters of streets on private property, thus limiting it to the use of the public without compensation."

Again, at the top of page 121, the observations of the Court are pertinent to our case.

> "The landowner is no doubt compelled to bear (if he cannot himself protect his property against them) the consequences naturally flowing from grading and regulating the streets, but he is not compelled to

> submit to the destruction or injury of his land by the intentional diversion of the water from the streets to and on his property for the benefit of the public. The municipal authorities have no right to single him out to bear without compensation therefor a public burden to the relief of the property of his neighbors."

This case was reviewed by this court, and the same is reported in 37 N. J. Eq. 600. The decree of the Court of Chancery was unanimously affirmed upon the opinion written by Judge Van Syckel. In the course of the opinion at page 601, it is stated:

> "The injury complained of here is not that consequent upon the alteration of grades, but flows from a scheme put into execution by the municipal authorities by which the water is diverted from following the grades of the streets. By means of artificial ducts or channels the surface water over a large district is carried away from where it would otherwise be discharged, and made to pour upon the complainant's lands."

Again, at page 602, the Court says, with respect to the limited right of municipalities:

> "Unless the right of municipalities is limited to this extent, there will be nothing to restrain them from constructing sewers by which the concentrated surface water of an entire city would be cast upon the premises of any proprietor that might arbitrarily be selected to bear the burden.
>
> "The cases furnish no authority for such an invasion of property rights without making due reparation."

The decision of this court was rendered during the November Term, 1883.

The subject was next considered by the Court of Chancery is the case of *Miller* v. *Morristown,* 47 N. J. Eq. 62, confirmed by this court in 48 *Id.* 645.

In this case the complainants filed a bill to have defendant enjoined from discharging surface water on their land. The complaint made was that the defendant so graded the streets they improved that the surface water from a larger area is carried away from where it would naturally go and made to flow on their land. And, in the second place, they showed that defendants have so arranged the discharge of the water carried to their land by street gutters as to cause the water to make an open channel for itself through their land, and that by this means an easement has been fastened on their lands for which no compensation has been made. In the course of the opinion Vice-Chancellor Van Fleet says at the bottom of page 64:

> "The law pertinent to the first ground of injury alleged by the complainants is well settled in this State. 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. Town of Union *ads.* Durkes, 9 Vr. 21. Where, however, a municipality puts into 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 otherwise be discharged, and is made to flow upon the land of one person in easement of the lands of others, there a wrong is committed of which it is the duty of the courts to take cognizance, and which, a court of equity may redress by injunction." (See Field *v.* West Orange, *supra.*)

The observations of this court in *Kehoe* v. *Rutherford,* 74 N. J. L. 659, are pertinent to the issues here involved. This action was brought to recover injuries resulting to the property of the plaintiff from the discharge of surface water thereon by the Borough of Rutherford. From a report of this case it appears that originally the greater portion of the surface water flowing down Park avenue in said borough had continued on past Rutherford avenue into the lowlands of Union Township and drained through them to the Passaic River. The borough built a stone culvert or sluiceway which received the surface water flowing down the northerly side of Park avenue and conveyed it beneath the surface of the street and discharged the surface water upon Rutherford avenue at a point opposite, or nearly opposite the property of the plaintiff from whence it flowed with great force upon his lands and into his house, barns, sheds and gardens, doing substantial injury.

In the course of the opinion of this court Mr. Justice Trenchard says at the foot of page 661:

> "It is also the settled law of this State that a municipality has no right by artificial drains, to divert surface water from the course it would otherwise take and cast it in a body large enough to do substantial injury, on land where, but for said artificial drains, it would not go." (Cases cited.)
>
> "Reviewing the evidence with these principles in mind, we perceive that it established that the artificial culvert constructed and maintained by the defendant diverted the surface water of a large area from the course which it would otherwise take and cast it, in a body large enough to do substantial injury, on the land of the plaintiff, where, but for such artificial drain, it would not go."

The latest case in our reports here on this particular subject is *Joralemon* v. *Belleville,* 90 N. J. L. 206.

This action was brought to recover damages due to the flooding of plaintiff's land by reason of the diversion of surface water by the Town of Belleville. Here this court affirmed the judgment of the Essex Circuit Court. The defendant relied upon the case of *Miller* v. *Morristown,* above cited, and in this connection Justice Parker in the opinion says:

> "The argument proceeds on the assumption that plaintiff's evidence showed nothing more than a regrading of streets and diversion of water consequent thereon. If this were true, defendant's point would be well taken under the first branch of the Miller case; but the evidence tends to show in addition, and the jury evidently found, that water flowing down Joralemon street had been intentionally diverted therefrom by special provision for that purpose and thrown on plaintiff's land. This was a very different thing from mere re-grading, and brought the case under the second branch of the Miller case, where it was held that such conduct is an actionable injury. * * * If the plaintiff's evidence were believed, the defendant for its own convenience diverted the water naturally flowing down Joralemon street and turned it over to the plaintiff's land. This it had no right to do without making proper compensation."

However, the most interesting and the most pertinent part of the opinion to the case in hand is to be found on page 209:

> "Finally it is claimed that the court erred in charging the jury as follows in response to plaintiff's request:
>
> " '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 water course 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.' "

Dealing with the objection made by appellant to this charge of the Court, Mr. Justice Parker says at the bottom of page 209:

> "If by 'acts of defendant' counsel means the general system of regrading, rather than the particular act of diversion at the crossing of Washington avenue, the charge was correct. If, as was held in Miller *v.* Morristown, the town might lawfully adopt a new set of grades causing incidental changes in drainage, it is that system, and not the natural drainage of an uninhabited country to which owners are to conform and which they are entitled to assume will be maintained. If by 'acts of defendant' the particular diversion is meant, we answer that a reading of the instruction will demonstrate that no such interpretation as that indicated by appellant can reasonably be placed upon it; for the comparison is between the 'natural course, according to the grade of streets and level of adjacent property,' and the 'artificial collection and diversion to the plaintiff's land.' "

The facts in the Belleville case are practically identical with the facts in the instant case before the Court. According to the grades of the streets and the levels of adjacent property, the surface water has for nearly thirty years last past run

down Oxford street into the Third River. According to the observation of the Court of Errors and Appeals in the Belleville case, this is the system and not the natural drainage of an uninhabited country which complainant is entitled to assume will be maintained. In the Belleville case according to the grades of the streets and the level of the adjacent property the surface water would have flowed down Joralemon street into the Passaic River. The town authorities of Belleville, however, diverted this water northward on Washington avenue and caused it to flow into an old water course or brook running down through the plaintiff's property. Evidently the Town of Belleville attempted to justify such a course by reason of the fact that anciently the water coming down the hillside naturally ran toward the water course or brook running through the plaintiff's property. According to the opinion of the Court of Errors and Appeals the Town of Belleville had no right to so conduct the surface water. Likewise in the case before the Court the Town of Montclair seeks to divert the water which, according to the grade of the streets and the levels of the property, has for years been running down across the Borough of Glen Ridge into the Third River. Even if in a state of nature the surface water from the areas in question might have reached Tony's Brook, yet after all these years and after the establishment of these grades and levels, the Town of Montclair has no legal right to gather these waters together and cast them into the brook and thereby impose an additional servitude upon the property of the complainant.

The Town of Montclair attempts to minimize the damage sustained by the complainant by reason of this diversion, but we respectfully contend that the complainant is not obliged to sub-

mit to any additional burden. In fact, it is impossible now to anticipate what action the Town of Montclair might take in the future and what other areas might be connected up in such a way as to further damage the complainant's property. Already one of the areas in question has been connected with the new sewer and the town admits that it is its intention to connect therewith a smaller area described in the bill of complant.

The court below in the opinion says (Case p. 199, l. 14):

> "There is no legal obstacle to the Town re-grading Oxford street, restoring the natural flow, and catching it up in the drain. It has the power to re-grade. The natural flow being restored by re-grading, the complainant could not complain against its discharge into the brook; injury from drainage incidental to re-grading would not be actionable. Miller *v.* Morristown, 47 N. J. E. 62, Aff. 48 *Id.* 645. And the Town is not to be put to the expense of first exercising the power in order to enjoy the privilege. That may be regarded as done, to work out the equities, although a familiar maxim, is not strictly applicable."

We respectfully contend that there is a distinction between the re-grading of the streets and the construction of artificial drains to direct the flow of the water. This is clearly pointed out both in the Rutherford and Belleville cases. This court has held that the municipality has no right by artificial drains to divert the surface water. In the *Belleville case,* 90 N. J. L. 206, at the bottom of page 207, the opinion proceeds as follows:

> "The argument proceeds on the assumption that the plaintiff's evidence showed nothing more than a re-grading of streets and diversion of water consequent thereon. If

this were true the defendant's point would be well taken under the first branch of the Miller case; but the evidence tends to show in addition, and the jury evidently found, that water flowing down Joralemon street had been intentionally diverted therefrom by special provision for that purpose and thrown on plaintiff's land. This was a very different thing from mere re-grading, and brought the case under the second branch of the Miller case where it was held that such conduct is an actionable injury."

Applying these observations to the instant case, it clearly appears that we are not dealing with mere re-grading of streets, but with the construction of catch basins below the street levels and the construction of artificial underground drains or sewers to take the waters from the surface and to carry them to the brook as indicated. In fact, the grading or re-grading of streets is in no way involved in the scheme of surface water drainage complained of.

Under the rules established by the cases above cited, we respectfully contend that the Town of Montclair is without legal right to impose this additional servitude upon the lands of the complainant.

We respectfully submit that the decree of the Court of Chancery dismissing complainant's bill should be reversed and that the appellant should be granted the relief for which it prays in its said bill of complaint.

Respectfully submitted,

LUM, TAMBLYN & COLYER,
Solicitors for and of Counsel
with Complainant-Appellant.

RALPH E. LUM and
EGBERT J. TAMBLYN,
Of Counsel.

New Jersey Court of Errors and Appeals

CONSOLIDATED SAFETY PIN COMPANY, *Complainant-Appellant,* *vc.* TOWN OF MONTCLAIR, in the County of Essex, *Defendant-Respondent.*	*On Appeal from Chancery.*

BRIEF OF DEFENDANT-RESPONDENT.

Tony's Brook is an ancient, natural water course, made by surface water, which arises in the northwest portion of the Town of Montclair, runs entirely through the town, has several branches which also rise in the town and join it within the town, the brook making a rather sharp turn to the east at the southern boundary of the basin herein described and running then generally easterly through the Town of Montclair, the Borough of Glen Ridge and into the Town of Bloomfield wherein just beyond the Glen Ridge boundary line lies the property of the appellant and through which said Tony's Brook runs. The brook joins the Second River in Bloomfield, which said river empties into the Passaic River. The brook with its said branches in the Town of Montclair makes a natural drainage system for surface waters in the localities through which they run and which form its watershed of 1739 acres within the town, as shown by the map which was used at the hearing in place of Exhibit D. 2, and is submited herewith by consent as an exhibit.

There has always existed entirely with the Town of Montclair along its eastern locality ex-

tending partly at and partly near its boundary line with the Borough of Glen Ridge, a natural depression or basin by reason of the natural topography in that section the drainage of which generally speaking runs from its northerly end southerly to Tony's Brook which bounds it at its southern-most point. The eastern side of this basin is a natural ridge high enough to prevent flowage to the east at and near the boundary line between the Town of Montclair and the Borough of Glen Ridge. It includes the areas in question drained by the "New Pine street" extension of "Old Pine street" drain, namely, "Area 3," consisting of 52 acres, and "Area 4," consisting of 18 acres, and also the areas drained by the "Old Pine street" drain, namely, "Area 2," consisting of 42 acres and "Area 1," consisting of 38 acres; shown on said map.

As the Town of Montclair grew up from the earliest settlement the said brook and its branches was used as the means of draining the surface waters from within its watershed in the town by the methods then generally used for that purpose, but as the town became more thickly settled and engineering practice advanced instead of draining the surface waters to the brook by gutters and over the surface of the streets, pipe drains were built from time to time to accomplish the same end. The first of these in Montclair was in the year 1906, when the town built two pipe drains for some of such surface water and thereafter continued from time to time to build drains in the brook's watershed conducting to the said brook such waters from the localities which the said drains were to serve. These are shown by the items of same in A. F. No. 25, S. of C., p. 187. Their total cost was $176,329.22.

The part of Montclair in which "Area 3" and "Area 4" are included was backward in developing with buildings except in a scattered way, until within the past five years, and large tracts of land within this section lay undeveloped by many buildings up to that time, since which there have been rapid developments by way of dwellings and whole avenues of houses have been built, until now the section is quite well settled as a residential district. Until it became so well settled, the expense of pipe drains by the "New Pine street" extension was not warranted.

Prior to about five years ago, many of these large tracts were owned by private parties who had held them for a great many years, and one of these large tracts extended from the Glen Ridge line over part of what is now Oxford street westerly and northerly over a considerable portion of "Areas 3" and "4." At some time in the past, the owners of this tract, possibly acting with owners of adjacent tracts, because there were no natural streams or drainage from said "Areas 3" and "4" to the east (Witnesses A. E. Owens, pp. 130 and 131; W. H. Warnock, p. 172; H. B. Kummel, p. 178; State of Case), did some excavating and grading at their own expense and by their own plan and methods, in an easterly direction, at where Oxford street now is, cutting or grading through the natural ridge aforesaid, but entirely as a private enterprise (A. F. No. 21, S. of C., p. 187). There was no action in any way with regard to Oxford street by or on behalf of the defendant-respondent, Town of Montclair, until December 14, 1903, when Oxford street from Grove street in Montclair to the Glen Ridge boundary line was taken over by the Town of Montclair for the first time as a public street (A. F. No. 22, S. of C., p. 187).

The section of the town in which "Areas 1" and "2" are located was much earlier settled, the section being nearer the principal old highway, Bloomfield avenue, owned and controlled by the County of Essex. The Town of Montclair in the year 1916, built the "Old Pine street" surface water drain 39″ in diameter to drain at the time "Areas 1" and "2" (A. F. Nos. 14 and 17, S. of C., p. 185) but built in size and with the intent for the eventual extension into "Areas 3" and "4" as soon as the conditions there warranted the expense. This condition arose seven (7) years later in about the year 1923, when plans were made and proceedings taken to construct such an extension which said extension would join with and empty into the Old Pine street drain, the surface waters from "Areas 3" and "4." The construction of such extension was made 36″ in diameter and there now runs through the Old Pine street drain the surface waters from "Area 3" in addition to "Areas 1" and "2" (A. F. Nos. 15 and 17, S. of C., p. 185). "Area 4" has not yet been turned into the Old Pine street drain. The new Pine street extension joins the "Old Pine street drain" on Pine street, just south of the Erie R. R. right of way (A. F. No. 17, S. of C., p. 185).

This litigation concerns the right of the Town of Montclair, defendant-respondent, to build the extension of the "Old Pine street" drain, to conduct through it the water from "Areas 3" and "4." It is important to note that the new Pine street drain does not empty directly into the brook, but is an extension (A. F. Nos. 17 and 18, S. of C., p. 185) and that the waters in question flow through the old drain which was located and built of a size for that very purpose. The Town of Montclair has now a population of about 31,000.

Certain facts have been agreed upon between the parties which give in more detail many of the fundamentals of the status prior to the litigation. These are set forth in the (S. of C., pp. 182-189).

From the very beginning of the plans for the Pine street extension for the waters in question the proposition has been for an extension of the Old Pine street drain and never as a new drain going directly to the brook and the extension was built as planned from the end of the Old Pine street drain which has been built large enough for that purpose. Complainant-appellant understood this to be such an extension by its letter of October 27, 1923 (p. 190, S. of C.).

STATUS OF LITIGATION.

The first notice of demand ever made by or on behalf of the complainant-appellant or its predecessors in interest to the drainage to Tony's Brook above the Consolidated Safety Pin Company's property by the Town of Montclair, Township of Montclair, Town or Township of Bloomfield, of which latter Montclair was a part prior to April 15, 1868, of surface waters from the brook's watershed within Montclair's territory above said property was that made by the appellant by its letter of October 27, 1923 (A. F. No. 20, S. of C., p. 186).

This first letter of notice and demand then is 25 days subsequent to the date of the award (October 2, 1923), (A. F. No. 19, S. of C., p. 186) by the town officials of Montclair to the successful bidder for the construction of the extension of the Pine street drain to carry the waters from "Areas 3" and "4"—the ones in issue.

Said letter of October 27, 1923, is as follows:

Complainant's Exhibit No. 3.

CONSOLIDATED SAFETY PIN COMPANY
BLOOMFIELD, N. J.

October 27th, 1923

To the Honorable
Howard F. McConnell, Mayor
and
James T. Hanan,
Charles G. Phillips,
John Picken,
John C. Barclay,
Board of Commissioners of the Town of Montclair.
Montclair, New Jersey

Gentlemen:

"It has just come to the attention of the Consolidated Safety Pin Company, of Bloomfield, New Jersey, that the Town of Montclair has adopted ordinances and taken other proceedings looking to the construction of an underground drain or storm sewer system in the Town of Montclair, connecting with the existing storm sewer in Pine Street near the Southerly line of the right of way of the Erie Railroad and extending Northerly in Pine Street to Walnut Street, thence Westerly in Walnut Street to Grove Street, thence Northerly in Grove Street to Chestnut Street and thence Westerly in Chestnut Street to Christopher Street.

The construction and operation of this proposed storm sewer is intended, so we are informed to conduct the accumulated surface or storm water from a considerable area lying Easterly of Montclair Avenue and Northerly of Walnut Street in said Town of Montclair away from its natural drainage shed and discharge such water through the existing storm sewer in Pine Street and in turn into Tony's Brook, so-called, which lies in and drains another drainage area totally separate and distinct from the area first above described.

The Consolidated Safety Pin Company owns and operates and for more than twenty years last past has owned and operated a large manufacturing plant located on both sides of said Toney's Brook in said Town of Bloomfield, and in connection therewith ponds and uses the waters of said Toney's Brook adjoining said plant at fixed elevations.

The discharge of storm or surface water from the drainage area first above described into said Toney's Brook through the construction and operation of said proposed storm sewer system, upon its connection with the existing storm sewer in Pine Street will prevent the use and operation of said pond and waters of said Toney's Brook in the manufacturing processes and plant of the Consolidated Safety Pin Company, and at times will add to said Toney's Brook an increased flow of water in excess of the customary flow of said stream and will cause great and irreparable damage to the manufacturing operations and plant of the Consolidated Safety Pin Company in said Town of Bloomfield.

The Consolidated Safety Pin Company therefore protests against the construction and operation of the proposed storm sewer system which will divert the accumulation of storm or surface water from the drainage area first above described, into Toney's Brook, and further protests against the connection of said proposed storm sewer system with the storm sewer now in said Pine Street, and further protests against the diversion of the storm or surface water that may accumulate in the drainage area first above described and its discharge into said Toney's Brook at any point above the plant of the Consolidated Safety Pin Company.

The Consolidated Safety Pin Company further gives notice that it will seek to protect its rights in the premises, if threatened, or if invaded, by appropriate actions in equity and at law.

THE CONSOLIDATED SAFETY PIN COMPANY

By Earl F. Copp,
General Manager.

To this letter the respondent, Town of Montclair replied by letter dated November 10, 1923, as follows:

Defendant's Exhibit by Consent.

TOWN OF MONTCLAIR
BOARD OF COMMISSIONERS

November 10, 1923

Consolidated Safety Pin Company,
Bloomfield, N. J.

Gentlemen:

Your letter of October 27, 1923, addressed to the Board of Commissioners protesting against the construction of the Pine Street storm sewer has been referred to me for attention.

You apparently are under the impression that the water from the drainage area, which this sewer is intended to serve, originally flowed easterly into Glen Ridge. The topography is such as to indicate that the natural drainage of surface waters within this drainage area tended toward Toney's Brook.

It is contended therefore, that there is no diversion of water, in consequence of which the Town is entirely within its rights in conducting the surface water from this drainage area into Toney's Brook.

It is further stated that the water from this drainage area running into Toney's Brook will increase the brooks flowage to no appreciable extent.

Yours very truly,
JAMES T. HANAN,
Commissioner.

JTH:W:R.

Notwithstanding the reasons given by the appellant for its notice and demand in its letter dated October 27, 1923, it shifted its position and gave different reasons in its letter dated November 22, 1923, as follows:

Complainant's Exhibit No. 4.

CONSOLIDATED SAFETY PIN COMPANY
BLOOMFIELD, N. J.

November 22, 1923.

Town of Montclair,
Board of Commissioners,
Attention Hon. Howard F. McConnell, Mayor
Montclair, N. J.

Dear Sir:—

Acknowledging receipt of your letter of November 10th last, in response to our written protest of October 27th against the construction of the proposed storm water sewer system therein referred to, and the discharge of storm or surface water into Tony's Brook, so-called, above the plant of this company in the town of Bloomfield:

We have been advised by counsel that we are not now concerned with the original, natural flow of the water from the drainage area which the proposed storm sewer system is to serve. We are further advised that without regard to the direction of the original flow of such water, we are now entitled, as a riparian proprietor to have the present customary flow of Tony's Brook adjacent to our lands and plant at Bloomfield continue as it has for more than twenty years, without increase in volume, or otherwise, due to the accumulation and discharge into it of storm or surface waters collected from a drainage area from which such waters have not in fact for more than twenty years last past flowed into such brook.

We do, therefore, earnestly renew the protest, set forth in our letter of October 27th against the construction of the sewer system referred to and the discharge into Tony's Brook, at

any point above our plant, of storm or surface waters from the drainage area described, and we desire to give this further notice that our company will take such action at law or in equity as seems to us necessary or desirable if our rights in the premises are threatened or invaded.

CONSOLIDATED SAFETY PIN COMPANY
By Earl F. Copp,
General Manager.

The defendant-respondent, Town of Montclair, proceeded to complete the New Pine street extension of the Old Pine street drain, already authorized and undertaken, and it was completed in the year 1924.

This action was brought by complainant-appellant originally against the respondent Town of Montclair, on March 28, 1924, when the appellant filed its bill (copy of bill at p. 1 of S. of C.), and obtained an order to show cause made by the Hon. John E. Foster, Vice-Chancellor now deceased, why an injunction should not issue pursuant to the prayer of the bill, which order was returnable on April 8, 1924. The motion on the said order came on to be heard before the said Vice-Chancellor and on April 14, 1924, he made an order of that date denying complainant-appellant's application for an injunction and discharging said rule to show cause.

This defendant-respondent thereafter filed its amended answer (S. of C., p. 10).

Complainant-appellant filed its replication (S. of C., p. 31).

After final hearing had in the Court of Chancery before Vice-Chancellor Backes, the Vice-Chancellor advised a final decree, that this appellant's bill of complaint be dismissed for the

reasons given in his opinion. From that final decree the appellant appeals to this court. The Court's opinion will be found at p. 196, S. of C.

THE ISSUES OF THE PLEADINGS.

Complainant-appellant's bill of complaint, we submit, fails to allege facts or circumstances that entitle it to the relief requested.

A. The allegations of the bill are so insufficient and indefinite as to make it uncertain on what the complainant bases its cause of action and claims for relief.

B. It is uncertain whether it claims
   (1) As a riparian owner against this respondent for diversion of waters in question from where they would naturally go
   (2) Or on rights that it has gained over this respondent by adverse possession or prescription.
   (3) Or on (1) and (2).
   (4) It does not plead any other right.

C. The notice it speaks of in Par. 13 was that given by its letters to the Town of Montclair dated October 27, 1923, and November 22, 1923. These letters have inconsistent claims and also differ from its claims in its bill of complaint.
   (1) The letter of October 27, 1923 seems to base the complainant-appellant's right on
      a. An ownership and use of ponds and waters at fixed elevations for *twenty years* last past.
      b. That the drainage of said areas will be a diversion of water away from its natural drainage shed into another drainage area separate and distinct from its natural one.

(2) The letter of November 22, 1923, states that appellant "is not now concerned with the original natural flow of the water from the drainage area which the proposed storm sewer system is to serve—but without regard to the direction of the original flow of such waters we are now entitled, as a riparian proprietor to have the present customary flow of Tony's Brook adjacent to our lands and plant at Bloomfield continue as it has for more than *twenty years*, without increase in volume, or otherwise, due to the accumulation and discharge into it of storm or surface waters collected from a drainage area from which such waters have not in fact for more than twenty years last past, flowed into such brook."

D. The bill of complaint says:

(1) Par. 9. * * *"that the surface water within the limits of the area hereinabove described has for a period of *thirty years* last past and upwards flowed in a general easterly direction and drained into what is known as the Third River which ultimately discharges into the Passaic River within the limits of the Town of Nutley in the said County of Essex."

(2) Par. 10 * * *"that the said Town of Montclair by its officers and agents are so constructing the said storm sewer system as to gather the surface waters from the said area and to conduct the same by means of pipes and sewers in a direction almost opposite to that from which they have been flowing as aforesaid * * *"

(3) Par. 11 * * *"that the said Town of Montclair and the officers thereof

propose by means of artificial drains to *divert* the surface water of the aforesaid area from the course which it would otherwise take and cause it to discharge in the said watercourse known as Tony's Brook as aforesaid; that by reason of the said actions on the part of the said defendant hereto, the said waters will be conducted to the said brook where they would not *naturally* flow and where they would not go but for the artificial drains and changes effected by the said defendant as aforesaid."

(4) As to its rights if any as a riparian owner it alleges (Par. 3) that some of its property was not acquired until the year 1922.

The bill makes no allegations that its claims are founded on its rights, if any, as a riparian owner.

The bill makes no allegations of its right to build or maintain a dam across Tony's Brook at its property.

The bill makes no allegations as to its right or its necessity for any certain height of dam or any dam at all.

The bill makes no allegations as to its right or its necessity for a certain or any height of water maintained by a dam.

As to its rights if any, based on adverse possession or on prescription; the bill makes no allegations of the essentials of pleading necessary to ground an action on its right if any based on adverse possession or prescription.

The bill makes no allegations of the continuous use by it and maintenance of a certain or any height of water for the period necessary to found

an action on adverse possession or prescription, nor alleges the essentials of such pleading.

The bill makes no allegation of the continuous use and maintenance of a certain or any height of dam for the period necessary to found an action on adverse possession or prescription, nor alleges the essentials of such pleading.

As to any other grounds of action that it may believe it had, we submit that there is nothing alleged in the bill of complaint that sets forth any circumstances or essentials of pleadings to ground any claim; and the uncertain claims above stated we reiterate are uncertain and indistinct and insufficient to sustain an action and justify any relief to complainant.

As to the damages that appellant alleges in the bill that it has and will suffer:

(1) At Par. 6 the complainant-appellant alleges

> "That at times of heavy rains and freshets a very large volume of water flows through the said brook and through the premises of the complainant and frequently during the course of a year the waters flow down the said brook and overflow the banks thereof and spread out upon and over the lands of the complainant in such a way and manner as to injure the buildings erected upon said premises and also to interfere with the manufacturing operations of the complainant thereon."

(2) At Par. 7 the appellant alleges

> "That in times of heavy rains and freshets as aforesaid, the channel of the said brook is inadequate and insufficient to carry the surface water flowing down the same from the said municipalities located above the complainant's lands and premises as aforesaid; that should the amount of water flowing down said brook be augmented to any extent whatever the overflow of waters would be such as to greatly damage the lands and buildings of the complainant and to cause an absolute cessation of operations within the buildings upon said lands."

(3) At Par. 12 the appellant alleges

> "That complainant has been conducting for many years last past upon its said lands and premises manufacturing operations in the buildings and structures erected thereon; that complainant has in the various departments of its operations about three hundred employees regularly engaged therein; that whenever the waters from the said brook overflow the lands and premises of the said complainant as above alleged, the manufacturing operations of the complainant are very seriously affected; that the rise in the waters of said brook have heretofore necessitated the *extinguishing of the fires in the power plant* of the complainant and thereby caused an *entire cessation of manufacturing operations* in complainant's said plant; on such occasions also the goods and chattels of the complainant upon the said premises have been seriously injured and damaged; that any increase in the volume of water coming down the channel of the said brook will in times of heavy rains cause an overflow of water upon the lands of the complainant and render its manufacturing plant substantially useless."

It is difficult to understand in the face of the foregoing allegations and admissions how any claim can be grounded or successful against this defendant-respondent as the above allegations admit as already existing without the addition of any waters from the New Pine street extension a condition

a. from which appellant has and will in the future suffer.
b. that appellant has suffered and tolerated and is willing now to suffer and tolerate

and in the future, without any allegation that it did anything to avoid, prevent, or minimize or that it is necessary to do the same and which it is fair to assume therefore does not injure it materially or irreparably.

c. that in view of the serious damage appellant has already suffered and will suffer in the future without the waters from the New Pine street extension that the latter will materially, irreparably damage or add any separable damage to what it already admits.

d. That the extent of appellant's damage admitted as suffered and which it is willing to suffer, makes the percentage added by the New Pine street extension insignificant, inseparable and negligible in volume and extent of damage especially as compared with the advantages to this respondent the Town of Montclair and the public and citizens it represents. Also that it only suffers from any damage once or twice a year at times of unusual storms.

The admissions of the appellant in its letter of October 27, 1923, and as above and as hereinafter stated in its bill of complaint and in the "Agreed Facts" (p. 182 S. of C.), are of the highest importance in the consideration of this case and this respondent contends that appellant's said admissions are alone sufficient and to have justified and required the Court of Chancery to deny appellant the relief it sought and to have justified and required a dismissal of the appellant's bill of complaint and to warrant the final decree, and to require a dismissal of the appeal by this court.

The said letter of October 27, 1923 (S. of C., p. 190), admits that the waters and drain in question are merely an extension of the existing

storm sewer in Pine street namely the Old Pine street drain for it says

> "It has just come to the attention of the Consolidated Safety Pin Company, of Bloomfield, New Jersey, that the Town of Montclair has adopted ordinances and taken other proceedings looking to the construction of an underground drain or storm sewer syster in the Town of Montclair, connecting with the existing storm sewer in Pine street near the Southerly line of the right of way of the Erie Railroad * * *"

and yet this was the first notice appellant ever sent (A. F. No. 20, S. of C., p. 186).

The bill of complaint also admits Par. 5, that the drainage of Tony's Brook from the Town of Montclair and the Borough of Glen Ridge is an accumulation and drainage of surface waters, which municipalities

> "are at a level considerably higher and above the level of complainant's lands."

The relief complainant-appellant asks in its bill of complaint is

> (1) An injunction against this respondent discharging surface waters from Areas 3 and 4 into the brook at any point above appellant's lands.
>
> (2) An injunction against this respondent discharging surface waters from Areas 3 and 4 directly or indirectly upon the lands of the appellant.

We submit that the appellant utterly failed by its proof to establish a case against this respondent even on the uncertain grounds it alleges as above shown, which will justify its being granted any relief by this court.

This respondent submits the only proof appellant made was of the damage it had already suffered and would suffer without the addition

of any waters from the New Pine street extension of the Old Pine street drain. Mr. Copp, the general manager of the complaint-appellant company admitted that his company had not and could not show damage if any from the waters in question from the said Areas 3 and 4 as separable from the damage it had already suffered, now suffers, or would be likely to suffer in the future from the conditions existing without the addition of said waters in question (S. of C., pp. 39-59). Moreover, the appellant merely showed that it suffered any damage once or twice a year in times of unusual storms and its proof of such conditions as well as its allegations thereof show such an extensive amount of water and damage without the waters in question as to dismiss the idea of any damage from the insignificant volume contributed by the areas in question.

An examination of the "Agreed Facts" (S. of C., p. 182), this respondent submits, disposes of most of appellant's claims. What is left is as follows:

a. The qualification in "Agreed Fact No. 4" which says, "Before the drains for surface water herein listed under Par. 25 were built by Montclair to carry such waters from the brook's watershed within Montclair to Tony's Brook within Montclair, such waters drained to the brook within Montclair by other ways and means. (Where the surface waters from the Areas 3 and 4 of the New Pine street drain went is not admitted by complainant, but is left to this court to determine.)"

b. The qualification in "Agreed Fact No. 25" which says that "except so far as the acceptance of Oxford street in 1903 and paving in 1906 by the Town may have affected the drainage of such waters from said areas," "there have never been any proceedings, actions, or provisions by or on behalf of the Township or Town of Montclair for drainage or surface waters from the areas in question now served by the New and Old Pine street drains through Oxford street or otherwise to the east and the only proceedings, actions and provisions for the drainage of such waters from said areas are those by means of the New Pine street drain and its connection with the Old Pine street drain."

This respondent met the allegations of the appellant with its answer in the form of general explanations and defenses, and with fourteen separate defenses.

Note—The answer of this respondent contained allegations concerning diversion of waters by the Borough of Glen Ridge and the County of Essex. These seemed justified at the time the amended answer was drawn, but were later abandoned and no proof made by this defendant. Also two counter-claims among other things bringing in Borough of Glen Ridge and County of Essex as defendants. These were dismissed in court below, but respondent does not appeal.

The general defenses of this defendant-appellant as alleged are as follows:

Tony's Brook and the surface waters from its watershed.

Before and since the year 1891, always a natural watercourse.

Surface water from Town of Montclair is from natural watershed of brook.

No other legal way for such water to go.

No other equitable way for such water to go.

No other natural way for such water to go.

No other feasible way for such water to go.

So gone with knowledge and without objection of complainant, largely by at least thirty (should be twenty-two) drains and sewers of this defendant since year 1907 (should be 1906), into the brook above the property of the complainant.

As part of general surface water system relying on use of brook for that purpose.

Deny that Pine street drain will *divert* any such waters from the natural flow of such waters.

Montclair and its predecessors before and since the year 1891 always have used Tony's Brook as the outlet for the surface waters in its watershed within the town.

Drain System in General.

Relying on use of Tony's Brook this defendant has constructed since 1907, at least thirty drains for surface water as part of general system (should be twenty-two drains since 1906).

It has always been the right, plan and intention of the Town of Montclair to drain Pine street area into the brook, as the legal, equitable, natural and only feasible outlet.

1. As soon as locality developed so to indicate best manner.
2. As a step, Old Pine street drain was built in 1916.

Montclair has legal and equitable right to build the drain.

Complainant has no legal or equitable right to prevent it from doing so.

Pine Street Drain.

Amount insignificant in volume of drainage at their property.

And insignificant and negligible compared with advantages to public and citizens of Montclair.

Our description of area differs somewhat from that of complainant. The areas in question which complainant describes are those that we call Areas 3 and 4. The correct acreage of these areas is, Area 3—52 acres, Area 4—18 acres. (These are shown on the map used at the trial and submitted herewith for the use of the court.)

It has always been the Town of Montclair's right, plan and intention to drain Areas 3 and 4 into the brook as the legal, equitable, and only feasible outlet.

1. As soon as locality developed so as to indicate best manner.
2. As a step old Pine street drain built in 1916.

Complainant had notice of the intention of the Town of Montclair to so build by reason of the building of the Old Pine street drain and complainant made no objection.

The drainage from Areas 3 and 4 is natural drainage to the brook.

Drainage through Oxford Street or otherwise to East.

This defendant denies that the surface water in question flowed as complainant alleged for the period alleged.

This defendant alleges that if any such surface water so flowed

1. It did not so flow naturally.
2. Nor due to any acts or omissions of this defendant.

Acquiescence.

The surface waters from the watershed of the brook within the Town of Montclair has so gone with the knowledge and without objection of the complainant and since 1907, thirty drains constructed and maintained by this defendant at great expense as part of the general surface water system relying on such use of the brook. (Should be twenty-two drains since 1906, S. of C., p. 188.)

Complainant had notice by the building of the Old Pine street drain that this defendant would eventually build the Pine street extension and the complainant made no objection.

That in spite of such use at the time of the brook by this defendant the Town of Montclair, the complainant built its dam and channel.

Dam and Channel.

Complainant constructed the present dam about the year 1908.

Complainant constructed the present channel about the year 1908.

These interfered with the flow of the brook.

This defendant denies that the natural channel of the brook is insufficient in time of heavy rains or freshets.

This defendant denies complainant's rights to obstruct the brook by a dam or otherwise maintain it in any other than the natural way of the channel and brook.

Damages.

Complainant responsible for its own damages if any.

The surface waters from "Areas 3 and 4" will be insignificant in volume of drainage at complainant's property.

The surface waters from "Areas 3 and 4" will not unnaturally, inequitably, illegally or materially increase the volume of water at the premises of complainant.

The damages if any caused by the surface waters from "Areas 3 and 4" are insignificant and negligible compared with the advantages by the use of the drain in question by the public and citizens of Montclair.

The complainant admits it has suffered, now suffers and will suffer in the future, great damage under existing conditions irrespective of the addition of any surface waters from "Areas 3 and 4."

Special Defenses. This defendant-respondent has fourteen special defenses, which are briefly as follows:

First Separate Defense. Is that the complainant in the year 1891, dedicated to the public use the brook at its property, the use of the waterway and its property at and under the waterway for the drainage of all such surface water. (Circumstances alleged in full in answer.)

Second Separate Defense. This defendant disclaims as unauthorized by and not binding on this defendant the acts or omissions of any other person whereby any of the said surface waters flowed other than into Tony's Brook.

Third Separate Defense. The construction and use of the sewer in question is in furtherance of a natural and lawful scheme of municipal and public improvement in connection with the grading and improvement of its streets by this defendant for the drainage area and locality in question.

Fourth Separate Defense. Complainant's land being below this defendant the Town of Mont-

clair, it is subject to the flow of all surface water from within defendant's limits from within the watershed of said brook, and defendant has an easement over the property of the complainant for the passage of all surface waters from within defendant's limits from the natural watershed of said brook.

Fifth Separate Defense. Complainant's alleged rights if any are qualified ones and subject to defendant's right to drain all the surface water from within defendant's limits from within said brook's natural watershed into said brook.

Sixth Separate Defense. The construction and use of said drain by this defendant will not increase to any appreciable extent the present volume of the water of the said brook nor to any appreciable or separable extent the damage which complainant admits it now suffers and is liable to suffer under existing conditions.

Seventh Separate Defense. (To be considered with "Tenth" and "Twelfth"). The passage of time has not invested the complainant with any right, title or interest of, in, or to the said brook, the use of said brook, the natural waterway of said brook and the lands at the complainant's property beneath said brook, adverse to the rights of this defendant, nor by way of prescription as time cannot run against this defendant, in such circumstances.

Eighth Separate Defense. The alleged rights of the complainant are insignificant as compared with the rights of the public constituting the Town of Montclair, this defendant.

Ninth Separate Defense. The complainant has no right to maintain the dam at its said premises across the said brook.

Tenth Separate Defense. (To be considered with "Seventh" and "Twelfth.") The complainant has no cause of action against this defendant as the dam now on its premises on the said brook has not been in existence for the past twenty years continuously.

Eleventh Separate Defense. The complainant is guilty of laches and has not been vigilant in asserting its alleged rights.

Twelfth Separate Defense. (To be considered with "Seventh" and "Tenth.") The rights complainant claims have not for the past twenty years been openly, uninterruptedly and notoriously exercised and used by it, nor has the height of water which complainant now claims the right to maintain, been maintained or used by it at that height continuously during the period of the past twenty years.

Thirteenth Separate Defense. Complainant is estopped to interfere with this defendant in the construction of the drain in question. (Circumstances alleged in full in the answer.)

Fourteenth Separate Defense. No storm or surface water from the area alleged in Par. 8 of bill of complaint could or did lawfully go or flow by way of drain, sewer, or otherwise in an easterly direction into or through any other municipality and the private properties therein, into Third River and Passaic River as alleged in Pars. 9, 10 and 11 of bill of complaint, during the period alleged in Par. 9, as it was and is a condition precedent to the legality of such drainage, sewerage, or flow, that the provisions of the constitution and statutes of New Jersey in such case made and provided be complied with.

Relief Requested by this Defendant-Respondent.

That the bill of complaint be dismissed with costs.

ARGUMENT.

This respondent's general and special defenses as pleaded, proved, as supported by the "Admitted Facts" and law, follow

The parties have settled certain fundamental facts and issues which will be found as "Agreed Statement of Facts" in the (Case, pp. 182-189). A review of these is of the utmost importance in considering and disposing of this case and this appeal, and it is respectfully suggested that these be read by the Court before the rest of the "State of Case" and the briefs, as we believe it will lead to a clearer understanding of the issues that remain to be considered and determined.

As heretofore outlined, the amended answer of this respondent from paragraphs 1 to 13 inclusive goes into an explanation and defense of the matters raised by the appellant's bill or in denial of same. This is followed by fourteen (14) "Separate Defenses."

It is hereby respectfully submitted that the following as well as the foregoing are the fair and equitable view of the circumstances.

Since man first came and trampled the grass, cut a tree, made a path, or dug a ditch to keep the ground dry about his hut in any locality, there has never been an absolutely natural flow or drainage of natural waters or streams. The ways and means of surface water drainage have merely changed as communities grew, and engineering knowledge increased and methods changed of conducting such by pipes instead of

over surface of streets or in open gutters and drains.

Tony's Brook is an ancient natural watercourse. It is a public highway for natural storm water.

The waters in question are surface waters from a part of brook's watershed in Town of Montclair and enter the brook within the Town of Montclair.

Such waters are conducted to Tony's Brook, not by a new drain but by an extension of an old drain that was built for that purpose in 1916 without objection by anybody.

The waters in question after entering the brook are a part of the watercourse.

As to the notice by appellant, it was too late and the appellant was grossly guilty of laches in trying to protect its alleged rights.

No notice was given by appellant until October 27, 1923, after all the necessary proceedings had been taken by the respondent, Town of Montclair, including its obligation by contract with the contractor for construction of the drain in question. This, its first notice of October 27, 1923, was 25 days after the award of contract to the successful bidder for the construction of the extension in question.

And even this "notice" of October 27, 1923, is inconsistent with its later "notice" of November 22, 1923. And its bill of complaint bases its alleged rights on still different grounds.

By waiting since 1890 to assert its alleged rights, appellant is guilty of inequitable conduct and not entitled to any relief.

It sits idly by and permits this respondent to develop its drainage system to the brook from the brook's watershed.

Appellant's contention that this respondent should drain such waters to the east through Oxford street or otherwise is preposterous, inequitable and illegal. Basing its inconsistent claim on an assumption that said waters have gone east through Oxford street for twenty or thirty years, it then assumes, that it has gained some adverse right. This is in utter disregard of the law that there can be no adverse possession against a municipality, as hereinafter shown, and so none against either this respondent, Town of Montclair, the respondent Borough of Glen Ridge, the Town of Bloomfield, the Town of Nutley, all in Essex County, and Delawanna, in Passaic County, for all would be affected by such diversion, as such waters would, after being drained to the boundary line between Montclair and Glen Ridge, have to pass over the lands in Glen Ridge and Bloomfield and through the same where, of course, this respondent has no control, to "Third River" in Bloomfield, which passes through Nutley and joins the Passaic River at Delawanna.

Thus also disregarding the rights and equities of not only all of said municipalities to the east but of the citizens of each one whose properties would be affected, and subjecting this respondent to damage and other suits on account of same and of the rights of riparian owners below Town of Montclair on the brook and on "Second River" in Borough of Glen Ridge, Town of Bloomfield and City of Newark, subjecting this respondent to suits for damages for any such diversion by reducing the natural drainage of the brook and of the rights of the riparian owners in said mu-

nicipalities to the east on "Third River" and Passaic River above place of entry of "Second River" in Passaic River, subjecting this respondent to suits for damages for any such diversion by increasing the natural flow of Third River and such part of Passaic River; subjecting this respondent to great expense after standing by without objection and permitting us to incur the liability and expense of constructing it in the present way.

Subjecting this respondent to the great expense from claims of riparian owners as above noted.

If the drainage naturally flows to Tony's Brook as this respondent claims and as it submits it proved, it has no right to take it to the east through Oxford street or otherwise, nor has the appellant any right to request it to.

If appellant has any right it is theoretical. If anything this is a case of "damage without injury" by appellant's own pleading, admissions, and proof.

Unless appellant itself has restricted the channel of Tony's Brook at its property the natural waterway there must be large enough for the passing of the waters from Areas 3 and 4, as they only add surface waters from a part of the brook's watershed which must have been conducted by the brook through appellant's property ever since there was such a stream even before there were such owners or municipalities along the same. And there only is drained to the brook what falls in that part of its shed in the form of rain or snow.

The land where appellant arbitrarily went and built in 1891 was low and swampy.

There was no dam there. They used a log or timber or two to raise the brook water a few inches at first and at no time up to 1908 was it higher than 16 inches.

The present channel is artificial and restricted and is itself a diversion into it of the brook's natural waterway.

The "dike" built across the west end of appellant's property by appellant, testified to by witness Bruett, and the making of "banks" for the brook were clearly a plan to divert the brook from its natural channel and confine it to a location most convenient and agreeable to appellant, irrespective of the natural way and flow of the brook at its property. By undertaking to arbitrarily do so, appellant made itself liable to provide a sufficient waterway not only for normal flow of brook but also for any and all flood waters of the brook from above its property. It was on notice and accepted any and all risks by so doing. It chose to build and continued to build many buildings during the years since it first settled, without change of elevation or alteration of the level of its fires, machinery, storage of raw or finished materials at what it found originally a swamp and a waterway for a natural stream in flood times.

It suffered and will continue to suffer greatly as it admits without water from Pine street extension but apparently it is willing to do so.

To succeed, appellant had the burden of proof to show

a. To what extent if any the waters in question damaged it.
b. That the damage if any was material.
c. That the damage if any was appreciable.

d. That the damage if any was separable.
e. That the damage if any was irreparable.
f. That appellant cannot reasonably prevent, avoid, or diminish the damage.

The appellant failed to show a single instance of any damage caused by this respondent's New Pine street extension although it had been in operation over 2 years at the time of the final hearing.

And it is of the highest importance to note that by its own proof appellant could only show that it suffered in times of unusual storms once or twice a year the great damage it admits (without waters from Pine street extension). So that for 363 days a year it is suffering no damage at all from the flow of the brook.

Instead, appellant admitted in its bill of complaint, past, present and future conditions having caused and which would cause it damage so great as to result in "Injury to the buildings and serious interference with manufacturing operations; extinguishing fires in its power plant and causing *entire cessation* of manufacturing operations; good and chattels seriously injured and damaged." (Bill of Complaint, pars. 6 and 12.)

What more could appellant suffer? If it accepts such injury and damages without concern or efforts to prevent, it cannot really suffer financially or in other than a theoretical way.

It chose to start and continued to build many buildings during the years since it first settled, without change of elevation or alteration of the level of its fires, machinery, storage of raw or finished materials at what it found originally a

swamp and a waterway for a natural stream in flood times.

Appellant failed to prove how much if any and for how long any such waters went to east through Oxford street or otherwise from Areas 3 and 4.

This respondent proved that at no time has it put any drain in Oxford street or other street to drain such waters to the east.

No proof by appellant that dam or the channel at present constructed or what if any particular height of water is necessary to its operation.

The appellant alleged in its bill and attempted to prove that the waters in question naturally drained to the east at Oxford street or in that locality, but it utterly failed to do so. This respondent proved beyond a reasonable doubt

(a) The waters from these areas naturally go to Tony's Brook.

(b) That there was a natural ridge at and near the boundary line between Glen Ridge and Montclair that prevented these waters from going to the east and that this ridge extended across what is now Oxford street before it was graded through by private parties.

(c) That there were no natural streams to drain the waters from the areas in question to the east. Note: that the first watercourse east of Oxford street at the Montclair-Glen Ridge line is the Third River which is located about in the middle of Bloomfield.

Testimony:

The original natural flow of Areas 3 and 4 carried by the "New Pine street" extension of the "Old Pine street" drain was southerly to Tony's Brook and that is where the said drains now take the storm water in question.

Respondent's witnesses: W. A. Stickel (Case, pp. 123, 124, 128), A. E. Owens (Case, pp. 131, 132, 133, 135), A. F. Rahn (Case, pp. 139, 141) and H. B. Kummel (Case, pp. 178, 179).

There were no natural watercourses through Oxford street or otherwise to drain the water in question naturally out of Areas 3 and 4.

Respondent's witnesses: W. A. Stickel (Case, p. 127), A. E. Owens (Case, p. 130) and A. F. Rahn (Case, p. 139).

Oxford street was cut through a natural ridge of land which until the cut prevented the water in question from draining to the east through Oxford street and from draining anywhere else to the east.

Respondent's witnesses: W. A. Stickel (Case, pp. 124, 126, 127), A. E. Owens (Case, p. 130) and A. F. Rahn (Case, p. 139).

There was a natural depression in the topography running to the south toward Tony's Brook just west of Walnut street.

Appellant's witness: J. E. Torrey (Case, p. 170).

Respondent's witness: A. E. Owens (Case, p. 132).

In this respondent town the streets were laid out in a natural, logical way in the aforesaid natural basin which naturally drains to the brook and such layout and grading of streets and their drainage only carries out what naturally drained to the brook.

The old drain was extended by the "New Pine street" extension as soon as the settlement of the locality warranted the expense.

> "The great bulk of building and street development within the section including Areas 3 and 4 was within the three or four years prior to the building of the 'New Pine street' extension of the 'Old Pine street' drain."

Appellant's witness: E. N. Harrison (Case, p. 93).

The surface water in question goes by gravity through the catch basins into the Pine street extension to the Old Pine street drain built not only to carry Areas 1 and 2 but Areas 3 and 4 and is thence conducted to the brook and becomes part of the brook, a natural watercourse within the Town of Montclair 1.2 miles above complainant's property which is located in the Town of Bloomfield, with the Borough of Glen Ridge in between the two areas.

The cases given by the complainant were where surface water was accumulated and drained in concentrated volume and force, on or at the objector's property, and have no application in this case as the water in question becomes a part of the stream and spreads out and is not thrown on a particular spot of another land owner's property in a concentrated stream or with the force of such. Such water as reaches the complainant's property at all over the banks thereof, is only at times of unusual floods and at such time only a very small percentage thereof. At present all Area 3 adds is 3% and goes by way of Old Pine street drain. This according to Engineer Wentworth, our engineer and witness. When Area 4 is added it will be only 1% and will also go by old drain. Such addition is inseparable, immaterial and negligible from the great damage that the complainant admits suffering without such addition. And the damage is all from the overflow of a natural stream in storm times.

The added waters in question and their becoming a part of Tony's Brook does not single out the complainant to bear any burden. The burden, if any, is one that it accepted as a proximate result of its choice in locating on a natural watercourse with notice of existing conditions and from which it admitted it has suffered in the past and will in the future, damage so great that the question we submit is "with damage so great admitted without efforts to avoid, prevent, or diminish either in the past, present or future, what is the injury claimed from the trifling addition of the waters in question as well as from the damage they admit without such addition." This defendant claims it is a case of "damage without injury."

Here it is not only this defendant's right, but its equitable as well as legal obligation to drain such surface water to its outlet Tony's Brook, provided by nature instead of diverting by a drainage system and dumping it in an unnatural way on this defendant's neighbors, Glen Ridge, Bloomfield, Nutley, in Essex County and Delawanna in Passaic County whose rights and equities complainant completely disregards, not to speak of the suits against this defendant for diversion by owners damaged on Third River and Passaic River above Second River entrance into latter or otherwise at the east as well as by owners on Second River and Passaic by way of Tony's Brook. Although said surface waters might as complainant's brief expresses it, "*cross* Glen Ridge and find their way to Third River."

This although no proof of any water course to the east until Third River which latter is in Bloomfield about one and one-half miles away to the east from Montclair-Glen Ridge line. How they will "cross and find their way" makes no difference apparently.

Storm water is not offensive sewerage. It is merely rain, snow or ice water. The manner and nature of improvement of streets improved from the time when citizens of municipalities accepted as necessary or not objectionable not only the drainage of storm water but the drainage of sewerage over the streets in the gutters; as engineering skill improved and people became more particular various schemes of drainage and sewerage were experimented with and installed until now it has become the practice of engineers in civilized communities that can afford it to not only drain the offensive sewerage underground but also to drain the storm water beneath the surface of the streets so far as possible. The usual scheme in the modern storm water drainage systems being to have underground drains with catch basins at particular places in the locality to drain whatever storm water may run on the surface of the street between such catch basins. These drains are naturally made in conformity with the grades of the streets and are designed to drain that locality in which they exist in the general drainage tendency and toward the natural drainage outlet of the locality. They do not increase the amount of storm water that would flow on the surface to the same outlet on the surface of the streets if there were no catch basins there, they merely reduce as far as possible the accumulation on the surface of the streets of the amount of storm flow, so that it will be more convenient

for vehicles and pedestrians to use the surface of the street during the period of the storm. Naturally the grades of these drains if for no other reason than economy parallel the grades of the streets under which they lie. The grading, regrading, regulation and improvement of streets naturally involves the drainage there of or plans for drainage. It is trifling with words to say that there is any distinction in this case between the regrading of streets and the construction of the artificial drains to direct the flow of the water.

The appellant's brief makes claim to its proof of certain issues and circumstances and offers law which it claims supports its contention.

It repeats the issues it uncertainly, indefinitely and insufficiently pleaded in its bill, namely, it repeats the allegations that the waters in question have for at least thirty years gone to the east instead of to Tony's Brook, and this appears to be appellant's chief contention. Thereby it raises the issues of the rights gained by it, if any, by adverse possession or prescription. Of course, as will be shown by the law hereinafter given it neither could nor can gain any such right against this respondent, the Town of Montclair, a municipal corporation.

It also repeats the allegations of the bill, that the waters in question will be diverted from where they would naturally flow, but in spite of its effort to make such claim we submit that the natural original flow was established at the final hearing beyond question to have been south to Tony's Brook.

At page 4 it is stated in their brief that the court below held "injury from drainage inci-

dental to regrading would not be actionable." What the Court said was (Case, p. 200), "The proper remedy of the complainant, under the circumstances, had the defendant been responsible, is compensation as in *Simmons* v. *Paterson,* 60 N. J. Eq. 385." And this is one of its "Grounds of Appeal."

At pages 7 and 8 appellant's brief discusses the testimony of Dr. Kummell. Dr. Kummell is the State Geologist of New Jersey, and also a director of the Department of Conservation and Development of this State. The map which he produced is an exhibit in this case and is a compared copy with what is known as the "mother map" in the possession of the above departments with which he is connected, which mother map was the result of a topographical survey made on behalf of the State, and is not allowed to leave the record room in Trenton. Dr. Kummell testified at the final hearing in this case, which will be found at (pp. 178, 179 and 180 of the Case); that he had made a personal examination of the topography of Areas "three" and " four" shown on the map and which are those localities in question in this case, and that he had made the inspection on December, 1925; that he had verified the map by his inspection on the ground and found the map correct; that in his opinion the storm flows of the said Areas "three" and "four" originally naturally went southward into Tony's Brook.

At page 8 of appellant's brief the testimony of appellant's witness Mr. Torrey is discussed. Mr. Torrey on cross examination concerning the existence of a natural depression or gully that respondent claims is a part of the natural valley running north and south in this locality that

naturally drains the waters in question to Tony's Brook, made the following answers:

> "Q On the west side, back of the houses on the west side of Walnut Crescent? A The low point was in the rear of the houses.
> Q Yes; that is quite extensive. It runs along quite a bit, from nearly Oxford street, does it not? A From nearly Oxford street.
> Q And that was the natural topography of that land? A Yes, sir; that was the low point."

This testimony of Mr. Torrey's confirms that of Mr. Owens' who was one of respondent's witnesses, who himself is an engineer, being chief engineer of the Central Railroad of New Jersey, and who had been a resident of Montclair nearly all his life and for a great part of it from his early childhood nearby or within the locality mentioned as Areas "three" and "four." Mr. Owens testified (see Case, p. 132), that there was a velley of which this was a part and which conducted the waters in question southward to Tony's Brook. Mr. Owens gave other important testimony which is referred to hereinafter.

At page 6 of appellant's brief, the testimony of respondent's witness Mr. Warnock is discussed. To clarify just what water the New Pine street extension takes and the Old Pine street drain formerly took, Agreed Facts Nos. 15, 17 and 18 are herewith given; and will also be found (Case, p. 185):

> "*18.* The 'New Pine street' drain does not directly drain into Tony's Brook any of the waters drained by it, but the same are conducted to and emptied into Tony's Brook by the 'Old Pine street' drain.
>
> *15.* The 'Old Pine street' drain conducts to Tony's Brook within Montclair at Pine street intersection with the said brook not only the surface waters from the areas

within the brook's watershed which it served before the construction of and connection with it of the 'New Pine street' drain, but also the waters of area three of the 'New Pine street' drain which are emptied into it by the 'New Pine street' drain at the place the two drains join each other.

17. The 'Old Pine street' drain is joined and emptied into by the 'New Pine street' drain at a point in Pine street just south of the southern line of the right of way of the Erie Railroad. The 'Old Pine street' drain is thirty-nine inches in diameter where it joins the 'New Pine street' drain and the latter drain is thirty-six inches in diameter at that place."

The appellant suffered serious damage to operations and stock from the brook's overflowing banks before the "New Pine street" drain water went into the brook.

Appellant's witnesses E. F. Copp (Case, pp. 39, 40, 44, 45, 47); A. I. Quackenbush (Case, pp. 63-64); H. B. Church (Case, p. 82).

Respondent's witnesses F. R. Barnett (Case, pp. 104, 105, 106); P. E. Wiberg (Case, p. 109); H. H. Bidulph (Case, pp. 111-112); J. J. Mooney (Case, pp. 112-113).

The place at which the appellant company located and built on was a swamp covered with water. Respondent's witness P. E. Wiberg (Case, p. 108).

The appellant company built its building so that the first floor was at the level of the ground and has never made any change of the same. Appellant's witness E. F. Copp (Case, pp. 48-49).

At the times of the floods some of the storm water which damaged appellant came from Bloomfield avenue and this water was not from

the brook. Appellant's witnesses S. N. Reid (Case, p. 67); A. Hagel (Case, p. 86).

The appellant is unable to separate, distinguish or apportion the damage, if any, that it suffers by the addition of the water from the "New Pine street" drain. Appellant's witness E. F. Copp (Case, pp. 40, 41, 50, 51).

The appellant's operations are only interfered with two or three times a year at times of heavy storms and overflow of the brook and for the rest of the year it is able to conduct its business. Appellant's witness E. F. Copp (Case, p. 49).

At page 9 of appellant's brief, it offers the cases upon which it "grounds its claim."

It refers first to the case of *Joralemon* v. *Town of Belleville,* a case considered in this court and reported 90 L. 206; 101 Atl. 204. This is a case at law for damages, *Case book Er. & Ap.* 1917 V. 685. Before discussing the opinion in that case, certain facts in connection with that case should be considered. The Town of Belleville at the locality under consideration in that case may be generally described from a topographical standpoint, as a side hill running substantially north and south with the Passaic River at the bottom to which the hill descends. In the said case Joralemon street, which is discussed in the opinion, runs from the top of the hill in an easterly direction down nearly to the river. Washington avenue, which is also discussed in the opinion, crosses Joralemon street and runs substantially in a northerly and southerly direction parallel with the river, but about half-way down the hill.

The property of the plaintiff in that case lay near the foot of the hill along the north side of Joralemon street. An old water course, which

is mentioned in the opinion, had run down the hill at the north of Joralemon street and finally reached and passed through plaintiff's property. The surface waters mentioned in the opinion and which plaintiff complained of as being diverted, were partly of waters that originally flowed down the line of Joralemon street to the foot of the hill and into the Passaic River and to a great extent of surface waters that were diverted by the town by cutting through a ridge of land in the section south of Joralemon street and west of Washington avenue and draining these waters to Joralemon street and adding to its natural flow; and that the town in addition to prevent the said accumulated waters from flowing down Joralemon street beyond Washington avenue had constructed a bank or ridge across the easterly side of Washington avenue where it intersects Joralemon street and across the whole intersection, and by a culvert directing the said flow of accumulated waters into the old water course, and thence down the water course onto plaintiff's property. If any of the water that flowed originally down the line of Joralemon street at any time in ancient days ever flowed in the said old water course, it cannot be claimed that the surface water from the other section lying between the southerly side of Joralemon street and the westerly side of Washington avenue ever ran in the old water course as that was in a different watershed and separated from the Joralemon street watershed by a ridge which the town as aforesaid cut down.

Quoting from the opinion in the foregoing case as to just what the status was shows that it is not at all like our case. The opinion says:

> "The case presented under the first count was that in the storm conditions of November 11, 1911, this artificial diversion caused on overflow of plaintiff's land, whereby he was damaged. The second count, as amended, rested on the same acts of defendant in diverting the water, and in addition charged that early in 1912, the town connected the natural water course with a covered drain just east of plaintiff's premises and put catch-bars across the opening, so that in March, 1912, during storm conditions, the excessive volume of diverted water flooded plaintiff's premises as before, and in addition the opening of the covered drain became blocked by debris caught by the bars, and the water backed up on plaintiff's premises. * * * "

So that this is also a case of a plaintiff objecting to surface waters being diverted to his property from where they naturally originally went, which is just the opposite of our case.

The brief of plaintiff-respondent in the Joralemon case states plainly what the facts were in that case namely that the Town of Belleville cut and graded through a natural ridge of land so that surface and storm water that had naturally originally run and drained in a southerly direction after said grading by the town ran northerly to Joralemon street to a place and in a direction which it had never run before. The Town of Belleville had also prior to that suit also graded down a hump or ridge in Joralemon street itself that did or might have prevented this aforesaid water running easterly down Joralemon street. With the grading done as aforesaid by the Town of Belleville, the aforesaid storm water that originally ran to the south of Joralemon street joined the storm water that fell on Joralemon street and which latter naturally ran down Joralemon street in running down the hill to the east and if undiverted would have naturally

continued down Joralemon street to the foot of the hill and there have run into the Passaic River. The town, however, after its said improvements because of the large quantity of surface and storm water coming down Joralemon street as a result of its said grading, installed culverts in both sides of Washington avenue at its intersection with Joralemon street to catch the flood now coming down the hill to carry it in a northerly direction into an old water course. The town also built a bank or dyke at the same location on the east side of Washington avenue across Joralemon street to catch the said storm water, diverted out of its natural course down Joralemon street and conducted it to the said old water course. Thus a large amount of storm water which originally ran in a southerly direction south and away from Joralemon street was conducted and diverted by the town to an old water course which the said water had never used and in which it had never originally naturally run and could not have reached because of the said natural ridge cut down and graded by the town and it was because of this action by the Town of Belleville that the plaintiff Joralemon in that case was damaged, sued for said damage and was upheld in this court in this contention. The foregoing statements are all based on statements in a printed brief of the plaintiff-respondent in the case of Joralemon against the Town of Belleville in the appeal to this court which said case is the one cited by the complainant-appellant now before this court. A map showing the layout of the streets in Belleville and locality in question, considered in that appeal has been prepared on behalf of this respondent and is annexed to copies of its brief.

The statements in the said brief of Joralemon against the Town of Belleville which support the foregoing statements on behalf of this respondent are as follows:

(Page 2 of that brief.) "The uncontradicted proof is that through a number of years prior to 1911, the town authorities had carried to completion an extensive scheme of macadamizing and grading of streets lying west of Washington avenue and south of Joralemon street. A large table land extending from Joralemon street south to John street (a distance of over a mile) and roughly bounded on the west by Dewitt avenue, on the east by Hornblower avenue, was divided by a slight rise in the ground running from east to west. So much of it as lay north of this ridge drained northerly toward Joralemon street, but the slope was so little that the rainfall did not really drain off but lay in puddles and in several ponds and swamps until the water had disappeared by evaporation into the ground. The grading that was done by the town preliminary to macadamizing (page 3 of that brief) gave a slope of six inches to the hundred feet. This was very slight, but with the macadamizing of streets and the forming of gutters incidental thereto, there was enough to send the water on to Joralemon street. The town also cut through this ridge, so that the water that had before run southerly to Quarry street thereafter ran northerly to Joralemon street. Plaintiff's testimony (p. 10) not contradicted. The result was that the ponds and swamps practically disappeared, and especially after heavy rains the flow of water down Joralemon street was greatly increased (plaintiff's testimony, pp. 8 to 10, cross examination of Mr. Shepard, defendant's engineer, pp. 181 to 187, both inclusive). The Town of Belle-

ville runs along at the foot and up the sides of the hill easterly and sloping downward to the Passaic River. Joralemon street ran up this hill, and the water that fell on Joralemon street, together with any water that was drained to it, naturally ran down Joralemon street, and if there was any considerable quantity of water some of it would naturally continue to the foot of the hill, east of Cortlandt street, and ultimately reach the Passaic River.

The town put in a small pipe under Joralemon street near Linden avenue, emptying into a depression in the fields. This, however, could not have taken the additional water that had been brought to Joralemon street by the town's grading and macadamizing. It was only a one-inch pipe and could only take a small portion of this water. Later the town cut down the grade of Joralemon street and the little pipe from that time can be ignored, for thereafter all of the water went down Joralemon street and none of it through the pipe (p. 4 of that brief). Exhibit D. 1 will make this clear. It shows the original grade of Joralemon street, between Hornblower avenue and Linden avenue, resembling a shallow bowl which would hold water, and also shows the change in grade consisting of cut and fill corresponding with the raising of the bottom of the bowl and the cutting away and lowering of its brim, thus spilling the water instead of holding it. As we have seen, the natural spill was down Joralemon street.

It was to be expected that under these circumstances Joralemon street would be called upon to carry a good deal of water down its steep slope. Look at the map and see the long distance that this street covers in its downward slope. Imagine all the rainfall on the street itself, add to it such as comes to the street naturally from the adjoining property; then add this immense contribution from the so-called table land, the result of the town's grading and macadamizing of a number of streets, and it is easy to see what would happen with every shower or protracted rain that amounted to anything. The water went down Joralemon street in great volume and with great velocity, washing sand and gravel down the slope and depositing it on Washington avenue, and continuing in a torrent across the avenue and down Joralemon street (p. 11, l. 10; p. 12). Not only this, but in its course it would catch up the water slowly moving northerly along the west side of Washington avenue, and carry it with it down the hill. The water on the east side of Washington avenue flowing northerly would, on striking Joralemon street with its slope from the avenue downward, naturally turn the corner and run down the hill, rather than to keep across Joralemon street (p. 5 of that brief) in its northerly flow (p. 194, ll. 1 to 20). Frequently the town was compelled to repair the damages to streets caused by this water running down Joralemon street, sometimes cutting the road up in great gulleys (pp. 11-12, ll. 10 to 15; p. 13, ll. 25 to 40; p. 90, l. 35; p. 91, ll. 10 to 25; p. 95, ll. 30 to 40; p. 97, ll. 30 to 40; p. 100, ll. 20 to 30; pp. 114 and 115; p. 116, ll. 30 to 40; p. 119, l. 40; p. 198). The town installed culverts in Washington avenue on both sides, at its intersection with Joralemon street. This was to catch this flood as it came down the hill and to carry it northerly to a point where it was emptied into the old water course (pp. 14 to 17). Not content with the culverts, for they would quickly become choked with the earth washed down Joralemon

street, they then caused a sort of bank or little "dyke" to be made on the east side of Washington avenue, north and south across Joralemon street (pp. 14 to 17). This kept the water running northerly along the east side of Washington avenue from turning and finding its way down the Joralemon street hill and passed it on up to the water course. It also caught so much of the water coming down Joralemon street as the culverts were unable to catch, and so sent that out of its natural course to the water course. The natural result of all this increase of flow and artificial collection and diversion of it to the water course was seen in the floods complained of by the plaintiff.

At page 9 of appellant's brief, it next offers *Field* v. *West Orange,* 36 N. J. Eq. 118 (1882), Case book Er. & Ap. 1883, V. 79. This case was heard by this court and reported in 37 E. 600. It was again heard later in the Court of Chancery and reported in 46 E. 183; 2 At. 236. The complainant in that case lost the case as shown in last mentioned report.

The Town of West Orange at the locality under consideration in that case may be generally described, from a topographical standpoint, as follows: Main street in said town descends in a westerly direction to Valley street, which latter street runs at right angles north and south at the foot of Main street, Northfield avenue and Mt. Pleasant avenue in said town descend in an easterly direction to Valley street each to one side of said Main street. The contention of the complainant in that case was that the surface water along the line of Main street had originally naturally flowed down to and in a southerly direction along Valley street into a natural brook and was so carried away, and that the surface

water along the lines of Mt. Pleasant and Northfield avenue had originally naturally flowed down to and in a northerly direction along Valley street into another natural brook and was so carried away; that the Town of West Orange had diverted the water from its said natural lines of flow by ditches and culverts directly onto complainant's lands which lay on and along the westerly side of Valley street where the other said avenues join Valley street. So that this case was a complaint against diverting the waters from where they naturally originally ran onto complainant's property.

At page 12 of the appellant's brief it offers the case of *Miller* v. *Morristown,* 47 E. 62; 20 At. 61, Case Book Er. and App. 1891, Vol. 165; a case heard in Chancery and later in this court where the decree was affirmed on *V.-C.* Van Vleet's opinion, and reported in 48 E. 645; 25 At. 20.

Morristown at the locality under consideration in that case may be generally described as follows with respect to the property of the complainant in that case. The property of the complainant, Miller, lay along and easterly from the easterly side of MacCulloch avenue. The said avenue ran substantially north and south. The land of the Millers was somewhat lower than the level of the said avenue. From the westerly side of the said avenue opposite the Miller property the land rose to the west. As hereinafter quoted from the opinion the surface water naturally drained from the land on the west side of MacCulloch avenue to and across said avenue and thence on to complainant's land spreading out on same. As hereinafter quoted from the opinion the municipal authorities of

Morristown drained the same to a culvert which the town constructed on MacCulloch avenue in front of the Miller property so arranged as to discharge the water onto the Miller property at a single point with such force as to make an open channel for itself all the way through the complainant's land, from three to five feet wide and from two to three feet deep. As shown in the opinion the case was considered in two phases; "*First,* they say that the defendants so graded the streets they improved as that the surface water from a larger area is carried away from where it would naturally go, and made to flow to their land, and there discharge itself. The special grievance here complained of is that by the scheme of drainage adopted by the defendants the quantity of water which would naturally discharge itself on the complainant's land has been very largely increased. And, in the *second* place, they say that the defendants have so arranged the discharge of the water carried to their land by the street gutters as to cause the water to make an open channel for itself through their land, and that by this means an easement for the benefit of the public has been fastened on their land, for which no compensation has been made." The Court held that the complainants were entitled to a decree prohibiting the defendant from maintaining the culvert for the purpose of discharging the water passing through it on to the land of the complainants. What the Court says in discussing these two phases and upholding the defendant in the first phase and finding against it in the second is of such importance in considering the said case with the one in issue that liberty is taken

to herewith quote at length from the said opinion as follows:

> "Prior to the improvement of MacCulloch avenue and the adjacent streets by grading and guttering, the proofs show that the course which the surface water, flowing along the easterly side of MacCulloch avenue, from both north and south, naturally took, when it reached the depression, was to pass from the street onto the complainants' land; and it there, in consequence of the bottom of the depression being nearly level, spread itself out over the surface, without washing or breaking the land, or causing injury or annoyance of any kind. The bottom of the depression was unbroken by a waterway of any kind. Part of it was in sod, and another part was used as a garden. A wagon road, leading from the mansion to the barn in the rear, ran across it; and a corncrib, with a chicken house beneath, stood in it where its surface was lowest. The water flowing along the westerly side of the avenue flowed off on land lying on that side. None of it discharged itself on land of the complainants, except in rare instances, when unusual floods occurred; and, at such times, that which flowed over mingled itself with that flowing along the easterly side and the whole volume then passed off on the complainant's land, and then spread itself out, without breaking the surface or doing other damage. This was the condition of the complainants' land, and the natural course of the surface water, prior to the doing of the acts which the complainants say have resulted in a violation of their constitutional rights, and against the consequences of which they ask protection. * * *"
>
> "The law pertinent to the first ground of injury alleged by the complainants is well settled in this State. 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. *Town of Union* v. *Durkes*, 38 N. J. Law 21. Where, however, 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 is made to flow upon the land of one person, in ease of the lands of others, there a wrong is committed of which it is the duty of the courts to take cognizance, and which a court of equity may redress by injunction. *Field* v. *West Orange*, 36 N. J. Eq. 118; on appeal, 37 N. J. Eq. 600. The question whether the complainants are entitled to relief or not in respect to their first ground of action must be determined by the principles just stated. 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. * * *"

"But their second claim is well founded. That, in my judgment, rests on a solid foundation. There is no dispute about the facts. The defendants, in executing their scheme of improvement, constructed a basin in MacCullough avenue, opposite the depression in the complainant's land, for the reception of the water flowing along both sides and from both directions; and they also built a culvert, about three feet in width and two feet in depth, extending from the basin to the complainants' land. This arrangement resulted, as it manifestly was intended it should, in pouring all the water collected from the area of drainage on the complainants' land at a single point; and the consequence is that the water has, by its own force, made a channel for itself all the way through the

complainants' land. This channel is irregular in width, depth and course. In some places it is five feet wide and in others only three, and it is from two to three feet in depth. One of the witnesses describes its course as zigzag. This method of discharging the water collected in the basin condemns the complainants' land to public use just as effectually as that purpose would have been accomplished if the defendants had made an actual entry on their land, and opened a channel through it. * * *"

This then is another case where the defendant had diverted surface water from where and in the manner in which it had originally naturally flowed and drained the same directly to an arbitrary point on the complainant's property in an accumulated concentrated volume and force. This is entirely unlike the case on this appeal.

At page 13 of appellant's brief it mentions the case of *Kehoe* v. *Rutherford*, 74 L. 659; 65 Atl. 1046. Case book Er. & Ap. 1907, Vol. 407. This is a case at law for damages. The facts produced in that case show that the plaintiff lived on an intersection of three streets, one of which was Rutherford avenue, the dividing line between the Borough of Rutherford and the Township of Union. The other streets at said intersection are Park avenue, which runs through both those municipalities, and Stuyvesant avenue, which does likewise. The plaintiff claimed and proved that the Borough of Rutherford collected the surface water for more than three miles of territory, and diverted it by a culvert at the intersection from Park avenue "and discharged the same upon Rutherford avenue at a point opposite or nearly opposite the property of the plaintiff from whence it flowed with great force upon the lands of the plaintiff and into his houses, barns, sheds and gardens" * * *

"previous to that time the greater part of the said surface water flowing down Park avenue had continued on past Rutherford avenue in a (southerly) direction into the lowlands of Union Township and drained through them to the Passaic River."

So that this is another case where the plaintiff sues for damages because of diverting the waters from where they naturally originally ran onto plaintiff's property.

We distinguish their foregoing cases as follows: They all involve a diversion of surface water from where the said waters originally flowed or would flow and drainage of the same directly to an arbitrary point on the objector's property in accumulated, concentrated volume and force. In our case the water in question drains into and then becomes part of the brook as it originally naturally did, over a mile above appellant's property. The said water from Areas 3 and 4 of course, is only storm water.

In our case the water in question drained through the New Pine street extension of the Old Pine street drain from Areas 3 and 4 enters Tony's Brook within Montclair itself. Tony's Brook is a natural water course which flows every day of the year. The waters from Areas 3 and 4 so drained become a part of the natural stream itself within respondent's municipality and the stream flows for nearly a mile and a half before reaching the appellant's property in Bloomfield. Two or three times a year, in times of heavy storms, the brook overflows the banks at appellant's property and has been doing that ever since it originally located there in 1891. Now that the waters in question are drained into the brook in Montclair the appellant

objects, but it did not give a scintilla of proof that any of the water from the said Areas 3 and 4 get to appellant's property in storm time or causes it any damage. It admits in its bill of complaint and in its proof that it often suffered great damage to its operations and stock before the waters in question were added to the brook and it admitted in its proof by the testimony of its general manager Mr. Copp, that it could not separate, distinguish or attribute to the said drain, any of the damage which it suf- d in the storms since.

In the Joralemon case, the Kehoe case and the West Orange case cited by appellant the water so drained to the single point on the objector's property was gathered from a large area arbitrary in selection without regard to the natural watershed of the water so drained.

In our case the only waters drained through the New Pine street extension of the Old Pine street drain is from Areas 3 and 4 and these areas as shown by our proof beyond question are a part of the natural drainage area of Tony's Brook and originally naturally flowed to said brook. And instead of being a diversion from where the waters would naturally go it is a return to where they would naturally go. It would be a diversion to permit them to go where the appellant wants them to go.

In its cases the acts complained of was the sole and only cause of damage.

In our case the brook has always caused the appellant great damage as it admits in its bill of complaint and proof and as Mr. Copp, their manager, said he could not distinguish or separate any damage that the waters in question might cause the appellant. Appellant's com-

plaint admits complete damage without the addition of the drainage in question. Therefore it is a case, if anything, of "injury without damage."

In not one of the appellant's cases was there involved the following questions:

1. Reverting the natural surface waters to where they originally naturally went as soon as the development of the section justified the defendant town in going to the expense.

2. The rights of owners and other municipalities to the east of Montclair to damages by Montclair diverting waters to them of waters not natural to that section.

3. The rights of owners and other municipalities on Tony's Brook, below Montclair, to damages by Montclair diverting waters from them that were natural to the brook.

Finally we contend that their cases support our contention that the respondent not only has the right, but is legally and equitably obligated to drain the waters in question south to Tony's Brook and not out to the east through Oxford street. And that instead of supporting appellant's action, claim and appeal the cases support respondent's contention and support the rights and equity of property owners and municipalities to the east and south of Montclair as aforesaid.

The law which this respondent offers in support of its general and special defenses, is as follows:

"That any town which may be formed or incorporated under the provisions of this act shall take, hold, possess, and enjoy and become absolutely vested with all the rights and property of the town, borough or township of which it is the successor, and shall be responsible for and liable

to all contracts, debts, and obligations of such town, borough or township."

P. L. 1895, p. 222 (8), C. S. 5520—(324) "Towns."

"The common law rule is that surface water is a common enemy which every proprietor may fight as he deems best, regardless of its effect upon other proprietors."

40 Cyc. 642.

Citing *Jessup* v. *Bamford Bros. S. M. Co.,* 66 L. 641, 51 Atl. 147, 58 L. R. A. 329.

And citing *Bowlsby* v. *Speer,* 31 L. 351.

See also *Town of Union* v. *Durkes,* 38 L. 21.

"The owner of land has a right to discharge the natural drainage of his land, and the surface water accumulating thereon, into a water course whereby it becomes a part thereof."

"Watercourses," Gould, Sec. 274, p. 552.

Citing note (1) *Sparks M. Co.* v. *Newton,* 57 E. 367, 41 Atl. 385, 60 Eq. 399, 45 Atl. 596.

See also *Schnitziuz* v. *Bailey,* 53 E. 235, 22 Atl. 732.

Sparks Mfg. Co. v. *Town of Newton,* 41 Atl. 385, p. 391, says:

> "In the first place, there will be here no catching and accumulation of what is classed as 'surface' water. It will all be water which in the course of nature has reached the bed of a natural running stream, and becomes commingled therewith. By such commingling it becomes a part of the stream itself, and the right of the lower riparian proprietors to have it pass by their lands becomes at once fixed."

No adverse nor prescriptive right pleaded nor can be as present dam only there since 1908.

Banks v. *Simpkins,* 88 E. 1, 102 Atl. 680.

Citing at page 688, column 1, *Carlisle* v. *Cooper,* 21 N. J. E. 576.

This respondent has no right to divert said waters away from Tony's Brook, their natural outlet. To do so will subject it to damage suits.

Sparks Mfg. Co. v. *Town of Newton,* 57 E. 367, 41 Atl. 385, p. 392, says col. 1:

> "The question now under consideration is not the value to the riparian proprietor of the use of flood or freshet waters as compared with the ordinary flow of a stream; but the question is as to the right of the upstream riparian owner to collect it and save it, and divert it entirely from the downstream riparian owner. It is one of title, and not of value. The fact that it may be of very little value to the downstream riparian owner does not justify the upstream riparian owner in diverting it. * * *
>
> "And even in the matter of value it by no means follows that in the present case what might be deemed a flood or freshet in the neighborhood of Morris Lake would not be of considerable value in its flow at Hamburg * * *."

See also *Town of Union* v. *Durkes,* 38 N. J. L. 21 at p. 22, says,

> "But there was another circumstance in the case made at the trial; and it was this feature which probably led the judge who presided, to let the facts go to the jury. Some of the witnesses stated that the streets above the hill were so graded as to draw off from a swamp which was there, the water from two or more natural watercourses. To conduct such water into a public street, and to convert such street into a channel for its discharge, was, of course, unjustifiable, and for damage caused by such an act the defendant would be plainly responsible."

See also *Shields* v. *Arndt,* 4 E. 234.

This respondent the Town of Montclair had legislative authority to construct its said Pine street extension and did so in accordance with law to discharge the said waters into Tony's Brook, a natural watercourse and is not therefore subject to the charge of maintaining a nuisance.

> "By the said affidavits it appears that all the sewers constructed under this legislation discharged into the Passaic River, and that at least up to the year 1872 the only system of constructing sewers which had been adopted in this country was by building them underground, with the outlet into the natural watercourse on the banks of which the city was built.
>
> "From this recital, I think it sufficiently appears that the City of Paterson had legislative authority to construct the system of sewers the use of which the complainants seek by their information and bill to restrain. Full power was conferred by this legislation upon the City of Paterson to adopt and execute its own plan of sewerage, so far as the rights of the state were concerned. If the power inhered in the legislature to bestow such authority upon the city, it is settled law of this state that the municipal corporation is not responsible for those incidental damages that result from the proper exercise of its functions, and such exercise will not subject it to charge of maintaining a public nuisance. Baseman *v.* Railroad Co., 50 N. J. Law 235, 13 Atl. 164; s. c. affirmed, 52 N. J. Law 221, 20 Atl. 169. So far as the authority of the state can avail for that purpose, the legislative consent furnishes ample protec-

tion to the city for the appropriate exercise of granted power."

Grey (Simmons) v. *City of Paterson,* 45 Atl. 995, at p. 996, col. 1; 60 E. 385; 48 L. R. A. 717.

"Another illustration of a grant by implication is found in the right of a municipality to discharge its sewage. The state's right is to have the waters flowing over its riparian lands not only undimished in quantity, but also unimpaired in quality. But, when the Legislature authorized the municipality to construct the ordinary sewer system, it, by necessary implication, authorizes it to put the sewers thus constructed to their ordinary use. The right of the City of Paterson 'to vent its sewage into the stream' was the basis of the opinion of the Court of Errors in Doremus *v.* Paterson, 65 N. J. E. 711, 55 Atl. 304. One will look in vain for any express authority on the part of Paterson to discharge its sewage into the Passaic, much less to pollute its waters."

Wilson v. *East Jersey Water Co.,* 79 Atl. 440 at p. 443, col. 1; 78 E. 329.

As to rights and control of the state of natural watercourses.

"My opinion is that, subject to the lawful transient right of riparian owners along the banks of running streams, the waters of which finally empty into a tidal stream, there is vested in the sovereign power the right to insist upon the proper riparian user of the waters therein, in order that the common right to the use of the residue, which is not private property, may be preserved for the benefit of those to whom all common property belongs; nor would the grant of every owner of land along the stream, from its source to tide water, affect the right of the public, for which the state is but another

name, for that only can be granted which the grantor hath, which is the transitory usufructuary use, subject to which running water is *publicis juris* * * *."

McCarter v. *Hudson Co. Water Co.,* 61 Atl. 710 at p. 713, col. 2; 70 N. J. E. 525.

"Other questions were discussed on the argument, but I prefer to rest my conclusion on the reasons I have given; for I am satisfied that the state in its sovereign right, as owner of the bed of all tidal streams, becomes the owner of all fresh water flowing upon its land, and that any interference with the proper flow of such water, resulting in a diminishment of the natural quantity, is the subject of equitable interference, and also that the corporation act, under which the defendant and its agents exist, grants no right in derogation of public ownership of such water * * *."

McCarter v. *Hudson Co. Water Co.,* 61 Atl. 710, at p. 714, col. 1; 70 N. J. E. 525.

Appellant is not entitled to the relief it asks for the foregoing reasons and also because it has not made out a clear case.

Injunction will not be granted a riparian owner who alleges his rights have been unlawfully invaded or interfered with unless the pleadings and evidence show a very clear case.

40 Cyc. 568.

Holsman v. *Boiling Spring Bleaching Co.,* 14 E. 335, a riparian case, says at page 343, "To entitle the party to the remedy by injunction in cases of private nuisance, *the right must be clear,* and the injury must be such as from its nature is not susceptible of being adequately compensated for by damages, or such as from its long continuance may occasion a constantly re-

curring grievance, which cannot be prevented otherwise than by injunction."

This case cited 40 Cyc. 568.

See also *Shields* v. *Arndt*, 4 E. 234, p. 245.

The cases supporting the following separate defenses of this respondent pleaded in its answer are:

First Separate Defense.

Is that complainant in the year 1891 dedicated to the public use the brook at its property, the use of the waterway and its property at and under the waterway for the drainage of all such surface water. (Circumstances alleged in full in answer under this defense.)

"Dedication may be either common law or statutory and the former may be either express or implied * * * A common law dedication is distinguished from a statutory dedication, and prescription, operates as an estoppel and usually rests upon an estoppel *in pais*. A common law or a non-statutory dedication is just as efficacious as a statutory dedication, provided it is accepted by the municipality in any of the ways recognized by law, or provided the owners by any acts having that effect have estopped themselves to question the dedication."

McQuillan. Mun. Corp., p. 7501, Sec. 1539.

"The owners offer either express or implied, of appropriation of land or some interest or easement therein to public use, and acceptance thereof, either express or implied (when acceptance is required) constitute dedication.

McQuillan Mun. Corp., Supp. Vol. VII, Sec. 1537, p. 7500.

"Whether a dedication has been made is essentially a question of fact and a fact which may be established by indirect evidence as no formalities in making a dedication are essential."

18 C. J. 58.

"Dedication is the appropriation or gift by the owner of land or of an easement therein for the use of the public."

18 C. J. 38.

"* * * the doctrine of dedication is based upon good faith and is thus analogous to the doctrine of estoppel, and while many decisions refer to implied dedication as operating on the principle of estoppel, the technical requirements of an estoppel need not exist to make a good dedication. * * *"

18 C. J. 38.

"Where there has been an actual dedication it may be accepted by the public at any time and mere delay however long does not impair the right."

Tweddell v. *Village of S. Orange*, 112 Atl. 511, 95 L. 327.

"It was argued that the dedication had not been consummated when the suit was brought, by reason of the absence of an acceptance or user by the public of that part of the street which is in controversy. That question has been set at rest in the courts of this state. Acceptance by a formal adoption by the public authorities or by public user is necessary to impose on the public the duty to amend or repair, but is not essential to the consummation of the dedication so as to cut off the owner from the power of retraction or subject the dedicated lands to the public use, whenever, in the estimation of the local authorities, the wants or convenience of the public require it for that purpose."

Citing cases—C. of E. & A., *Hoboken L. & I. Co.* v. *Mayor, etc. of Hoboken*, 36 L. 540 at p. 545.

"And it has been held that when the right of the public to a way rests upon long con-

tinued use for the period of time for the acquisition of title to land by adverse possession, such use establishes a conclusive presumption of consent and so of a dedication upon the part of the property owner and at the same time negatives the idea of a mere license."

Dillon Mun. Corp., 5th Ed., Sec. 1080, p. 1710.

Page 1711—

"But when it is said that it must be uninterrupted, this refers to the right and not simply to an interruption of the use."

"Long acquiescence in user by the public may under certain circumstances operate as a dedication of land to the public use."
18 C. J. 58.

A case of dedication by acquiescence, estoppel, is that of *State, Kiernan* v. *Mayor of Jersey City,* 40 L. 483, which says, page 485:

"The sole purpose of setting aside the awards on this ground is that he may have an award made to him. But on the case as it stands before us, I think he is not entitled to an award. His land taken was a strip about two feet by about two hundred feet. It had been actually thrown open to the public as early as November, 1871, and at some period between that time and this the prosecutor's fence was built upon the new line. No complaint is heard till January, 1878, and no explanation of this acquiescence is offered. Nothing conflicts with, but everything accords with, the idea that the prosecutor has dedicated that strip to public use."

Another case that we submit supports the same proposition is that of one in the Court of Errors and Appeals, namely, *State—Parker* v. *City of New Brunswick,* 32 L. 548, where the questions of the rights of a turnpike company in a street where it was claimed that a dedication by the said company of that part of its road within the

city to the uses of a public street was to be implied and the Court held at page 552:

"* * * if this company has recognized this avenue as a public street there can be no doubt that such recognition would amount to a dedication. It is to be remembered that there is nothing to raise even a suspicion that the turnpike company make any objection to the passage or enforcement of the city ordinance in question. These corporators, to all appearance, have stood by and seen this grading and paving done in the prescribed mode."

Atlantic City v. *Asso. Real. Corp.,* 70 Atl. 345 at p. 348 says:

"acceptance may be shown by an instrument in writing executed by the proper authorities or by the use and improvement of the property dedicated by the duly authorized authority. *Abbott on Mun. Corp.,* page 1767."

Jarman v. *Freeman,* 85 Atl. 184, a case in the Court of Errors and Appeals, at page 186 says:

"* * * We think there can be no question that the City of Atlantic City, as trustee for the public, had a right to accept the dedication of the lands in question as and for a public street."

In *Smith* v. *The State,* 23 L. 130, where the question was as to a corner of the intersection of two streets and whether the actual corner made by the intersection of such and treated and considered by the owner of a lot at the corner as the boundary of the lot as against what might be the corner made by accurate plotting of surveys and where adjoining owners have acquiesced and treated it as the true line of a street for forty or fifty years. It was held in this case that such owners cannot be permitted after such acquiescence to change or correct the course of the street by showing that such surveys would

give it a different direction. And that the use of land by the public as a highway or a street for more than twenty years and the acquiescence of the owner in such use is conclusive proof of dedication. A strip of land adjoining a public highway regularly laid out it was held may become dedicated by acquiescence in the use of it as a part of the highway by the public. The foregoing is found in the syllabus of this case but the language of the opinion supports it. *The case says at page 141:*

> "undoubtedly his lot extends to Broadway, but the dispute is not whether it shall extend to that street or otherwise, but what in this controversy must be considered the line of the street. Is it to be that line which has been adopted by the adjoining land owners and acquiesced in by a succession of owners, including those under whom the defendant claims for more than half a century or that line which might be ascertained by a recurrence to the old survey * * *; In my judgment it will never do thus to tamper with the rights which have grown up for such a length of time by the acts and under the consent of those interested and the acquiescence of the public. The case was properly put before the jury on the ground of dedication, which may be conclusively presumed after an uninterrupted use by the public of the ground on which the defendant has placed his building for so long a period with the acquiescence of all concerned."

The foregoing case is cited as supporting part of the following test in *Dillon Mun. Corp.*, 5th Ed., Sec. 1080, p. 1710 Note (2):

> "Intent to dedicate presumed from user for prescription period. Dedication and public ways or uses acquired or created by prescription have been distinguished as resting upon different foundations. But although the fundamental principles of each may not

coincide, user by the public of land as a way or for any other public use for the period which will bar actions relating to real property has been generally recognized as creating a public right founded upon a presumed dedication. The intent of the owner to dedicate will be presumed against the owner where it appears that the easement in the street or property has been used and enjoyed by the public for a period corresponding with the statutory limitation of real actions.

> "A dedication may indeed be made for any use of a nature which the general public can enjoy."
> 18 C. J. 46.

> "No good reason can be assigned why land lying under tidewater may not be dedicated by the owner with the assent of the State, as well as lands not so covered."
> Court of E. & A., 12 E. 545, p. 554.

Second Separate Defense.

This defendant disclaims as unauthorized by and not binding on this defendant the acts or omissions of any other person whereby any of the surface waters referred to in the bill of complaint flowed other than into Tony's Brook.

Third Separate Defense.

The construction and use of the sewer in question is in furtherance of a natural and lawful scheme of municipal and public improvement in connection with the grading and improvement of its streets by this defendant for the drainage area and locality in question and the complainant therefore has no cause of action.

To this effect is the case of *Schnitzius* v. *Bailey,* 22 Atl. 732, 48 E. 409:

> "If the farmer can improve his land by changing the watercourse thereon which passes from his land to and upon lands of lower proprietors, without substantial injury to such lower proprietors, he may do so. To this extent he may increase the volume or velocity thereof by surface or under drainage. The lower proprietors have no right to complain, unless they can show material injury."

This same case was affirmed by the Court of E. & A., 32 At. 219, 53 E. 235.

This case was cited and approved as being the law on the matter in New Jersey in *Banks* v. *Simpkins,* 102 Atl. 680, 88 E. 1, by C. Walker.

Fourth Separate Defense.

That the complainant's land being below this defendant, the Town of Montclair, it is subject to the flow of all surface water from within defendant's limits from within the watershed of said brook, and defendant has an easement over the property of the complainant for the passage of all surface waters from within defendant's limits from the natural watershed of said brook, as herein shown and hereby referred to.

V.-C. Backes' opinion in this case, State of Case, page 199:

> "An owner of land can dedicate, appropriate or give an easement therein for the use of the public."
> 18 C. J. 38.
>
> "The implied offer by an owner of the appropriation of land or some interest therein to public use creates an easement therein for that use."
> *McQuillan Mun. Corp.,* Suppl. Vol. VII, Sec. 1537, p. 7500.

We claim to come within the same circumstances as in the case of *Earl* v. *DeHart,* 12 E. 280, a Court of Errors and Appeals case, which says at page 285:

> "This water having run in the same course for more than twenty years, and the complainant, and those under whom she holds, having enjoyed it as a right during that period in its present channel, no one has a right to dam up the channel or to divert the course of the water, to the injury of the complainant's land. It makes no difference whether it is a natural watercourse or an artificial ditch. If it is a mere ditch, and the complainant's land has enjoyed the use of it for more than twenty years, and as an adverse right, then it is an easement which the owner of the complainant's land has in that of the defendants; it is a privilege without profit, and is as much the subject of protection as a natural watercourse.
> "A considerable number of decisions lay down the rule that user of land by the public for the prescriptive period of twenty years, when of the character hereinafter prescribed in this section, is sufficient of itself to create the presumption of a dedication or grant to the public, without proof of direct acts indicating an intention to dedicate * * *."

This case cited by *V.-C.* Church in *Kearns* v. *Bloomfield,* 138 Atl. 386.

> 18 C. J. 101.
> "And it has been held that when the right of the public to a way rests upon long continued use for the period of time for the acquisition of title to land by adverse possession, such use establishes a conclusive presumption of consent and so of a dedication upon the part of the property owner and at the same time negatives the idea of a mere license."
> *Dillon Mun. Corp.,* 5th Ed., Sec. 1080, p. 1710.

To the same effect *Smith* v. *State,* 23 L. 130.

Fifth Separate Defense.

Complainant's alleged rights if any are qualified ones and subject to defendant's right to drain all the surface water from within defendant's limits from within said brook, as herein shown and hereby referred to.

> "The prescriptive right to the use or flow of water originating from its accustomed use such right may be qualified as to time, seasons, and mode of enjoyment by the character of the use from which the right has originated. Prescriptions may be upon condition in restraint of the mode in which the prescriptive right is to be enjoyed, or may have annexed to them a duty to be performed for the benefit of the persons against whom the prescription exists."
>
> *Carlisle* v. *Cooper,* 21 E. 576, p. 597, C. of E. & A., citing authorities.

To the same effect as *Defiance Fruit Co.* v. *Fox,* 76 E. 147, 74 Atl. 302.

Sixth Separate Defense.

The construction and use of said sewer by this defendant will not increase to any appreciable extent the present volume of the water of the said brook nor to any appreciable or separable extent the damage which complainant admits it now suffers and is liable to suffer under existing conditions and complainant therefore is not entitled to any relief against this defendant.

Seventh, Tenth and **Twelfth Separate Defenses** are alleged in the answer of this respondent for the purpose of convenience in classification of the grounds given in said defenses respectively but which collectively support the point that "the passage of time has not invested the appellant with any rights, title or interest against this

respondent. They are given and discussed here together.

Seventh Separate Defense.

The passage of time has not invested the complainant with any right, title or interest of, in, or to the said brook, the use of said brook, the natural waterway of said brook and the lands at the complainant's property beneath said brook, adverse to the rights of this defendant, nor by way of prescription as time cannot run against this defendant in such circumstances.

See *V.-C.* Backes' opinion in State of Case, page 199.

> "Lapse of time, however long, the public user is suspended in abeyance though coupled with a user by the owner which might otherwise be adverse will not make title by prescription against the public." *C. of E. & A. Hoboken L. & I. Co.* v. *Mayor, etc. of Hoboken,* 36 L. 540 at p. 549.

This case cited and the above-statement approved by the Court of E. & A. again in *Quinlan* v. *Borough of Fair Haven,* 131 At. p. 870.

> "The law is settled that public authorities are not barred by laches." *Trenton & M. C. T. Co.* v. *Inhabitants of Ewing Twnshp.,* Crt. E. & A. 90 E. 563, 107 Atl. 416 at p. 417, col. 1.
>
> "The weight of authority supports the view that the maxim, '*Nullum tempus occurrit regi,*' applies not only to the sovereign power of the state, but also to municipal and quasi municipal corporation as trustees of the rights of the public * * *"

2 C. J. 221.

Tenth Separate Defense.

The complainant has no cause of action against this defendant as the dam now on its premises on the said brook has not been in existence for the past twenty years continuously.

The appellant did not build its present dam until the year 1908, only fifteen years prior to its first notice to this respondent in 1923. Up to 1908 it only had a few pieces of timber the entire height of which was sixteen inches. As a matter of fact, the appellant neither pleaded nor proved any height of dam it either was entitled to or had maintained continuously for the period of twenty years.

The statements applying to the above are more fully set forth below under the *"Twelfth Separate Defense."*

Carlisle v. *Cooper,* 21 E. 576, pp. 595 and 596 C. of E. & A. *Bank* v. *Simpkins.*

Chancellor Walker in 102 Atl. 680 p. 688, 88 E. 1, says:

> "The defendant could prevail only by showing that he had held the water so high in his dam for the prescriptive period of twenty years as to affect the land of plaintiff as injuriously as it did at the time of the flood in August, 1915."

And cites as authority *Carliste* v. *Cooper* above-mentioned. To the same effect—*Defiance Fruit Co.* v. *Fox,* 76 E. 147, 74 Atl. 302.

Twelfth Separate Defense.

The rights complainant claims have not for the past twenty years been openly, uninterruptedly and notoriously exercised and used by it, nor has the height of water which complainant now claims the right to maintain been maintained or

used by it at that height continuously during the period of the past twenty years.

> "The principle of law stated by the Chancellor, that the extent of the right acquired by adverse user is not determined by the height of the structure, but is commensurate with the actual enjoyment of the easement, as evidenced by the extent to which the land of the owner of the servient tenement was habitually or usually flowed during the period of prescription, rests upon sound reasoning, and is supported by authority," at p. 594 of case below.
>
> "As a general rule, the height of the dam when in good repair and condition, including such parts and appendages as make its efficient height in its ordinary action and operation, fixes the extent of the right to flow, without regard to fluctuations in the flowage which are due to accidental causes, such as a want of the usual repairs, or the variation in the quantity of water in the stream in times of low water or drought, or in the pondage of the dam by being drawn down by use. Occasional use of flash boards for short periods, when little or no injury may be done, as an exception to the general rule not to keep them on, does not amount to the open, uninterrupted, and notorious adverse use necessary to establish a prescriptive right. If used for the full period of twenty years, only during times of low water, a prescriptive right will not be acquired thereby to keep the water up to the height of such boards during the whole year."

Carlisle v. *Cooper,* 21 E. 576 p. 595 and 596 C. of E. & A.

To the same effect—*Defiance Fruit Co.* v. *Fox,* 76 E. 147, 74 Atl. 302.

Eighth Separate Defense.

The alleged rights of the complainant are insignificant as compared with the rights of the public constituting the Town of Montclair, this defendant as herein shown and hereby referred to.

This respondent's answer also elsewhere makes the same allegations. See pars. 7, 10 and 12 (S. of C., pp. 15, 21, 22).

It was said in the case of *Grey, ex rel. Simmons* v. *Mayor of City of Paterson,* 60 E. 385, 45 Atl. 995, Ct. of E. & A., where the city had built and was using many drains and sewers to discharge in the Passaic River and a bill was filed on behalf of riparian owners to enjoin the city from so doing, it was held that acquiescence of the riparian owners made it inequitable to enjoin the use of the sewers by the city which had been built at great expense and which accommodated so many people and where the rights of the complainant were insignificant as compared with the rights of the public in the City of Paterson. The language of the opinion holding this is found at column 2 page 997 and column 1, page 998 as follows:

> "On the other hand the City of Paterson, at an enormous expense, has put into operation under legislative authority, and for a long series of years has used and enjoyed a system of sewerage which accommodates a population of over 100,000 people. By the restraint prayed for, this sewerage system will be suddenly destroyed, and the homes of this multitude of people will be rendered perilous to health and life, and unfit for occupancy. While the city cannot, upon this continued acquiescence of these riparian owners, predicate the right to deprive them of their property in the stream, yet in view of such acquiescence, and the magnitude of the injury which would fall upon the public

> by prohibiting the use of the sewers, it would be inequitable to enjoin, if relief can otherwise be afforded. The relators are here asking equity, and they must do equity—The granting or refusing of an injunction is a matter resting in the sound discretion of the court. Where it would cause great injury to the defendants, and might be of serious detriment to the public, without corresponding advantage to the complainant, it will not be granted. The authorities are collected in Stew. N. J. Dig., p. 620, Sec. 7-10. In Railroad Co. *v.* Prudden, 20 N. J. Eq. 531, Mr. Justice Depue, in delivering the opinion of this court, said 'An injunction ought not to be granted when the benefit secured by it to one party is of little importance, while it will operate oppressively and to the great annoyance and injury of the other party, unless the wrong complained of is so wanton and unprovoked in its character as properly to deprive the wrongdoer of the benefit of any consideration as to its injurious consequences.' And he recognized the facts of acquiescence as a consideration of importance in determining whether the defendants should be restrained."

This court cited the last-mentioned case and recognized that in cases of acquiescence the principle above stated at page 525 applied, in the case of *Rowland* v. *N. Y. S. M. Co.,* 101 Atl. 521, 88 E. 168, *V.-C.* Backes.

Ninth Separate Defense.

The complainant has no right to maintain the dam at its said premises across the said brook.

In the first place appellant does not plead its right to build or maintain any dam. In its proof the appellant merely showed that sometime after it bought the property it had a few boards or timbers about sixteen inches in height above the bed of the brook that it used as a dam and which

height was not shown to have been raised until the year 1908, when the present dam was built. Neither did it allege or prove its use of or right or necessity to use any particular height of water. By its own proof it has only had its present dam since the year 1908 and therefore for less than twenty years. This being so, its right to such dam fails by reason of the opinion in *Carlisle* v. *Cooper,* 21 E. 576, p. 595, C. of E. & A.

> "The principle of law stated by the Chancellor, that the extent of the right acquired by adverse user is not determined by the height of the structure, but is commensurate with the actual enjoyment of the easement, as evidenced by the extent to which the land of the owner of the servient tenement was habitually or usually flowed during the period of prescription, rests upon sound reasoning, and is supported by authority," at page 594.
>
> "As a general rule, the height of the dam when in good repair and condition, including such parts and appendages as make its efficient height in its ordinary action and operation, fixes the extent of the right to flow, without regard to fluctuations in the flowage which are due to accidental causes, such as a want of the usual repairs, or the variation in the quantity of water in the stream in times of low water or drought, or in the pondage of the dam by its being drawn down by use. Occasional use of flash boards for short periods, when little or no injury may be done, as an exception to the general rule not to keep them on, does not amount to the open, uninterrupted, and notorious adverse use necessary to establish a prescriptive right. If used for the full period of twenty years, only during times of low water, a prescriptive right will not be acquired thereby to keep the water up to the height of such boards during the whole year."

Carlisle v. *Cooper,* 21 E. 576, pp. 595-6 C, of E. & A.

Cited and approved in *Banks* v. *Simpkins,* 88 E. 1, 17, 18, 102 Atl. p. 688, by *C.* Walker.

To same effect, *Defiance Fruit Co.* v. *Fox,* 76 E. 147, 74 Atl. 302.

Eleventh Separate Defense.

The complainant is guilty of laches and has not been vigilant in asserting its alleged rights, as herein shown and hereby referred to

Appellant gave its first notice to this respondent by its letter of October 27, 1923, twenty-five days after the contract was awarded on October 2, 1923, by the Board of Commissioners of the Town of Montclair, and therefore obligated the Town to proceed with the construction and for the payments thereunder to the person to whom it awarded the contract and who actually did construct the said drain and was paid therefor. To have refused to proceed with the contract after the said award because of the said notice would have subjected the Town to a heavy damage claim by the said contractor.

If, then, the appellant really considered it had any rights in the premises it was grossly negligent in bringing them to the attention of the authorities of the Town of Montclair. As shown by the admitted facts No. 19 (S. of C., p. 186), the proceedings were initiated on July 17, 1923, by a resolution of the Board of Commissioners to publish notice of intention and thereafter as shown by the items in said admitted facts at state of case, page 186. The proceedings were in accordance with law leading up to the award of contract on October 2nd, after advertisement for bids made, receipt of bids and award of contract as aforesaid. Moreover, on October 16th, twelve days before the notice was received and

eleven days before it was dated, the Board of Commissioners adopted an ordinance appropriating money to proceed with the said contract, and the execution of the contract between meetings of October 30th and November 6, 1923 (S. of C., pp. 186, 193) was merely the formality for which the Town had already obligated itself on October 2nd.

Such laches defeats appellant's rights, if any, to the relief it now seeks.

> "A court of equity always refuses to aid stale demands when the party has slept upon his rights."
>
> *Schneider* v. *Schmitt,* 86 E. 366, 98 Atl. 418.

Citing at page 420, *DeGrauw* v. *Mecham,* 48 E. at p. 224, 21 Atl. 193, p. 194, col. 2.

> "A party is guilty of laches which ordinarily bars the enforcement of his right where he remains passive while an adverse claimant incurs risk, enters into obligations, or makes expenditures in approving the property in suit * * * in reliance on his own right."
>
> 21 C. J. 232 (88), citing many N. J. cases, including 27 E. 1.

Rabe v. *Dunlap,* 51 E. 40, 25 Atl. 959, says at page 961:

> "Had the complainants applied for an injunction promptly and while it was in the power of the court to extend protection to them without doing wrong or injustice to others, it would have been granted. * * * Nothing can call forth the activity of a Court of Equity but conscience, good faith, and reasonable diligence. Where these are wanting the court is passive, and does nothing. Laches and neglect are always discountenanced and therefore from the beginning of this jurisdiction there was always a limitation to suits in equity."

Thirteenth Separate Defense.

Complainant is estopped to interfere with this defendant in the construction of the drain in question. (Circumstances alleged in full in the answer under this defense.)

This respondent claims an estoppel exists against the appellant by reason of:

(a) Appellant's conduct and acquiescence in standing by and permitting

1. The authorization, construction and payment for and use of the Old Pine Street drain of a size to take not only Areas 1 and 2 but 3 and 4, in the year 1916 up to the time of its notice October 27, 1923, when the proceedings of the Board of Commissioners of the Town of Montclair, this respondent, were merely to carry out the original plan of 1916 by extending from the end of the Old Pine Street drain the extension of the same now in question.
2. The use of the brook for surface waters from the brook's watershed within the Town of Montclair, without and with drains by this respondent, the Town of Montclair, since the appellant became the owner of its property in Bloomfield and the expenditure by the Town of Montclair of large sums of money in the construction of the system of drains for that purpose depending on such use.

> "Where a person having a claim sees another doing an act incon-

sistent therewith, and stands by in such a manner as to induce the person doing the act, and who might otherwise have abstained from it, to believe that he assents to its doing, he cannot afterward be heard to complain of it."

21 C. J. 1166.

"If a person by his conduct induces another to believe in the existence of a particular state of facts and the other acts thereon to his prejudice, the former is estopped as against the latter to deny that that state of facts does in truth exist."

21 C. J. 1060.

(b) Appellant's silence in standing by and permitting such use also creates an estoppel against this. 21 C. J. 1061 says: "Estoppel by silence arises where a person who by force of circumstance is under a duty to another to speak refrains from doing so and thereby leads the other to believe in the existence of a state of facts in reliance upon which he acts to his prejudice."

(c) Appellant's laches by gross delay and neglect to give any notice until 25 days after the contract for the particular drain in question, namely the Pine Street extension, had been awarded to the contractor and the town had thereby entered into serious obligation and liability with and to the contractor, failure to carry out which would subject the town to heavy damages, created an estoppel against the appellant. 21 C. J. 1060 terms this an estoppel by laches.

(d) An estoppel *in pais* against the appellant exists by reason of the foregoing situation and it is contended on behalf of this respondent that the proof not only of this defendant but of the appellant itself at the final hearing amply supports this claim and such proof taken in connection with the "admitted facts" can leave no other conclusion.

(e) An estoppel by acquiescence has also been established by the allegations of this respondent by the proof, and by the "admitted facts." 21 C. J. 1216. The particulars of and other authorities on acquiescence are given in this brief at and after page .

Fourteenth Separate Defense.

No storm or surface water from the area alleged in par. 8 of bill of complaint could or did lawfully go or flow by way of drain, sewer, or otherwise in an easterly direction into or through any other municipality and the private properties therein into Third River and Passaic River as alleged in pars. 9, 10 and 11 of bill of complaint, during the period alleged in par. 9, as it was and is a condition precedent to the legality of such drainage, sewerage, or flow, that the provisions of the constitution and statutes of New Jersey in such case made and provided be complied with.

The provision of the constitution is at Art. I, Sec. 16. That such statutes are

Law 1917, Chap. 152, Art. XXI, and Secs. 1-17 thereof inclusive particularly.

Nor. J. N. & S. Dig. Plant v. *Van Buskirk,* 96 L. 546, 115 Atl. 215.

Law 1895, Chap. 113 and Sec. 60 thereof particularly.

Law 1884, Chap. 24 and Secs. 1-14 thereof inclusive particularly.

In conclusion, this defendant-respondent respectfully submits that the decree of the Court of Chancery dismissing complainant's bill should be affirmed with costs to be adjudged to this respondent and that the appellant should be denied the relief for which it prays in said bill of complaint.

Respectfully submitted,

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HAROLD BOUTON,
Of Counsel.